STATE OF LOUISIANA	*	**NO. 2004-KA-2113**
VERSUS	*	**COURT OF APPEAL**
STEVEN HYDE	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
CONSOLIDATED WITH:	*	**CONSOLIDATED WITH:**
STATE OF LOUISIANA	*	**NO. 2004-KA-2114**
VERSUS	*	
	* * * * * * *	
STEVEN HYDE		

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NOS. 323-908 C/W 324-314, SECTION "J"
Honorable Darryl A. Derbigny, Judge
* * * * * *
CHIEF JUDGE JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge James F. McKay III and Judge Terri F. Love)

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WRITS DENIED

The defendant, Steven Hyde, appeals from the trial court's judgment denying his motion for discharge from Feliciana Forensic Facility "(Feliciana") and the trial court's denial of his oral motion to reconsider the sentence, wherein the defendant was remanded back to Feliciana. The defendant's appeals were consolidated. For the reasons that follow, we shall treat the consolidated appeals as consolidated writ applications and deny the writs.

On December 23, 1987, the defendant was charged by bill of information in # 323-908, with armed robbery, a violation of La. R.S. 14:64, and entered a plea of not guilty. On January 20, 1988, he was charged by bill of information in # 324-314 with simple robbery, a violation of La. R.S. 14:65, and entered a plea of not guilty. On March 14, 1988, in # 323-908, he was found guilty of first-degree robbery and, on April 11, 1988, was sentenced on that conviction to twenty-five years at hard labor. On April 19,

1988, in # 324-314, the trial court appointed a sanity commission. At an April 26, 1988 sanity hearing, the defendant was found incompetent to proceed and was remanded to Feliciana. On July 12, 1988, in # 323-908, the trial court granted the defendant's motion for new trial, whereupon he entered pleas of not guilty and not guilty by reason of insanity. The testimony of the sanity commission members from # 324-314 was admitted into evidence, and the trial court found the defendant incompetent to proceed and remanded him to Feliciana.

On February 15, 1990, in # 324-314, the trial court ruled that the defendant was competent to proceed, and found him not guilty by reason of insanity at the time of the offense. The trial court found that he posed a danger to himself and others, and remanded him to Feliciana. On February 21, 1990, in #323-908, the trial court made the same ruling. From that point forward, the cases essentially merged.

On September 17, 1992, another hearing on the defendant's mental status was conducted, pursuant to this Court's order in writ 92-K-1209. After hearing the testimony of Dr. Ritter and the stipulation that Dr. Medina's testimony would be the same, the trial court found the defendant

suffered from no disease or defect and was not a danger to himself or others, and, on November 13, 1992, placed him on an indefinite period of active and supervised probation subject to certain special conditions.

On September 21, 1993, the district court placed a "probation hold" without bond on the defendant, and denied his application for release on December 10, 1993. On December 22, 1993, this Court granted the defendant's writ in 93-K-2500 and ordered the district court to conduct a hearing on the rule to revoke probation on or before January 21, 1994 or order his release without bond. The hearing was not conducted as ordered; consequently, the defendant again sought writs in this Court. On February 4, 1994, in writ 94-K-0194, this Court ordered the district court to hold a hearing on or before February 22, 1994 to determine whether the defendant was a danger to himself or others. On February 22, 1994, following a hearing during which Dr. Franklin and Dr. Ritter testified, and the testimony of Dr. Braden and Dr. Medina was stipulated to, the district court revoked the defendant's probation and remanded him to Feliciana for further care, custody, and treatment. Writ applications 94-K-0408, 94-K-0423, and 94-K-0452, were consolidated for review of this ruling.

In writ 95-K-1433, this Court affirmed the district court's finding that the defendant was mentally ill based on testimony that he had an "antisocial personality disorder." The Supreme Court denied writs. State v. Hyde 96-1223 (La. 5/31/96), 673 So. 2d 1040.

In writ 96-K-1027, the defendant asserted that he was not mentally ill or a danger to himself; therefore, he should be released. Because his motion had not been filed in the trial court, his motion for discharge was transferred to the trial court for an evidentiary hearing.

In writ 96-K-2098, the defendant sought review of the district court's finding that he was mentally ill. After having reviewed the transcript from the sanity hearing, this Court found no error in the district court's ruling. Again, the doctors testified that relator had an "antisocial personality disorder." Writ 97-K-0690 was denied as repetitious.

In writ 97-K-2316, the defendant complained that he had not been to court for a review of his mental status since September 1996 and requested that he be released to probation. On December 16, 1997, this Court denied the writ, noting that it was without jurisdiction to grant the defendant's request for release to probation and informing him that, pursuant to La.

C.Cr.P. art. 655(B), he must make an application to the review panel of the mental institution in which he was committed for discharge or release to probation, and that if the review panel recommended to the court that he be discharged, conditionally or unconditionally, or placed on probation, the court should conduct a hearing following notice to the district attorney. Writs 2000-K-1153 and 2001-K-1782 were denied for similar reasons.

In writ 2002-K-1266, the defendant sought review of the district court's judgment of June 18, 2002 finding him mentally ill and dangerous and ordering that he remain in the East Louisiana Mental Health System Forensic Division. This Court found no error in that judgment.

On March 23, 2004, with court approval, he was released from East Louisiana Mental Health System to Upper Room Ministry, subject to many supervisory provisions, including monitoring by Forensic After Care. Upon his arrival, there was no bed available for him, and he was required to sleep on a sofa pending the availability of a bed. Thereafter, he left the facility without permission and went at his sister's house. Two days after his release from the East Louisiana Mental Health System, on March 25, 2004, he was arrested on a probation violation and has remained incarcerated since that

time. At a mental health status hearing on May 25, 2004, Dr. Richou testified that the defendant has been diagnosed with polysubstance abuse and antisocial personality disorder, both of which constitute mental diseases or defects. It was also Dr. Richou's opinion that, based on the extensive documentation of the defendant's past violent and dangerous behavior, if left to his own devices, he has a high propensity for engaging in violent and dangerous behavior. After hearing the testimony of Dr. Richou and the stipulation that Dr. Salcedo's testimony would be the same, the trial court found that the defendant continues to suffer from a mental disease or defect and that he presents a danger to himself or others, and remanded him to the custody of the Feliciana Forensic Facility.

At the conclusion of the May 25, 2004 hearing, after the trial court found that the defendant continued to suffer from a mental disease or defect and presented a danger to himself or others, counsel for defendant filed an oral motion for reconsideration of sentence, which the trial court denied. Counsel also filed an oral notice of appeal.

Meanwhile, in State v. Hyde, unpub., 2004-1167 (La. App. 4 Cir. 8/2/04), writ denied, 2004-2195 (La. 10/15/04), 883 So. 2d 1046, this Court

denied defendant's pro se writ, attached to which was the transcript of the hearing upon which the judgment presently being appealed is based. The Louisiana Supreme Court denied writs.

The first issue before us is jurisdictional. In State v. Everett, 505 So. 2d 133 (La. App. 4 Cir. 1987), this Court held that a judgment of not guilty by reason of insanity was not a final judgment from a conviction and sentence, and therefore was not appealable under La. C.Cr.P. art. 912(A), and treated the appeal as an application for supervisory writs. In State v. Boudreaux, 592 So. 2d 449 (La. App. 5 Cir. 1991), the Court held that a trial court's refusal to order an insanity acquittee's release from a state forensic facility was not a final judgment or ruling subject to appeal under La. C.Cr.P. art. 912. The Fifth Circuit also treated the appeal as an application for supervisory writs.

Considering Everett and Boudreaux, we find that the judgment being appealed from is not a final judgment or ruling subject to appeal under La. C.Cr.P. art. 912, and we shall treat the consolidated appeals as consolidated applications for supervisory writs.

The issue before the trial court at the time of the May 25, 2004 hearing was whether the defendant was both mentally ill and a danger to himself or others. At that hearing, Dr. Richard Richou, a stipulated expert in

the field of forensic psychiatry, testified that he and Dr. Raphael Salcedo, appointed by the trial court, had examined the defendant on a number of occasions. Dr. Richou stated that the defendant had not been diagnosed with a psychotic disorder, and that he was not being maintained on any psychotropic medications, nor had he been for years. Dr. Richou agreed with the 2003 diagnosis by the staff at the Forensic Division of Eastern Louisiana Mental Health System of polysubstance abuse and antisocial personality disorder. He stated that the diagnostic and statistical manual for the American Psychiatric Association, described by him as the officially recognized book of psychiatric diagnoses and diagnostic criteria used by mental health professionals in North America, listed both chemical dependency and antisocial personality disorder as recognized mental disorders with recognized diagnostic criteria. Dr. Richou stated that on this basis, he believed the defendant was suffering from a mental illness that rendered him dangerous.

Dr. Richou recognized that his opinion, with which Dr. Salcedo concurred, was at odds with the opinion of the forensic facility, which, he implied, did not believe that the defendant had a mental illness or defect. As to the dangerousness aspect, Dr. Richou testified that there was substantial documentation of violent and dangerous behavior by the defendant. He said

that he and Dr. Salcedo were of the opinion that, if left to his own devices, the defendant had a high propensity for engaging in violent and dangerous behavior.

Dr. Richou conceded that the defendant was not presently legally insane, that is, that he absolutely could tell the difference between right and wrong. Dr. Richou also conceded that, given the defendant's diagnosis of polysubstance abuse and antisocial personality disorder, he could reside at either the Upper Room Ministry or a facility such as Odyssey House. However, Dr. Richou went on to opine that the defendant did not seem to conform to the general expectation of what is likely to happen when an individual with his history is given the opportunity to be in a less restrictive setting than the institution in which he had been a long-term resident. Dr. Richou stated that it was his opinion that living in a hospital setting was "probably the only thing that's going to make it unlikely that [The defendant] is going to wreak any kind of havoc in society."

The parties stipulated that if Dr. Raphael Salcedo were to testify, he too would testify that he examined the defendant and that his findings were similar to Dr. Richou's conclusions.

The most recent patient status report on the defendant by a forensic review panel in the record is dated July 17, 2003. That report shows a

diagnosis of polysubstance abuse, in remission in a controlled environment, and an antisocial personality disorder. As noted by Dr. Richou, the forensic review panel found that the defendant was not then mentally ill, nor dangerous to himself or others.

Based on this evidence the trial court found that the defendant continued to suffer from a mental disease or defect and represented a danger to himself or others and remanded him to the custody of the Feliciana Forensic Facility.

The defendant assigns as error that the trial court erred in denying his motion for discharge because the State did not prove by clear and convincing evidence that he had both a mental illness or defect and was a present danger to himself or others.

Pursuant to La. C.Cr.P. art. 654, when a defendant is found not guilty by reason of insanity in a non-capital felony case, the trial court shall order the defendant committed to a proper state or private mental institution if it is determined that the defendant cannot be released without danger to others or himself. Under La. C.Cr.P. art. 655, a defendant committed pursuant to La. C.Cr.P. art. 654 may make application to a mental institution review panel for discharge or release on probation, or the superintendent of the mental institution holding the defendant may, on his own initiative, issue a report to

such review panel recommending discharge or release on probation. Ultimately, the trial court makes a determination as to whether or not to discharge or release on probation. La. C.Cr.P. art. 657. The trial court may, after considering the superintendent's report and any review panel recommendations for discharge or release on probation, either continue the commitment or hold a contradictory hearing to determine whether the defendant is no longer mentally ill as defined by La. R.S. 28:2(14) and can be discharged or released on probation without danger to others or himself as defined by La. R.S. 28:2(3) and (4). Id. At such a hearing, the State has the burden of proving by clear and convincing evidence that the committed defendant is currently both mentally ill and dangerous. Id.

La. R.S. 28:2(14) defines a "mentally ill" person as:

> [A]ny person with a psychiatric disorder which has substantial adverse effects on his ability to function and who requires care and treatment. It does not refer to a person suffering solely from mental retardation, epilepsy, alcoholism, or drug abuse.

La. R.S. 28:2(3) defines dangerous to others as follows:

> "Dangerous to others" means the condition of a person whose behavior or significant threats support a reasonable expectation that there is a substantial risk that he will inflict physical harm upon another person in the near future.

La. R.S. 28(4) defines "dangerous to self" as follows:

> "Dangerous to self" means the condition of a person whose behavior, significant threats or inaction support a reasonable expectation that there is a substantial risk that he

> will inflict physical or severe emotional harm upon his own person.

La. C.Cr.P. art. 657 was amended in 1993 to comport with *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, (1992). Prior to that amendment, by Acts 1993, No. 700, § 1, continued commitment under La. C.Cr.P. art. 657 required proof only that the defendant was dangerous to himself or others, and the burden at the trial court hearing was on the defendant to show that he was not dangerous.

In *Foucha*, some four years after defendant Foucha was found not guilty by reason of insanity and committed to a forensic facility, a hospital panel reported that there had been no evidence of mental illness since his admission, and recommended conditional discharge. At the contradictory trial court hearing, the two members of the sanity commission concluded in their report that Foucha was in remission from mental illness, but they could not certify that he would not constitute a menace to himself or others if released. One doctor testified that upon commitment, Foucha probably suffered from a drug induced psychosis, but had recovered from that temporary condition and evidenced no present signs of psychosis or neurosis. However, the doctor further testified that Foucha had an "antisocial personality," a condition the doctor testified was not a mental disease and was not treatable. It was stipulated that the other member of the

sanity commission, if present, would give essentially the same testimony.

The U.S. Supreme Court held in *Foucha* that Foucha's continued confinement required that the State prove by clear and convincing evidence that he was both mentally ill and a danger to himself or others.

In the present matter, Dr. Richou testified that the defendant had an antisocial personality disorder and thus was suffering from a mental illness that rendered him dangerous. He said that he and Dr. Salcedo were of the opinion that, if left to his own devices, the defendant had a "high propensity" for engaging in violent and dangerous behavior. Although, the defendant in *Foucha* also had an antisocial personality disorder, the mental health expert who testified at Foucha's discharge hearing could not certify that Foucha had a mental illness. In contrast, Dr. Richou testified without contradiction that the defendant in the instant case was suffering from a mental illness. This opinion was confirmed by Dr. Salcedo's stipulated opinion and the evidence of the diagnostic and statistical manual for the American Psychiatric Association.

Therefore, pursuant to *Foucha*, the State met its burden of proof to show by clear and convincing evidence that the defendant was both mentally ill and a danger to himself or others. Accordingly, we find that the district court did not abuse its discretion in denying the defendant's motion for

discharge and remanding him to Feliciana.

For the foregoing reasons, we convert the instant consolidated appeals to consolidated writ applications, and deny the writ applications.

WRITS DENIED