2012 IL App (4th) 110294-U

NOS. 4-11-0294, 4-11-0295 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 29, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
HENRY MALLORY,	)	Nos. 08CF64
Defendant-Appellant.	)	08CF155
	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court erred in finding defendant in need of inpatient care without the introduction of any evidence.

(2) Trial court's order establishing maximum period of commitment is vacated as premature.

¶ 2 In July 2010, the trial court found defendant, Henry Mallory, not guilty by reason of insanity (NGRI) of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2006)) and unlawful possession of a weapon by a person in the custody of the Department of Corrections (DOC). On February 8, 2011, based upon a Department of Human Services (DHS) opinion (which was not formally introduced into evidence), the court stated defendant would be receiving inpatient services at a secure unit. On March 14, 2011, the court entered an order finding the maximum period of commitment for defendant's inpatient treatment was 15 years, less 180 days' good

conduct credit and 192 days' credit. The court determined this period of commitment would start on April 20, 2020—the date his preexisting term of imprisonment would conclude—and continue to November 19, 2033. Defendant appeals, arguing (1) the court's February 8, 2011, statement defendant would be receiving inpatient services at a secure unit violates Illinois law because no evidence was introduced justifying the court's action, (2) the court improperly calculated his *Thiem* date (*People v. Thiem*, 82 Ill. App. 3d 956, 403 N.E.2d 647 (1980)) by starting his period of commitment on April 20, 2020, and (3) defendant was denied the effective assistance of counsel. We remand for further proceedings.

¶ 3 I. BACKGROUND

¶ 4 In April 2008, the State charged defendant with aggravated battery in case No. 08-CF-64, alleging defendant threw a liquid substance (urine) on a correctional officer on January 23, 2008. In July 2008, the State charged defendant with unlawful possession of a weapon by a person in the custody of DOC (720 ILCS 5/24-1.1(b) (West 2006)) in case No. 08-CF-155, alleging defendant possessed a dagger-like weapon on or about May 3, 2008, while confined in the Pontiac Correctional Center. The record reflects the trial court began issuing orders applicable to both cases in March 2009.

¶ 5 On July 27, 2010, the trial court held a consolidated bench trial on both cases. After hearing the evidence presented, the court found defendant NGRI.

¶ 6 On November 1, 2010, a hearing on a 30-day report due from DHS was scheduled for December 6, 2010. On November 30, 2010, DHS submitted a report to the trial court titled "NGRI Initial Evaluation and Recommendation for Mental Health Services on a Secure Inpatient Unit." The report recommended defendant was "in need of Mental Health Services on an

Inpatient Basis, currently in a secure unit." However, the cover letter attached to the report contradicted the report, stating DHS was submitting a request for conditional release privileges.

¶ 7 At the hearing on December 6, 2010, the trial court and both attorneys agreed the cover letter was inaccurate. Defense counsel also pointed out some factual inaccuracies in the report. The trial court stated:

> "All right. [Defense Counsel], can you draw up a written order that you could submit to me later that points out that there are some inaccuracies and we would like DHS to verify the report and also their [*sic*] recommendations since the cover letter is inconsistent with the recommendations in the eval[uation]."

From the docket sheet, it appears no written order was ever filed. The docket sheet for December 6, 2010, reflects the trial court entered the letter received from DHS dated November 30, 2010, into evidence, although the transcript of the hearing does not reflect an offer or admission into evidence. Moreover, the docket sheet does not reflect the report from DHS, which contained inaccuracies and needed to be clarified, was admitted into evidence, nor does the transcript reflect an offer, stipulation, or admission of the report into evidence.

¶ 8 On February 8, 2011, the trial court held another hearing. At the hearing, the court stated:

> "This matter is set today for clarification from DHS on their [*sic*] initial 30-day report. I did receive a letter dated January 24, 2011, file-stamped January 28, 2011, and a copy of that has been provided to both attorneys, and that clarifies, I think, DHS's

> position with regards to Mr. Mallory's treatment; and I think we had some discussion prior to going on the record, and it's my understanding that, I guess, based upon this opinion from DHS, Mr. Mallory will be receiving in-patient [*sic*] services at a secure unit, and I think somebody will be submitting an order to me in that regard; and then the other issue set for today was set for the *Thiem* date and the attorneys are going to put their heads together and come up with an agreement on this, and, hopefully, set a stipulation for a *Thiem* date."

From the record, it does not appear any evidence was introduced or any stipulations made at this hearing, nor was a written order of commitment entered.

¶ 9 On March 14, 2011, the trial court entered an order finding the maximum period of commitment for defendant's inpatient treatment was 15 years, less 180 days' good conduct credit and 192 days' credit. The court determined this period of commitment would start on April 20, 2020—the date his preexisting term of imprisonment would conclude—and continue to November 19, 2033, because if sentenced to imprisonment, defendant's sentence would have been mandatorily consecutive. No transcript or bystander's report of the March 14, 2011, hearing was included in the record on appeal.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Jurisdiction

¶ 13 Although the appellate court may not review the merits of a trial court's NGRI

finding (*People v. Harrison*, 226 Ill. 2d 427, 441, 877 N.E.2d 432, 440 (2007), defendant argues the appellate court has jurisdiction over this appeal because he is not contesting his acquittal, but what the trial court did after the acquittal. The court simply stated defendant would be receiving inpatient services at a secure unit without any evidence or stipulations to support this decision and ordered his maximum period of commitment to begin on April 20, 2020, and end on November 19, 2033. The State agrees with defendant this court has jurisdiction over this appeal.

¶ 14 We agree with the parties. Defendant is not challenging the NGRI finding. Instead, he is challenging his involuntary commitment and the end date of his period of involuntary commitment. Our supreme court stated in *Harrison*:

> "If defendant is in fact aggrieved by his involuntary commitment, his grievance results from the court's posttrial finding that he was in need of inpatient mental-health services. He chose not to challenge that finding. [Citation.] The finding is still open to challenge if defendant can demonstrate that he is no longer in need of inpatient services." *Harrison*, 226 Ill. 2d at 439, 877 N.E.2d at 438.

Having found jurisdiction exists, we now turn to the merits of the appeal.

¶ 15 B. Propriety of Commitment Order

¶ 16 Defendant next challenges the propriety of the trial court's February 8, 2011, commitment order. The record in this case does not contain a written commitment order from the trial court. Instead, at the February 8, 2011, hearing, the trial court simply stated:

> "This matter is set today for clarification from DHS on their

> [*sic*] initial 30-day report. I did receive a letter dated January 24, 2011, file-stamped January 28, 2011, and a copy of that has been provided to both attorneys, and that clarifies, I think, DHS's position with regards to Mr. Mallory's treatment; and I think we had some discussion prior to going on the record, and it's my understanding that, I guess, based upon this opinion from DHS, Mr. Mallory will be receiving in-patient [*sic*] services at a secure unit, and I think somebody will be submitting an order to me in that regard; and then the other issue set for today was set for the *Thiem* date and the attorneys are going to put their heads together and come up with an agreement on this, and, hopefully, set a stipulation for a *Thiem* date."

This statement does not make clear whether the court made a finding or if the court was simply deferring to the judgment of DHS. Pursuant to section 5-2-4(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-2-4(a) (West 2008)), the court must make a finding and not simply defer to the judgment of DHS. Section 5-2-4(a) states in relevant part:

> "The Court shall hold a hearing as provided under the Mental Health and Developmental Disabilities Code *to determine* if the individual is: (a) in need of mental health services on an inpatient basis; (b) in need of mental health services on an outpatient basis; (c) a person not in need of mental health services. The Court shall enter its findings." (Emphasis added.) 730 ILCS 5/5-2-4(a) (West

2008).

¶ 17 In *People v. Johnson*, 2012 IL App (5th) 070573, ¶ 7, 965 N.E.2d 602, 605, the Fifth District Appellate Court provided the following overview for the procedures following an NGRI verdict.

> "Once a verdict of not guilty by reason of insanity is entered, the court must hold a hearing within 30 days to determine whether the defendant is currently in need of treatment and, if so, whether he needs treatment on an inpatient or outpatient basis. 730 ILCS 5/5-2-4(a) (West 2006). The hearing is governed by the procedures outlined in the Mental Health Code. 730 ILCS 5/5-2-4(a) (West 2006). Thus, the defendant cannot be found subject to involuntary commitment without the testimony of at least one psychiatrist, clinical psychologist, or clinical social worker who has actually examined him. 405 ILCS 5/3-807 (West 2006). The court must find that the defendant 'is reasonably expected to inflict serious physical harm upon himself or another' and that he either needs care on an inpatient basis or would benefit from such care. 730 ILCS 5/5-2-4(a)(1)(B) (West 2006). This finding must be supported by clear and convincing evidence. 730 ILCS 5/5-2-4(g) (West 2006); see also 405 ILCS 5/3-808 (West 2006)." *Johnson*, 2012 IL App (5th) 070573, at ¶ 7, 965 N.E.2d at 605.

¶ 18 Defendant points out he did not stipulate to any evidence at the February 8, 2011,

hearing. Further, it does not appear the report from DHS was ever introduced into evidence. The State concedes:

> "No testimony was heard and no reports or any other evidence was entered into the record at the hearing. [Citation.] No stipulations as to the reports were made by either party, and the trial court did not mention stipulating any report into evidence. [Citation.] No order for commitment was entered by the trial court, and no findings of fact or conclusions of law by the trial court are in the record concerning defendant's need for inpatient treatment."

¶ 19 We accept the State's concession on this issue. The docket sheet (but not the transcript of the hearing) shows the trial court, on December 6, 2010, admitted into evidence a letter dated November 30, 2010, from DHS. However, the letter does not support an involuntary commitment finding. In fact, the letter stated DHS was submitting a request for conditional release privileges for defendant. We also accept the State's concession the court did not admit into evidence the actual report, which stated defendant was in need of mental health services on an inpatient basis, nor did the parties enter into a stipulation concerning the contents of the report.

¶ 20 The State concedes the trial court could not find by clear and convincing evidence defendant was in need of inpatient treatment because the trial court had no evidence to consider. We agree. As a result, we reverse the trial court's oral pronouncement committing defendant and remand this case for an evidentiary hearing on the issue of defendant's need for involuntary commitment as a result of the NGRI verdict.

¶ 21 C. *Thiem* Date

¶ 22 Defendant next argues the trial court erred by starting his period of involuntary commitment on April 20, 2020, defendant's scheduled prison release date from the sentence he was serving at the time of the underlying incidents in this consolidated appeal. According to defendant, a period of commitment should be served concurrently with a term of imprisonment. Defendant argues his period of confinement should have started on October 1, 2008, which was the date of his transfer to DHS.

¶ 23 The State argues defendant's interpretation of section 5-2-4(b) is contradicted by the plain language of that statute. According to the State:

> "The trial court was correct in determining that any sentence defendant would have received would be served consecutively to his already existing sentence, as [section 5-8-4(d)(6) (730 ILCS 5/5-8-4(d)(6) (West 2008))] provides: 'If the defendant was in the custody of the [DOC] at the time of the commission of the offense, the sentence *shall be served consecutive* to the sentence under which the defendant is held by the [DOC]."

¶ 24 However, because we are remanding this case for an evidentiary hearing on the issue whether defendant is in need of inpatient care, we also vacate the trial court's order determining his maximum term of involuntary commitment because it was premature. If, on remand, the court determines by clear and convincing evidence defendant is in need of "mental health services on an inpatient basis" (730 ILCS 5/5-2-4(a) (West 2008)), the court will then need to determine defendant's "maximum period of commitment" (730 ILCS 5/5-2-4(b) (West 2008)).

¶ 25 Having vacated the trial court's order establishing the maximum period of commitment, we need not address defendant's argument the court erred when it set the start of the period of commitment when defendant's current prison sentence ends. However, on appeal, the parties raise an interesting issue with regard to when the maximum period of commitment begins. Does this period begin when defendant's prison sentence—for which he was incarcerated when he committed the NGRI offenses—ends? Or does the maximum period of commitment run concurrently with that prison sentence? Finally, if the period of commitment runs concurrently with the prison sentence, what date should constitute the beginning of his period of commitment? We have no way of knowing whether this issue was even considered by the trial court because the parties did not include a transcript or bystander's report for the March 14, 2011, hearing. On remand, if the court determines by clear and convincing evidence defendant is in need of mental health services on an inpatient basis, the trial court will need to address the following question: does section 5-8-4(d)(6) of the Unified Code (730 ILCS 5/5-8-4(d)(6) (West 2008)) have any applicability to inpatient admissions pursuant to section 5-2-4(b) of the Unified Code (730 ILCS 5/5-2-4(b) (West 2008)) after a NGRI acquittal.

¶ 26 Section 5-8-4(d)(6) states:

> "If the defendant was in the custody of the Department of Corrections at the time of the commission of the offense, the sentence shall be served consecutive to the sentence under which the defendant is held by the Department of Corrections." 730 ILCS 5/5-8-4(d)(6) (West 2008).

Section 5-2-4(b) of the Unified Code states in relevant part as follows:

> "If the Court finds the defendant in need of mental health services on an inpatient basis, the admission, detention, care, treatment or habilitation, treatment plans, review proceedings, including review of treatment and treatment plans, and discharge of the defendant after such order shall be under the Mental Health and Developmental Disabilities Code, except that *the initial order for admission of a defendant acquitted of a felony by reason of insanity shall be for an indefinite period of time. Such period of commitment shall not exceed the maximum length of time that the defendant would have been required to serve, less credit for good behavior as provided in Section 5-4-1 of the [Unified Code], before becoming eligible for release had he been convicted of and received the maximum sentence for the most serious crime for which he has been acquitted by reason of insanity*." (Emphasis added.) 730 ILCS 5/5-2-4(b) (West 2008).

Clearly, if defendant had been convicted of the charges at issue in this appeal, defendant's sentence would not have started until after the completion of the sentence he was serving when he committed the offenses. However, defendant was not convicted but received an NGRI acquittal. The question for the trial court is whether an "order for admission of a defendant acquitted of a felony by reason of insanity" pursuant to section 5-2-4(b) constitutes a "sentence" for purposes of section 5-8-4(d)(6) of the Unified Code (730 ILCS 5/5-8-4(d)(6) (West 2008)). We direct the trial court to have the parties brief this issue if the court determines defendant is in

need of mental health services on an inpatient basis.

¶ 27 In resolving this issue, the parties and the trial court should keep the following in mind. When a defendant is confined after a verdict of not guilty by reason of insanity, he is confined for purposes of treatment and protection of the public, not punishment. *People v. Harrison*, 366 Ill. App. 3d 210, 216-17, 851 N.E.2d 152, 159 (2006). Further, "[t]he primary objective of section 5-2-4 [of the Unified Code] is to insure that insanity acquitees are not indeterminately institutionalized * * * and that the intrusion on liberty interests is kept at a minimum." *People v. Jurisec*, 199 Ill. 2d 108, 129, 766 N.E.2d 648, 660 (2002). The supreme court has recognized that detention of an individual at a mental health facility implicates a substantial liberty interest. *Harrison*, 226 Ill. 2d at 437, 877 N.E.2d at 437.

¶ 28 Neither the trial court nor the parties are limited to justifying their respective positions pursuant to these two statutes alone. If another statute or judicial decision justifies a result either way, the parties should bring this authority to the trial court's attention.

¶ 29 D. Effective Assistance of Counsel

¶ 30 Because of our earlier rulings in this appeal, we need not address defendant's argument his counsel in the trial court was ineffective.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we vacate the trial court's oral commitment order and remand this case for the trial court to hold a hearing pursuant to section 5-2-4(a) of the Unified Code (730 ILCS 5/5-2-4(a) (West 2008)) to determine, by clear and convincing evidence, whether defendant is in need of mental health services and, if so, whether on an inpatient or outpatient basis. If the court determines defendant is in need of mental health services on an

inpatient basis, the court shall direct the parties to brief and the court shall then decide whether the maximum period of commitment under an "order for admission of a defendant acquitted of a felony by reason of insanity" pursuant to section 5-2-4(b) of the Unified Code (730 ILCS 5/5-2-4(b) (West 2008)) should start at the conclusion of the sentence he is currently serving, considering, if defendant had been convicted, his sentence would have had to have been served consecutively (730 ILCS 5/5-8-4(d)(b) (West 2008)).

¶ 33 Commitment order vacated; cause remanded with directions.