2016 IL App (5th) 130409-U

NO. 5-13-0409

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| *In re* V.V., Alleged to Be a Person Subject to Involuntary Treatment With Psychotropic Medication | ) | Appeal from the Circuit Court of Madison County. |
| (The People of the State of Illinois, Petitioner-Appellee, | ) | |
| v. | ) | No. 13-MH-14 |
| V.V., Respondent-Appellant). | ) | Honorable Stephen A. Stobbs, Judge, presiding. |

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's order finding respondent subject to the involuntary administration of psychotropic medication is reversed where the State failed to meet its burden in establishing that such involuntary administration was warranted.

¶ 2 Respondent, V.V., appeals from an order finding him subject to the involuntary administration of psychotropic medication pursuant to section 2-107.1 of the Mental Health and Developmental Disabilities Code (Code). 405 ILCS 5/2-107.1 (West 2014).

Although respondent's appeal would ordinarily be considered moot, we address the merits in light of our finding an exception to the mootness doctrine. We reverse.

¶ 3 BACKGROUND

¶ 4 The pertinent facts necessary to reach our decision are brief.

¶ 5 Respondent was admitted to Alton Mental Health Center (Health Center) on November 14, 2008, after being found not guilty by reason of insanity on a reduced theft charge in Peoria County. Respondent had no prior admissions to the Health Center or any other mental healthcare facility.

¶ 6 On January 18, 2013, Dr. Mahmood, respondent's psychiatrist at the Health Center, filed a petition and affidavit for involuntary administration of psychotropic medication. The petition indicated respondent's diagnoses were schizoaffective disorder, bipolar type, personality disorder, and NOS, and asserted that as a result of these mental illnesses or developmental disabilities, respondent exhibits deterioration of his ability to function, suffering, and threatening behavior.

¶ 7 A hearing on Dr. Mahmood's petition was held on February 5, 2013. At that hearing, Dr. Mahmood testified that respondent's diagnosed mental illnesses were "schizoaffective disorder, bipolar type, which means there are periods when he has mood symptoms which includes elated mood, irritable mood, problems with sleep." Dr. Mahmood testified that respondent becomes "hyperverbal" and his speech becomes "very tangential," changing from topic to topic. Dr. Mahmood further testified that respondent

exhibits false beliefs, including that he is a lawyer, a chess expert, a government expert, and owns a farm. Dr. Mahmood testified respondent also changes his name.

¶ 8 Regarding the petition's assertion that respondent exhibits deterioration of his ability to function, suffering, and threatening behavior as a result of his mental illnesses, Dr. Mahmood testified as follows:

"Q. [Attorney for State] Because of his mental illness, is there a deterioration in his ability to function?

A. [Respondent] according to records and according to him was able to function which means that he was able to hold a job and he was able to take care of himself since 2007. He was admitted here in 2008 on a reduced theft charge. Here at Alton Mental Health, there has been times when staff has concerns about his taking shower. They believe that he does not take the shower or clean himself. Problems regarding his sleep is another issue. But if you look at his room, his room is very neat and clean. He is–his appearance is groomed.

Q. Because of his mental illness, do you believe he's suffering?

A. According to [respondent], he's not suffering, but I believe because of his unrealistic ideations he is suffering. He does get tormented because of his beliefs, because when he becomes–sorry–when he comes psychotic, he starts talking to the camera on the wall, he wants to make sure–and he gives explanations to the staff.

* * *

Q. Because of his mental illness, does he exhibit any threatening behavior?

A. [Respondent]–when he is in an episode, when he's hyperverbal, and when he's making all these threatening remarks, he has–in the past he has done that. But we come to the present. In the present, at present, he has–since March–since–since December of 2012, he has started making threatening remarks towards one particular client. He was–because of his–all these threatening and disruptive behaviors, he was placed on emergency medications on 1/14. [Respondent] also was attacked by one client because [respondent] was hovering over that particular client, and that particular client was very irritated with [respondent], and he started punching him. Other clients have also been complaining about [respondent], so he has been involved in behaviors like that."

¶ 9 Respondent did not present any testimony at the hearing. After determining respondent exhibited a deterioration of his ability to function as a result of his serious mental illness, the trial court granted Dr. Mahmood's petition. Specifically, the court noted that respondent's propensity to invade the personal space of others and agitate others put him in a position of danger if someone were to strike him. The court did not find that respondent exhibited suffering or threatening behavior as a result of his illness.

¶ 10 Respondent then filed a motion to reconsider and points and authority in support of his motion to reconsider. Thereafter, two hearings were held on respondent's motion. At the first hearing, the court noted that allegations of respondent's isolation, ideations, and inability to communicate were supported by evidence and supported its finding that respondent lacked the ability to function properly. At the second hearing, over respondent counsel's objections, the court amended the order to reflect that respondent

also exhibited threatening behavior as a result of his aggressive behavior and "putting himself in a position of harm." The court denied respondent's motion to reconsider.

¶ 11 This appeal followed.

¶ 12 ANALYSIS

¶ 13 I. Mootness Doctrine

¶ 14 Initially, we must address the question of mootness in this case. Section 2-107.1 provides that an order authorizing the involuntary administration of medication shall not be effective for more than 90 days. 405 ILCS 5/2-107.1(a-5)(5) (West 2014). Here, the trial court's order granting Dr. Mahmood's petition for involuntary administration of psychotropic medication was entered on February 5, 2013. Since 90 days have passed and the trial court's order is no longer effective, this case is moot.

¶ 15 Generally, Illinois courts do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected by the court's decision. *In re Daryll C.*, 401 Ill. App. 3d 748, 752, 930 N.E.2d 1048, 1052 (2010). However, three exceptions to the mootness doctrine are recognized: (1) the public interest exception; (2) the capable of repetition yet avoiding review exception; and (3) the collateral consequences exception. *Daryll C.*, 401 Ill. App. 3d at 752, 930 N.E.2d at 1052. Whether an exception to the mootness doctrine applies is a question of law reviewed *de novo*. *In re Vanessa K.*, 2011 IL App (3d) 100545, ¶ 13, 954 N.E.2d 885.

¶ 16 Respondent argues his appeal is not moot because it falls under the public interest and capable of repetition yet avoiding review exceptions to the mootness doctrine. After

careful consideration, we agree and find that this appeal falls within the capable of repetition yet avoiding review exception.

¶ 17 The capable of repetition yet avoiding review exception has two elements: (1) the challenged action must be of a duration too short to be fully litigated prior to its cessation; and (2) there must be a reasonable expectation that the same complaining party would be subjected to the same action again. *In re Alfred H.H.*, 233 Ill. 2d 345, 358, 910 N.E.2d 74, 82 (2009). In the instant case, there is no question the first element has been satisfied, as the order was limited to only 90 days. This period is far too brief to permit appellate review, as in virtually every case, the challenged medication order will expire before appellate review can be completed. *In re Barbara H.*, 183 Ill. 2d 482, 492, 702 N.E.2d 555, 559 (1998). Thus, the only question regarding this exception is whether respondent's arguments have also satisfied the second element.

¶ 18 Our supreme court has interpreted the second element to require that "the actions must have a substantial enough relation that the resolution of the issue in the present case would be likely to affect a future case involving respondent." *Alfred H.H.*, 233 Ill. 2d at 359, 910 N.E.2d at 82. Where a respondent's history of mental illness makes it likely that he or she will be subjected to involuntary treatment again, a reviewing court has authority to consider the respondent's appeal under this exception to the mootness doctrine. *In re R.K.*, 338 Ill. App. 3d 514, 520, 786 N.E.2d 212, 216 (2003).

¶ 19 The record in this case indicates respondent has a lengthy and ongoing medical history that dates back to his admission to the Health Center in November 2008. Further, the circumstances present here are likely to reoccur, as evidenced by respondent's having

been court ordered to receive psychotropic medications on two separate instances in the past–once in 2010 and once in 2011. Accordingly, we address the merits of respondent's appeal pursuant to the capable of repetition yet avoiding review exception to the mootness doctrine, and, therefore, we need not address the public interest exception.

¶ 20 II. Involuntary Medication

¶ 21 Respondent asserts the State failed to establish, by clear and convincing evidence, two of the elements required for the involuntary administration of psychotropic medication. First, respondent argues the State failed to establish that respondent lacked the capacity to make a reasoned decision about the proposed treatment. Second, respondent argues the State failed to establish that his mental illness caused deterioration in his ability to function and suffering or threatening behavior sufficient to warrant involuntary medication.

¶ 22 The State concedes it failed to prove that respondent lacked the decisional capacity to make a reasoned decision about the treatment since it did not present evidence that respondent had been given written information regarding alternative forms of treatment as required under section 2-102(a-5) of the Code. 405 ILCS 5/2-102(a-5) (West 2014). The State further argues it presented clear and convincing evidence that respondent exhibited a deterioration of his ability to function and threatening behavior.

¶ 23 Receiving involuntary mental health services, including the involuntary administration of psychotropic drugs, involves a " ' "massive curtailment of liberty." ' " *In re Michael H.*, 392 Ill. App. 3d 965, 972, 912 N.E.2d 703, 709 (2009) (quoting *Barbara H.*, 183 Ill. 2d at 496, 702 N.E.2d at 561 (quoting *Vitek v. Jones*, 445 U.S. 480,

491 (1980))). Thus, it is well recognized that mentally ill patients have a constitutional liberty interest in refusing treatment. *Michael H.*, 392 Ill. App. 3d at 972, 912 N.E.2d at 709. The procedures codified in our Code protect these important interests and ensure that Illinois citizens are not improperly subjected to such services. *Michael H.*, 392 Ill. App. 3d at 972, 912 N.E.2d at 709. Accordingly, Illinois courts have repeatedly stressed the importance of following the Code's procedures in order to fully protect the rights of patients like respondent who are alleged to be subject to treatment they do not wish to receive. *Michael H.*, 392 Ill. App. 3d at 972, 912 N.E.2d at 709.

¶ 24 Section 2-107.1 provides that authorized involuntary treatment shall not be administered unless it is determined, by clear and convincing evidence, that the following seven factors are present:

> "(A) That the recipient has a serious mental illness or developmental disability.
>
> (B) That because of said mental illness or developmental disability, the recipient currently exhibits any one of the following: (i) deterioration of his or her ability to function, *** (ii) suffering, or (iii) threatening behavior.
>
> (C) That the illness or disability has existed for a period marked by the continuing presence of the symptoms set forth in item (B) of this subdivision (4) or the repeated episodic occurrence of these symptoms.
>
> (D) That the benefits of the treatment outweigh the harm.
>
> (E) That the recipient lacks the capacity to make a reasoned decision about the treatment.

(F) That other less restrictive services have been explored and found inappropriate.

(G) If the petition seeks authorization for testing and other procedures, that such testing and procedures are essential for the safe and effective administration of the treatment." 405 ILCS 5/2-107.1(a-5)(4) (West 2014).

" 'The trial court must find evidence of each of the elements to authorize the forced administration of psychotropic medication.' " *In re Bobby F.*, 2012 IL App (5th) 110214, ¶ 16, 970 N.E.2d 25 (quoting *In re Louis S.*, 361 Ill. App. 3d 774, 779, 838 N.E.2d 226, 232 (2005)).

¶ 25 Our supreme court has defined clear and convincing evidence as the quantum of proof that leaves no reasonable doubt in the mind of the fact finder regarding the truth of the proposition in question. *Bazydlo v. Volant*, 164 Ill. 2d 207, 213, 647 N.E.2d 273, 276 (1995). Clear and convincing evidence is considered to be more than a preponderance, while not quite approaching the degree of proof necessary to convict a person of a criminal offense. *In re John R.*, 339 Ill. App. 3d 778, 782, 792 N.E.2d 350, 353 (2003). Although this section requires proof by clear and convincing evidence, great deference is given to the trier of fact, and reversal is only warranted when its decision is manifestly erroneous. *In re Perona*, 294 Ill. App. 3d 755, 766, 690 N.E.2d 1058, 1066 (1998). A judgment against the manifest weight of the evidence will be found only where an opposite conclusion is readily apparent or where the findings appear to be unreasonable, arbitrary, or not based on the evidence. *John R.*, 339 Ill. App. 3d at 782, 792 N.E.2d at 353.

¶ 26 III. Decisional Capacity

¶ 27 Forced administration of psychotropic medication is not permitted if an individual has the capacity to make a treatment decision for himself, "even if it is clearly in that individual's best interest." *John R.*, 339 Ill. App. 3d at 783, 792 N.E.2d at 354. " 'An individual has the capacity to make treatment decisions for himself when, *based upon conveyed information concerning the risks and benefits of the proposed treatment and reasonable alternatives to treatment*, he makes a rational choice to either accept or refuse the treatment.' " (Emphasis in original.) *John R.*, 339 Ill. App. 3d at 782-83, 792 N.E.2d at 354 (quoting *In re Israel*, 278 Ill. App. 3d 24, 36, 664 N.E.2d 1032, 1039 (1996)).

¶ 28 Section 2-102(a-5) of the Code requires a treating physician seeking to administer psychotropic medication to "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." 405 ILCS 5/2-102(a-5) (West 2014); *Bobby F.*, 2012 IL App (5th) 110214, ¶ 18, 970 N.E.2d 25. A physician's failure to advise the patient destroys the patient's ability to make a reasoned decision regarding medications because he or she has not been provided with necessary information. *Bobby F.*, 2012 IL App (5th) 110214, ¶ 18, 970 N.E.2d 25. Verbal notification is insufficient to meet the statutory requirement. *Bobby F.*, 2012 IL App (5th) 110214, ¶ 18, 970 N.E.2d 25.

¶ 29 As our district recently stated:

> "Proof that a respondent has been advised and given written information about alternatives to medication is crucial ***. *** Failure to comply with this

requirement is a sufficient basis to reverse an order authorizing involuntary treatment." *In re Debra B.*, 2016 IL App (5th) 130573, ¶ 26, 55 N.E.3d 212.

¶ 30 In this case, the State concedes there was insufficient proof that respondent lacked the decisional capacity to make a reasoned decision about the proposed treatment because the State failed to demonstrate at the hearing that it complied with section 2-102(a-5) of the Code. 405 ILCS 5/2-102(a-5) (West 2014). Specifically, the State concedes Dr. Mahmood did not testify at the hearing regarding written information on alternative forms of treatment she had given respondent. Further, the petition itself, which indicates Dr. Mahmood provided the required information under section 2-102(a-5) in writing to respondent, was not admitted into evidence at the hearing. Thus, the State presented no evidence which would allow the court to conclude that respondent had been provided with information regarding alternative forms of treatment.

¶ 31 " 'A reviewing court must determine sufficiency of the evidence at the hearing based upon the evidence presented to the trial court.' " *Bobby F.*, 2012 IL App (5th) 110214, ¶ 23, 970 N.E.2d 25 (quoting *In re Laura H.*, 404 Ill. App. 3d 286, 291, 936 N.E.2d 801, 806 (2010)). As we indicate above, the trial court must find evidence of each of the elements under section 2-107.1 to authorize the forced administration of psychotropic medication, including that respondent lacks the capacity to make a reasoned decision about the treatment. Since the State failed to present evidence that respondent was informed in writing regarding alternatives to the proposed treatment, the trial court's involuntary treatment order was against the manifest weight of the evidence. *Laura H.*, 404 Ill. App. 3d at 291, 936 N.E.2d at 806.

¶ 32 We further note that the right to written notification is not subject to a harmless error analysis. *Louis S.*, 361 Ill. App. 3d at 780, 838 N.E.2d at 232. Because of the liberty interests involved, strict compliance is required with the procedural safeguards codified in the Code. *Louis S.*, 361 Ill. App. 3d at 780, 838 N.E.2d at 233. "Without evidence respondent received the required written notification, the trial court erred by ordering him to be subjected to the involuntary administration of medication." *Louis S.*, 361 Ill. App. 3d at 781, 838 N.E.2d at 233. For these reasons, we reverse the trial court's involuntary treatment order.

¶ 33 In light of the foregoing, we need not address respondent's second contention regarding whether the State established, by clear and convincing evidence, that his mental illness caused deterioration in his ability to function and suffering or threatening behavior sufficient to warrant involuntary medication.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we reverse the trial court's order finding respondent subject to the involuntary administration of psychotropic medication.

¶ 36 Reversed.