

FILED: July 13, 2011

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of M. T., Alleged to be a Mentally Ill Person.

STATE OF OREGON,
Respondent,

v.

M. T.,
Appellant.

Jackson County Circuit Court
09503MC

A144286

Mark S. Schiveley, Judge.

Submitted on June 06, 2011.

James A. Palmer filed the brief for appellant.

John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Anna M. Joyce, Deputy Solicitor General, filed the brief for respondent.

Before Haselton, Presiding Judge, and Armstrong, Judge, and Duncan, Judge.

DUNCAN, J.

Reversed.

1 DUNCAN, J.

2 The trial court committed appellant to the custody of the Oregon Health
3 Authority (OHA) on the ground that, as a result of a mental disorder, appellant was
4 dangerous to himself and others. Appellant assigns error to the trial court's failure to
5 provide him with information as required by ORS 426.100(1). For the reasons explained
6 below, we conclude that the trial court committed plain error and reverse.¹

7 The relevant facts are procedural and undisputed. Appellant came before
8 the trial court for a civil commitment hearing. Appellant appeared via closed circuit
9 television from the county jail. He was represented by appointed counsel, who was
10 present in the courtroom where the hearing was being held. The court informed appellant
11 that "the purpose of this hearing is to determine whether you suffer from a mental
12 disorder, and if you do, whether as a result of that, you're a danger to yourself, or to
13 others, or you're unable to care for your basic personal needs." The court told appellant
14 that it had appointed counsel to assist him; that the state would call witnesses who would
15 be subject to cross-examination; and that appellant could call his own witnesses after that.
16 The court asked appellant's counsel whether he had "review[ed] with [appellant] the
17 nature of the hearing, and the proceedings." Appellant's counsel answered that he had
18 "attempted to do so." The court did not inform appellant of the possible results of the
19 proceeding or his right to subpoena witnesses.

¹ Appellant also assigns error to the trial court's commitment decision, arguing that there was insufficient evidence that he was "mentally ill." ORS 426.005(1)(e). We reject that assignment without discussion.

1 The state called witnesses who testified that appellant suffered from
2 paranoid schizophrenia and was a danger to others. Appellant's counsel called appellant's
3 mother, who is his legal guardian, as a witness. Appellant's mother did not dispute the
4 state's evidence; indeed, she added that appellant's schizophrenia made him a danger to
5 himself. However, she testified that, because of concerns about how appellant had been
6 treated in state facilities in the past, she had "made other arrangements for his care and
7 treatment."

8 After the presentation of evidence, the trial court concluded that appellant
9 suffered from a mental disorder and, as a result, was dangerous to himself and others.
10 The court committed appellant to the custody of OHA for a period of up to 180 days.

11 ORS 426.100(1) requires a trial court conducting a civil commitment
12 hearing to advise the allegedly mentally ill person of the reason for, nature of, and
13 possible results of the hearing, as well as the person's rights to subpoena witnesses and be
14 represented by counsel, including appointed counsel. It provides:

15 "At the time the allegedly mentally ill person is brought before the
16 court, the court shall advise the person of the following:

17 "(a) The reason for being brought before the court;

18 "(b) The nature of the proceedings;

19 "(c) The possible results of the proceedings;

20 "(d) The right to subpoena witnesses; and

21 "(e) The person's rights regarding representation by or appointment
22 of counsel."

23 The required advice is "essential to the allegedly mentally ill person's

1 understanding of the nature and purpose of the hearing[.]” [State v. Maxwell](#), 164 Or App
2 171, 172, 988 P2d 939 (1999), *rev den*, 330 Or 71 (2000). It is an “integral part” of the
3 legislature’s attempt “to ensure that all allegedly mentally ill persons get the benefit of a
4 full and fair hearing[.]” *State v. Allison*, 129 Or App 47, 50, 877 P2d 660 (1994).

5 A trial court must advise an allegedly mentally ill person of the information
6 specified in ORS 426.100(1) regardless of whether the person is represented by counsel.
7 *Allison*, 129 Or App at 50 (“Whether or not [an allegedly mentally ill person] is
8 represented by counsel, the court must inform [the person] of the nature and possible
9 outcome of the proceeding.”). To comply with that requirement, a court “must either
10 advise the allegedly mentally ill person directly regarding those rights or conduct an
11 examination on the record to determine whether a valid waiver of the right to be advised
12 has been knowingly and voluntarily made.” [State v. Ritzman](#), 192 Or App 296, 298, 84
13 P3d 1129 (2004) (citing *State v. May*, 131 Or App 570, 571, 888 P2d 14 (1994)).

14 A trial court’s failure to advise an allegedly mentally ill person as required
15 by ORS 426.100(1) “is not only error, but it is plain error that we [may] exercise our
16 discretion to consider despite an appellant’s failure to raise and preserve the issue at the
17 hearing.” *Ritzman*, 192 Or App at 298 (citing *State v. Tardanico*, 132 Or App 230, 231,
18 888 P2d 15 (1994) (trial court’s failure to provide the required information was an error
19 “apparent on the face of the record” and “an egregious one”)). In determining whether to
20 exercise our discretion, “we also consider whether the error was harmless.” *Ritzman*, 192
21 Or App at 299 (citing [State v. Cach](#), 172 Or App 745, 750 n 4, 19 P3d 992, *rev den*, 332

1 Or 316 (2001)).

2 As we have held, the legislature enacted ORS 426.100(1) to ensure that,
3 before a civil commitment hearing, an allegedly mentally ill person is given "sufficient
4 productively usable information to enable the person to take the actions necessary to
5 protect his or her interests." [State v. Baffam](#), 166 Or App 552, 556, 999 P2d 541 (2000),
6 *rev dismissed as improvidently allowed*, 335 Or 142 (2002). Accordingly, we have held
7 that a trial court's failure to provide an allegedly mentally ill person with the information
8 specified in ORS 426.100(1) is harmless when the person received the information from
9 another source. For example, in *Ritzman*, we held that the trial court's failure to comply
10 with ORS 426.100(1) was harmless where, before the commitment hearing, a written
11 "Notice of Intent to Continue Commitment" that contained all of the information
12 specified in ORS 426.100(1) was delivered to, read to, and signed by the appellant. 192
13 Or App at 300-01. In contrast, in [State v. Scharf](#), 201 Or App 71, 74, 116 P3d 949
14 (2005), we held that the trial court's failure to comply with ORS 426.100(1) was not
15 harmless where the allegedly mentally ill person had received a written "Citation for
16 Commitment Hearing" that contained information similar to that specified in ORS
17 426.100(1) but had not signed it. We explained that, "without an acknowledgement from
18 appellant that he actually read the citation, we cannot conclude that he was adequately
19 advised of his rights as we did in *Ritzman*." *Scharf*, 201 Or App at 74.

20 Applying the foregoing legal principles, we conclude that the trial court
21 erred by failing to advise appellant as required by ORS 426.100(1) and that the error is

1 reviewable as plain error. *Ritzman*, 192 Or App at 298. As appellant points out and the
2 state acknowledges, the court failed to advise appellant of all of the information specified
3 in ORS 426.100(1). Specifically, the court failed to advise appellant of the "possible
4 results of the proceedings," as required by ORS 426.100(1)(c), and of appellant's "right to
5 subpoena witnesses," as required by ORS 426.100(1)(d). The court's failure to comply
6 with ORS 426.100(1) was a legal error, and it is apparent on the face of the record.

7 The state does not contend otherwise. Instead, the state argues that we
8 should not exercise our discretion to correct the trial court's error because it was
9 harmless. As described, when determining whether a court's failure to provide the
10 information specified by ORS 426.100(1) was harmless, we consider whether the
11 allegedly mentally ill person otherwise received the information the legislature intended
12 the person to receive in order to protect his or her own interests.

13 The state argues that appellant was notified of the possible results of the
14 hearing through a written "Notice of Commitment Hearing," which appellant received
15 before the hearing and which included, as an attachment, a mental health investigator's
16 report. According to the state, the investigator's report lists actions the trial court could
17 take. The difficulty with the state's argument is that the listed actions are those that the
18 court could take following the *investigation*, not following a later *commitment hearing*.
19 The listed actions relate to whether the trial court should proceed to a commitment
20 hearing and, if so, whether appellant should be held pending the hearing.² They do not

² The listed actions are part of a printed form the investigator used for his report,

1 relate to the possible results of the hearing.

2 ORS 426.130 establishes the possible results of a civil commitment
3 hearing. If, following the presentation of evidence, a trial court determines that the
4 allegedly mentally ill person is not mentally ill, "the person shall be discharged
5 forthwith." ORS 426.130(1)(a). If, on the other hand, the court determines that the
6 person is mentally ill, there are three possible results. If the person "is willing and able to
7 participate in treatment on a voluntary basis" and "will probably do so," the court "[s]hall
8 order the release of the [person] and dismiss the case." ORS 426.130(1)(b)(A).
9 Alternatively, the court "may order conditional release," ORS 426.130(1)(b)(B), or "may
10 order commitment of the individual to the [OHA]," ORS 426.130(1)(b)(C). If the court
11 orders conditional release or commitment, the court shall establish a period of conditional
12 release or commitment not to exceed 180 days. ORS 426.130(2).

13 Information about the possible results of the proceedings is essential to an
14 allegedly mentally ill person's ability to prepare for and participate in a commitment
15 hearing. It is basic information about what is at stake for the person, information that will
16 affect the person's assessment about how much, and in what manner, to prepare for the
17 hearing. Importantly, it includes information about possible results--voluntary treatment
18 and conditional release--that can be secured only with the cooperation of the allegedly
19 mentally ill person. Without notice of those possible results, a person is not in a position

and each is preceded by a space that an investigator can check if the investigator recommends that the trial court take that action.

1 to adequately protect his or her interests.

2 The investigator's report, on which the state relies, did not inform appellant
3 of the possible results of the hearing. It did not inform appellant that he was facing up to
4 180 days in custody, information that was necessary for him to understand the significant
5 potential consequences of the hearing on his personal liberty. Nor did it inform him that,
6 if he could establish that he was a candidate for voluntary treatment or conditional
7 release--perhaps by agreeing to and advocating for the arrangements his mother had made
8 for him--he could avoid or minimize that consequence. Thus, the report did not provide
9 appellant with the same information that the trial court was required to provide under
10 ORS 426.100(1), and the fact that appellant received a copy of the report does not render
11 harmless the court's failure to comply with ORS 426.100(1).

12 The state also argues that the trial court's failure to advise appellant of the
13 possible results of the hearing was harmless because appellant was represented by
14 counsel. Representation by counsel does not, in and of itself, render a trial court's failure
15 to comply with ORS 426.100(1) harmless. *See, e.g., Scharf*, 201 Or App at 74 (reversing
16 judgment committing the appellant, who was represented by counsel, on the ground that
17 trial court failed to comply with ORS 426.100(1)); *Allison*, 129 Or App at 50 (same).
18 Representation by counsel can render a court's failure to comply with ORS 426.100(1)
19 harmless if the record establishes that counsel adequately advised the allegedly mentally
20 ill person of the information specified in ORS 426.100(1), but the record in this case does
21 not establish that appellant's counsel did so. It does not establish that appellant's counsel

1 told appellant anything about the possible results of the hearing. As described above, the
2 trial court asked appellant's counsel whether he had "review[ed] with [appellant] the
3 nature of the hearing, and the proceedings." Appellant's counsel answered that he had
4 "attempted to do so." For two reasons, appellant's counsel's answer does not establish
5 that he advised appellant about the possible results of the commitment hearing. First, it
6 was in response to a question about whether he had advised appellant of the nature of the
7 hearing and proceedings, the subject of ORS 426.100(1)(b), as opposed to the possible
8 results of the hearing, the subject of ORS 426.100(1)(c). Second, and more importantly,
9 even assuming that the court's question encompassed the possible results of the hearing,
10 appellant's counsel answered that he had "attempted" to provide information to appellant,
11 which indicates that did not provide all of the required information. Thus, as with the
12 investigator's report, the record in this case provides no basis for concluding that
13 appellant's counsel provided appellant with the information necessary to render harmless
14 the court's failure to comply with ORS 426.100(1).³ Accordingly, we exercise our
15 discretion to correct the error.

16 Reversed.

³ Because we conclude that the trial court's failure to advise appellant of the possible results of the civil commitment hearing, as required by ORS 426.100(1)(c), is reviewable as plain error, we reverse on that ground and do not reach appellant's argument that the trial court also erred by failing to advise him of his right to subpoena witnesses, as required by ORS 426.100(1)(d).