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NO. COA14-669
NORTH CAROLINA COURT OF APPEALS

Filed: 18 November 2014

IN THE MATTER OF:

B.J.G.,
Respondent.

Wake County
No. 13 SP 51080

Appeal by respondent from order entered 27 January 2014 by Judge James R. Fullwood in Wake County District Court. Heard in the Court of Appeals 20 October 2014.

Attorney General Roy Cooper, by Assistant Attorney General Josephine N. Tetteh, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for respondent-appellant.

Parker Poe Adams & Bernstein LLP, by Matthew W. Wolfe, for appellee Holly Hill Hospital.

GEER, Judge.

Respondent B.J.G. appeals from an order of the trial court involuntarily committing him to Holly Hill Hospital for a period of inpatient mental health treatment not to exceed 90 days. See N.C. Gen. Stat. §§ 122C-268, -271(b)(2) (2013). Respondent argues that the trial court erred in allowing him to proceed pro se at the involuntary commitment hearing without properly

ensuring that he waived his right to counsel knowingly and voluntarily in accordance with the rules adopted by the Office of Indigent Defense Services ("IDS Rules"). See N.C. Gen. Stat. § 122C-268(d) (providing a right to counsel at involuntary commitment hearing).

Appellees concede this error and agree that the order must be vacated. We join the parties in finding this case indistinguishable from *In re Watson*, 209 N.C. App. 507, 706 S.E.2d 296 (2011), in which the trial court improperly allowed the respondent to proceed pro se in his involuntary commitment hearing. Therefore, we vacate the trial court's order and remand for further proceedings. *Id.* at 522, 706 S.E.2d at 305.

Facts

On 18 December 2013, respondent's sister signed an affidavit and petition for involuntary commitment asserting that respondent was mentally ill and presented "a danger to himself." She alleged that respondent was "not taking his medication" and was experiencing visual hallucinations. She also reported that after law enforcement responded to a "disturbance" at his residence, respondent expressed that he "wanted the deputy to shoot him." A magistrate ordered respondent to be held for examination at Holly Hill Hospital pursuant to N.C. Gen. Stat. § 122C-261(b) (2013). Respondent was examined by two physicians

on 18 and 20 December 2013, both of whom recommended his involuntary commitment.

The trial court held a hearing on respondent's involuntary commitment on 9 January 2014. Respondent appeared at the hearing with appointed counsel, Becky C. Zogry, who informed the court that respondent had "indicated a desire to represent himself, to speak on his own behalf." The trial court addressed respondent as follows:

THE COURT: Okay. Mr. [B.J.G.], obviously, these are complicated hearings from a legal perspective. They involve rather significantly important matters: you. You're an important person. Your well-being is important to us.

If you're not a lawyer, if you've not had any experience with this, the question is, do you feel sure you can get through the legal proceedings representing yourself without the help of a very competent and very experienced lawyer?

[RESPONDENT]: Like I said, I don't know every word. I'm still learning. But simple words and knowledge, I can handle myself, sir.

THE COURT: All right.

[RESPONDENT]: I'm not evil, and I've never been suicidal. Like I say, I have my wrongs and my --

THE COURT: Okay.

[RESPONDENT]: But I returned, 'cause I repent, and I turned away from ways that are not [inaudible] or ways --

THE COURT: Okay.

[RESPONDENT]: -- that would cause me pain.

As far as overindulgence --

THE COURT: Okay. Mr. [B.J.G.], stay with me on this, okay?

[RESPONDENT]: I love you, sir.

THE COURT: I appreciate that. But this is a legal proceeding that follows certain legal rules. Who goes first, da, da, da, da, da. And the lawyer has done these proceedings before. I would suggest to you that you would want this lawyer to help you with this proceeding and represent you.

[RESPONDENT]: If I had to answer that question, Your Honor -- I asked that question, I'd rather -- I'd rather speak for myself. Like the Bible says, a man that --

THE COURT: Within the --

[RESPONDENT]: [inaudible].

THE COURT: Within the limitations that I've got, I will allow Mr. [B.J.G.] in to represent himself --

[RESPONDENT]: Thank you.

THE COURT: -- at the appropriate times.

UNIDENTIFIED FEMALE SPEAKER: Thank you, Your Honor.

(DISCUSSION OFF RECORD)

THE COURT: You do understand that the judge can't help you with the thing, with the case. You -- if you're going to

represent yourself, you've got to do it by yourself.

[RESPONDENT]: Like I said --

THE COURT: Okay.

[RESPONDENT]: -- you're the honor and judge, and you have the right to set me free. And Dr. Childers --

THE COURT: Okay.

[RESPONDENT]: -- he's malpracticing me. You know what I'm saying?

THE COURT: Okay. Okay. Well, hold that. Just -- I understand. Okay.

Based on this colloquy, the court allowed respondent to proceed pro se. The court advised respondent that "the lawyer is here if you need any legal advice. If you wish to have her advice, she's sitting right here with us." There is no indication that respondent consulted with counsel; nor did counsel intervene or speak on respondent's behalf at any time during the hearing.

After hearing the evidence, the trial court found by clear, cogent, and convincing evidence that respondent "is currently suffering with sever[e] active psychosis" and that he "is dangerous to himself and others." The court ordered respondent "committed . . . to the inpatient 24-hour facility, Holly Hill Hospital, . . . for a period not to exceed 90 days from the date of the hearing."

Discussion

Initially, we note that the 90-day commitment period contemplated by the trial court's order has expired. Appellee Holly Hill Hospital advises this Court that respondent has been discharged and that his current condition and need for treatment are unknown. Nonetheless, we have repeatedly recognized that "'a prior discharge will not render questions challenging the involuntary commitment proceeding moot[,]" inasmuch as "'the challenged order may form the basis for future commitment or may cause other collateral legal consequences for the respondent[.]'" *In re Allison*, 216 N.C. App. 297, 299, 715 S.E.2d 912, 914 (2011) (quoting *In re Booker*, 193 N.C. App. 433, 436, 667 S.E.2d 302, 304 (2008) and *In re Webber*, 201 N.C. App. 212, 217, 689 S.E.2d 468, 472-73 (2009)). Respondent now claims, and appellees agree, that the trial court erred by accepting respondent's waiver of counsel without complying with the statutory requirements for such a waiver.

N.C. Gen. Stat. § 122C-271(b)(2) provides that a person may be involuntarily committed "for a period not in excess of 90 days" if a trial court "finds by clear, cogent, and convincing evidence that the respondent is mentally ill and is dangerous to self[.]" However, under N.C. Gen. Stat. § 122C-268(d), "[a] person facing involuntary commitment must be represented by counsel of his choice, and if he is indigent, he must be

represented by counsel appointed in accordance with the rules adopted by the Office of Indigent Defense Services" *In re Watson*, 209 N.C. App. at 513-14, 706 S.E.2d at 300. Rule 1.6(a) of the IDS Rules (amended effective 7 March 2014) states that, before accepting a person's decision to waive counsel and proceed pro se, "the court shall follow the requirements of G.S. 15A-1242 and shall consider, among other things, such matters as the person's age, education, familiarity with the English language, mental condition, and the complexity of the matter."

N.C. Gen. Stat. § 15A-1242 (2013), in turn, provides that the court must make a "thorough inquiry" and find that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

In *In re Watson*, this Court held that "the protections afforded by N.C. Gen. Stat. § 15A-1242, N.C. Gen. Stat. § 122C-268(d), and IDS Rule 1.6 are mandatory in involuntary commitment proceedings[.]" 209 N.C. App. at 516, 706 S.E.2d at 302. Here, as in *In re Watson*, the record does not indicate that the trial

court clearly advised respondent of his right to counsel or ensured his understanding of "the nature of the proceedings and the length or type of commitment he was facing." *Id.* at 518, 706 S.E.2d at 303. Also, there is no indication that the court considered the factors prescribed by IDS Rule 1.6, including respondent's capacity to waive counsel. *See id.* at 519, 706 S.E.2d at 304. Although defendant had standby counsel during the proceeding, this Court has held that "'neither the statutory responsibilities of standby counsel, N.C.G.S. § 15A-1243, nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.'" *Id.* at 516, 706 S.E.2d at 301-02 (quoting *State v. Pruitt*, 322 N.C. 600, 603, 369 S.E.2d 590, 592 (1988)).

As in *In re Watson*, "the trial court failed to comply with the statutory mandates of N.C. Gen. Stat. § 15A-1242, N.C. Gen. Stat. § 122C-268(d) and IDS Rule 1.6" *Id.* at 519, 706 S.E.2d at 304. We, therefore, agree with the parties that the trial court's colloquy with respondent was insufficient because "the trial court did not conduct a thorough inquiry as contemplated by IDS Rule 1.6 and N.C.G.S. § 15A-1242." Consequently, "respondent's waiver of counsel was ineffective and the resulting commitment order must be vacated." *Id.* In

light of this conclusion, we need not consider his remaining arguments. *Id.* at 521-22, 706 S.E.2d at 305. The involuntary commitment order is vacated and this matter is remanded for a new hearing to determine whether respondent met the criteria for involuntary commitment as of 9 January 2014, the date of the original hearing.

Vacated and remanded.

Judges CALABRIA and McCULLOUGH concur.

Report per Rule 30(e).