IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1124

Filed: 18 June 2019

Wake County, No. 18 SPC 1725

IN THE MATTER OF: J.P.

Appeal by respondent from order entered 1 June 2018 by Judge Eric C. Chasse in Wake County District Court. Heard in the Court of Appeals 22 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Marilyn Fuller, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for respondent-appellant.

TYSON, Judge.

J.P. ("Respondent") appeals from an involuntary commitment order, which committed him to twenty-one days of inpatient treatment. Based upon the Supreme Court of North Carolina's recent opinion in *In re E.D.*, __ N.C. __, __ S.E.2d __ 2019 WL 2114965 (2019), we do not address Respondent's argument and affirm the district court's order.

I. Background

On 26 May 2018, Respondent's brother filed an affidavit and petition to have Respondent involuntarily committed. Respondent's brother alleged Respondent had dismantled his own bed set and threw it across the front yard of their home. Respondent's brother also alleged Respondent had threatened him and their other family members and had refused to take his medication.

Later that day, at 6:11 p.m., Respondent was initially examined by Dr. Evan Pushchak at WakeMed Hospital in Raleigh. Dr. Pushchack found J.P. was "mentally ill," "dangerous to [him]self"and "in need of further evaluation and treatment at an appropriate psychiatric facility to ensure safety and stability." Based upon Dr. Pushchak's evaluation, a magistrate ordered law enforcement to take into custody, transport, and deliver Respondent to Holly Hill Hospital ("Holly Hill"). Respondent arrived at Holly Hill on 27 May 2018 at 10:30 a.m.

Following his admission to Holly Hill, Respondent was next evaluated by Dr. Y. Wang on 28 May 2018 at a time listed on the examination form as "1533 o'clock." Dr. Wang noted his opinion that Respondent was "mentally ill," "dangerous to [him]self," and "dangerous to others." Dr. Wang listed Respondent as "aggressive manic" and recommended Respondent's inpatient commitment for 31 days.

On 31 May 2018, the statutorily-mandated hearing on Respondent's commitment was held in district court. *See* N.C. Gen. Stat. § 122C-268 (2017). Dr. Wang was admitted as an expert in psychiatry and testified on behalf of Holly Hill.

Dr. Wang testified that during his examination on 28 May, Respondent was very "uncooperative," "agitated," and "aggressive." Dr. Wang recounted Respondent pounded on the counters at a nurse's station and Respondent threw a chair at another patient.

Based upon his observations of Respondent, Dr. Wang formed the opinion and working diagnosis that Respondent suffered from bipolar disorder and "[h]e could have a severe paranoia psychotic episode." Dr. Wang was still trying to determine Respondent's exact diagnosis and a proper medication regime at the time of the hearing. According to Dr. Wang, outpatient treatment for Respondent would be "inadequate" because Respondent was still "in crisis" at the time. Dr. Wang recommended 21 days of continued commitment would be appropriate to "further stud[y] his mental disorder" and determine the best course of treatment.

At the close of Dr. Wang's testimony, Respondent moved to dismiss the case since Dr. Wang could not diagnose Respondent's exact mental illness. Respondent asserted that no evidence had been presented of his being involved in any "incidents" since he was examined on 28 May, and that "being locked in a 24-hour facility is a pretty extreme remedy[.]" The district court denied Respondent's motion to dismiss.

The district court found and concluded Respondent was mentally ill and dangerous to others and entered an order committing Respondent to an inpatient facility "for a period not to exceed 21 days." Respondent filed timely notice of appeal.

II. Issue

Respondent's sole argument is the trial court's involuntary commitment order must be vacated because the second examination mandated by Chapter 122C was not performed within 24 hours after Respondent's arrival at Holly Hill.

III. Preservation

Respondent argues for the first time on appeal that the trial court's involuntary commitment order must be vacated because he did not receive a second examination by a physician within 24 hours of his arrival at a mental health facility. Respondent acknowledges his "counsel did not argue at the hearing before [the district court] that the second examination was not conducted within 24 hours after [Respondent's] arrival to Holly Hill" pursuant to N.C. Gen. Stat. § 122C-266(a) (2017).

Respondent's argument is based upon the time of "1533 o'clock" noted on the examination form completed by Dr. Wang on 28 May 2019.

N.C. Gen. Stat. § 122C-266(a) provides:

> Except as provided in subsections (b) and (e), *within 24 hours of arrival at a 24-hour facility* described in G.S. 122C-252, *the respondent shall be examined by a physician*. This physician shall not be the same physician who completed the certificate or examination under the provisions of G.S. 122C-262 or G.S. 122C-263. The examination shall include but is not limited to the assessment specified in G.S. 122C-263(c).

N.C. Gen. Stat. § 122C-266(a) (emphasis supplied).

Respondent cites Rule of Appellate Procedure 10 for the general rule that "the failure to raise an issue at the trial level waives review of the issue at the appellate level." *See* N.C. R. App. P. 10(a)(1). Respondent contends that, despite the provisions of Rule 10 regarding the preservation of arguments on appeal, his argument is still preserved pursuant to this Court's decisions in *In re Spencer*, 236 N.C. App. 80, 762 S.E.2d 637 (2014), and *In re E.D.*, __ N.C. App. __, 813 S.E.2d 630 (2018).

In the case of *In re E.D.,* the respondent argued *that she was not examined by a physician within one day of her arrival at a 24-hour facility, but by a psychologist, and that* N.C. Gen. Stat. § 122C-266(a) was violated. *In re E.D.*, __ N.C. App. at __, 813 S.E.2d at 631. The State argued the respondent had not preserved the issue because she had failed to raise it before the trial court. *Id.*

To determine whether the respondent's argument concerning the statutory violation was preserved, this Court analyzed our prior holding in *In re Spencer*. *Id.* at __, 813 S.E.2d at 632.

In *Spencer,* the respondent had argued "that the record [did] not demonstrate that he was examined by a second physician within twenty-four hours of being admitted to Holly Hill Hospital, in violation of N.C. Gen. Stat. § 122C-266." *Spencer*, 236 N.C. App. at 84, 762 S.E.2d at 640.

This Court held the respondent's argument was preserved, and stated: "It is well established that when a trial court acts contrary to a statutory mandate and a

[party] is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding [the party's] failure to object at trial." *Id.* (alterations in original) (quoting *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010)).

In *In re E.D.,* this Court followed the reasoning in *Spencer* to hold the respondent's argument was preserved, despite his failure to raise it before the trial court. This Court concluded: "*Spencer* stands for the proposition that the second examination requirement contained in N.C. Gen. Stat. § 122C-266(a) is a statutory mandate—the violation of which is automatically preserved as an issue on appeal regardless of whether the respondent objects in the trial court." *In re E.D.*, __ N.C. App. at __, 813 S.E.2d at 632.

On 7 June 2018, our Supreme Court allowed discretionary review of this Court's *In re E.D.* opinion. After the parties had submitted their briefs in this case, the Supreme Court filed its *In re E.D.* opinion on 10 May 2019. __ N.C. __, __ S.E.2d __, 2019 WL 2114965. The Supreme Court reversed this Court's holding and held, in part:

> We conclude that the Court of Appeals erred when it held that N.C.G.S. § 122C-266(a) imposes a statutory mandate that automatically preserves a violation of that provision for appellate review. On that basis, we reverse the decision of the Court of Appeals. Because we so conclude, and because respondent did not raise the issue of the violation of N.C.G.S. § 122C-266(a) at the district court hearing on her involuntary commitment, this issue is not preserved for appellate review.

Id. at *3.

The Supreme Court distinguished its prior cases, which held a statutory mandate automatically preserved an issue for appellate review. *Id.* at *5. The Supreme Court further held: "We hold that a statutory mandate that automatically preserves an issue for appellate review is one that, either: (1) requires a specific act by a trial judge, or (2) leaves no doubt that the legislature intended to place th[e] responsibility on the judge presiding at trial[.]" *Id.* at *16 (internal citations and quotation marks omitted) (alteration in original).

Applying its holding to N.C. Gen. Stat. § 122C-266(a), the Supreme Court stated: "this statute does not require a specific act by a trial judge. Furthermore, the statute does not place any responsibility on a presiding judge. . . . N.C.G.S. § 122C-266(a) does not fit within either category of statutory mandates that would automatically preserve an issue for appellate review." *Id.* at *7. Based upon its holding, the Supreme Court also partially overruled *In re Spencer*, "to the extent it conflicts with this conclusion." *Id.*

In light of our Supreme Court's holding in *In re E.D.*, Respondent's failure to receive a second evaluation by a physician within 24 hours of being admitted to Holly Hill, as is statutorily and expressly required by N.C. Gen. Stat. § 122C-266(a), was not automatically preserved. *See id.* Respondent acknowledges his hearing counsel did not object or argue a violation of N.C. Gen. Stat. § 122C-266(a) before the trial

court as a basis to bar or invalidate his involuntary commitment. Based upon our Supreme Court's holding in *In re E.D.* and Rule 10, Respondent has waived his only argument on appeal. *Id.*; N.C. R. App. P. 10(a)(1).

Respondent requests this Court to exercise its discretion to invoke Rule of Appellate Procedure 2, if his argument is deemed to have not been automatically preserved.

This Court may exercise Rule 2, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest[.]" N.C. R. App. P. 2. "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017), *disc. review allowed on additional issues*, __ N.C. __, 813 S.E.2d 849 (2018).

After reviewing Respondent's argument, the record on appeal, and the transcript of the hearing before the district court, no extraordinary circumstances are shown by Respondent to merit a Rule 2 suspension of our appellate rules. Respondent does not challenge the district court's findings of fact to support his involuntary commitment, nor its findings he was mentally ill and a danger to others. In the exercise of our discretion, we decline to invoke Rule 2 and dismiss Respondent's appeal. N.C. R. App. P. 2.

IV. Conclusion

Based upon our Supreme Court's holding in *In re E.D.* and the Rules of Appellate Procedure, Respondent's attempt to raise his challenge and argument for the first time on appeal is not preserved. N.C. R. App. P. 10(a)(1). In our discretion, we decline to invoke Rule 2 to suspend our appellate rules. N.C. R. App. P. 2.

Defendant has failed to show reversible error in the district court's ruling ordering his involuntary commitment. The district court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges BRYANT and ZACHARY concur.

Report per Rule 30(e).