IN THE COURT OF APPEALS OF IOWA

No. 3-218 / 12-1133
Filed April 24, 2013

IN THE INTEREST OF J.H.,
Alleged to Be Seriously Mentally Impaired,

J.H.,
Respondent-Appellant.

Appeal from the Iowa District Court for Plymouth County, Steven J. Andreasen, Judge.

J.H. alleges ineffective assistance of counsel in an Iowa Code chapter 229 (2011) proceeding wherein he stipulated to serious mental impairment. **REMANDED WITH DIRECTIONS.**

Zachary S. Hindman of Bikakis, Mayne, Arneson, Hindman & Hisey, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Gretchen Witte Kraemer, Assistant Attorney General, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

J.H. alleges ineffective assistance of counsel in an Iowa Code chapter 229 (2011) proceeding wherein he stipulated to serious mental impairment. Because the record is inadequate to determine whether or not appointed counsel was ineffective, we remand for a determination by the same judicial officer who entered the order adjudicating J.H. seriously mentally impaired. If that officer finds counsel was ineffective, J.H. shall be allowed to withdraw his stipulation and the State may pursue adjudication anew.

I. Background Facts and Proceedings.

On June 4, 2012, J.H.'s mother filed an application and supporting affidavit alleging that he was seriously mentally impaired. She noted a change in his behavior marked by paranoia and aggression toward his wife. She feared that "drugs have become a problem." J.H.'s brother also filed a supporting affidavit confirming he also observed paranoia and witnessed J.H. threaten his family members. J.H. was detained at the Cherokee Mental Health Institute (CMHI) pending a hospitalization hearing, pursuant to Iowa Code section 229.11.[1]

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[1] This section states, in pertinent part:

> If the applicant requests that the respondent be taken into immediate custody and the judge, upon reviewing the application and accompanying documentation, finds probable cause to believe that the respondent has a serious mental impairment and is likely to injure the respondent or other persons if allowed to remain at liberty, the judge may enter a written order directing that the respondent be taken into immediate custody by the sheriff or the sheriff's deputy and be detained until the hospitalization hearing.

A June 6 CMHI report deemed J.H. mentally ill, incapable of making responsible decisions with respect to his treatment, likely to physically injure himself or others, and likely to inflict severe emotional injury on those unable to avoid contact with him. Appointed counsel for J.H. filed an application for a second physician's examination, pursuant to Iowa Code section 229.10(1)(a).[2] The application was granted, and a second examination was scheduled for June 18.

In the interim an updated report completed on June 12[3] stated that while J.H. was mentally ill, he had "gained some insight into his illness" and agreed to comply with the recommendation for outpatient treatment. Thus, he was deemed capable of making responsible decisions with respect to his treatment. Also, contrary to the June 6 assessment, he was deemed not likely to physically injure himself or others, and not likely to inflict severe emotional injury on others.

On June 13, before the 229.10(1)(a) examination could be conducted, J.H. appeared and stipulated to serious mental impairment. He was adjudicated seriously mentally impaired and discharged for outpatient treatment. The parties waived reporting of the hearing. In lieu of a transcript, a statement of the evidence was prepared from a digital recording and submitted, pursuant to Iowa Rule of Appellate Procedure 6.806(3). The statement contains the following exchange:

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[2] This section states, in pertinent part: "the respondent shall be entitled to a separate examination by a licensed physician of the respondent's own choice."

[3] The June 12 "updated" report was completed by the same Cherokee Mental Health Institute providers that completed the June 6 assessment.

> Court: And have the parties received a copy of what is now two consultation physician's reports from Mental Health Institute?
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> Oetken: Yes your honor.
>
> Murphy: Yes your honor.
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> . . . .
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> Court: The court has reviewed the consultation report and the updated report and [J.H.], have you had a chance to discuss those reports and the doctors' opinions with Mr. Murphy?
>
> J.H.: Yes.
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> . . . .
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> Court: It's the court's understanding, [J.H.], from speaking with counsel that perhaps there's an agreement that the parties would basically stipulate and agree to a finding by this court that you are seriously mentally impaired at least as that term is defined under Iowa law and that you would be ordered to be released from the Mental Health Institute and confirm that discharge today, and that you would be ordered to follow up with outpatient treatment through Dr. Moeller and that that first follow-up appointment would be on June 18th that was previously scheduled for a second opinion evaluation. And then you just need to arrange a substance abuse evaluation through Dr. Moeller either with him or with someone that he would recommend. Is that your understanding as well?
>
> J.H.: Yes, I believe there is already an appointment with Jackson Recovery though.

On June 20, 2012, J.H. filed a pro se appeal alleging his trial counsel was ineffective in allowing him to stipulate that he was seriously mentally impaired. He alleges that he never agreed to have the matter tried to the court; trial counsel failed to communicate with him, except for one telephone call and a short meeting five minutes before the hearing; trial counsel refused to communicate with him through his wife; trial counsel's firm had previously sued him on behalf of a farmers' cooperative; and he was not shown the physician's report until after the hearing.

After appointment of appellate counsel, J.H. filed a motion for limited remand to develop a factual record in support of his claims of ineffective assistance. The motion was denied.

II. Mootness Issue.

The State contends the appeal is moot because J.H. is no longer involuntarily hospitalized. However, the State acknowledges the same issue was raised in *In re B.B.*, 826 N.W.2d 425 (Iowa 2013). Since the State filed its brief, our supreme court has now ruled in *In re B.B.* and concluded, "a party who has been adjudicated seriously mentally impaired and involuntarily committed is presumed to suffer collateral consequences justifying appellate review." *B.B.*, 826 N.W.2d at 429. Because J.H. pursues this appeal to address the collateral consequences of the adjudication, his appeal presents a justiciable issue for our review.

III. Scope and Standard of Review.

We review ineffective assistance of counsel claims de novo. *State v. Lyman*, 776 N.W.2d 865, 877 (Iowa 2010). To establish a claim of ineffective assistance of counsel, a claimant must prove: (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* at 877–78. A claimant's failure to prove either element by a preponderance of the evidence is fatal to the claim. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

III. Discussion.

Our supreme court has not definitely held that persons facing involuntary civil commitment under chapter 229 have a right to effective assistance of

counsel. On two previous occasions, when addressing commitments of sexually violent predators under chapter 229A, the supreme court has recognized a similar issue, but declined to answer it. *See In re Detention of Crane*, 704 N.W.2d 437, 438–39 n. 3 (Iowa 2005); *In re Detention of Willis*, 691 N.W.2d 726, 730 (Iowa 2005). In both cases, the court noted that chapter 229A proceedings are civil and not criminal in nature, and therefore the Sixth Amendment to the federal constitution is not directly implicated. *Crane* 704 N.W.2d at 438 n. 3; *Willis*, 691 N.W.2d at 730. Rather, a person's right to counsel in chapter 229A proceedings is conferred by statute. *See* Iowa Code § 229A.6(1). Although the court has stated that granting the right to effective assistance of counsel "appears to be consistent with precedent," *see Crane*, 704 N.W.2d at 438 n. 3, the court has not specifically held such to be so. Instead, the court assumed the right exists, and then dismissed the underlying claims for lacking merit. *Id*. at 439; *Willis*, 691 N.W.2d at 730.

Like chapter 229A proceedings and chapter 232 termination of parental right actions, proceedings under chapter 229 are civil and the right to counsel is conferred by statute. *See* Iowa Code § 229.8(1). Therefore, we too will assume the right to effective assistance of counsel exists under chapter 229 for the purposes of this appeal.

J.H. claims he did not understand that he was stipulating to a finding of serious mental impairment and that he did not intend to do so. He claims effective trial counsel would have presented evidence to demonstrate he was not seriously mentally impaired.

Given the nature of the updated consultation report which provides one opinion that J.H. did not meet the statutory definition of serious mental impairment on the date of the hospitalization hearing, J.H. presents a potentially colorable claim. However, the updated report is but one piece of evidence. Under the limited record we cannot discern what additional evidence may have been presented in support or defense of the findings had J.H. contested the statutory elements. Thus, we cannot know whether counsel's support of a stipulation was appropriate in light of the totality of the circumstances.

IV. Conclusion.

Because the record is inadequate to determine whether or not appointed counsel was ineffective, we remand for a determination by the same judicial officer, if practicable, who entered the order adjudicating J.H. seriously mentally impaired. If after a hearing counsel is determined to have been ineffective, J.H. shall be allowed to withdraw his stipulation. If the stipulation is withdrawn, the adjudication shall be set aside, declared null and void, and the State may pursue adjudication anew. If counsel was not ineffective, the adjudication shall remain in effect.

REMANDED WITH DIRECTIONS.