NO. COA09-1623

NORTH CAROLINA COURT OF APPEALS

Filed: 6 July 2010

IN THE MATTER OF:

DEBORAH McCRAY

Wake County
No. 08 SPC 1271

Appeal by Respondent from involuntary commitment order entered 5 January 2009 by Judge Ned Mangum in District Court, Wake County. Heard in the Court of Appeals 27 April 2010.

Attorney General Roy Cooper, by Assistant Attorney General Janette Soles Nelson, for petitioner-appellee.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Kristen L. Todd, for respondent-appellant.

WYNN, Judge.

"To support an inpatient commitment order, the [trial] court shall find by clear, cogent, and convincing evidence that the respondent is mentally ill and dangerous to self,. . . or dangerous to others, ..." N.C. Gen. Stat. § 122C-268(j) (2009). In the present case, the trial court (I) failed to find a reasonable probability that Respondent's dangerous conduct toward others would be repeated; and, (II) regarding dangerousness to self, failed to find a reasonable probability of Respondent's suffering serious physical debilitation in the near future. Following the statutory law of North Carolina, we must reverse the trial court's order recommitting Respondent for sixty days.

Respondent was initially involuntarily committed based on an affidavit completed on 6 November 2008 by Dr. Jane McConnell, an Emergency Room Physician at Cape Fear Valley Medical Center in Fayetteville, North Carolina. Respondent was transported to Dorothea Dix Hospital (a.k.a. Central Regional Hospital). On 20 November 2008, the trial court ordered that Respondent be committed for inpatient treatment for up to 30 days and outpatient treatment for up to 60 days.

Based on a doctor's recommendation for continued treatment, the trial court held another commitment hearing on 18 December 2008 to determine whether Respondent should be recommitted. Dr. Tianna Praylow, Respondent's psychiatrist, was the only witness who testified at the hearing. Dr. Praylow diagnosed Respondent to suffer from Schizoaffective disorder bipolar type and described Respondent as delusional; experiencing hallucinations; irritable; and belligerent. Dr. Praylow testified that Respondent's medical records indicated aggressive outbursts.

Dr. Praylow said that one severe episode of an aggressive outburst "was written down by the nurse towards whom the aggressive behavior was perpetrated." The notes indicated that on 5 December, Respondent requested to be seen by a medical doctor, stating that her kidneys and liver had been damaged and she was having pain. Since Dr. Praylow did not witness the aggressive outburst, she relied upon the nurse's notes to state that:

> [Respondent] was informed that the doctor had been called, and she demanded that he immediately come to see her. She had a confrontation with a nurse and subsequently

> poured a pitcher of juice onto the nurse. That nurse attempted to redirect [Respondent], and over the course of her attempt to redirect [Respondent], [Respondent] was witnessed cocking her fist in an attempt to hit a healthcare technician.

After the State had finished its examination, the trial court questioned Dr. Praylow regarding this incident as follows:

> Q. All right. And you describe that incident through medical records is that she dumped a water pitcher on a -- on a staff person and -- is that right so far?
>
> A. And cocked her fist at ----
>
> Q. And cocked her fist. Do you in what manner [sic] that she cocked her fist?
>
> A. I wasn't there to witness, but the record says that she attempted to hit another technician.

Although Dr. Praylow did not observe the confrontation with the nurse, moments later she observed Respondent being escorted to a quiet room "talking loudly, exhibiting aggressive behavior." Dr. Praylow opined that Respondent was threatening and dangerous to the people who were trying to escort her to the quiet room. The State presented no testimony by anyone allegedly threatened by Respondent.

According to Dr. Praylow's testimony, Respondent was taking forced medication by injection. Respondent resisted taking medication due to her delusional belief that she was pregnant with five babies and she did not want those babies to become drug addicts. Dr. Praylow stated that Respondent required forced hygiene because she had "not been cooperative with maintaining activities of daily living." Dr. Praylow testified that:

> [Respondent] has a longstanding history of mental illness. She is extremely delusional and extremely psychotic. She is daily observed resisting redirection from staff members. She is daily observed sitting in a corner responding to internal stimuli, talking to herself. She, as recently as two days ago, informed me that she was removing me from her care because I am an incompetent doctor and I have damaged her kidneys and liver with the medications that I've been giving her. She also refuses to acknowledge Dr. Ford, who is another doctor involved in her treatment, as a member of her treatment team.

Dr. Praylow stated that Respondent was noncompliant not only with her psychotropic medications but also with her high blood pressure medication and her thyroid medication. Dr. Praylow believed that Respondent was at risk of suffering serious debilitation if she did not take her blood pressure and thyroid medication. Dr. Praylow testified that Respondent was a danger to herself "given the fact that upon her presentation for admission to the hospital she had been noncompliant with her medications" and "was very disheveled and unkempt when she came into the hospital." Dr. Praylow testified further that:

> [Respondent] has not been cooperative and compliant with the treatment that we have wanted to provide for her, and I think that if she were released from the hospital today that she would likely harm herself because she is not in a mental capacity to care for herself, to take her medications as she needs to and to do things that she needs to be able to do . . . to pay her bills, to prepare meals for herself. She's so delusional and is experiencing so many hallucinations that I really fear that she will be unsafe without supervision in an inpatient facility.

Based on the evidence presented at the hearing, the trial court made the following written findings of fact:

> [Respondent] has Schizo Affective Disorder B. Polar Type. She is very delusional [and] responds to internal stimuli. She is belligerent [and] has angry outbursts. Within the recent past she refuses to take her medications [and] Hospital must force them. She believes that she is pregnant [with] 5 children. When admitted to hospital she was unkempt and disheveled. She has thrown a pitcher [and] attempted to hit a staff member.

The trial court concluded that Respondent was mentally ill, and that she was dangerous to herself and to others. By order filed 5 January 2009, the trial court ordered that Respondent be recommitted for 60 days. Respondent gave notice of appeal.[1]

On appeal, Respondent does not contest the trial court's finding of her mental illness. Respondent argues, however, that the trial court's findings of fact do not support its conclusions of law because (I) the trial court's conclusion that Respondent was dangerous to others was made without finding a reasonable probability that the conduct would be repeated; and (II) the trial court's conclusion that Respondent was dangerous to herself was made without finding a reasonable probability of her suffering serious physical debilitation within the near future.

Preliminarily, we note that N.C. Gen. Stat. § 122C-268(j) sets out the criteria for involuntarily committing a person in a mental hospital. The trial court must find "by clear, cogent, and convincing evidence that the respondent is mentally ill and

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[1]Although the term of Respondent's 60-day commitment expired early in 2009, this appeal is not moot. *See In re Webber*, __ N.C. App. __, __ 689 S.E.2d 468, 472-73 (2009)("When the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent, an appeal of that order is not moot.").

dangerous to self . . . or dangerous to others . . . ." N.C. Gen. Stat. § 122C-268(j) (2009). The statute also requires the trial court to record the facts that support its findings. *In re Koyi*, 34 N.C. App. 320, 321, 238 S.E.2d 153, 154 (1977). We review a re-commitment order "to determine whether there was *any* competent evidence to support the 'facts' recorded in the commitment order and whether the trial court's ultimate findings of mental illness and dangerous to self or others were supported by the 'facts' recorded in the order." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980).

I

Respondent first argues that the trial court's findings of fact do not support its conclusion that Respondent was dangerous to others as defined by N.C. Gen. Stat. § 122C-3(11)(b) which states,

> "[d]angerous to others" means that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; *and that there is a reasonable probability that this conduct will be repeated.* Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct.

N.C. Gen. Stat. § 122C-3(11)(b) (2009) (emphasis added).

The State argues that in the present case, Respondent's act of cocking her fist with the intent to hit a staff member meets the statutory definition. Respondent replies that, even if the confrontation with the nurse was sufficient to establish one

element of dangerousness to others, still the trial court was also required to find a reasonable probability that the conduct would be repeated. *See id.* Respondent observes that the trial court made no findings regarding any previous episodes of dangerousness to others to establish the probability of future dangerous conduct.

In *In re Monroe*, 49 N.C. App. 23, 270 S.E.2d 537 (1980), this Court affirmed a finding of dangerousness to others when respondent "had become uncontrollable at all times," frequently made threats to his mother, and was ready to fight if someone sought to chastise him. *Id.* at 31, 270 S.E.2d at 541. This Court explained that "the present statutory definition of 'dangerous to others' does not require a finding of 'overt acts.'" *Id.* Although we held that mere threats are sufficient, we emphasized in *Monroe* the frequent repetition of the objectionable behavior.

> The trial court found as facts that respondent had become uncontrollable at all times and that he frequently had made threats to his aged and nervous mother. This finding was supported by Mr. Patrick Monroe's testimony that he had heard respondent state to his mother "I'm gonna get you all yet" and that the number of threats made by respondent had increased over the last three to four weeks.

Id. Thus, in *Monroe*, there were previous episodes of dangerous conduct to consider. *Monroe* followed the statutory language that, in the absence of actual injury or property damage, a finding of dangerousness to others requires evidence (1) that within the relevant past the individual has threatened to inflict serious bodily harm on another or created a substantial risk of the same, and (2) that there is a reasonable probability that such conduct

will be repeated. *See* N.C. Gen. Stat. § 122C-3(11)(b) (2009).

With regard to future dangerousness, the State here argues that evidence of Respondent's noncompliance with her medication and her history of noncompliance with medication while in the community demonstrate a reasonable probability of continued dangerousness if she had been discharged. We are directed to no authority for the proposition that refusal of medical treatment constitutes a danger *to others* sufficient to satisfy the statute. Simply stated, there was no evidence presented, and trial court failed to make any finding, of a reasonable probability that Respondent's threatening conduct would be repeated. Following the language in N.C. Gen. Stat. § 122C-3(11)(b), the trial court's order cannot therefore be upheld on the basis of dangerousness to others.

II

Respondent next argues that the trial court erred in concluding that Respondent was dangerous to herself. We address this claim as an alternate basis upon which the order might stand. *See Monroe*, 49 N.C. App. at 31-32, 270 S.E.2d at 541 (affirming an order on the basis of dangerousness to others although the evidence was insufficient to establish dangerousness to self).

N.C. Gen. Stat. § 122C-3 defines "dangerous to himself" to mean that within the relevant past:

> 1. The individual has acted in such a way as to show:
>
> I. That he would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and

> social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety; and
>
> II. That there is a reasonable probability of his suffering serious physical debilitation within the near future unless adequate treatment is given pursuant to this Chapter. A showing of behavior that is grossly irrational, of actions that the individual is unable to control, of behavior that is grossly inappropriate to the situation, or of other evidence of severely impaired insight and judgment shall create a prima facie inference that the individual is unable to care for himself;

N.C. Gen. Stat. § 122C-3(11)(a)(1) (2009).

The State argues that in the present case there was sufficient evidence for the trial court to conclude that Respondent was a danger to herself due to her lack of grooming, hygiene, and not taking her medicine for her medical conditions. The State cites *In re Medlin*, 59 N.C. App. 33, 295 S.E.2d 604 (1982), as standing for the proposition that the failure of Respondent to care for her medical needs, diet, grooming and general affairs meets the criteria for dangerousness to self.

In *Medlin*, this Court relied on N.C. Gen. Stat. § 122-58.2(1), which provided that "as used in Article 5A (Involuntary Commitment) '[t]he phrase 'dangerous to himself' includes, but is not limited to, those mentally ill or inebriate persons who are unable to provide for their basic needs for food, clothing, or shelter, ...'" 59 N.C. App. at 37, 295 S.E.2d at 607 (quoting *In re Lee*, 35 N.C. App. 655, 657, 242 S.E.2d 211, 212-13 (1978)). We observe that our legislature has repealed N.C. Gen. Stat. § 122-58.2(1),

and there is no comparable language in the current statute.[2] *See* N.C. Gen. Stat. § 122C-3(11)(a)(1) (2009). We conclude from this that *Medlin* provides no route to bypass the statute's requirement of a finding "[t]hat there is a reasonable probability of [Respondent's] suffering serious physical debilitation within the near future." *Id.*

The State maintains that this requirement is nevertheless met because Dr. Praylow testified that Respondent would suffer serious physical debilitation due to her lack of compliance with her blood pressure and thyroid medication. Dr. Praylow testified as follows:

> Q. Will she suffer serious physical debilitation if she didn't take the blood pressure and thyroid medication?
>
> A. Yeah, she is at risk of suffering serious debilitation.
>
> Q. In the near future?
>
> A. I can't give you a specific, say several months to years, but high blood pressure

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[2] *Medlin* quoted the language of N.C. Gen. Stat. § 122-58.2(1) that had appeared earlier in *Lee*. At the time *Lee* was decided, the statute appeared as quoted therein. *See* N.C. Gen. Stat. § 122-58.2(1) (Supp. 1977). The statute was amended however in 1979 (before *Medlin* was decided in 1982) to reflect the current definition of dangerousness to self. *See* Act of 8 June 1979, ch. 915, sec. 1, 1979 N.C. Sess. Laws 1260-61; *see also Collins*, 49 N.C. App. at 248-50, 271 S.E.2d at 75-76 (discussing the 1979 amendment). In 1985, chapter 122 of the General Statutes was repealed. *See* Act of 4 July 1985, ch. 589, sec. 1, 1985 N.C. Sess. Laws 670. The current definition of dangerousness to self was re-codified at N.C. Gen. Stat. § 122C-3(11)(a)(1). *See id.* at 671-72. Thus, *Medlin* relied on an obsolete statute. At least two cases decided by this Court since 1985 have relied on *Medlin*, apparently without realizing that its statutory basis had been removed. *See In re Woodie*, 116 N.C. App. 425, 431, 448 S.E.2d 142, 145 (1994); *In re Lowery*, 110 N.C. App. 67, 72, 428 S.E.2d 861, 864 (1993). Notwithstanding these cases, we are bound by the language of the current statute.

> untreated and hypothyroidism untreated can be life threatening.

A danger that may not manifest itself for several years does not meet the statutory requirement of a serious risk "within the near future." *Id.* Although there was some evidence that Respondent was resistant to taking her psychotropic medication, there is no evidence in the record, nor do the trial court's findings reflect, that Respondent's failure to take such medication would create any probability of physical debilitation within the near future.

In sum, there is no evidence, nor do the trial court's findings reflect, "a reasonable probability of [Respondent's] suffering serious physical debilitation within the near future." *Id.* The trial court's order can not therefore be upheld on the basis of dangerousness to self. Accordingly, we hold that the trial court's conclusions of law that Respondent posed a danger to others or to herself are not supported by its findings of fact.

Reversed.

Judges CALABRIA and STEELMAN concur.

Report per rule 30(e).