ORIGINAL

20040265

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

SEP 23 2004

STATE OF NORTH DAKOTA

Filed 9/23/04 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF R.R.

North Dakota State Hospital, Petitioner & Appellee	)	Supreme Court No. 20040265
v.	)	Stutsman County No. 04-R-328
R.R., Respondent & Appellant	)	

APPELLEE'S BRIEF

Appeal from the Order for
Hospitalization and Treatment
Entered August 19, 2004,
by the Honorable John E. Greenwood
Judge of the Southeast District Court

Jay Schmitz (ID # 05705)
Assistant State's Attorney, Stutsman County
511 Second Avenue Southeast
Jamestown, ND 58401
(701) 252-6688

Attorney for Appellee

TABLE OF CONTENTS

PARAGRAPH

TABLE OF AUTHORITIES . . . .

ISSUES PRESENTED . . . .

STATEMENT OF THE CASE AND STATEMENT OF FACTS 1

LAW AND ARGUMENT . . . .

1. Was the finding that alternative treatment was unsuitable to R.R.'s situation clearly erroneous? 6

2. Are contentions based on R.R.'s treatment at the State Hospital after the date of the hearing reviewable on this appeal? 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES:

PARAGRAPH

In the Interest of R.N.,
513 N.W.2d 370 (N.D. 1994) 8, 11

In the Interest of J.S.
499 N.W.2d 604 (N.D. 1993) 9, 10

Estate of Kjorvestad
375 N.W.2d 160 (N.D. 1985) 13

STATUTES AND RULES:

N.D.C.C. §25-03.1-22(1) 7

N.D.C.C. §25-03.1-02(12) 7

N.D.C.C. §25-03.1-21(1) 7, 9

N.D.C.C. §25-03.1-19 7

ISSUES PRESENTED

1. Whether the petition for involuntary commitment was supported by clear and convincing evidence that R.R. suffers from a mental illness and that without treatment, R.R. posed a serious risk of harm to himself or others?

2. Whether the district court's finding that treatment other than hospitalization would not be adequate to meet R.R.'s needs or sufficient to prevent harm or injuries that he may inflict on others was clearly erroneous?

3. Whether R.R's contentions based on treatment he has received at the State Hospital since August 19, 2004, are outside the scope of the evidence presented at the treatment hearing and thus not subject to review on this appeal?

STATEMENT OF THE CASE
AND
STATEMENT OF FACTS

1. Petitioner and appellee North Dakota State Hospital ("NDSH") will join in the appellant's Statement of the Case. NDSH also joins the appellant's Statement of Facts. subject to the following additions and clarifications:

2. In addition to exhibiting "threatening and psychotic behavior" at Trinity Hospital, R.R. initiated a physical altercation with staff in the radiology department and with Minot police officers who responded to the call for assistance, and had to be placed in restraints. R.R. has a history of confrontations and altercations with the Minot police. (Transcript, p. 8; p. 11. lines 16-24). R.R. said he had been "drawn" to the hospital by a "magnetic beam" (Tr., p. 8, lines 9-12); in Dr. Coombs opinion, the hospital staff's inability to comprehend R.R.'s delusional ramblings about this "beam" probably contributed to his increasing agitation and eventual physical aggression at Trinity Hospital. [Tr., p. 12].

3. The appellant's claim that Dr. Coombs testified R.R. was "doing better" on this admission to NDSH is a characterization, not fact: The doctor's actual testimony was that R.R. had not been threatening or aggressive toward staff since his admission on August 2. 2004, in contrast to his behavior during several previous stays at NDSH. [Tr., p.11. lines 12-15].

4. Dr. Coombs also testified. however, that R.R. was still in the midst of a "psychotic episode" (Tr., p. 10-11); this psychosis was evidenced by the "paranoid and delusional statements" R.R. was continuing to make to the NDSH staff: In addition to the "magnetic

beam" that "drew" him to Trinity Hospital, R.R. said (i) there was a "conspiracy in which some of his friends had been murdered on certain birthdays"; (ii) that "Dr. [Joseph] Belanger[1] had spies [in] Minot." and had "hypnotized [R.R.] so he would commit suicide"; and (iii) that a nurse at NDSH had told R.R. "she had body parts in her refrigerator." [Tr., p. 10, lines 1-17]. Dr. Coombs emphasized the paranoid aspect of R.R.'s delusions. [Tr., p. 12].

5. Regarding a possible transfer from the Secure Ward, R.R.'s counsel asked whether Dr. Coombs was "looking at [transferring R.R.] as soon as possible"; the doctor replied that "at the earliest it would be next week. I'm going to push for that." [Tr., p.14-15]. Dr. Coombs had testified just prior to that exchange that a transfer would have to be approved by the director of psychology and the administration at NDSH. [Tr., p.13-14].

[1] Dr. Belanger also is a staff psychologist at NDSH, who had worked with R.R. during several of his previous commitments.

LAW AND ARGUMENT

6. THE DISTRICT COURT'S FINDING THAT ALTERNATIVE TREATMENT WAS INADEQUATE TO MEET R.R.'S NEEDS OR TO PREVENT THE RISK OF HARM TO OTHERS WAS NOT CLEARLY ERRONEOUS

7. The district court ordered R.R. to undergo involuntary treatment at NDSH for a period not to exceed 90 days [N.D.C.C. §25-03.1-22(1)], having made the necessary findings that (i) R.R. is a "person requiring treatment," i.e., he is mentally ill and poses a serious risk of harm to himself, others or property [N.D.C.C. §25-03.1-02(12)]; and (ii) treatment other than hospitalization was inadequate to meet his needs or prevent the risk of harm to himself or others. [N.D.C.C. §25-03.1-21(1)]. Section 25-03.1-19 requires petitioner NDSH to prove the allegations of the petition – that R.R. is mentally ill and poses a serious risk of harm to himself or others – by clear and convincing evidence.

8. The appellant's brief concedes the district court properly found that R.R. requires treatment, although it does cast a few vague aspersions on Dr. Coombs' testimony as to NDSH's revised diagnosis of R.R.'s mental illness (see, e.g., brief at p. 5; pp. 8-9).[2] No issue is raised as to the district court's finding that unless R.R. receives treatment for his mental illness, there is a substantial likelihood that the assaultive and threatening conduct which landed him back at NDSH will continue. Moreover, the findings that R.R. is

---

[2] Previously, R.R. had a standing diagnosis of bi-polar disorder; Dr. Coombs testified that the diagnosis had been changed to schizoaffective disorder because of the increasingly delusional and paranoid nature of R.R.'s thought. Despite R.R.'s derision of these "purported" diagnoses, the revision is not that remarkable: as Dr. Coombs stated, "schizoaffective" means R.R.'s manic or bi-polar ("affective") disorder now has a strong psychotic/delusional/paranoid ("schizoid") aspect. [Transcript, pp. 9-10].

mentally ill and poses a serious risk of harm or injury to others must be sustained unless this Court is "firmly convinced [they are] not supported by clear and convincing evidence." In the Interest of R.N., 513 N.W.2d 370, 371 (N.D. 1994).

9. The finding which R.R. *does* contest – the availability and appropriateness of "out-patient" treatment – is not an element of the petition; it is separately required by Section 25-03.1-21(1). Prior decisions have established that unsuitability of alternative treatment also must be shown by clear and convincing evidence,[3] and requires a "two-fold inquiry" as to whether such treatment is (i) adequate to meet R.R.'s needs and (ii) sufficient to prevent harm or injuries that he may inflict. The finding that a less restrictive form of treatment was not appropriate in this matter cannot be overturned unless this Court finds it was "clearly erroneous." In the Interest of J.S., 499 N.W.2d 604, 606 (N.D. 1993).

10. "Violent, aggressive, and unpredictable behavior constitutes clear and convincing evidence that treatment outside the hospital would not be appropriate." [In the Interest of J.S., 499 N.W.2d at 607]. Dr. Coombs testified that alternative treatment would not meet R.R.'s needs based on his recent history, i.e., "the fact that he had stabilized when we discharged him [on his previous admission, on July 27] and he came right back [on August 2] . . . our plan is to step him down from the Secure Unit to a less secure unit and . . . see how he manages . . . [and if] he can maintain less disruptive behaviors . . ."

[3] In contrast to the findings under §25-03.1-19, however, §25-03.1-21(1) does not expressly establish a "clear and convincing" standard: in fact, the language of the latter statute seems to require an *affirmative* "find[ing] that treatment other than hospitalization *is adequate* to meet [R.R.'s] treatment needs and is sufficient to prevent harm or injuries [to himself or others]" (emphasis added).

Asked if R.R. was "suitable for placement in a non-hospital setting," Dr. Coombs stated "no, not right now." [Tr., p. 13, lines 3-15]. He noted that R.R. was currently having a "psychotic episode," with a marked increase in delusions and paranoia from his previous stays at NDSH. [Tr., pp. 10-11]. Dr. Coombs also believed that unless and until R.R. "breaks through the psychosis" – given his long history of "threatening or aggressive behavior," including several "run-ins" with Minot police officers – R.R. was likely to pose a "physical danger to others." [Tr., pp. 11, line 5, to p. 12, line 7].

11. A finding is "sufficient if [it] enables this court to understand the reasoning behind the court's decision," and is not "consider[ed] . . . in a vacuum, but read in light of the entire record." In the Interest of R.N., 513 N.W.2d at 371-72. Dr. Coombs was the only witness at the hearing. Given his unrebutted testimony, and the "clearly erroneous" standard for this appeal, the district court's finding that a less restrictive setting was unsuitable in this case must be upheld.

12. ISSUES RELATING TO R.R.'S TREATMENT AT NDSH SINCE THE DATE OF THE HEARING ARE NOT SUBJECT TO REVIEW ON THIS APPEAL

13. The appellant's second contention – that the treatment he has received at NDSH after August 19th, particularly his continued confinement in the Secure Unit, constitutes illegal "punishment" – involves facts and issues that were not presented to or determined by the district court at the treatment hearing, and thus is outside the scope of this appeal. R.R. apparently argues that events occurring since the date of the hearing somehow show that the district court erred in finding that out-patient treatment was not appropriate. [Appellant's brief at pp. 10-11]. The short answer to this whole line of argument is there

is nothing in the record from which the merits of R.R.'s contentions can be evaluated. for the obvious reason that it was impossible to present evidence or argument at the hearing concerning events that allegedly occurred after it was over. It is settled law that a claim of error will not be reviewed where there is no record and no offer of proof by which the claim can be evaluated. Estate of Kjorvestad, 375 N.W.2d 160, 167 (N.D. 1985).

CONCLUSION

14. For the foregoing reasons, petitioner and appellee North Dakota State Hospital respectfully requests that the Court affirm the district court's findings and its order that R.R. undergo treatment at the State Hospital for a period not to exceed 90 days.

RESPECTFULLY SUBMITTED this 23rd day of September, 2004.

STUTSMAN COUNTY STATE'S ATTORNEY OFFICE
Attorneys for Appellee
511 2nd Avenue SE
Jamestown, ND 58401
(701) 252-6688

Signed: JAY A. SCHMITZ
Assistant State's Attorney (ID# 05705)