ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20050399

SUPREME COURT #_____

IN THE INTEREST OF M.M.

William Pryatel, M.D., North Dakota State Hospital, Petitioner/Appellee, -vs- M.M., Respondent/Appellant.	)	Stutsman County #05-R-306

BRIEF OF APPELLANT

Appeal from the Order for Hospitalization and Treatment and
the Order to Treat with Medication
Dated and Issued November 16, 2005

Southeast District Court Judge
Honorable Mikal Simonson

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2. Whether the district court erred in its findings that the respondent is "person requiring treatment" with a serious risk of harm of substantial deterioration in physical health or disease under N.D.C.C. § 25-03.1-02(12)?
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4. Whether court ordered medication is the least restrictive form of intervention available for M.M.'s treatment under N.D.C.C.§25-03.1-18.1?

STATEMENT OF THE CASE

On November 2, 2005, a Petition for Involuntary Commitment was filed in Ward County. (App. pp. 19-21). Honorable Robert Holt issued a Temporary Treatment Order and Notice of Further Treatment Following Preliminary Hearing on November 4, 2005. (App. p.18). Honorable John E. Greenwood issued an Order Appointing Attorney for M.M. dated November 14, 2005. (App. p.11). A Notice of Treatment Hearing was filed that same day. (App. p.10). On November 15, 2005, a Report of Examination, a Diagnostic Intake Plan, and a Report Assessing Availability and Appropriateness of Alternative Treatment were filed with the Clerk of District Court. (App. pp. 12-17). Immediately prior to the Treatment Hearing on November 16, 2005, a Request to Treat with Medication was filed at Stutsman County District Court. (App. p. 8). Following a treatment hearing held on November 16, 2005 in Stutsman County, Honorable Mikal Simonson entered the findings of fact, conclusions of law on record and issued an Order for Hospitalization and Treatment and Order to Treat with Medication to be in effect for a period of 45 days. (App. pp. 6-7). Pursuant to Respondent's motion, the Court issued an Order to Stay the Medication Order Pending Appeal on November 17, 2005. (App. p. 4). On that same day, the Court issued an Order Denying Respondent's Request for Independent Expert Examination. (App. p. 5).

M.M. filed a notice of appeal on November 23, 2005 pursuant to N.D.C.C. §25-03.1-29 and N.D.R.App. P., Rule 2.1. (App. p. 1). M.M. is appealing from both the Order for Hospitalization and Treatment and the Order to Treat with Medication.

STATEMENT OF FACTS

M.M. is 55 year-old male who is diagnosed with a "psychotic disorder not otherwise specified" during his recent involuntary commitment to the North Dakota State Hospital. M.M. came to the North Dakota State Hospital after being admitted to Trinity Hospital in Minot, North Dakota and refusing surgery for kidney stone removal. M.M. was admitted to Trinity Hospital because he was unable to urinate. A psychiatric consultant filed a Petition for Involuntary Commitment based on statements made by the Respondent that were termed delusional and psychotic. (App. p. 19-21).

Dr. William Pryatel states in his initial report of examination that M.M. denies previous psychiatric treatment. Dr. Pryatel has no evidence that M.M. has ever had any prior psychiatric treatment, yet states in his report that "a barrier to discharge is his history of medication non-compliance." Dr. Pryatel certified the admitting diagnosis as "Axis I: Psychotic disorder NOS; Axis II: No diagnosis; Axis III: Urinary Stones in urinary tract; Axis IV: Homelessness, lack of primary support, financial concerns; Axis V: 21." (App. pp. 12-17). Dr. Pryatel testified at the treatment hearing that M.M. is a mentally ill person in need of treatment due to M.M.'s substantial likelihood of serious harm in his physical deterioration due to his apparent kidney stones and his refusal to have them removed. Dr. Pryatel further testified that M.M. has not displayed any kind of violent behavior toward himself or others and satisfactorily cares for himself at the hospital.

Dr. Pryatel offered scant testimony regarding lesser restrictive treatment alternatives other than to recommend in-patient hospitalization stating that M.M.

is not a candidate for alternative options at this time due to his refusal of medication and his homelessness.

M.M. testified on his own behalf at the Treatment Hearing. He explained that he was in a great deal of pain upon his admittance to Trinity Hospital and his statements reflect that he was not thinking clearly due to the pain he was in. He also testified that he had not been given information regarding his kidney difficulty. When information was presented and surgery was recommended. M.M. stated that he had wanted a little time to consider his options and that request was taken as a refusal to get medical treatment. He testified that he was advised if he didn't get surgery that he might die and if he refused surgery he would be committed to the State Hospital. He thought this strange. Furthermore, M.M. stated that his statements to Dr. Pryatel had been taken out of context. Rather, M.M. had repeated these statements to Dr. Pryatel in an attempt to explain to him that the reason why he said them was due to the extreme pain he was in at Trinity Hospital.

Honorable Mikal Simonson acknowledged that M.M.'s reluctance to have surgery and his request time to consider his options were reasonable and that his acute medical condition apparently did cause his extreme pain. He also found that some but probably not all of M.M.'s delusional statements could have been made as a result of that condition. The Court went on to find that M.M. would be in danger of physical deterioration due to the kidney stones and that as such, he issued an Order to for Hospitalization and Treatment and granted Petitioner's

request to treat with medication but for a period of 45 days rather than the 90 day statutory maximum.

M.M.'s provisional diagnosis is a psychotic disorder not otherwise specified. M.M. has been offered anti-psychotic medication and has refused it. Dr. Pryatel requested and was granted a court order for forced administration of medication of the Risperdal, Haloperidol, or Olanzapine. (App. pp. 6, 8). Dr. Pryatel testified at the treatment hearing that Olanzapine is a newer medication with fewer side effects than some of the older medications but is only available in oral form, which is one disadvantage when compared with Haldol, an injectable, long acting medication. He further stated that the side effects of Haldol may result in tardive dyskinesia, abnormal involuntary movements of the tongue, jaw, trunk or extremities.

LAW AND ARGUMENT

1. M.M. is not a "mentally ill" person as defined by N.D.C.C. § 25-03.1-02 (11).

The evidence presented at the preliminary and treatment hearings is not sufficient meet the statutory requirement of clear and convincing required by N.D.C.C. §25-03.1-19 to support the district court's finding that M.M. is a mentally ill order authorizing involuntary treatment. The burden of proof in commitment proceedings is on the petitioner to prove by clear and convincing evidence that M.M. (the respondent) is a "mentally ill person". N.D.C.C. § 25-03.1-19; In the Interest of J.A.D., 492 N.W.2d 82, 83 (N.D. 1992). There is a presumption the respondent does not require treatment. Id., at 85. A "mentally ill person" is defined under N.D.C.C. § 25-03.1-02(11) is defined as:

> An individual with an organic, mental, or emotional disorder which substantially impairs the capacity to use self-contol, judgment, and discretion in the conduct of personal affairs and social relations.

Dr. Pryatel has diagnosed M.M. with a Psychotic Disorder NOS based on one intake assessment interview and reports of M.M. making delusional statements while experiencing a kidney stone attack at Trinity Hospital in Minot. North Dakota. Dr. Pryatel stated that M.M.'s kidney stone condition could be "very serious" and that M.M. was not using good judgment in electing not to have surgery to remove these stones stating "the stones aren't going to go away, they are going to have to come out eventually." Yet, in his Report of Examination, Dr. Pryatel states "Physically, he (M.M.) appears to be healthy but still has the

urinary stones in his urinary tract." There is certainly nothing in this Report of Examination that indicates M.M. is in any imminent danger in refusing surgery to remove his kidney stones. In fact, his medical condition is termed "stable." There is also no medical report in evidence to indicate that M.M. actually does have urinary tract stones.

Apparently the two reasons M.M. is found to be a mentally ill person is one, he refused surgery for removal of urinary tract stones and two, he made some delusional statements. The Court found that M.M. was reasonable to not have surgery and to request time to consider his option. Thus, reason number one fails to meet the statutory requirement required to find M.M. as a "mentally ill" person. Secondly, M.M. provided rational testimony explaining why he had made statements, explaining that he had been in extreme pain and was not thinking clearly at that time. Then, when he tried to explain this to Dr. Pryatel, he testified that his statements were taken out of context. Again, the Court agreed that some, but probably not all, of these delusional statements likely were a result of M.M. acute kidney stone attack. It appears that Court's reluctance to let M.M. go in case he did have a future kidney stone attack stems from genuine concern for an individual who has very little means and is a "drifter". However, this does not meet the clear and convincing standard set forth under N.D.C.C. §25-03.1-19 required to find M.M. as a "mentally ill" person.

2. M.M. is not a "person requiring treatment" as defined by N.D.C.C. § 25-03.1-2(12).

The Petitioner did not present sufficient evidence to satisfy the statutory requirement set forth under N.D.C.C. §25-03.1-19 for the Court to find M.M. as a "person requiring treatment" as defined by N.D.C.C.§25.03.1-02(12).

To determine whether a person is in fact "a person requiring treatment", the court must use a two-step process. J.A.D., at 83. Initially, "the court must find that the individual is mentally ill," and second, "the court must find that there is a reasonable expectation that if the person is not hospitalized there exists a serious risk of harm to himself, others, or property." Id.

Even if an individual is determined to be mentally ill, it does not mean that he or she is a "person requiring treatment". In the Interest of B.D., 510 N.W.2d 629, 631 (N.D.1994). The mentally ill person must also pose serious risk of harm to himself, others, or property if not treated. Id. The North Dakota Supreme Court held in In the Interest of R.N., 450 N.W.2d 758 (N.D. 1990) that an involuntary treatment order requires "clear and convincing proof that the mentally ill individual is a person who requires treatment as defined by the statute, not one who would benefit from treatment."

Again, M.M. refutes the Court's finding that he is a "mentally ill" person. Furthermore, M.M. vehemently denies that he is a "person requiring treatment." N.D.C.C.§25-03.1-02(12) defines a "person requiring treatment" as:

> a person who is mentally ill or chemically dependent, and there is a reasonable expectation that if the person is not treated there exists a serious risk of harm to that person, others, or property. "Serious risk of harm" means a

substantial likelihood of:

a. Suicide, as manifested by suicidal threats, attempts, or significant depression relevant to suicidal potential;

b. Killing or inflicting serious bodily harm on another person or inflicting significant property damage, as manifested by acts or threats;

c. Substantial deterioration in physical health, or substantial injury, disease or death, based upon recent poor self-control or judgment in providing one's shelter, nutrition, or personal care; or

d. Substantial deterioration in mental health which would predictably result in dangerousness to that person, others, or property, based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors.

Here, the evidence presented addresses only factor (c) of N.D.C.C. § 25.03.1-02(12). Petitioner Dr. Prytel testified that he was not concerned about factors (a), (b), or (d), but only (c) regarding M.M.'s physical health due to the urinary tract stone condition. Even if M.M. were found to be a person who may benefit from some kind of mental therapy, M.M. contends it still would not rise to the level needed to trigger the "person requiring treatment" threshold set forth under the statute.

M.M. testified that if he did experience trouble with a kidney stone attack that he would be more than able to seek out appropriate medical attention. He testified that he has made it 55 years on his own and will continue to be able to look after himself upon discharge. M.M. testified that he has never had psychiatric treatment before or has ever had a mental health issue until this recent kidney stone episode. Even in his Report of Examination, Dr. Pryatel states that

"This is his (M.M.'s) first psychiatric hospitalization" and listed M.M.'s assets as his "survival skills." (App. pp. 13-17).

Furthermore, M.M. raises a second point on appeal regarding the district court's finding that he is a "person requiring treatment." Dr. Pryatel certified an admission diagnosis, Axis III, of homelessness in his examination report regarding M.M.. (App. pp. 13-17). North Dakota Supreme Court held in In the Interest of J.A.D., 492, N.W.2d 82 (N.D. 1992) that:

> "Not all homeless people are mentally ill and in need of treatment. Homelessness may in some instances be a product of mental illness, but it may also be the result of economic hardship or simply lifestyle choice. We cannot categorize homeless people as people in need of compulsory mental therapy simply because they do without a traditional home, kitchen, plumbing, or electricity."

J.A.D., supra at 86. The Court held that J.A.D. was not a "person requiring treatment." Id. Similar to the facts in J.A.D., at 85, rather than a danger to others or property, the concern regarding M.M. focuses on the dangerousness to himself due to a possible physical deterioration caused by urinary tract stones. M.M., like J.A.D., may be choosing a life-style of "homelessness" or "wanderlust" because he enjoys its benefits. Apparently, M.M. has had the wherewithal to survive one way or another for 55 years and has sufficient survival skills necessary to maintain himself. What is to say that this type of existence, although not one chosen by many people, is not a personal choice of lifestyle? It is well known that there are people all across the land, including winter survivalists, homeless persons, and people with differing religious and political convictions that make different kinds of lifestyle choices; many of those choices may seem bizarre or

odd to an "average American" but certainly are not all indicative that these people are mentally ill individuals requiring treatment. Although clearly the Hurricane Katrina victims are not homeless by their own choosing, many are homeless nonetheless and it would be absurd to define all of them as "mentally ill" persons "requiring treatment." In the same vein, M.M. may or may not be homeless by his own choosing but to define him as a "mentally ill" person "requiring treatment" because of his homelessness would be equally as absurd. It appears by the tone Dr. Pryatel's uses in his Report of Examination as well as his testimony that he characterizes M.M. way of life in a negative light by his use of such terms as "pan-handles for money" and "lives a vagabond existence" and describing M.M.'s desire to be released from the hospital as "wanting to go along his merry way." (App. pp. 13-17).

3. M.M. asserts that the district court erred by not considering or ordering a lesser restrictive treatment alternative.

When an individual is found by the trial court to be a "person requiring treatment" under N.D.C.C. § 25.03.1-02(11), he or she has the right to the least restrictive conditions necessary to achieve the purposes of treatment. N.D.C.C. § 25-03.1-21; 25-03.1-40(2). The North Dakota Supreme Court held in In the Interest of J.K., 1999 ND 182, 599 N.W.2d 337 (N.D. 1999) that the district court is required to make a two prong assessment: (1) whether a treatment program other than hospitalization is adequate to meet the individual's treatment needs, and (2) whether an alternative treatment program is sufficient to prevent harm or injuries which an individual may inflict on himself or others. Furthermore, the

district court must find, by clear and convincing evidence, that the alternative treatment is not adequate or that the hospitalization is the least restrict alternative. Id.

N.D.C.C. § 25-03.1-21 (1) states:

> Before making its decision in an involuntary treatment hearing, the court shall review a report assessing the availability and appropriateness for the respondent of treatment programs other than hospitalization which has been prepared and submitted by the state hospital or treatment facility. If the court finds that a treatment program other than hospitalization is adequate to meet the respondent's treatment needs and is sufficient to prevent harm or injuries which the individual may inflict upon the individual or others, the court shall order the respondent to receive whatever treatment other than hospitalization is appropriate for a period of ninety days.

Additionally, N.D.C.C.§ 25-03.1-01 provides that "the provisions of this chapter are intended by the legislative assembly to: (5) Encourage, whenever appropriate. that services be provided within the community." Moreover, the North Dakota Supreme Court's held in In the Interest of Laura Goodwin, 366 N.W.2d 809. at 814 (N.D. 1985) that "poverty is not a criteria for commitment" and found that the record in that proceeding was "statutorily deficient." Though there are several distinctions between Goodwin and the present case, M.M. contends that lack of financial means is a relevant similarity. Likewise, M.M. asserts that little, if any, meaningful attempt was made by the petitioner to explore suitable and available treatment alternatives.

In Dr. Pryatel's Report of Examination and Report Assessing Availability and Appropriateness of Alternate Treatment, "patient is homeless and wants to move on" and "not willing to work with a human service center" were listed

respectively as the alternatives available to hospitalization. Dr. Pryatel also indicated on the latter report that "alternative treatment is not in the best interests of the respondent or others and the respondent is in need of hospitalization for the following reasons: "patient is very delusional and psychotic." (App. pp. 12-17). At the treatment hearing, the petitioner spent very little time addressing alternatives to hospitalization for M.M., rather the vast majority of Dr. Pryatel's testimony focused on the involuntary treatment and medication issues. "In some cases, a reporting doctor may reasonably conclude that less restrictive alternative to hospitalization simply do not exist." In the Interest of J.S., 545 N.W. 2d 145, 148 (N.D. 1996). However, there is simply insufficient evidence from Dr. Pryatel's report or the record to support the conclusion that alternative treatment were adequately considered before being determined as unavailable. Therefore, M.M. asserts that the district court erred in its finding of continued hospitalization, because the petitioner failed to present clear and convincing evidence that alternative treatment was not available or adequate to prevent harm to M.M. or others.

4. Forced administration of medication is not the least restrictive intervention available for M.M.'s treatment.

Under N.D.C.C. § 25-03.1-18.1, a treating psychiatrist may request authorization from the court to treat a person under a mental health treatment order with prescribed medication. The court may consider the request in an involuntary treatment hearing. As part of the request, the treating psychiatrist and

another licensed physician or psychiatrist no involved in the current diagnosis or treatment of the patient shall certify:

> (1) That the proposed prescribed medication is clinically appropriate and necessary to effectively treat the patient and there is a reasonable expectation that if the person is not treated as proposed there exists a serious risk of harm to that person, other persons, or property;
>
> (2) That the patient was offered that treatment and refused it or that the patient lacks the capacity to make or communicate a responsible decision about that treatment;
>
> (3) That prescribed medication is the least restrictive form of intervention necessary to meet the treatment needs of the patient; and
>
> (4) That the benefits of the treatment outweigh the known risks to the patient.

Each of these four factors must be proven by clear and convincing evidence. In the Interest of B.D., 510 N.W.2d 629 (N.D. 1994). N.D.C.C. § 25-03.1-18.1(2)(a) provides that the court must consider all relevant evidence presented, including:

> (1) The danger the patient presents to self or others;
> (2) The patient's current condition;
> (3) The patient's past treatment history;
> (4) The results of previous medication trials;
> (5) The efficacy of current or past treatment modalities concerning the patient;
> (6) The patient's prognosis; and
> (7) The effect of the patient's mental condition on the patient's capacity to consent.

M.M. has been diagnosed upon his involuntary commitment to the North Dakota State Hospital as having a psychotic disorder NOS (not otherwise specified). The medication requested for M.M.'s treatment is Risperdal,

Haloperidol, or Olanzapine. Dr. Pryatel testified that Olanzapine is a newer medication with fewer side effects than Haldol but that it is only available in an oral form. Haldol is available as an injectable, longer lasting medication. M.M. has refused all medications.

Honorable Mikal Simonson questioned Dr. Pryatel regarding the factors under N.D.C.C. § 25-03.1-18.1(2)(a)(1)(2)(3)(4)(5)(6)(7) concerning the forced administration of medication. Dr. Pryatel offered the possibility that M.M. may have a future kidney stone attack and his refusal to have surgery to remove the stones as a danger he presents to himself under factor (1); he relied on the report of examination for factor (2). For factors (3), (4) and (5), Dr. Pryatel stated that he did not know if M.M. has any past treatment history, previous medication trials, or past treatment modalities. M.M. on the on the other hand, testified succinctly that he has not ever been hospitalized or otherwise treated for a mental illness. Dr. Pryatel had little to offer in terms of M.M.'s prognosis, factor (6). Dr. Pryatel testified as well as indicated in his Report of Examination that there was not enough history to secure a firm diagnosis for M.M. (App. pp. 13-17). Even so, according to Dr. Pryatel, M.M. should definitely be treated with medication.

M.M. argues that the diagnosis of "psychotic disorder NOS" is vague and a "catch all" diagnosis used because the Dr. Pryatel admittedly does not have enough history or information to make a firm diagnosis. Therefore, M.M. asserts that it is improper to force administration of medication in this instance. M.M. further contends that there is insufficient evidence to meet the clear and

convincing standard required for a court to order involuntary treatment with medication.

Haldol (Haloperidol) is a "psychotropic medication" and has "potential side effects that are serious, adverse and irreversible." In the Interest of C.W., 552 N.W.2d 382, (Justice Sandstrom concurring specially). "Involuntary psychotropic medication is a seriously invasive procedure with potential permanent side effects. Id. Because M.M. does not agree whatsoever about being hospitalized, there is a substantial likelihood that he will not consent to taking either the Risperdal, Haloperidol, or Olanzapine in oral form. Thus, if the district court's order is upheld, M.M. will likely have to be tied down and injected with the Haldol. This then begs the question whether forced administration of medication is the "least restrictive form of treatment." The North Dakota Supreme Court concluded in In the Interest of B.D., 510 N.W.2d 629 (N.D. 1994) "when the choice is between involuntarily treating a patient with drugs (which could stabilize the patient and allow an early release from hospitalization), and not medicating the patient at all (which could cause a deterioration in condition and lead to indefinite hospitalization), that forced medication is the least restrictive form of treatment." However, M.M. contends that there are major distinguishing factors between the situations in C.W. and B.D. and his own circumstances. First, unlike the individuals in those two cases who had a long history of mental illness and repeated hospitalizations, this is the first time M.M. has been admitted to the North Dakota State Hospital and Dr. Pryatel admitted that there is not enough history or information to make a firm diagnosis for him.

Second, Dr. Pryatel testified that M.M. has not displayed any type of behavior since he has been hospitalized that would appear to be a danger to himself or others. Rather, through his own testimony, M.M. appeared rational and coherent. The individuals in C.W. and B.D. displayed chronic behaviors that put either themselves or others in danger. Although the North Dakota Supreme Court upheld the district court's order to involuntary treat with medication in both C.W. and B.D. as the "least restrictive form of intervention", M.M. asserts that the significantly different set of facts in his case clearly show that forced administration of medication is not the least restrictive form of intervention for his treatment.

CONCLUSION

The petitioner has the burden of showing by clear and convincing evidence that M.M. is a "mentally ill" person and is a "person requiring treatment"; that alternative treatment was not available or adequate to prevent harm to M.M. or others; and that involuntary treatment with medication is the "least restrictive form of intervention" to treat M.M.. Because there was insufficient evidence to prove each of these requirements, the Order for Hospitalization and Treatment and Order to Treat with Medication and M.M. respectfully requests that both orders be reversed and vacated.

Dated this 23rd day of November, 2005.

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