

NOTICE
Decision filed 11/10/14. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (5th) 130565-U

NO. 5-13-0565

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> S.N., Alleged to Be a Person Subject to Involuntary Treatment With Psychotropic Medication)	Appeal from the Circuit Court of Randolph County.
)	
(The People of the State of Illinois, Petitioner-Appellee, v. S.N., Respondent-Appellant).)	No. 13-MH-149
)	Honorable Richard A. Brown,
)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Where the State (1) failed to comply with section 2-102(a-5) of the Mental Health and Developmental Disabilities Code and (2) failed to prove by clear and convincing evidence that the tests and procedures that were ordered were essential for the safe and effective administration of the medication, the order of the circuit court is reversed.

¶ 2 The respondent, S.N., appeals from an order of the circuit court of Randolph County finding him subject to involuntary administration of psychotropic medications according to section 2-107.1(a-5) of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/2-107.1(a-5) (West 2012)). The respondent argues that (1) the circuit court's finding that he met the statutory criteria for forced administration of medication was against the manifest weight of the evidence, and (2) he was not afforded

effective assistance of counsel. The State has filed a confession of error. We find the respondent's contentions and the State's confession to be well-taken. For the reasons that follow, we reverse the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 The respondent was admitted to Chester Mental Health Center (Chester) on May 24, 2013, after the circuit court of Will County found him unfit to stand trial on eavesdropping charges. On May 5, 2014, the circuit court of Will County entered an order of *nolle prosequi* on the eavesdropping charges.

¶ 5 On November 21, 2013, the respondent's treating psychiatrist at Chester, Dr. Nageswararao Vallabhaneni, filed a petition seeking an order authorizing the involuntary administration of psychotropic medication and necessary, supportive medical testing including the use of a nasogastric tube. The petition stated that the respondent had been given a personal list of the side effects of the proposed medications in writing. The petition listed two primary medications, olanzapine and lorazepam, and two alternative medications, risperidone and clonazepam, as well as their proposed dosages. The petition also stated that Dr. Vallabhaneni was requesting blood testing, blood draws, and if the respondent's medical condition was at risk from worsening psychosis, the authority to administer the medication via a nasogastric tube.

¶ 6 The circuit court held a hearing on the petition on November 27, 2013. Dr. Vallabhaneni testified for the State as follows. He was the respondent's treating psychiatrist at Chester. Since at least 2011, the respondent had multiple mental health admissions along with one involuntary medication order, and was diagnosed with major

depressive disorder with psychotic features. The respondent had not threatened or harmed other patients at Chester, but had acted in an intimidating manner by calling people names. Prior to coming to Chester, the respondent had been at Elgin Mental Health Center, where reports indicated that he had tried to commit suicide twice.

¶ 7 Dr. Vallabhaneni further testified that the respondent lacked the capacity to make a reasonable decision about his treatment. He confirmed that he had given the respondent a written list of the medications, the potential side effects of the medications, and alternatives to the medications. The State entered that list of information into evidence. The list specifically contained information about alternatives to the medicinal treatment, as well as information about lorazepam, Klonopin, and olanzapine. Notably absent from the list of information was any information about risperidone. Dr. Vallabhaneni did not testify about the testing he was requesting or about the use of the nasogastric tube.

¶ 8 The respondent testified that he had not threatened anyone and had not attempted to commit suicide or otherwise harm himself. He also claimed that he was innocent of the charges brought against him in Will County.

¶ 9 The court entered an order for the administration of authorized involuntary treatment, finding that the respondent had a serious mental illness, had exhibited deterioration in his ability to function, and had exhibited threatening behavior. In addition to authorizing the involuntary administration of psychotropic medication, the court ordered specific testing and procedures when necessary to administer the medication and that the medication be administered via a nasogastric tube should the respondent's medical condition be at risk from worsening psychosis.

¶ 10 On November 27, 2013, the respondent filed a motion to dismiss the petition for the administration of authorized involuntary treatment and then a *pro se* notice of appeal and an amended *pro se* notice of appeal on December 10, 2013. In the motion to dismiss and the notice of appeal, the respondent indicated that he knew the risks associated with the medications and did not want to be on those medications. Counsel was then appointed to the respondent, and this appeal followed.

¶ 11

ANALYSIS

¶ 12 We begin by noting that this appeal is moot because the 90-day period authorized by the circuit court's order has expired. Nevertheless, we will address the questions raised in this appeal because they are capable of repetition yet might evade review because of the short duration of the orders and the respondent's continuing mental health issues and unwillingness to take medication. See *In re Joseph M.*, 405 Ill. App. 3d 1167, 1175 (2010).

¶ 13 The respondent argues that the State failed to prove by clear and convincing evidence that (1) the respondent lacked the decisional capacity to make a reasoned decision about the proposed treatment (405 ILCS 5/2-107.1(a-5)(4)(E) (West 2012)), and (2) the tests and other procedures that the court ordered, which included the use of a nasogastric tube, were essential for the safe and effective administration of the medication (405 ILCS 5/2-107.1(a-5)(4)(G) (West 2012)). The respondent further argues that he was denied the effective assistance of counsel. The State concedes that no direct testimony was presented concerning the use of the nasogastric tube and that one of the

proposed medications, risperidone, was omitted from the written notification of side effects, risks, and benefits and alternatives to treatment.

¶ 14 The Code states that a recipient of mental health services shall be provided with adequate and humane care and services in the least restrictive environment, pursuant to an individual service plan. 405 ILCS 5/2-102(a) (West 2012). Section 2-102(a-5) of the Code states that if the services include the administration of psychotropic medication, the physician shall: (1) advise the recipient, in writing, of the side effects, risks, and benefits of the treatment, as well as alternatives to the proposed treatment, to the extent such advice is consistent with the recipient's ability to understand the information communicated, and (2) determine and state in writing whether the recipient has the capacity to make a reasoned decision about the treatment. 405 ILCS 5/2-102(a-5) (West 2012). If the recipient lacks the capacity to make a reasoned decision about the treatment, the treatment may be administered only pursuant to section 2-107 or 2-107.1 of the Code. 405 ILCS 5/2-102(a-5) (West 2012).

¶ 15 Medication may be administered to a recipient without his consent if and only if it has been determined by clear and convincing evidence that, *inter alia*, (1) the recipient lacks the capacity to make a reasoned decision about treatment, and (2) if the petition seeks the authorization for testing and other procedures, such testing and procedures are essential for the safe and effective administration of the treatment. 405 ILCS 5/2-107.1(a-5)(4)(E) & (G) (West 2012). Whether there was substantial compliance with a statutory provision is a question of law, which we review *de novo*. *In re Tiffany W.*, 2012 IL App (1st) 102492-B, ¶ 10. A reviewing court will not reverse a circuit court's

determination about the sufficiency of the evidence unless such determination was against the manifest weight of the evidence. *Id.* A judgment is against the manifest weight of the evidence only where the opposite conclusion is apparent or where the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.*

¶ 16 A patient's capacity to make treatment decisions for himself is based upon the conveyed information concerning the risks and benefits of the proposed treatment and reasonable alternatives to treatment. *In re John R.*, 339 Ill. App. 3d 778, 785 (2003). The failure to provide the respondent with the statutorily mandated written information about the risks and benefits of the proposed treatment as well as the alternatives to the treatment amounts to reversible error because the respondent has not received all of the information necessary to make a rational choice. *In re Bobby F.*, 2012 IL App (5th) 110214, ¶ 18.

¶ 17 In this case, the respondent was not provided with any information about risperidone, one of the proposed medications. There was no way the respondent could have made a fully informed, reasoned decision about treatment without first having all of the information about the treatment before him. Because the State failed to present evidence that it fully complied with section 2-102(a-5) of the Code, the treatment order must be reversed.

¶ 18 The respondent also argues, and the State concedes, that the State failed to prove by clear and convincing evidence that the tests and other procedures ordered, including the use of a nasogastric tube, were essential for the safe and effective administration of the medication. When seeking the involuntary testing of a mental health patient, the State must prove by clear and convincing evidence that such testing is essential for the safe and

effective administration of the treatment. 405 ILCS 5/2-107.1(a-5)(4)(G) (West 2012). The State must present specific testimony about the requested testing and procedures. *In re David S.*, 386 Ill. App. 3d 878, 883 (2008). This court has reversed an involuntary medication order where the testifying physician simply confirmed at the hearing that he wanted to conduct testing to ensure that the administration of the medication was safely and effectively done. *In re Larry B.*, 394 Ill. App. 3d 470, 478 (2009). With no other evidence presented about the administration and testing methods, we found that the physician's testimony "fell far short of clear and convincing specific expert testimony in support of a request for testing." *Id.*

¶ 19 Here, virtually no evidence was given concerning testing, and no testimony was given regarding the use of the nasogastric tube. The State did not present any evidence that showed that the testing was essential for the effective administration of the medications. The only information regarding the testing was in the petition, and it simply stated that Dr. Vallabhaneni was requesting testing and that the testing was essential for the effective administration of the medication, which was nothing more than a conclusion without any support. Therefore, we cannot find that the State presented clear and convincing evidence regarding the need for medical testing and the use of the nasogastric tube.

¶ 20 The respondent also contended that his appointed counsel provided ineffective assistance. Because of the resolution of the preceding issues and our determination that the order granting the petition must be reversed, we need not consider the respondent's

allegations of error regarding his counsel's representation. See *In re Larry B.*, 394 Ill. App. 3d 470, 479 (2009).

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Randolph County ordering the involuntary administration of medication for the respondent is reversed.

¶ 23 Reversed.