DA 18-0191

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 20N

IN THE MATTER OF:

M.Q.,

Respondent and Appellant.

APPEAL FROM: District Court of the Eighteenth Judicial District,
In and For the County of Gallatin, Cause No. DI-12-035-C
Honorable John C. Brown, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, James Reavis, Assistant Appellate Defender, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Damon Martin, Assistant Attorney General, Helena, Montana

Martin D. Lambert, Gallatin County Attorney, Bradley D. Bowen, Deputy County Attorney, Bozeman, Montana

Submitted on Briefs: September 18, 2019

Decided: January 28, 2020

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion, shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 M.Q. appeals from the Order of the Eighteenth Judicial District Court, Gallatin County, involuntarily committing her to the Montana State Hospital (MSH) at Warm Springs for up to 90 days. We reverse.

¶3 On February 10, 2018, Officer Hansen of the Bozeman Police Department placed M.Q. into protective custody and took her to the Bozeman Health Emergency Department after she exhibited homicidal ideation and psychotic episodes. M.Q. was subsequently evaluated by Dr. Harry Kelleher, MD, and Crisis Response Team (CRT) member Gina Temple, a Licensed Clinical Professional Counselor of the Gallatin County Mental Health Center. Dr. Kelleher determined M.Q. suffered from bipolar disorder and manic episodes. Both Dr. Kelleher and Ms. Temple opined M.Q. was unable to provide for her own basic needs. M.Q. was subsequently placed at Hope House Emergency Detention Facility in Bozeman upon Dr. Kelleher and Ms. Temple's recommendations.

¶4 On February 12, 2018, the State of Montana filed a Petition for Involuntary Commitment of M.Q. to MSH. That same day, M.Q. appeared from Hope House via videoconference, with appointed counsel, for an initial hearing. The District Court set a commitment hearing for February 14, 2018. The District Court also appointed Shannon Maroney as the certified mental health professional to evaluate M.Q. prior to the

commitment hearing and ordered the Gallatin County Sheriff's Office to transport M.Q. from Hope House to the commitment hearing.

¶5 On the day of the commitment hearing, M.Q. refused to be transported or appear via videoconference from Hope House. Both counsel for the State and M.Q.'s counsel were present at the hearing. The State requested the District Court waive M.Q.'s presence and proceed with the hearing. M.Q.'s counsel objected, arguing that M.Q. was entitled to be at the hearing and had not waived her presence. M.Q.'s counsel further remarked that it is "frightening, Orwellian almost, to have a commitment of a person who is not willing to come."

¶6 The District Court allowed the State to present testimony to support M.Q.'s waiver. The State called Gallatin County Sheriff's Deputies Hernandez and Rouse, who testified M.Q. was uncooperative when they attempted to transport her to the commitment hearing that day. The deputies further testified that M.Q. refused to appear via videoconference.

¶7 The State also called Ms. Maroney, who evaluated M.Q. prior to the commitment hearing with M.Q.'s counsel present. Ms. Maroney testified M.Q. "appeared to understand the options that her attorney had reviewed with her regarding the outcome" of the commitment hearing, but M.Q. "knowingly refus[ed]" to attend. Ms. Maroney further testified that a forcible transport would cause M.Q. "a significant amount of distress" which would "likely increase her symptoms."

¶8 From the testimony, the District Court concluded M.Q. had voluntarily waived her right to be present at the hearing, finding M.Q. was familiar with the process, having been previously committed to MSH, and therefore did "not wish participate" in the commitment

hearing. The District Court further found that forcibly transporting M.Q. "would be likely to seriously adversely affect her mental condition, and would cause her stress, which would further aggravate her condition, increase her paranoia, and increase her decompensation, and make her condition worse." The District Court conducted the remainder of the hearing in M.Q.'s absence and ultimately committed her to MSH for a period not to exceed 90 days.

¶9 Due process claims in an involuntary civil commitment proceeding are subject to plenary review. *In re S.D.*, 2018 MT 176, ¶ 8, 392 Mont. 116, 422 P.3d 122 (citing *In re N.A.*, 2014 MT 257, ¶ 10, 376 Mont. 379, 334 P.3d 915). We review a district court's involuntary commitment order to determine whether the district court's findings of fact are clearly erroneous and its conclusions of law are correct. *In re S.D.*, ¶ 8 (citing *In re R.W.K.*, 2013 MT 54, ¶ 14, 369 Mont. 193, 297 P.3d 318). "Whether a district court's findings of fact satisfy statutory requirements is a question of law." *In re S.M.*, 2014 MT 309, ¶ 13, 377 Mont. 133, 339 P.3d 23 (citations omitted). Montana's involuntary commitment statutory scheme "contains multiple safeguards to protect the due process rights of individuals facing the possibility of being involuntarily committed." *In re M.K.S.*, 2015 MT 146, ¶ 16, 379 Mont. 293, 350 P.3d 27. As such, we require strict adherence to the involuntary commitment statutory scheme "to ensure that 'the government does not invade an individual's freedom or liberty without due notice, cause and process.'" *In re M.K.S.*, ¶ 16 (citations and quotations omitted).

¶10 Additionally, we recognize that an appeal from an order of involuntary commitment is not moot despite the appellant's release or the 90-day commitment period lapsing, since the issues are capable of repetition, yet otherwise would evade review. *See In re S.L.*, 2014

MT 317, ¶ 21, 377 Mont. 223, 339 P.3d 73 (citing *In re C.R.*, 2012 MT 258, ¶ 14, 367 Mont. 1, 289 P.3d 125).

¶11 To order a respondent's involuntary commitment to a mental health facility, a district court must first hold a hearing to determine whether the respondent suffers from a mental disorder, and, if so, whether the respondent requires commitment. Section 53-21-126(1), MCA. The respondent is entitled to be physically present at the hearing. Section 53-21-126(1), MCA.

¶12 As we recently examined in *In re S.D.*, the respondent, if capable of doing so, may "intentionally and knowingly" waive her right to be present at the hearing, as well as waive certain other express statutory rights granted to the respondent under the involuntary commitment statutes.[1] *In re S.D.*, ¶¶ 10-12 (citations omitted).

¶13 If the respondent is not capable "of making an intentional and knowing decision," the respondent's rights may only be waived as provided in § 53-21-119(1) and (2), MCA. Pursuant to § 53-21-119(1), MCA, the respondent's rights may be waived by "counsel and friend of respondent, if a friend of respondent is appointed, acting together if a record is made of the reasons for the waiver." *See also* § 53-21-102(8), MCA (defining "[f]riend of respondent" as "any person willing and able to assist a person suffering from a mental disorder and requiring commitment or a person alleged to be suffering from a mental disorder and requiring commitment in dealing with legal proceedings, including

[1] Section 53-21-115, MCA, enumerates a respondent's procedural rights in an involuntary commitment proceeding. Of these rights, only the respondent's right to counsel and right to receive mental health treatment cannot be waived. Section 53-21-119(1), MCA.

consultation with legal counsel and others."); § 53-21-122(2)(b), MCA (setting forth the procedure for appointing a friend of respondent, "[i]f the court finds that an appropriate person is willing and able to perform the functions . . . ."). In other words, an incapable respondent's rights "may be waived only when her counsel and appointed friend agree on the waiver and make a record of it . . . ." *In re S.D.*, ¶ 11 (citing *In re L.K.-S.*, 2011 MT 21, ¶¶ 22-26, 359 Mont. 191, 247 P.3d 1100; *In re P.A.C.*, 2013 MT 84, ¶ 13, 369 Mont. 407, 298 P.3d 1166).

¶14 Section 53-21-119(2), MCA, also allows the respondent's physical presence to be waived by her "attorney and the friend of respondent" and with the "concurrence of the professional person and the judge" upon the judge making certain factual findings. *See In re S.D.*, ¶ 11 (citing *In re L.K.*, 2009 MT 366, ¶ 19, 353 Mont. 246, 219 P.3d 1263) ("[I]f the court holds a hearing and the respondent is not there, the hearing may go forward in her absence only if the respondent's attorney and friend waive her presence, with the concurrence of the designated professional, and the presiding judge makes the factual findings required by [§ 53-21-119(2), MCA] . . . ."). The district court must first find that "the presence of the respondent at the hearing would be likely to seriously adversely affect the respondent's mental condition," and "an alternative location for the hearing in surroundings familiar to the respondent would not prevent the adverse effects on the respondent's mental condition." Section 53-21-119(2)(a), MCA. The district court may alternatively find from the record that "the respondent has voluntarily expressed a desire to waive" her physical presence at the hearing. Section 53-21-119(2)(b), MCA.

¶15 We held in *In re S.D.* that a district court applying these statutory requirements must first make an affirmative determination on the record, including the representations of the respondent and/or her attorney and friend, that the respondent understands her procedural rights, and that she waives those rights intentionally and knowingly. *In re S.D.*, ¶ 12 (citations omitted). We further recognized "[t]he nature and extent of the record regarding the respondent's waiver depends upon the facts and circumstances of the case." *In re S.D.*, ¶ 12 (citing *In re P.A.C.*, ¶ 14). A record of waiver is generally sufficient if it reflects that the attorney had discussed the matter with his client; that the client desired to waive her rights; and that the attorney was satisfied that his client understood her rights and the nature of the proceeding. *In re S.D.*, ¶ 12 (citations omitted). However, "[a] waiver of rights should not be presumed," *In re L.K.*, ¶ 19 (citations omitted), and a district court should undertake a "[m]ore 'diligent' inquiry . . . if the respondent's capacity to waive her rights is in doubt . . . ." *In re S.D.*, ¶ 12 (quoting *In re P.A.C.*, ¶ 14).

¶16 M.Q. argues on appeal that her statutory and due process rights were violated when the District Court conducted a civil commitment hearing without M.Q. being present, over the objection of her attorney, and committed M.Q. to MSH. We agree.

¶17 The record demonstrates the District Court did not obtain an effective waiver of M.Q.'s physical presence from either M.Q. or her attorney, as required by § 53-21-119(1) and (2), MCA.[2] M.Q.'s counsel affirmatively objected to holding the hearing in M.Q.'s absence, arguing M.Q. was entitled to be present and that her presence had not been

[2] No friend of respondent was appointed in this case.

waived. Absent strict compliance with § 53-21-119(1) and (2), MCA, the District Court could not conduct the commitment hearing in M.Q.'s absence.

¶18 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review. The District Court's interpretation and application of the law were incorrect. Reversed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ LAURIE McKINNON
/S/ DIRK M. SANDEFUR
/S/ INGRID GUSTAFSON