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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-141

No. COA21-349

Filed 1 March 2022

Durham County, No. 20 SPC 2106

IN THE MATTER OF: T.B.

Appeal by Respondent from Order entered 15 January 2021 by Judge Pat Evans in Durham County District Court. Heard in the Court of Appeals 15 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Erin E. McKee, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for respondent-appellant

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Respondent-Appellant T.B. (Respondent) appeals from an Involuntary Commitment Order entered in Durham County District Court declaring Respondent mentally ill, a danger to self, and ordering Respondent be committed to an inpatient facility for thirty days. The Record reflects the following:

¶ 2 On 6 December 2020, Dr. Joseph Zanga, a physician at Duke University Hospital, signed an Affidavit and Petition for Involuntary Commitment in Durham

County District Court alleging Respondent was mentally ill and a danger to herself or others or in "need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." Submitted with this Affidavit was an Examination for Involuntary Commitment report conducted by Dr. Zanga. In this report, Dr. Zanga stated Respondent had a "psychiatric history of Schizoaffective Disorder" and was "brought in by police after an altercation with her mother over pork rinds." Dr. Zanga continued stating:

> On evaluation, she is disorganized, tangential, and cannot recall many details of the incident. She cannot even remember that it was her mother she was in an altercation with. She is non-compliant with medications, has not been attending appointments. She denies having any mental illness or having a psychiatrist, even though she does. She cannot contract for safety and cannot be discharged without a hospitalization for stabilization and to prevent further decompensation.

¶ 3 The same evening Dr. Zanga signed his Affidavit and Petition, 6 December 2020, a magistrate issued a form Findings and Custody Order finding reasonable grounds to believe Respondent was mentally ill and a danger to herself or others, and ordering Respondent to be placed in the custody of Duke University Hospital pending a hearing in District Court.[1]

¶ 4 On 8 December 2020, Respondent underwent a second evaluation, conducted

[1] The Petition and magistrate's Order were not filed with the Durham County Clerk of Court until the following day, 7 December 2020.

by Dr. Jonathan Nahmias, at Duke University Hospital. Dr. Nahmias's report stated:

> [Respondent] was admitted to the hospital after she had a physical altercation with her mother in which she hit her mother with a frying pan. While on the inpatient unit, she states the woman she fought with was not her mother and cannot explain the reasons why she came to the hospital. She has also exhibited highly disorganized speech, not answering questions or providing logical details of any symptoms she's experiencing.

Dr. Nahmias also opined that Respondent met the criteria for commitment because Respondent is "an individual with a mental illness" and is "dangerous to self or others."

¶ 5 On 15 January 2020, after four continuances, the trial court heard Respondent's case pursuant to N.C. Gen. Stat. § 122C-268. At the outset, Respondent's counsel objected to the proceedings because there was no representative for the State present. The trial court overruled Respondent's objection. In support of the Petition, the trial court called Dr. Kim Nui to testify. The trial court asked Dr. Nui to "let me know what it is you want me to know about this matter." Dr. Nui testified Respondent has a "history of schizoaffective disorder, bipolar type" and "was brought in by police . . . after doing some damage to the kitchen with some dents in the wall and hitting her mother with a frying pan repeatedly. . ." Since being in the hospital, Respondent "expressed auditory hallucinations of family and people talking through the walls" in addition to delusions about her identity. For example, Dr. Nui testified:

> her identity has changed over time in terms of her name, nationality, and that of her family as well. She's expressed to me she believes that she is pregnant or has an infection despite lab results that are negative for both . . . She's expressed that there are other girls of the same name at home and on the units when there were not, and I - - and I think probably maybe very importantly still believes Mom is not Mom, or rather either a roommate or someone she doesn't know, someone acting like Mom, but it's not Mom, still.

Furthermore, Respondent had a couple incidents where she refused to take her medications, and informed Dr. Nui that she intends to stop taking the medication when she's discharged from the hospital. Ultimately, Dr. Nui concluded that because of continued hallucinations, delusions, and high likelihood of medication non-compliance "that discharge at this point would be - - would make her a danger to others, given what had happened when she was first brought in."

¶ 6 On cross-examination by counsel for Respondent, Dr. Nui testified that since being in the unit, Respondent had not attempted to harm anyone or vocalized a desire or wish to harm anyone. Furthermore, although there had been previous instances between Respondent and her mother, the frying pan incident was the worst. Finally, Dr. Nui testified that at the time of trial, she did not feel that Respondent was an immediate or imminent danger to herself.

¶ 7 After Dr. Nui testified, Respondent took the stand. Respondent stated that she was 24, had lived in North Carolina her entire life, and had been living with someone named "Kizzy," who was not her real mother. Respondent testified that she wanted

to go back to school, get a degree, and have a career. Respondent did acknowledge that she hurt her mother because she was "disrespectful," but explained that was a "one-time thing" and she didn't "do stuff like that." When asked about taking her medications, Respondent stated that she wanted to be "stable" but wanted "to make sure [she's] on the right medicine." After Respondent finished testifying, her counsel asked the court to not find that she is a danger to herself or others.

¶ 8 Despite Respondent counsel's request, the court orally announced its Findings stating Respondent "has a mental illness, she's a danger to others, and she's to be committed to a period not to exceed 30 days." The trial court also entered a written Order that same day that included handwritten notes in the space provided for findings but failed to check any of the necessary boxes on the forms indicating whether the parties were or were not represented by counsel, whether Dr. Zanga's Examination report was incorporated by reference as findings, or whether the court found its written facts by clear, cogent, and convincing evidence. Despite these failures, the court included the following written notes resembling findings:

> Continued hallucinations and delusions; talks to wall and people not there; believes ID has changed - - name, nationality; thinks she is pregnant other people on ward with her with same name; says mother is stranger or roommate; non-compliant [with] medication. High likelihood of remaining medication non-complian[t]. Admitted to hurting Mom because she "was disrespectful." Testimony was rambling and incoherent (Respondent).

The trial court concluded Respondent was mentally ill and a danger to others. Therefore, the trial court ordered Respondent committed involuntarily for thirty days. Respondent filed Notice of Appeal from the trial court's Order on 15 January 2021.

Appellate Jurisdiction

¶ 9 Respondents in involuntary commitment actions have a statutory right to appeal a trial court's order. N.C. Gen. Stat. § 122C-272 (2021) ("Judgment of the district court [in involuntary commitment cases] is final. Appeal may be had to the Court of Appeals by the State or by any party on the record as in civil cases."). Rule 3 of our Rules of Appellate Procedure requires a party to file written notice of appeal thirty days after the entry of an order of a superior or district court rendered in a civil action or special proceeding. N.C.R. App. P. 3(a), (c) (2021).

¶ 10 In this case, Respondent filed written notice of appeal on 15 January 2021, the same day as the entry of the written Order, and well within the thirty-day period. Furthermore, although the commitment period has expired, the appeal is not moot because the challenged order may have collateral legal consequence. *See In re Moore*, 234 N.C. App. 37, 41, 758 S.E.2d 33, 36 (2014) ("The possibility that respondent's commitment in this case might likewise form the basis for a future commitment, along with other obvious collateral legal consequence, convinces us that this appeal is not moot."). Thus, Respondent's appeal is properly before this Court.

Issues

¶ 11 The issues on appeal are whether: (I) the trial court's Findings of Fact as reflected on the form Order support its ultimate Finding Respondent was dangerous to others; and (II) the trial court violated Respondent's due process right to an impartial tribunal by calling and examining a witness in order to elicit evidence, in the absence of any representative of the State.

Analysis

I. Sufficiency of the Findings of Fact

A. Form Deficiencies

¶ 12 Here, the trial court failed to check any of the first five boxes on the form Order including indicating whether (1) the parties were represented, (2) the court incorporated by reference Dr. Zanga's Examination Report, or (3) its written facts were supported by clear, cogent, and convincing evidence. We recently addressed the issue of the trial court's failure to check a box on the Involuntary Commitment Order Form in *In re A.S.* There, the trial judge referenced the commitment examiner's report in the Order but did not check box four expressly incorporating the report into its findings. *In re A.S.*, 2021-NCCOA-585 ¶ 10. We concluded even though the trial court included details about the report in the space below line four, without checking the box, we could not infer the trial court intended "by clear, cogent, and convincing evidence [to] find[ ] as facts all matters set out." *Id.* at ¶ 23. Thus, "[b]ecause we

determine[d] that the report was not incorporated," we concluded "the remainder of [the] respondent's arguments regarding . . . the report . . . [we]re no longer properly relevant to our review[,]" and ended our review thereof there. *Id* at ¶ 24.

¶ 13 Nevertheless, because the trial court in *In re A.S.* had properly checked off box five above the trial judge's handwritten observations, these observations were properly incorporated as findings, and we were thus able to review the issue of whether these findings were sufficient to support the ultimate finding that the respondent was a danger to himself or others. *See id.* at ¶ 31.

¶ 14 This case presents an even more stark example of a trial court's failure to properly complete the form Order, as here the trial court failed to check off both box number four and box number five. Although, the trial court included details about Dr. Zanga's Examination Report in the space below line four, it did not check the box expressly incorporating the report. Likewise, the trial court also included handwritten notes, apparently intended as findings, below box number five, but did not check the box expressly indicating the notes constituted findings found by clear and cogent evidence. Thus, without either box checked, there are no express findings made by the trial court, and, consistent with our prior decision in *In re A.S.*, we cannot infer the trial court intended to incorporate either the notes or the Examination Report as findings. Therefore, without any findings found by clear, cogent, and convincing evidence, the Order is insufficient to support an involuntary commitment.

See N.C. Gen. Stat. § 122C-268(j) (2019) ("To support an inpatient commitment order, the court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self . . . or dangerous to others. . .").

B. Remedy

¶ 15 Respondent contends the appropriate remedy for the insufficiency of the Findings of Fact is to reverse. However, this Court has frequently vacated and remanded for additional findings of fact in involuntary commitment cases when appropriate to do so. *See e.g., In re Caver*, 40 N.C. App. 264, 266, 252 S.E.2d 284, 286 (1979); *In re J.P.S.*, 264 N.C. App. 58, 59, 823 S.E.2d 917, 922; *In re Whatley* 224 N.C. App. 267, 274, 736 S.E.2d 527, 532 (2012). Similarly, here, we conclude the appropriate remedy is to vacate and remand to the trial court for entry of additional findings—if any can be made on the basis of the existing Record—to support its conclusion.[2] Absent findings found by clear, cogent, and convincing evidence, however, the commitment Order cannot be upheld.

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[2] Given our decision here, we do not reach the further issue of the sufficiency of the handwritten notes below box five to support the Commitment Order. On remand, however, the trial court may revisit its Findings, and—if in its discretion deems it appropriate upon the existing record—make additional and specific findings regarding whether Respondent constituted a danger to others. See *In re J.P.S.*, 264 N.C. App. 58, 62, 823 S.E.2d 917, 921 (2019) (*citing In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012) ("A trial court's involuntary commitment of a person cannot be based solely on findings of the individual's 'history of mental illness or . . . behavior prior to and leading up to the commitment hearing," but must [also] include findings of 'a reasonable probability' of some future harm absent treatment[.]") .

II. Impartial Tribunal

¶ 16 Respondent also argues the trial court violated her due process right to an impartial tribunal because the State was not represented by counsel and the trial court elicited evidence in favor of committing Respondent. We recently addressed this issue in two companion cases, *In re Q.J.* and *In re C.G.*, both filed on 20 July 2021. *In re Q.J.*, 2021-NCCOA-346, ¶ 21-22; *In re C.G.*, 2021-NCCOA-344, ¶ 22. There, this Court, relying on binding precedent in *In re Perkins* and *In re Jackson*, held the trial court does not violate Respondent's right to an impartial tribunal by questioning witnesses and eliciting evidence in an involuntary commitment case where the State has not appeared so long as the trial court does not ask questions meant to prejudice either party or impeach any witness. *Id.*; *see In re Perkins*, 60 N.C. App. 592, 594, 299 S.E.2d 675, 677 (1983) ("We are aware of no per se constitutional right to opposing counsel. Nothing in the record indicates language or conduct by the court which conceivably could be construed as advocacy in relation to petitioner or as adversative in relation to respondent.").

¶ 17 In this case, as in *Perkins, Q.J.*, and *C.G.*, the Record does not evince language or conduct by the trial court that could be construed as advocacy for or against either Petitioner or Respondent. Here, the trial court called Dr. Nui to testify. The trial court's only questions of Dr. Nui on direct examination were: "Now let me know what is you want me to know about this matter[,]"; "Doctor do you mind slowing down a

little bit? I have to take notes, and --"; and "is it your testimony that she is a danger to herself or not?" Thus, the trial court did not ask questions meant to prejudice either party or impeach any witness but merely sought to elicit information it deemed helpful to its decision. Therefore, the trial court did not violate Respondent's right to an impartial tribunal.

Conclusion

¶ 18 For the foregoing reasons, we vacate and remand the trial court's Order.

VACATED AND REMANDED.

Judges INMAN and ARROWOOD concur.

Report per Rule 30(e).