

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1997-CA-002083-MR

MARK DANIEL SALLEE

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE THOMAS WINE, JUDGE  
ACTION NO. 97-CR-000987

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: GUDGEL, CHIEF JUDGE; GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Mark Daniel Sallee (Sallee) appeals from an order of the Jefferson Circuit Court granting a petition to involuntarily hospitalize him for a period of 360 days pursuant to KRS Chapter 202A and granting Central State Hospital the right to forcible medicate him pursuant to KRS 202A.196. We affirm.

Appellant raises two issues on appeal. First, he questions whether a circuit court may, under any circumstances, enter an order authorizing forced medication of anyone properly proceeded against pursuant to KRS Chapter 202A. Second, he contends that no judge of the Court of Justice may enter an order allowing

administration of medication or treatment against the will of an individual or without the consent of the individual's parent, guardian or other person legally competent to consent on his behalf. Having thoroughly reviewed this matter and believing that the trial court's order properly and thoroughly addresses all issues raised by appellant, we adopt the trial court's order of August 11, 1997:

A hearing having been held on June 26, 1997 on the Commonwealth's motion and Central State Hospital's petition to continue the voluntary hospitalization and medication of the defendant, Mark Daniel Sallee, as well as on the defendant's motion to prohibit forced medication while hospitalized, the Court having considered the written memorandum of law, having considered the applicable case law and being otherwise sufficiently advised, the Court makes the following Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. The defendant, Mark Daniel Sallee ("Sallee") is charged with causing death of Frank Pysher on January 10, 1989. He was arrested shortly thereafter and has been incarcerated continuously under a \$100,000 cash bond.
2. Sallee was judged incompetent by the Circuit Court, the Honorable Rebecca Westerfield, and has been hospitalized at Central State Hospital (CSH) since September, 1991.
3. During his stay at CSH, Sallee has voluntarily submitted to medication prescribed to treat the chronic schizophrenia that Sallee suffers from. Dr. Walter Butler ("Butler"), Dr. Jennifer Jacobs ("Jacobs"), and Denise Robinson, R.N. ("Robinson"), all testified Sallee is indeed very mentally ill, even described as the most mentally ill patient ever treated in the Grauman Unit at CSH.

4. While the mental health professionals do not believe Sallee is malingering, he does not appreciate the extent of his mental illness. Further, because of his psychosis, he is unable to give informed consent for the medications mental health experts testified are necessary for his treatment.

5. On several prior occasions, Sallee has been ordered to undergo continuous periods of 360 days of involuntary hospitalization. During those periods, the defendant has always agreed to medications prescribed by the treatment psychiatrist. However, in January 1997, he refused to take the prescribed medication.

6. Butler, who has treated Sallee since 1994, testified that the medication has had a positive effect on Sallee. He testified that on a scale of 1 to 10, with 10 as the highest level of functioning, Sallee has progressed from a 1 to a 3. Sallee had never threatened anyone, been restrained, made inappropriate sexual contact or remarks, nor caused a major incident.

7. Since Sallee has refused to take his medication, his mental condition has regressed rapidly. Butler testified he paces the room, exposes himself to visitors, refuses to maintain his personal hygiene, talks to unseen persons, has assumed a new identity of Rudolph Mann, claims to receive messages from the television, talks of violence in terms of someone injuring him, as well as aggressive talk toward others, speaks obsessively about guns. Several times in open Court, Sallee challenged Butler as to whether or not Butler "could whip his ass."

8. Nurse Robinson testified that Sallee has tried tripping other patients, spits on staff, uses cuss words, is selectively mute and is increasingly hostile.

9. Jacobs testified to similar episodes as described by Butler and Robinson. She further testified that Sallee made up words, speaking in neologisms. He had not been a management problem until February 1997.

10. Butler testified as to the medications currently administered to Sallee

and those medications he proposed administering. Butler discussed all the potential side effects.

Currently Risperidone is the primary medication administered to Sallee at ½ of the maximum recommended dosage. Butler said there have been few side effects. Counsel for Sallee provided the Court with excerpts from the Physician's Desk Reference (PDR). The PDR describes several potential adverse effects. However, none of those side effects have manifested themselves to date. A reduction in the dosage or discontinuation of treatment is recommended whenever adverse conditions are noted.

Haldol, an anti-psychotic, could be administered once a month. There are higher risks associated with Haldol as compared to the other medications used by CSH. However the drug may be administered intravenously which would be necessary should Sallee continue to refuse treatment. Previous treatment with Haldol had been discontinued in 1992.

The other medication, Benztropine, Doxyphin and Hydroxy have few or no side effects. All of these medications have been recommended by the Treatment Appropriateness Review Committee at CSH.

11. Butler and Jacobs testified that continued hospitalization and medication is the least restrictive alternative for treating Sallee. Further they testified that he had benefitted from treatment and would continue to benefit.

12. Butler testified he didn't know if Sallee would ever be competent to stand trial.

#### CONCLUSIONS OF LAW

Counsel for defendant raises a jurisdictional question as to the authority of this Court to enter a forced medication order, citing KRS 202A.196(3) which states:

If a patient still refuses to participate in any or all aspects of his individual treatment plan,

the hospital may petition the District Court for a de novo determination of the appropriateness of the proposed treatment. (emphasis added).

This very issue has been addressed previously by the Kentucky Court of Appeals in Schuttemeyer v. Com'l, Ky. App., 793 SW2d 124 (1990) and by the Supreme Court of Kentucky in Tolley v. Com'l, Ky., 829 SW2d 580 (1995). The Schuttemeyer Court reasoned that by reading KRS 504.110 and KRS 504.030 together, if a Court finds a defendant incompetent and substantially unlikely to regain competency in the foreseeable future, then it shall conduct a hearing rearguing involuntary hospitalization under KRS 202A. The "Court" is defined as the Court whether District or Circuit where the determination of competency is made.

The Tolley Court adopted the Schuttemeyer reasoning, stating that Circuit Court would have jurisdiction to order involuntary hospitalization and medication since the District Court would have no knowledge of the hospitalization or patient. "To allow the District Court to then have jurisdiction over the treatment plan established pursuant to the involuntary hospitalization preceding in Circuit Court would be absurd." Tolley v. Com'l, supra at 583.

While counsel for the defendant may respectfully disagree with the 4-3 decision of the Kentucky Supreme Court, it is the law of the Commonwealth which this trial court will follow.

KRS 202A.026 sets out the criteria for involuntary hospitalization, including:

"No person shall be involuntarily hospitalized unless such person is a mentally ill person:

1. Who presents a danger or threat to self, family, or others as a result of mental illness;

2. Who can reasonably benefit from treatment, and

3. For whom hospitalization is the least restrictive alternative mode of treatment presently available.

Both the attorney for the Commonwealth and the defendant agree that Sallee is mentally ill, to such an extent that the treating mental health professionals describe him as the sickest individual ever treated.

The defendant's current obsession with guns and violence in light of the pending accusations, certainly substantiate the Commonwealth's claim that Sallee is a present danger to himself or others. His behavior in open Court, challenging Butler is indicative of thought pattern centered on violence.

While the degree of improvement shown while Sallee has been hospitalized has not been great, there has been both an improvement and an improvement which can be measured. The statute does not require that there be a significant improvement not total recovery, only that the mentally ill person may reasonably benefit from treatment. Based upon the evaluation of the treating professionals, it is clear that there has been a benefit.

Hospitalization is the least restrictive alternative mode of treatment as it is the only mode. Sallee has demonstrated that he will not take the medication necessary to control his psychosis. The treatment plan outlined by the Assessment Team deals with graduated levels of medication depended upon the responsiveness and cooperation of Sallee. Hospitalization insures the safety of Sallee and the community as well.

The challenge to forced medication under KRS 202A. 196 is similar to that raised in Tolley v. Com'l. Ky., 892 SW2d 580 (1995). The focus of the treatment plan is not to change Sallee's appearance, to make him competent to stand trial or to improve the

chances of securing a conviction. When asked by defense counsel, Dr. Butler stated he couldn't say Sallee would ever be competent to stand trial. Both the prosecution and the treatment team focused on the need to provide medication which would improve Sallee's mental functioning, reduce the danger of harming himself or others and to allow him to better care for his physical person. Unquestionably, a person suffering from the same mental disabilities, but not charged with a criminal offense would seek similar treatment. The remote chance that Sallee might become competent to stand trial should not deprive him or the community of the benefit of a person who while under medication is a "safer" person. The fact that Sallee has not been violent while medicated using the same medication requested by CSH is significant.

As in Tolley, supra, no effort of the treating mental health personnel, nor this Court, is designed to deprive the defendant of any constitution right guaranteed by either the U.S. or Kentucky Constitutions.

ORDER

WHEREFORE, for the above stated reasons,

IT IS HEREBY ORDERED that the petition to involuntarily hospitalize the defendant, Mark Daniel Sallee, for a period of 360 days pursuant to KRS Chapter 202A is GRANTED.

IT IS FURTHER ORDERED that the petition to permit Central State Hospital pursuant to KRS 202A.196 to forcibly medicate the defendant, Mark Daniel Sallee, the following treatments and medications for treatment of his mental illness is GRANTED.

1. Medication in any of the following singularly or in combination:

Risperidone up to 6 mg  
each day

Olanzapin up to 15 mg  
each day

Haloperdol  
oral/injectable up to 50  
mg po/IM each day

Haloperidol Decanoate up  
to 250 mg IM each month

Benztropine up to 6 mg  
each day

Doxepin up to 100 mg each  
day.

2. Other treatment

Routine laboratory data,  
Master chemistry (SMA 24)

CBC with differential

Thyroid Function Tests  
with TSH

Urinalysis

EKG

EEG - bi-annually or as  
needed

Annual physical

Annual PPD placement (TB  
skin test)

Monitor vital signs

Ensure basic hygiene  
needs are met.

Having determined that Schuttemeyer v. Commonwealth,  
Ky. App. 793 S.W.2d 124 (1990) and Tolley v. Commonwealth, Ky.,  
892 S.W.2d 580 (1995), are factually similar to the case sub  
judice and are dispositive of the issues raised by appellant, and  
that this Court is bound by Tolley pursuant to Kentucky Supreme  
Court Rule (SCR) 1.030(8)(a), we affirm.

ALL CONCUR.



BRIEF FOR APPELLANT:

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