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20060156

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

IN THE INTEREST OF J.S., RESPONDENT

Stutsman County #2004-R-227

Supreme Court #20060156

BRIEF OF APPELLEE

APPEAL FROM THE ORDER FOR CONTINUING TREATMENT

DATED APRIL 26, 2006

IN STUTSMAN COUNTY DISTRICT COURT

JAMESTOWN, NORTH DAKOTA

BY THE HONORABLE MIKAL SIMONSON

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ISSUE PRESENTED

I. WHETHER THE COURT ERRED IN FAILING TO ORDER LESS RESTRICTIVE ALTERNATE TREATMENT.

STATEMENT OF THE CASE

The appellee, the North Dakota State Hospital, hereinafter "Hospital", adopts the statement of the case of the respondent/appellant, hereinafter "J.S.". As to the nature of the case, the course of proceedings, and its disposition below. Hospital does not adopt the statement of the facts of J.S. and sets out now herein Hospital's statement of the facts.

STATEMENT OF THE FACTS

The following facts were gleaned from the documents of record in this matter as well as the notes of the appellee as a transcript of the hearing was not available at the time this brief was prepared.

J.S. has resided at the North Dakota State Hospital since 1989.

Dr. Daisy Van Valkenburg, M.D., a psychiatrist at the North Dakota State Hospital, is an expert examiner as defined by NDCC § 25-03.1-02(6). Dr. Van Valkenburg did not testify at the hearing on April 26, 2006, but did provide supporting documentation to the district court to include a Report of Examination, Certificate of Continuing Treatment, Report Assessing Availability and

Appropriateness of Alternate Treatment, and Diagnostic Intake and Plan (Assessment).

Dr. Alan Broadhead, M.D., is an expert examiner as defined by NDCC § 25-03.1-02(6). Dr. Broadhead testified at the hearing.

Dr. Van Valkenburg rendered a professional opinion in the documents provided to the Court regarding J.S.'s diagnosis, stating that it was Paranoid Schizophrenia, a mental illness, Diabetes, and hypertension. Dr. Broadhead testified at the hearing and rendered a professional opinion regarding J.S.'s diagnosis stating that it was Paranoid Schizophrenia.

J.S. has appealed various commitment orders on prior occasions. During this past year, he has been treated primarily with Risperidone Consta, an anti psychotic medication that is give in depot form as an intra-muscular injection. He has received this injection every two weeks. J.S. also receives insulin for diabetes.

His prior commitment orders were based on a number of factors, including his lack of insight into his mental and physical disabilities, his refusal to take medication, and in the past, threats and acts of violence.

Dr. Broadhead testified, that there have been no acts of violence by J.S. in the recent past, but there have been times where J.S. becomes threatening. Dr. Broadhead testified that without the medication, J.S. would inevitably relapse into a paranoid state and experience delusions and suffer from impaired judgment which would likely result in violent outbursts.

Without medication for his diabetes, it would be reasonable to expect that J.S. would suffer a life threatening condition to include a diabetic coma. Dr. Broadhead testified that J.S. takes the medication while in the hospital but will not take the medication if discharged. Dr. Broadhead indicated that J.S. has no insight into his mental illness or his diabetes and denies any need for medication. J.S. testified that he is being framed, that he is not ill, that he wants to be off all medications and sent home.

Dr. Broadhead testified that J.S. requires prompts to perform hygiene. Dr. Broadhead testified that J.S. is isolative and on a locked unit at the North Dakota State Hospital.

Dr. Broadhead determined that J.S. still remains a danger as a result of lack of insight into his mental and physical illness, his continued belief that he does not

need medication and his statements that he would not take medication either for his mental or physical illnesses if released from the hospital, his history of aggression, and his frequent statements that he will take his life if he is discharged on medication.

Dr. Broadhead also testified that J.S. has shown some improvement relative to participating in group therapy and will be encouraged to continue.

Dr. Van Valkenburg indicated in her report that alternative treatment is unavailable because J.S. could not be managed in the community and J.S. is not receptive to community placement. She indicated that J.S. refuses community services and says he will not cooperate with any other setting.

LAW AND ARGUMENT

I. THE COURT PROPERLY FOUND ALTERNATIVE TREATMENT WAS NOT APPROPRIATE AND DID NOT ERROR BY FAILING TO ORDER A LESS RESTRICTIVE ALTERNATIVE.

The scope of review in involuntary commitment cases is limited to a review of the procedures, findings, and conclusions of the lower court. In the Interest of H.G., 2001 ND 142,¶3, 632 N.W.2d 458. District courts are required to use a clear and convincing standard of proof, while the reviewing Court uses a more probing clearly erroneous standard of review, to balance the compelling interests of protecting a mentally ill person and of preserving that person's liberty. In the Interest of J.K., 1999 ND 182, ¶10, 599 N.W.2d 337. A district court's finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, although there is some evidence to support it, on the entire evidence the reviewing Court is left with a definite and firm conviction a mistake has been made. H.G., 2001 ND 142,¶3, 632 N.W.2d 458.

J.S. argues that the district court erred in its finding of continued hospitalization, because there was not

sufficient evidence that alternative treatment is not available to J.S. (Brief of Appellant p. 9).

The court did not error when it did not order a less-restrictive alternative treatment after considering NDCC § 25-03.1-21(1). Section 25-03.1-21(1), NDCC, provides:

> 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.

The North Dakota Supreme Court has stated numerous times that the statutory procedures require that a mental health patient has a right to the least restrictive conditions necessary to achieve the purpose of treatment. See, e.g., In the Interest of R.M., 555 N.W.2d 798, 800 (N.D. 1996). To comply with the requirements of NDCC § 25-03.1-21(1), the district court is required to make a two-part inquiry: (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. In the Interest of J.K., 1999 ND 182, ¶15, 599 N.W.2d 337.

The district court must find, by clear and convincing evidence, that alternative treatment is not adequate or that hospitalization is the least restrictive alternative. Id. The district court's findings are critical to ensure the basis for the district court's decision is clearly articulated, thereby demonstrating that the careful and serious consideration so clearly warranted in the context of an involuntary commitment proceeding has indeed been given. In the Interest of Palmer, 363 N.W.2d 401, 403 (N.D. 1985).

J.S. contends the district court erred in its finding, because the petitioner failed to explore options and present clear and convincing evidence that alternative treatment was not available or adequate to prevent harm to J.S. or others. Direct evidence of overt violence or even an expressed intent to commit violence is not required in commitment proceedings. In the Interest of D.P., 2001 ND 203,¶9, 636 N.W.2d 921. The Court must accept the inferences drawn by the district court when reasonable inferences can be drawn from credible evidence. In the Interest of M.S., 1999 ND 117,¶8, 594 N.W.2d 924.

There was evidence that J.S. was a person requiring in patient treatment and that alternative treatment was not available or adequate to prevent harm to J.S. or others.

Dr. Broadhead's testimony indicated that the lack of insight in J.S., relative to his mental and physical illnesses, that J.S. will refuse to take medication and likely relapse and become a danger to himself and others.

Dr. Broadhead indicated that a reduction or cessation in diabetic medication would likely result in a diabetic coma and become life threatening.

Relative to options of less restrictive settings, Dr. Broadhead indicated that other facilities have been considered, including the Veterans Home in Lisbon, ND, and the Odd Fellows in Devils Lake. These facilities have the same expectation of cooperation with treatment, and J.S. continues to state that he will not accept treatment. Therefore, no less restrictive environment is available.

The court also relied on Dr. Abordo's report assessing availability and appropriateness of alternate treatment and supporting documents.

The district court's finding that no less restrictive alternative treatment was appropriate for J.S. is supported by clear and convincing evidence.

J.S. argues that he has not, does not, and will not admit to being mentally ill and that the Hospital must recognize that as a fact and that other means of treatment need to be explored. (Brief of Appellant p. 8) This

situation is not a battle of wills as portrayed by J.S. Rather, a situation exists where acceptance to treatment, to include treatment with medication, is a condition precedent to J.S. receiving treatment in a less restrictive environment. Insight into his mental and physical illness would be a beneficial contributing factor toward the goal of attaining a less restrictive treatment environment. J.S. is receiving appropriate treatment considering the danger to himself or others that a less restrictive alternate setting would entail at this time.

CONCLUSION

The issue of alternate treatment was properly before the district court and the court properly found that alternative treatment was not appropriate to prevent harm to J.S. or others. The court's decision was based on clear and credible evidence.

DATED this 1st day of June, 2006.

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
:
COUNTY OF STUTSMAN)

Jolene Brown, being first duly sworn on oath, does depose and say: that she is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 1st day of June, 2006, this affiant deposited in the mailing department of the United States Post Office at Jamestown, North Dakota, a true and correct copy of the following documents filed in the above captioned action:

BRIEF OF PETITIONER/APPELLEE

That the copies of the above documents were securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Jodi Koch Scherr
Attorney at Law
Post Office Box 356
Valley City, North Dakota 58072

To the best of your affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jolene Brown

JOLENE BROWN

SUBSCRIBED and SWORN to before me this 1st day of June, 2006.

LEO A. RYAN, Notary Public
Stutsman County, North Dakota
My Commission Expires:12/27/08