IN THE COURT OF APPEALS OF IOWA

No. 9-488 / 08-1644
Filed August 6, 2009

IN RE THE DETENTION OF JAMES BABCOCK,

JAMES BABCOCK,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar, Judge (motion for order prohibiting counsel from attending psychiatric evaluation); George L. Stigler, Judge (trial).

James Babcock appeals from an order prohibiting counsel from attending his compelled psychiatric evaluation in this sexually violent predator proceeding. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Michael H. Adams, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, and Cristen Douglass and Virginia Barchman, Assistant Attorneys General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

James Babcock appeals from an order prohibiting counsel from attending his compelled psychiatric evaluation in this sexually violent predator proceeding. We affirm.

I. Background Facts and Proceedings.

On August 8, 2007, the State filed a petition under Iowa Code chapter 229A (2007) seeking to have Babcock committed as a sexually violent predator (SVP). Following a probable cause hearing held on August 21, the court found probable cause existed to believe that Babcock was an SVP and ordered him evaluated by the State pursuant to section 229A.5(5).

On October 11 Babcock's counsel filed a notice of intent to be present during the State's psychological evaluation. The State filed a motion for an order prohibiting counsel from attending the evaluation. Babcock resisted, asserting the examination was a critical state of proceedings under chapter 229A for which he had a right to counsel and his right against self-incrimination. An unreported telephone hearing was held. On November 7 the district court entered a ruling granting the State's motion. The court concluded:

> [A]ny potentially incriminating statements will be used in a proceeding already determined by our Supreme court to be civil. In considering a Kansas statute that has been determined to be similar to the Iowa statute, the Supreme Court of Kansas determined that submission to a psychological evaluation did not violate the right against self incrimination due to the fact the statute was civil in nature. *In re Hay*, 953 P.2d 666 (Kan. 1998). The same argument applies here in the context of the right to presence of counsel to guard against self incrimination.

Babcock's request for interlocutory appeal was denied.

Babcock was evaluated by State psychologist Anna Salter, who apparently testified at the SVP bench trial held on April 29, 2008. Babcock has not provided us a transcript of the hearing. On September 16, 2008, the district court entered a ruling finding Babcock was an SVP and ordering him committed to the custody of the director of the department of human services for control, care, and treatment until such time as it is safe to place him in a transitional release program.

Babcock appeals. He contends the district court's ruling denying his counsel's presence at the evaluation denied Babcock of his right to be free from self-incrimination and his right to counsel.

II. Scope and Standard of Review.

Our review of SVP proceedings is for correction of errors at law. Iowa Code § 229A.7(4) (noting Iowa rules of evidence and civil procedure apply to these civil commitment proceedings); Iowa R. App. P. 6.4. Constitutional issues are reviewed de novo. *In re Detention of Garren*, 620 N.W.2d 275, 278 (Iowa 2000).

III. Analysis.

Babcock asks this court to reverse the order of the district court denying counsel's presence at the psychological evaluation to protect his Fifth Amendment privilege. However, Babcock has provided no record of the hearing or even any suggestion what incriminating information was "gathered through the uncounseled interview." The district court ruling contains only one reference to Babcock's interview with the State's evaluator, clinical psychologist Dr. Anna Salter: "[Babcock] has shown an aptitude for deceitfulness, i.e. involvement in

forgery, attempted enticement and an attempt to mislead Dr. Salter when she interviewed him, i.e. his denial of a juvenile history when he has an extensive juvenile history."

> Pursuant to the Fifth Amendment, no person "shall be compelled in any criminal case to be a witness against himself." This privilege against self-incrimination applies equally to allow a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. The State cannot compel testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered without violating the Fifth Amendment.

State v. Seering, 701 N.W.2d 655, 669 (Iowa 2005) (internal quotations and citations omitted).

Babcock recognizes the SVP proceeding at which his statements to Salter were used against him is a civil proceeding. His claim is he had a right to counsel's help during the evaluation to allow him to claim his Fifth Amendment privilege not to answer questions that might incriminate him in future criminal proceedings—that is to say, new prosecutions for alleged crimes about which he may have made admissions to Salter. *See Allen v. Illinois*, 478 U.S. 364, 368, 106 S. Ct. 2988, 2991, 92 L. Ed. 2d 296, 304 (1986) (noting the Illinois Supreme Court had ruled that a person compelled to submit to a psychological evaluation under the sexually dangerous persons act is protected under the Fifth Amendment from use of his compelled answers in a subsequent criminal case).

We agree with the State that the record is inadequate and the issue is not ripe for determination of Babcock's claim. It is Babcock's duty to provide this court with a sufficient record to address and resolve the issue presented on appeal.

> Without the benefit of a full record of the lower court's proceedings, it is improvident for us to exercise appellate review. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). [Iowa Rule of Appellate Procedure] 6.10(3) allows an appellant the chance to have a record on appeal when the lower court does not report or record the proceedings. [Appellant's] failure to comply with rule 6.10(3) precludes him from seeking relief on appeal. Therefore, we must affirm the decision of the district court because [appellant] has failed to present a proper record on appeal.

In re F.W.S., 698 N.W.2d 134, 135-36 (Iowa 2005). We are not given a record of Babcock's statements to Salter.

Nor are we informed that the State expects to use any of those statements in a subsequent criminal prosecution. It has repeatedly been held that we neither have a duty nor the authority to render advisory opinions. *Hartford-Carlisle Sav. Bank v. Shivers*, 566 N.W.2d 877, 884 (Iowa 1997). An issue is ripe for adjudication "when it presents an actual, present controversy, as opposed to one that is merely hypothetical or speculative." *State v. Iowa Dist. Ct.*, 616 N.W.2d 575, 578 (Iowa 2000).

Lacking both an adequate record and a justiciable issue, we affirm.

AFFIRMED.