NO. 4-10-0245 Filed 01/05/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: GARY B., a Person Found Subject to Involuntary Admission,	)	Appeal from Circuit Court of
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Macon County
Petitioner-Appellee,	)	No. 10MH53
v.	)	
GARY B.,	)	Honorable
Respondent-Appellant.	)	Albert G. Webber,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

Held: The trial court erred in allowing respondent's appointed counsel to waive respondent's appearance at his commitment hearing after respondent had informed the trial court that he did not want appointed counsel to represent him, but instead wished to retain private counsel.

On March 30, 2010, the trial court ordered the involuntary admission of respondent, Gary B., for a period not to exceed 90 days. Respondent appeals, claiming the trial court violated his procedural due-process rights by failing to conduct an appropriate inquiry into his stated rejection of appointed counsel, and then allowing appointed counsel to waive his presence at the hearing. We agree with respondent's claims and reverse the trial court's judgment.

I. BACKGROUND

On March 19, 2010, respondent was a patient at St. Mary's Hospital in Decatur. One member of the nursing staff filed a petition for respondent's involuntary

admission to a mental-health facility because respondent exhibited threatening and aggressive behavior toward the staff. The petition was supported by two medical certificates, both indicating that respondent (1) suffered from a mental illness, (2) was reasonably expected to inflict serious harm upon himself or another, and (3) was in need of immediate hospitalization.

On March 30, 2010, the trial court conducted a hearing at St. Mary's. At the outset of the hearing, the following exchange occurred:

> "THE COURT: *** People present by Ms. Bolton. Respondent present with Mr. Finney. Is there a statement you want to make before we start?
>
> MR. FINNEY: For the record, I attempted to meet with Mr. B. last Thursday. He gave me a number of different attorneys' names that he–
>
> RESPONDENT: I want to talk to Tennant and Mary Pearlstein. Can I wait until then?
>
> THE COURT: Let me hear from Mr. Finney first, then I will hear from you, Mr. B.
>
> MR. FINNEY: Yesterday I came back to attempt to talk to–
>
> RESPONDENT: No, you didn't.
>
> MR. FINNEY: Yesterday I came back to try to talk to him about the arrangements for his attorney.
>
> RESPONDENT: I want to talk to Mary Pearl and Todd

Tennant. Can I go, can you get them here?

THE COURT: You need to stay here a minute. Then I'll talk–

MR. FINNEY: He gave me the name of Edward Rawls.

RESPONDENT: He quit the firm and I called Mr. Rawls yesterday and Mr. Rawls, he quit the firm.

MR. FINNEY: Basically indicated to me he was not representing Mr. B.

RESPONDENT: Can I talk to Mary Pearl, Mr. Todd Tennant and I want to talk to them before this man gets started. He look like somebody familiar. Police in the past. Mr. Police. Can I go? Can I go? This man don't make no sense.

THE COURT: Do you want to not participate, sir?

RESPONDENT: No.

THE COURT: You want to leave?

RESPONDENT: Yes.

THE COURT: Okay. You can leave.

RESPONDENT: Mary Pearlstein and–man, get your hand out of my face.

(Respondent leaves the room.)

THE COURT: Go ahead, Mr. Finney.

MR. FINNEY: That's all I wanted to bring to the court's attention. Then this morning, he gave me, apparently Todd

Tennant and Pearlstein as attorneys and I have not had the opportunity to attempt to call them. Of course they are not here.

THE COURT: Apparently from Mr. B's presentation this morning, his statements and his aggressive attitude, he does not wish to participate in this hearing and so the court is prepared to continue without him, if counsel wishes to.

MS. BOLTON: That would be fine, Your Honor.

MR. FINNEY: Yes.

THE COURT: Okay. First witness then, Ms. Bolton."

The State first presented two exhibits: (1) a comprehensive examination and social investigation and (2) a treatment plan. Both were admitted without objection. Dr. Rohil Patil, a psychiatrist, testified that he knew respondent "very well," as he had been his treating physician for the past year as a result of respondent's prior hospitalizations. According to Dr. Patil, respondent suffers from schizoaffective disorder with periods of depression, elation, aggression, paranoia, and delusional behavior. Dr. Patil said respondent has been noncompliant with his medication, he has "no insight," and he "is not in touch with reality." His aggressive behavior has escalated daily. In Dr. Patil's opinion, if respondent does not receive immediate treatment, he "may hurt somebody with his paranoid suspiciousness."

Dr. Patil testified that the least-restrictive treatment alternative was admission to Andrew McFarland Mental Health Center in Springfield. He said respondent had "decompensat[ed]" during out-patient treatment. Since respondent's admission to St.

Mary's, the staff has had to "coax him to do bathing, cleaning, feeding, to bring him to the dining room. He has no insight." Dr. Patil described respondent as "very unpredictable"and that he faces the risk of hurting himself or others due to his conduct.

On cross-examination, Dr. Patil testified that respondent has acted in an aggressive manner toward him, but he knows to keep his distance from respondent. "But he, to the outside world, he would get hurt."

The State next called Tom Moll, a licensed clinical social worker at St. Mary's. He testified that he had been employed at St. Mary's throughout respondent's multiple hospitalizations and had known him for approximately one year. Moll said respondent had "decompensated over the past several months." He had "back to back admissions," when hospital staff would stabilize respondent and then return him to Decatur Manor, when he would "quickly decompensate[]" and be returned to the emergency room. Respondent often appears threatening to others by being "very loud" and raising his fists. Moll said that, although the hospital staff knows how to handle respondent's behavior, others in the community may not.

Moll testified that he was unsuccessful in contacting any family members or the attorneys that respondent said represented him. According to Moll, respondent would "[a]bsolutely not" be able to reside on his own in the community. He has a difficult time residing in a structured-environment group home due to his decompensation and agitation. Moll said the "speed team" at the hospital has had to be called on several occasions to provide security in response to respondent's aggressive and threatening behavior toward staff and other patients. Like Dr. Patil, Moll opined that McFarland was the least-restrictive treatment alternative. Respondent's counsel did not cross-examine Moll.

Before closing its evidence, the State asked the trial court to take judicial notice of respondent's behavior prior to the start of the hearing. The court agreed to do so. Respondent did not present any evidence. After considering counsels' recommendations, the court found respondent was a person subject to involuntary commitment and that McFarland was the least-restrictive treatment alternative. Because respondent was not present, his counsel advised the court that respondent would receive the written order, the second page of which would set forth respondent's appeal rights. This appeal followed.

II. ANALYSIS

Respondent appeals, arguing his procedural due-process rights were violated when the trial court (1) refused to allow respondent to be represented by counsel of his choice, (2) appointed the public defender without respondent's consent, and (3) allowed the public defender to waive respondent's presence at the hearing.

A. Mootness

Initially, we note the case is moot. The trial court entered an order on March 30, 2010, and limited the enforceability of the order to a period not to exceed 90 days. The 90-day duration has long passed. Thus, we must determine whether this court is able to grant any meaningful relief to respondent if we addressed the merits of his claims. See *In re Robert F.*, 396 Ill. App. 3d 304, 310-11, 917 N.E.2d 1201, 1206 (2009). In other words, we must determine whether any exception to the mootness doctrine applies here.

In his brief, respondent asserts that all three established exceptions apply to justify our consideration of an otherwise moot issue. Those exceptions are (1) the collateral-consequences exception, (2) the public-interest exception, and (3) the capable-of-repetition-yet-avoiding-review exception. See *In re Alfred H.H.*, 233 Ill. 2d 345, 355-63,

910 N.E.2d 74, 80-84 (2009). The State concedes this case falls "within at least one of the exceptions to the mootness doctrine." Because we agree that the capable-of-repetition-yet-avoiding-review exception applies, we accept the State's concession.

The exception applies when (1) the challenged action is of such a duration that it may not be fully litigated prior to its cessation, and (2) there is a reasonable expectation that " 'the same complaining party would be subjected to the same action again.' " *Alfred H.H.*, 233 Ill. 2d at 358, 910 N.E.2d 82, quoting *In re Barbara H.*, 183 Ill. 2d 482, 491, 702 N.E.2d 555, 559 (1998). Although the limited duration of the 90-day commitment order prevents the case from being fully litigated within the applicable time frame, the issue presented in this appeal is capable of repetition in a subsequent action. This is particularly likely based on respondent's history of mental illness and prior hospitalizations. See *Barbara H.*, 183 Ill. 2d at 492, 702 N.E.2d at 560. It is reasonable to expect that the same action taken against respondent here may confront him again. See *Barbara H.*, 183 Ill. 2d at 492, 702 N.E.2d at 560.

Additionally, because this is not a case merely challenging the sufficiency of the particular evidence presented, it is possible that the specific issue pertaining to respondent's legal representation could arise in a subsequent mental-health case brought against respondent. *Cf. Alfred H.H.*, 233 Ill. 2d at 360, 910 N.E.2d at 83 (there was no "clear indication of how a resolution of [the sufficiency-of-the-evidence] issue" based on the specific facts presented in that particular specific adjudication could be of use to the respondent in future litigation). For these reasons, we will address the merits of respondent's appeal.

B. Supreme Court's Decision in *Barbara H.*

We begin our analysis by noting that the issues presented in this appeal are based on facts substantially similar to those present in the supreme court's decision in *Barbara H*. There, the respondent refused to attend the hearing and advised the public defender appointed to represent her that she did not want his representation. She claimed to be represented by someone else. *Barbara H*., 183 Ill. 2d at 494, 702 N.E.2d at 561. At the outset of the hearing, the public defender informed the trial court of these facts. *Barbara H*., 183 Ill. 2d at 494, 702 N.E.2d at 561. The court made no further inquiry, dismissing the public defender's concern of his authority to represent the respondent. *Barbara H*., 183 Ill. 2d at 494-95, 702 N.E.2d at 561. The court "continued to press the question" of whether the public defender was waiving the respondent's presence. *Barbara H*., 183 Ill. 2d at 495, 702 N.E.2d at 561. The public defender responded "by stating that 'as her attorney I would waive her presence.'" *Barbara H*., 183 Ill. 2d at 495, 702 N.E.2d at 561. The court accepted the attorney's statement as a valid waiver under section 3-806 of the Mental Health and Developmental Disabilities Code (Mental Health Code) (405 ILCS 5/3-806 (West 1996)). *Barbara H*., 183 Ill. 2d at 495, 702 N.E.2d at 561.

On review, the supreme court found the trial court had erred in accepting the public defender's waiver of the respondent's presence at the hearing without a proper inquiry into the respondent's intent and capacity pursuant to the requirements of section 3-805 of the Mental Health Code (405 ILCS 5/3-805 (West 1996)). *Barbara H*., 183 Ill. 2d at 495, 702 N.E.2d at 561. The court found that section 3-805, the statutory section which confers upon a respondent the right to counsel, did not "bestow on the court the power to force such individuals to accept representation from the public defender's office where, as here, there has been no showing that the individual is unable to afford her own attorney and

the record indicates that the individual has refused the public defender's assistance." *Barbara H.*, 183 Ill. 2d at 495, 702 N.E.2d at 561. The court further found that, by accepting the public defender's statement that he was waiving, on her behalf, the respondent's presence at the hearing, the trial court "unilaterally invalidated" the respondent's right to be represented by counsel of her choice or to represent herself. *Barbara H.*, 183 Ill. 2d at 495, 702 N.E.2d at 561.

The supreme court stated:

> "When presented with information that Barbara H. had secured alternative representation and rejected representation by the public defender, the court should not have ignored the matter. Instead, it should have delayed action on the commitment and medication issues pending a determination as to the status of her legal representation and her capacity to decide who should represent her." *Barbara H.*, 183 Ill. 2d at 495-96, 702 N.E.2d at 561.

Based on the importance of involuntary-treatment hearings and the fundamental liberty interests involved, the supreme court stated that it could not overlook the trial court's error. *Barbara H.*, 183 Ill. 2d at 496, 702 N.E.2d at 561. The court thereby affirmed the appellate court's judgment reversing the trial court's orders for involuntary commitment and involuntary administration of medication. *Barbara H.*, 183 Ill. 2d at 498, 702 N.E.2d at 562.

As an aside and in addition to the guidance provided by our supreme court in *Barbara H.*, we note that this court has previously found that a trial court's unilateral

decision of determining which counsel, if any, would represent the respondent at the involuntary-commitment hearing, without any inquiry into the respondent's choice and his capacity to make a choice, was reversible error. See *In re Click*, 196 Ill. App. 3d 413, 423, 554 N.E.2d 494, 500 (1990); *In re Tiffin*, 269 Ill. App. 3d 581, 586, 646 N.E.2d 285, 287 (1995).

C. Respondent's Right to Counsel

There are two statutory sections at issues here. First, section 3-805 of the Mental Health Code (405 ILCS 5/3-805 (West 2008)) governs a respondent's right to be represented by counsel of his choice. That section provides as follows:

> "Every respondent alleged to be subject to involuntary admission shall be represented by counsel. If the respondent is indigent or an appearance has not been entered on his behalf at the time the matter is set for hearing, the court shall appoint counsel for him. A hearing shall not proceed when a respondent is not represented by counsel unless, after conferring with counsel, the respondent requests to represent himself and the court is satisfied that the respondent has the capacity to make an informed waiver of his right to counsel.
> ***
> 1. If the court determines that the respondent is unable to obtain counsel, the court shall appoint as counsel an attorney employed by or under contract with the Guardianship and

> Mental Health Advocacy Commission, if available.
>
> 2. If an attorney from the Guardianship and Mental Health Advocacy Commission is not available, the court shall appoint as counsel the public defender or, only if no public defender is available, an attorney licensed to practice law in this State." 405 ILCS 5/3-805 (West 2008).

The record before us indicates that the trial court appointed the public defender to represent respondent on March 22, 2010, as set forth in the court's order which included the named appointment and scheduled the matter for a hearing. There is no indication that the court complied with the specific provisions of section 3-805 by first determining whether respondent was indigent or was otherwise unable to obtain counsel of his choice. Although the State claims that respondent did not specifically state that he was rejecting the public defender's representation, we find it was clear from his comments to the court that he, in fact, did not want Mr. Finney's representation. We believe the substance of the initial conversation among respondent, the court, and Mr. Finney, revealed respondent's unequivocal intent to reject Finney's representation. Thus, we find that, like the respondent in *Barbara H.*, respondent here did not want the public defender to represent him and claimed to be represented by someone else.

Also like *Barbara H.*, the trial court here was made aware of respondent's claims at the beginning of the hearing. See *Barbara H.*, 183 Ill. 2d at 494, 702 N.E.2d at 561. Nevertheless, the court inquired no further and allowed the public defender to waive

respondent's presence. This is troublesome because the court essentially forced respondent to accept representation by the public defender despite respondent's conveyed intention that he was refusing such services, and without determining whether respondent could afford his own attorney.

In addressing a similar scenario, our supreme court noted:

> "Pursuant to section 3-805, citizens of Illinois who are subject to involuntary commitment *** are entitled to be represented by counsel of their choice, when they are capable of obtaining it. They are even entitled to represent themselves, if they are capable of making an informed waiver of their right to counsel. In proceeding as it did here, the circuit court unilaterally invalidated those rights." *Barbara H.*, 183 Ill. 2d at 495, 702 N.E.2d at 561.

When it became evident that respondent was refusing the services of appointed counsel and that he had secured or intended to secure alternative representation, the trial court should have "delayed action on the commitment *** issue[] pending a determination as to the status of [his] legal representation and [his] capacity to decide who should represent [him]." *Barbara H.*, 183 Ill. 2d at 495-96, 702 N.E.2d at 561. If the court here would have determined, based on evidence, that respondent was incapable of securing counsel of his own choice, then it would have been appropriate to allow appointed counsel to continue his representation pursuant to section 3-805. Without making any attempt to take evidence on these questions, the court violated respondent's right to counsel.

D. Respondent's Right To Be Present

Section 3-806 of the Mental Health Code, the second statutory section implicated by the facts presented here, governs respondent's right to be present at the hearing. That section provides as follows:

> "(a) The respondent shall be present at any hearing held under this Act unless his attorney waives his right to be present and the court is satisfied by a clear showing that the respondent's attendance would subject him to substantial risk of serious physical or emotional harm.
>
> (b) The court shall make reasonable accommodation of any request by the recipient's attorney concerning the location of the hearing. If the recipient's attorney advises the court that the recipient refuses to attend, the hearing may proceed in his or her absence.
>
> (c) No inference may be drawn from the recipient's non-attendance pursuant to either subsection (a) or (b) of this Section." 405 ILCS 5/3-806 (West 2008).

Procedural due process guarantees respondent the right to be present at his hearing in order to protect his liberty interest. See *Specht v. Patterson*, 386 U.S. 605, 610, 18 L. Ed. 2d 326, 330, 87 S. Ct. 1209, 1212 (1967). However, respondent may waive this constitutional right. *People v. Johnson*, 75 Ill. 2d 180, 187, 387 N.E.2d 688, 691 (1979). Such waiver must be not only a voluntary act, but also a " 'knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences.' " *Johnson*, 75 Ill. 2d at 187, 387 N.E.2d at 691, quoting *Brady v. United States*, 397 U.S. 742,

748, 25 L. Ed. 2d 747, 756, 90 S. Ct. 1463, 1469 (1970). Our legislature ensured the preservation of respondent's procedural due-process rights by enacting section 3-806 and including therein the procedural safeguard that only respondent's counsel can waive his appearance at the hearing. If a trial court is confronted with the prospect that a respondent intends not to attend the hearing, the court may assume that the statutory protections had been provided and, accordingly, the respondent's counsel (1) was acting in good faith in making the announcement, (2) had informed his client of the consequences of his decision, and (3) was making a truthful statement at the request of his client. See *In re Perona*, 294 Ill. App. 3d 755, 763, 690 N.E.2d 1058, 1064 (1998). However, more importantly in terms of the issues presented here, the court should ensure that counsel has the authority to do so.

In this case, respondent refused to attend the hearing due to his apparent dissatisfaction with his legal representation. Without conducting the inquiry mentioned above, the trial court allowed respondent's appointed counsel to waive respondent's presence at the hearing even after respondent had intimated that he did not want the public defender to represent him. Thus, the court allowed respondent's "rights to be surrendered by a stranger" and through the actions "of an attorney []he did not know and did not want to represent [him]." *Barbara H.*, 183 Ill. 2d at 496, 702 N.E.2d at 561. Essentially, the court allowed an attorney to waive respondent's presence at his hearing when there is no indication that this attorney had the proper authority to do so.

E. Summary

Due to their gravity, these errors cannot be overlooked or simply evaluated in terms of prejudice to respondent as suggested by the State. Involuntary mental-health

proceedings entail a "'massive curtailment of liberty' [citation], and the right to counsel is a central feature of the procedures enacted by our legislature to ensure that Illinois citizens are not subjected to such services improperly." *Barbara H.*, 183 Ill. 2d at 496, 702 N.E.2d at 561-62, quoting *Vitek v. Jones*, 445 U.S. 480, 491, 63 L. Ed. 2d 552, 564, 100 S. Ct. 1254, 1263 (1980).

Based on the record before us, we conclude the trial court erred by (1) allowing the appointed public defender to waive respondent's presence at the hearing, after respondent had impliedly informed the court that he did not wish to be represented by court-appointed counsel, and (2) failing to conduct an inquiry into respondent's mental capacity and financial ability to make a meaningful or informed decision regarding his legal representation. The proceedings conducted here were "fatally defective" and as such, the resulting order cannot be affirmed. See *Barbara H.*, 183 Ill. 2d at 496, 702 N.E.2d at 562.

III. CONCLUSION

For the foregoing reasons, we reverse the trial court's judgment.

Reversed.