IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-5

Filed: 16 October 2018

Buncombe County, 17 SPC 50235

IN THE MATTER OF: M.L.

Appeal by respondent from order entered 13 July 2017 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 19 September 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Milind K. Dongre, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Aaron Thomas Johnson, for respondent-appellant.

DAVIS, Judge.

M.L. ("Respondent") appeals from the trial court's order committing him to Mission Hospital for a ninety-day period of inpatient treatment. After a thorough review of the record and applicable law, we must vacate the trial court's order.

Factual and Procedural Background

The record in this case is far from a model of clarity with regard to a number of the key events bearing on this appeal. It appears that on or about 22 June 2017, Respondent was detained outside a tire store in Macon County by Deputy Sheriff

Michael Hollifield. He was subsequently admitted to the emergency room of Angel Medical Center ("Angel") in Franklin, North Carolina. On or about 23 June 2017, Hollifield signed an affidavit and petition (the "Hollifield Petition") requesting that M.L. be involuntarily committed. Hollifield alleged in this document, in pertinent part, as follows:

> [Respondent was s]tating he has 'plans for Tennesse' [sic]. Passively resisting officers. Stated he has '9 thousand dollars to pay for his tennesse [sic] plans' – only had a bit over 3 dollars in change. Refusing to comply with officers in regards to information, gave officers incorrect information in regards to identity and date of birth . . . .

This petition was sworn before a magistrate and appears to bear an original date that was subsequently whited-out and written over with a new date of 23 June 2017.

The magistrate who witnessed Hollifield's affidavit also signed a "Findings and Custody Order: Involuntary Commitment" form (the "Custody Order") that same day. In the Custody Order, the magistrate found that based on "the petition in [this] matter that there [were] reasonable grounds to believe that the facts alleged in the petition are true and that the [R]espondent [was] probably . . . mentally ill and dangerous to self or others or mentally ill and in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness." The Custody Order directed that Respondent be taken into custody. The word "AMENDED" is written across the top of the Custody Order, but the form contains no information about when or how it was amended. The date and time on the Custody

Order also appear to have been whited-out and then written over. The portion of the Custody Order labeled "patient delivery to first examination site" indicates that "the respondent was presented to" a "Dr. Adams" at Angel at 5:35 p.m. on 23 June 2017.

A second petition and affidavit (the "Adams Petition") was also prepared on 23 June 2017. While the signature on the Adams Petition is illegible, the name "Dr. Omar Adams, MD[,] Angel Medical Center" is typed beneath the signature line.[1]

The Adams Petition contained the following information:

> Respondent was found at a local tire store speaking incoherently, acting erratically and being disruptive. [Law enforcement] was called at which point [R]espondent became combative and uncooperative. [Respondent] is diagnosed with Schizoaffective disorder and has not been taking his medications. [Respondent] has a history of over 35 previous psychiatric hospitalizations. [Respondent] was recently discharged from Georgia regional hospital. [Respondent] is unable to make safe decisions and is a risk to himself and others and to prevent further decompensation.. [sic] Inpatient treatment is necessary to provide safety and stability.

The Adams Petition was sworn before a notary, but there is no evidence in the record to indicate that the magistrate who signed the Custody Order — or, for that matter, any other magistrate — ever saw the Adams Petition. Nor does the Adams Petition bear a file stamp from Macon County.

[1] The record reflects that Dr. Adams conducted an examination of Respondent that same day. Because the Adams Petition does not specify what time it was prepared, however, it is unclear whether Dr. Adams examined Respondent before or after the magistrate issued the Custody Order.

On 26 June 2017, Respondent was transferred from the emergency department of Angel to Mission Hospital ("Mission"), a 24-hour facility in Buncombe County. A hearing was held in Buncombe County District Court on 13 July 2017 before the Honorable Ward D. Scott. At the hearing, Mission's attorney called as a witness Dr. Micah Krempasky, a staff psychologist at Mission, who testified that she had diagnosed Respondent with schizoaffective disorder. Dr. Krempasky detailed Respondent's symptoms, including auditory and visual hallucinations, paranoia, and delusional thinking. She also described his behavior, which included violence towards staff members at Mission and resistance to treatment. Dr. Krempasky further explained that Respondent's treatment included "forced medication protocol" and twenty-four-hour supervision.

While Virginia Hebert, counsel for respondent, was cross-examining Dr. Krempasky, the trial court ordered a recess during which "new documentation" was somehow obtained. This documentation apparently consisted of the Adams Petition, which was filed during this recess with the Buncombe County Clerk of Court.[2] After the recess, the court remarked that "this makes much more sense." Hebert voiced concerns about the origin of the new documentation and indicated that she had never seen it before. Mission's attorney responded that he had "no idea who they sent it to. [He] just [knew] that it was created at Angel. [He did not] know where they sent it."

[2] The Adams Petition contains a file stamp indicating that it was filed with the Buncombe County Clerk of Court at 2:35 p.m. This was twelve minutes into the recess, which began at 2:23 p.m.

The court noted that some "administrative issues" had arisen, that it was unclear how Respondent got to Angel, and that answers might be contained in the medical record. The court thus authorized Dr. Krempasky to disclose the contents of relevant medical records available to her. A pause in the proceeding then occurred after which the court attempted to "piece together" the events surrounding Respondent's commitment. The court was evidently confused by the presence of two petitions in the file and stated the following:

> So the Court's analysis is you have a doctor-initiated affidavit which substitutes as the petition. We have an amended document — or excuse me, an amended order for transportation which seems a bit odd — I know that's what the statute says — since he was already at the hospital, and it's hard to transport him from the hospital to the hospital, but that's the way the statute read — or reads. This is supported by the fact that the affidavit that's been presented to the Court was signed by a Dr. Omar Adams, and the document that was signed by the magistrate which was for a first examination by a Dr. Adams. It is possible, though, that there is more than one Dr. Adams in Angel . . . but it seems to be flowing quite well as far as some logical deduction.

During the hearing, Hebert argued that the deficiencies in the record and irregularities in the proceedings merited dismissal on a number of grounds. The trial court denied Hebert's motion, and on 13 July 2017 the court entered an order

directing that Respondent be involuntarily committed for a period of ninety days. Respondent filed a timely notice of appeal.[3]

Analysis

Our General Assembly has provided a detailed and comprehensive procedure that governs the initiation of involuntary commitment proceedings. N.C. Gen. Stat. § 122C-261 provides in pertinent part, as follows:

> (a) Anyone who has knowledge of an individual who is mentally ill and . . . dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b. . . . may appear before a clerk or assistant or deputy clerk of superior court or a magistrate and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a physician or eligible psychologist . . . .
>
> (b) If the clerk or magistrate finds reasonable grounds to believe that the facts alleged in the affidavit are true and that the respondent is probably mentally ill and . . . dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b. . . . the clerk or magistrate shall issue an order to a law enforcement officer or any other person authorized under G.S. 122C-251 to take the respondent into custody for examination by a physician or eligible psychologist.
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> . . .

[3] We note that although Respondent's commitment period has expired, his appeal is not moot given the "possibility that [R]espondent's commitment in this case might . . . form the basis for a future commitment, along with other obvious collateral legal consequences[.]" *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

> (d) If the affiant is a physician or eligible psychologist, all of the following apply:
>
> > (1) The affiant may execute the affidavit before any official authorized to administer oaths. This affiant is not required to appear before the clerk or magistrate for this purpose. This affiant shall file the affidavit with the clerk or magistrate by delivering to the clerk or magistrate the original affidavit or a copy in paper form that is printed through the facsimile transmission of the affidavit. If the affidavit is filed through facsimile transmission, the affiant shall mail the original affidavit no later than five days after the facsimile transmission of the affidavit to the clerk or magistrate to be filed by the clerk or magistrate with the facsimile copy of the affidavit.
> >
> > . . .
> >
> > (4) If the physician or eligible psychologist recommends inpatient commitment and the clerk or magistrate finds probable cause to believe that the respondent meets the criteria for inpatient commitment, the clerk or magistrate shall issue an order for transportation to or custody at a 24-hour facility . . . .

N.C. Gen. Stat. § 122C-261 (2017).

N.C. Gen. Stat. § 122C-263 mandates that once a respondent is taken into custody pursuant to a custody order, the respondent must receive an initial examination by a physician or psychologist. N.C. Gen. Stat. § 122C-263(a) (2017). If the examiner finds the respondent is mentally ill and dangerous to himself or others, the examiner "shall recommend inpatient commitment." N.C. Gen. Stat. § 122C-

263(d)(2) (2017). N.C. Gen. Stat. § 122C-3 defines the phrase "[d]angerous to himself or others," in pertinent part, as follows:

> a. "Dangerous to himself" means 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; or
>
> 2. The individual has attempted suicide or threatened suicide and that there is a reasonable probability of suicide unless adequate treatment is given pursuant to this Chapter; or
>
> 3. The individual has mutilated himself or attempted to mutilate himself and that there is a reasonable probability of serious self-mutilation

> unless adequate treatment is given pursuant to this Chapter.
>
> . . .
>
> b. "Dangerous 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 . . . .

N.C. Gen. Stat. § 122C-3(11) (2017).

If such a finding is made, the respondent must be brought to a 24-hour facility. N.C. Gen. Stat. § 122C-263(d)(2). Subsequently, "[a] hearing shall be held in district court within 10 days of the day respondent is taken into custody" at which the court must "determine the necessity and appropriateness of inpatient commitment." N.C. Gen. Stat. § 122C-267(a), (d) (2017). Advance notice of this hearing must be provided to the respondent "at least 72 hours before the hearing." N.C. Gen. Stat. § 122C-264(c) (2017).

This Court has stated that "[a] commitment order is essentially a judgment by which a person is deprived of his liberty, and as a result, he is entitled to [procedural safeguards] just as he would be if he were to be deprived of liberty in a criminal context." *In re Reed*, 39 N.C. App. 227, 229, 249 S.E.2d 864, 866 (1978) (citation omitted). Based on our thorough review of the record, we believe that the procedural

safeguards provided by our statutes were not strictly followed in this case and that we must therefore vacate the trial court's order of commitment.

First, the Hollifield Petition failed to allege sufficient facts to establish reasonable grounds for the issuance of the Custody Order. We deem instructive several decisions from this Court addressing the factual sufficiency of allegations seeking to establish grounds for involuntary commitment. In *Reed*, this Court reviewed a custody order issued on the basis of a petition asserting that the respondent was "mentally ill or inebriate [and] imminently dangerous to himself or others" because "[r]espondent is believed to have been on drugs for a number of years. He is so mixed up. He is now at a place where he is dangerous to himself." *Reed*, 39 N.C. App. at 228, 249 S.E.2d at 865. We determined that the petition "satisfied neither statutory nor due process requirements, and so was insufficient to establish reasonable grounds for the issuance of a custody order." *Id.* at 229, 249 S.E.2d at 866.

Similarly, in *In re Ingram*, 74 N.C. App. 579, 328 S.E.2d 588 (1985), we considered an involuntary commitment petition where the petitioner alleged as supporting facts that the respondent had "strange behavior and [was] irrational in her thinking," and would "leave[ ] her home and no one [knew] of her whereabouts, and at times [would] spend[ ] the night away from home. [She also would] accuse[ ] her husband of improprieties." *Id.* at 581, 328 S.E.2d at 589. As in *Reed*, we

determined that the petition did not meet the statutorily required standard and vacated the order of commitment. *Id.*

In the present case, the facts alleged in the Hollifield Petition were insufficient to show that Respondent was dangerous to himself or others. First, the Hollifield Petition alleged that Respondent stated that he had "plans for Tennesse [sic]" and that he had "9 thousand dollars to pay for his tennesse [sic] plans" when in actuality Respondent had approximately three dollars in change (presumably on his person). Without additional facts, it is unclear what kind of "plans" Respondent had or how these plans could support a conclusion that he posed a danger to himself or others. Similarly, Respondent's failure to give an accurate accounting of his personal belongings does not warrant such a conclusion.

The Hollifield Petition also stated that Respondent "passively resisted officers," "[r]efus[ed] to comply with officers in regards to information" and "[g]ave officers incorrect information in regards to identity and date of birth." Such conduct likewise fails to support a finding that the Respondent was dangerous to himself or others. Thus, the facts alleged in the Hollifield Petition were insufficient to support the issuance of the Custody Order.[4]

[4] We note that the State does not attempt to argue in its brief that the Hollifield Petition alleged sufficient facts to support a finding that Respondent was a danger to himself or others.

Second, although the trial court appears to have based its 13 July 2017 order on the Adams Petition, the record contains no evidence that the Macon County magistrate who signed the Custody Order ever saw the Adams Petition. N.C. Gen. Stat. § 122C-261(d) mandates that a physician-affiant such as Dr. Adams "*shall file*" a notarized affidavit with the clerk or magistrate where the petition is being initiated. N.C. Gen. Stat. § 122C-261(d) (emphasis added). The physician may either deliver the original copy or submit a copy by facsimile so long as an original is mailed within five days to the clerk of court or the magistrate. *Id.*

Here, the Adams Petition does not bear a file stamp from Macon County. Nor is there any evidence that the Adams Petition was transferred from the Macon County Clerk of Court to the Buncombe County Clerk of Court as part of the record. *See* N.C. Gen. Stat. § 122C-269(b) (2017) (The "clerk of superior court of the county in which the [24-hour] facility is located . . . shall request transmittal of all documents pertinent to the proceedings from the clerk of superior court where the proceedings were initiated."). Indeed, nothing in the record suggests that the Adams Petition was ever seen by, or submitted to, a magistrate in Macon County. Thus, we are unable to conclude that N.C. Gen. Stat. § 122C-261(d) was satisfied.

Moreover, due process concerns are implicated by the trial court's consideration of the Adams Petition given that (1) it suddenly appeared during the 13 July 2017 hearing (without any clear recognition of the circumstances attendant

to its arrival); and (2) there is no indication that Respondent or his attorney had ever previously seen the document.[5] It is axiomatic that due process requires that an individual facing the loss of his liberty must be put on proper notice of the allegations against him. *See Mathews v. Eldridge*, 424 U.S. 319, 348, 47 L. Ed. 2d 18, 41 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and the opportunity to meet it." (citation, quotation marks, and brackets omitted)).

Conclusion

For the reasons stated above, we vacate the trial court's 13 July 2017 order.

VACATED.

Judges ELMORE and DILLON concur.

Report per Rule 30(e).

[5] Indeed, the record makes clear that both the trial court and counsel were confused as to the proper manner in which the proceedings should be resumed given the sudden arrival of the document.