20140447

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of L. B.,	)	
	)	
	)	
Respondent-Appellant.	)	
	)	Supreme Ct. No. 20140447
	)	
	)	District Ct. No. 08-2014-MH-00104
.....	)	

BRIEF OF PETITIONER-APPELLEE

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOLLOWING TREATMENT FOR CONTINUING TREATMENT HEARING

Burleigh County District Court
South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

Alex Stock, Assistant
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STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in determining that L.B. was a chemically dependent person requiring treatment under N.D.C.C. § 25-03.1-02, and, in so determining, ordering L.B. to undergo treatment at ACS Apartments.

STATEMENT OF THE CASE

[¶2] The State agrees with L.B.'s statement of the procedure below in substantial part. The State makes the following additions:

[¶3] The district court reached its decision based on Dr. Balf's testimony at the treatment hearing. Tr. p. 16, ln. 17-18. Dr. Balf was the petitioner below. App. 2-4. The district court did not consider the Report of Examination or the Report Assessing Availability and Appropriateness of Alternate Treatment. Tr. p. 16, ln. 15-16.

[¶4] The district court's order indicated it found there was "clear and convincing [evidence] to indicate the Respondent is chemically dependent." App. 16. The Respondent's diagnosis was found to be "alcohol dependent . . . ." App. 16. The following symptoms or evidence to support the diagnosis were "treated ER 13x in last year; 3 weeks in ICU w/ alcohol tremens & delirium; alcohol abuse w/ severe diabetes." App. 17. The district court also found if L.B. is not treated, "there exists a serious risk of harm to self, others or property, and a substantial likelihood of: . . . Substantial deterioration in physical health, or substantial injury, disease, or death resulting from recent poor self-control or judgment in providing one's shelter, nutrition, or personal care . . . ." App. 17. The evidence to support the "danger to self, others, or property" was "ICU 3 weeks, for detox, delirium tremens. ER for alcohol 13x in last year." App. 17. Finally, the district court ordered treatment less restrictive than hospitalization. App. 18. Specifically, the district court ordered L.B. to undergo treatment at the ACS apartments for no more than 90 days,

ending on February 13, 2015. App. 18. The district court issued an Order for Less Restrictive Treatment to that effect. App. 19.

STATEMENT OF THE FACTS

[¶5] The State concurs with L.B.'s recitation of the factual background.

The State makes the following additions:

[¶6] Dr. Balf's petition contained the following facts to support it:

> This is the 4th admission since April 2014 for alcohol or substance abuse-related complications. This last time was admitted in ICU and stayed on life support for more than 3 weeks in delirium tremens. She had to be reintubated 3 times. She has not followed up with the treatment in between her hospital admissions. . . .

App. 3. At the hearing she gave some background information concerning her connection with L.B. She said,

> I saw [L.] first on November 5th. It was a consultant for ICU when she was still treated over there. And then I did the admission and I followed her until three days ago as my patient on the inpatient psychiatric unit.
>
> And, also, [L.] has followed with my behavioral health clinic not so consistently throughout the year, so I had access to the records as outpatient.

Tr. p. 8, ln. 10-17.

ARGUMENT

[¶7] The district court did not err in determining that L.B. is a chemically dependent person requiring treatment under N.D.C.C. § 25-03.1-02. Furthermore, the district court did not err in ordering L.B. to undergo residential treatment at ACS Apartments for a period not to exceed 90 days.

[¶8] This Court has stated, "District courts must use a clear and convincing standard of proof while this Court uses a more probing clearly erroneous standard of review." In re P.B., 2005 ND 201, ¶ 5, 706 N.W.2d 78 (citing Interest of J.S., 530 N.W.2d 331, 333 (N.D. 1995)). This Court "will affirm an order for involuntary treatment unless it is induced by an erroneous view of the law or if we are firmly convinced it is not supported by clear and convincing evidence." Id. "Harmless error exists when the defect in the proceeding does not affect the substantial rights of the parties." Kronberger v. Zins, 463 N.W.2d 656, 659 (N.D. 1990) (citing N.D.R.Civ.P. 61).

I. The district court's treatment order was not based on an erroneous view of the law.

[¶9] L.B. argues vehemently that the district court needed to consider the reports filed by Dr. Armstrong and Ms. Johnson (LAC).

A. Statutory Requirements of N.D.C.C. § 25-03.1-19

[¶10] In reading N.D.C.C. § 25-03.1-19, that is not the case. That section provides:

> The involuntary treatment hearing, unless waived by the respondent or the respondent has been released as a person not requiring treatment, must be held within fourteen days of the preliminary hearing. If the preliminary hearing is not required,

> the involuntary treatment hearing must be held within four days, exclusive of weekends and holidays, of the date the court received the expert examiner's report, not to exceed fourteen days from the time the petition was served. The court may extend the time for hearing for good cause. The respondent has the right to an examination by an independent expert examiner if so requested. If the respondent is indigent, the county of residence of the respondent shall pay for the cost of the examination and the respondent may choose an independent expert examiner.
>
> The hearing must be held in the county of the respondent's residence or location or the county where the state hospital or treatment facility treating the respondent is located. At the hearing, evidence in support of the petition must be presented by the state's attorney, private counsel, or counsel designated by the court. During the hearing, the petitioner and the respondent must be afforded an opportunity to testify and to present and cross-examine witnesses. The court may receive the testimony of any other interested person. All persons not necessary for the conduct of the proceeding must be excluded, except that the court may admit persons having a legitimate interest in the proceeding. The hearing must be conducted in as informal a manner as practical, but the issue must be tried as a civil matter. Discovery and the power of subpoena permitted under the North Dakota Rules of Civil Procedure are available to the respondent. The court shall receive all relevant and material evidence which may be offered as governed by the North Dakota Rules of Evidence. There is a presumption in favor of the respondent, and the burden of proof in support of the petition is upon the petitioner.
>
> If, upon completion of the hearing, the court finds that the petition has not been sustained by clear and convincing evidence, it shall deny the petition, terminate the proceeding, and order that the respondent be discharged if the respondent has been hospitalized before the hearing.

N.D.C.C. § 25-03.1-19. There is nothing within the statute that specifies how the clear and convincing evidence standard is to be met, other than the district court must follow the North Dakota Rules of Evidence. The district court did follow the Rules in this case by considering the testimony of the petitioner

alone in reaching its conclusion. That testimony was the only witness and evidence that L.B. had the opportunity to cross examine.

[¶11] Section 25-03.1-19 also says "[t]he respondent has the right to examination by an independent expert examiner if so requested." But it does not say that any of the reports need to be entered into evidence.

[¶12] Even if the reports should have been entered into evidence after testimony from the examiners, it was harmless error for the district court to move forward without that evidence. See In Interest of T.A., 472 N.W.2d 226, 228 (N.D. 1991) ("[W]e conclude that the petitioner's deviation in not submitting current written reports for the treatment hearing was harmless error."); see also Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 40, 788 N.W.2d 312 ("We will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning."). Based on Dr. Balf's testimony alone, the court was able to determine that there was clear and convincing evidence to support her petition under N.D.C.C. § 25-03.1-19.

B. Statutory Requirements of N.D.C.C. § 25-03.1-21

[¶13] L.B. bases part of her argument on her inability to cross-examine the person who prepared the least restrictive treatment report. Appellant's Brief at ¶¶ 61-67. Section 25-03.1-21 does require the district court 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." While there was a report prepared, it

was not admitted into evidence at the hearing because there was no witness to testify to it. See Tr. p. 16, ln. 15-16. But that did not leave the court without ample evidence concerning alternative treatment.

[¶14] Dr. Balf, who had treated L.B. in the ICU, testified that she believed L.B. required residential rehab treatment. Tr. p. 11, ln. 20-21. Dr. Balf also testified to some out-patient resources that had been attempted in L.B.'s case, such as the outpatient clinic at Sanford and the Bismarck Transition Center. Tr. p. 9, ln. 9-15. Dr. Balf indicated that L.B. had not followed through with those resources. Id. Based on Dr. Balf's testimony alone, the district court had evidence concerning both a recommended alternative treatment and L.B.'s ability or readiness to submit to other less restrictive alternatives.

[¶15] Therefore, even if the district court erred by not requiring the examiner to testify as to the least restrictive alternative report so that it could be entered into evidence, it was only a harmless error. See In Interest of T.A., 472 N.W.2d 226, 228 (N.D. 1991) ("[W]e conclude that the petitioner's deviation in not submitting current written reports for the treatment hearing was harmless error."); see also Investors Title Ins. Co. v. Herzig, 2010 ND 169, ¶ 40, 788 N.W.2d 312 ("We will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning."). Not only did the district court order an alternative to hospitalization, but it had clear and convincing evidence to support that order.

[¶16] Thus, the district court's order was in compliance with N.D.C.C. § 25-03.1-19 in that it held a hearing where both the petitioner and respondent were allowed to testify, present, and cross-examine witnesses; furthermore, it based its holding on clear and convincing evidence, which happened to be the only evidence that was admissible under the North Dakota Rules of Evidence. The order was also in substantial compliance with N.D.C.C. § 25-03.1-21 in that the court did consider and ordered alternative treatment after evidence had been presented that it was appropriate to do so. Therefore, the district court's treatment order was not clearly erroneous.

II. The district court's treatment order is supported by clear and convincing evidence.

[¶17] The district court's treatment order is supported by clear and convincing evidence and is therefore not clearly erroneous.

A. L.B. is a "Chemically Dependent Person."

[¶18] Section 25-03.1-02 defines a "chemically dependent person" as "an individual with an illness or disorder characterized by a maladaptive pattern of usage of alcohol or drugs, or a combination thereof, resulting in a social, occupational, psychological, or physical problems." N.D.C.C. § 25-03.1-02(2).

[¶19] In finding L.B. to be chemically dependent, the district court relied on the following facts: "treated ER 13x in last year; 3 weeks in ICU w/ alcohol tremens & delirium; alcohol abuse w/ severe diabetes." App. 17; Tr. pp. 8-9.

This is clear and convincing evidence to support a finding that L.B. meets the definition of "chemically dependent" under N.D.C.C. § 25-03.1-02(2).

B. L.B. is a "Person Requiring Treatment."

[¶20] The district court further found that L.B. was a person requiring treatment.

[¶21] Section 25-03.1-02 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 for the mental illness or chemical dependency 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 evidence of objective facts to establish the loss of cognitive or volitional control over the person's thoughts or actions or based upon acts, threats, or patterns in the person's treatment history, current condition, and other relevant factors, including the effect of the person's mental condition on the person's ability to consent.

N.D.C.C. § 25-03.1-02(12).

[¶22] The district court based its decision on sub-subsection (c): "[s]ubstantial deterioration in physical health, or substantial injury, disease, or death resulting from recent poor self-control or judgment in providing one's shelter, nutrition, or personal care . . . ." App. 16-17. The facts to support

"danger to self, others, or property" were "ICU 3 weeks, for detox, delirium tremens. ER for alcohol 13x in last year." App. 17; Tr. pp. 8-9; 10-11. Delirium tremens is "a severe form of alcohol withdrawal that involves sudden and severe mental or nervous system changes." *Delirium tremens*, MEDLINEPLUS, http://www.nlm.nih.gov/ medlineplus/ency/article/000766.htm (last updated: 03 December 2014); see also Tr. pp. 8; 10-11. Dr. Balf testified to how delirium tremens affected L.B.:

> This detox was the most severe of all. She was intubated for three weeks. She was in delirium tremens and she had to be re-intubated three times because of the severity of the delirium. . . .
>
> So [L.]'s delirium was quite profound with physical aggressivity and with auditory and visual hallucinations. After she was extubated, she made it to our floor, she persisted with visual hallucination and then she slowly improved. She was still confused and disoriented. For instance, the third day in her coming to our floor, on the 10th when I wrote my petition, she was determined that she needed to go to work and she didn't know what day it is and the exact name of the place she's at, but she was determined that she wants to go to work. And I argued that she's very weak, after four weeks in ICU, she needs to build back muscles and strength. And she declined our help and she fell because she refused our help. So she put herself in danger, but within the confined limits of our floor, so we were able to help and prevent complications.

Tr. p. 8-9, 10-11. This is clear and convincing evidence to support a finding that L.B. is a person requiring treatment under N.D.C.C. § 25-03.1-02(12).

[¶23] This Court has said, "The standard for involuntary commitment remains 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." In Interest of R.N., 450 N.W.2d 758, 761 (N.D. 1990)

(emphasis in original). The line between "requires" and "would benefit" is drawn at "a person who poses a serious risk of harm to self if not treated." Id. The testimony of Dr. Balf was certainly enough to support a finding that L.B. is a person requiring treatment. L.B.'s ER visits, her recent stay at the ICU for several weeks, and her inability to monitor her alcohol intake despite her "brittle diabetes" (Tr. p. 9) all show she is someone "who poses a serious risk of harm to self it not treated."

C. The District Court's Order Adequately Reflects Its Consideration Of Less Restrictive Alternatives To Hospitalization.

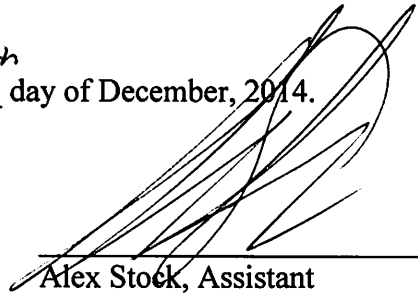
[¶24] The district court issued an Order for Less Restrictive Treatment. App. 19. Specifically, L.B. was ordered to undergo "outpatient [treatment] with residential component." Id. That is a less restrictive alternative from hospitalization.

[¶25] The Order was not based specifically upon a report from a medical examiner. Tr. p. 16, ln. 14-18. Rather, it was based on testimony from the petitioner, who was also the doctor who treated L.B. during her time in the ICU. Id. Dr. Balf testified that L.B. had not complied with less restrictive alternatives such as clinic visits and Bismarck Transition Center appointments. Tr. p. 9, ln. 9-15. She further testified she would recommend residential rehab for L.B. Tr. p. 11, ln. 20-21. That is what the district court ordered. Tr. p. 17, ln. 12-14; App. 19.

CONCLUSION

[¶26] For the reasons stated above, the State requests that the order for treatment be affirmed.

Dated this 19th day of December, 2014.



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.....	)	
STATE OF NORTH DAKOTA	)	
	) ss	
COUNTY OF BURLEIGH	)	

Gwen Tardif, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 22nd day of December, 2014, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Petitioner-Appellee
2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Gregory Ian Runge
Attorney at Law
1983 E. Capitol Ave.
Bismarck, North Dakota, 58501

which address is the last known address of the addressee.

Gwen Tardif

Subscribed and sworn to before me this 22nd day of December, 2014.

KIM BLESS
Notary Public
State of North Dakota
My Commission Expires February 24, 2016

Kim Bless, Notary Public
Burleigh County, North Dakota
My Commission Expires: 2-24-2016.