[Cite as *Licking & Knox Community Mental Health & Recovery Bd. v. T.B.*, 2010-Ohio-3487.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Licking & Knox Community Mental Health & Recovery Board,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-454
	:	(Prob. No. MI 17-218)
T.B.,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 27, 2010

David A. Belinky, for appellee.

Law Office of Brian M. Garvine, LLC, and *Brian M. Garvine*, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Probate Division

TYACK, P.J.

{¶1} T.B. is appealing the Franklin County Court of Common Pleas, Probate Division's judgment entry of commitment and coinciding order authorizing forced administration of psychotropic drugs.

{¶2} Although it is arguable that the underlying facts of this case date back two decades to appellant's divorce, the immediate events that led to this proceeding occurred on or about December 20, 2009, when appellant is alleged to have violated a protection order. The Franklin County Municipal Court found appellant incompetent to stand trial for the misdemeanor protection order violation, and an Affidavit of Mental Illness was filed in the probate court. (Entry, Mar. 10, 2010, at R. 3.) (Affidavit of Mental Illness, Mar. 15, 2010, at R. 5.) The probate court ordered appellant's transfer from the county correctional center to Twin Valley Behavioral Healthcare, and set a hearing, which eventually proceeded before a probate court magistrate on April 16, 2010. The magistrate found by clear and convincing evidence that appellant was subject to court-ordered hospitalization under R.C. 5122.01(B)(2), (3), and (4). (Entry Affirming Magistrate's Decision, May 12, 2010, at R. 53.) (Hereafter "Probate Court.") The magistrate further found by clear and convincing evidence that appellant would benefit from the forced administration of psychotropic medications.[1]

{¶3} In accordance with Civ.R. 53(E), appellant filed timely objections to the magistrate's decision, and a motion to stay the forced medication order. (R. 49, 51.) On May 3, 2010, a visiting judge in the Franklin County Probate Court held a hearing on the

[1] *See Steele v. Hamilton Cty. Community Mental Health Bd.,* 90 Ohio St.3d 176, 179, 2000-Ohio-47, fn. 3. ("Psychotropic drugs are 'compounds that affect the mind, behavior, intellectual functions, perception, moods, and emotions.' ") citing Winick, The Right to Refuse Mental Health Treatment (1997) 61 ("Winick"), citing Kaplan et al., Synopsis of Psychiatry: Behavioral Sciences and Clinical Psychiatry (1994) 410.

objections, and the court entered its entry affirming the magistrate's decision on May 12, 2010. (Probate Court, at 10.) Appellant filed a timely notice of appeal with this court, and raises two assignments of error for our review. Although the issues are related, each determination must be independent of the other;[2] therefore, we will address them separately.

Standard of Review

{¶4} Both parties stipulate to the standard of review as the one set forth in the syllabus of *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279 ("Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."). This is known as the manifest-weight standard of review for verdicts in *civil* cases. See, e.g., *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶24 (referring to "a civil manifest-weight-of-the-evidence standard."). In criminal cases, the standard of review is somewhat different. See id. at ¶25 (citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52). "In *Thompkins,* the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively." *Wilson* at ¶25. Although both *C.E.*

[2] "[I]t is clear that mental illness and incompetence are not one and the same. Therefore, the state may not rely on its *parens patriae* power to justify making treatment decisions for a mentally ill person simply because that person has been involuntarily committed." *Steele v. Hamilton Cty. Community Mental Health Bd.*, at 187.

Morris Co. and *Thompkins* afford the trial court's fact determinations great deference, under the former, the reviewing court affords more deference to the trial court's findings than under the latter. Id. at ¶26.

{¶5} *C.E. Morris Co.* and *Thompkins* notwithstanding, the textbook standard of review for decisions finding a person mentally ill and subject to court-ordered hospitalization, is clear and convincing evidence. See William H. Wolff Jr., et al., Anderson's Appellate Practice & Procedure in Ohio (2006 ed.Lexis) 97 (citing *In re Mental Illness of Thomas* (1996), 108 Ohio App.3d 697, 700); see also *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74 ("Where the proof required must be clear and convincing, a reviewing court will examine the record to determine whether the trier of facts had sufficient evidence before it to satisfy the requisite degree of proof."). This heightened standard of review is consistent with, inter alia, adoption, finding of civil contempt, and termination of parental rights. See *In re Adoption of Holcomb* (1985), 18 Ohio St.3d 361, 368 (holding that the probate court's determination "should not be overturned unless it is unsupported by clear and convincing evidence."); *ConTex, Inc. v. Consolidated Techs., Inc.* (1988), 40 Ohio App.3d 94, 95 ("When appellate review of a contempt adjudication entails an inquiry into the weight of the evidence * * * the applicable standard of review turns upon * * * clear and convincing evidence[.]"); *In re William S.*, 75 Ohio St.3d 95, 1996-Ohio-182, syllabus; *In re J.W.*, 171 Ohio App.3d 248, 2007-Ohio-2007, ¶13-14, 23 (holding that before a court may sever parental rights, the State must prove its allegations

by at least clear and convincing evidence). These cases represent three examples of an individual's liberty or fundamental rights being placed in jeopardy by the courts. Such is also the situation as here, where the individual has been found mentally ill by the probate court, and involuntarily committed to a psychiatric institution. See *State v. Williams* _____ Ohio St.3d _____, 2010-Ohio-2453, ¶51 (slip opinion) ("A civil commitment for any purpose is a significant deprivation of liberty and due-process protections must be afforded to a person facing involuntary commitment."); *Addington v. Texas* (1979), 441 U.S. 418, 425, 99 S.Ct. 1804; accord *In re Mental Illness of Thomas* at 705 ("The test balances the individual's right against involuntary confinement in deprivation of his liberty, and the state's interest in committing the emotionally disturbed.").

{¶6} We do not simply cast aside the manifest weight standard of review altogether, because even though the Supreme Court of Ohio applies the clear and convincing standard in cases such as involuntary commitment, the court did not disregard *C.E. Morris Co.* entirely in reaching those decisions. See, e.g., *Scheibel* at 74–75 ("An appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the [trial court's] findings."); see also *In re Mental Illness of Thomas* at 700 ("The [*C.E. Morris Co.*] standard applies when evaluating whether a judgment in a civil case is against the manifest weight of the evidence."); *In re Mowen*, 12th Dist. No. CA2005-05-040, 2006-Ohio-344, ¶31 (citing *C.E. Morris Co.*).

{¶7} We also note that the Supreme Court of Ohio has recently held that sexual predator classifications—though written into the penal chapter of the Revised Code are civil in nature, and therefore are afforded the *C.E. Morris Co.* standard of review. *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, syllabus; cf. *State v. Eppinger,* 91 Ohio St.3d 158, 163, 2001-Ohio-247 ("[I]n order for the offender to be designated a sexual predator, the state must prove by clear and convincing evidence that the offender has been convicted of a sexually oriented offense *and* that the offender is likely to engage in the future in one or more sexually oriented offenses.") (Emphasis sic.); *State v. Cook* (1998), 83 Ohio St.3d 404, 408 ("The conclusion by the trial court that an offender is a sexual predator must be supported by clear and convincing evidence.") (Citing R.C. 950.09(B)(3).)

{¶8} There is no dispute that involuntary commitments are civil in nature. The only question is whether the standard of review is governed by the clear and convincing standard, as in *Scheibel* and *In re Mental Illness of Thomas*, supra, or whether we must affirm the probate court's judgment if there is competent, credible evidence to support it, as in *C.E. Morris Co.*

> [FIRST ASSIGNMENT OF ERROR]:
>
> THE TRIAL COURT'S DECISION FINDING APPELLANT TO BE A MENTALLY ILL PERSON SUBJECT TO HOSPITALIZATION BY COURT ORDER WAS NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE[,]

> AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶9} The law governing civil commitment and the disposition of persons alleged to be mentally ill is statutory, and is principally set forth in Revised Code Chapter 5122. See, e.g., *State v. Johnson* (1987), 32 Ohio St.3d 109, 110 citing *Sheffel v. Sulikowski* (1980), 62 Ohio St.2d 128, 129–30 overruled by *Youngs v. Rogers* (1981), 65 Ohio St.2d 27, 29 fn.1 (holding that the habeas corpus is not available for involuntary commitment proceedings, because of the availability of other civil remedies).

{¶10} In Ohio, the term "mental illness" means "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life." R.C. 5122.01(A). Because this definition is statutory, a person may be adjudicated as mentally ill regardless of whether their condition meets the clinical definition of mental illness. *State v. Sullivan*, 90 Ohio St.3d 502, 510, 2001-Ohio-6. If the court finds that an individual meets the definition of mental illness, the court may order involuntary hospitalization if the individual:

> (1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm;
>
> (2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place

> another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness;
>
> (3) Represents a substantial and immediate risk of serious physical impairment or injury to self as manifested by evidence that the person is unable to provide for and is not providing for the person's basic physical needs because of the person's mental illness and that appropriate provision for those needs cannot be made immediately available in the community; or
>
> (4) Would benefit from treatment in a hospital for the person's mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or the person.

R.C. 5122.01(B).

{¶11} Beyond the statutory criteria, we look to case law for examples of types of conduct that justify (or do not justify) court-ordered hospitalization. See, e.g., *Franklin Cty. ADAMH Bd. v. D.F.*, 10th Dist. No. 06AP-609, 2006-Ohio-4786, ¶9-10 (affirming court-ordered hospitalization of an individual suffering from a delusional disorder that grossly impaired her judgment, such that she could not meet her basic needs); cf. *In re Slabaugh* (1984), 16 Ohio App.3d 255, 257 (finding conduct that is merely "bothersome or annoying" insufficient to order involuntary hospitalization); but see *In re Mental Illness of Thomas* at 700-02 (finding that evidence of paranoia and eccentric behavior combined with a dysfunctional family was sufficient to order hospitalization). This test is one of the totality of the circumstances and although a court makes the final decision as to whether to order involuntary hospitalization, the determination is more of a medical question,

rather than judicial one. *In re Burton* (1984), 11 Ohio St.3d 147, 149-50; *Steele v. Hamilton Cty. Community Mental Health Bd.,* 90 Ohio St. 176, 2000-Ohio-47 at 176, paragraph one of the syllabus.

{¶12} In this case, the principal piece of evidence was the testimony of John Morcos, M.D., the court-appointed psychiatrist who was formerly employed as a treating physician at Twin Valley, where appellant was being treated. Appellant stipulated to Dr. Morcos' credentials. (Tr. 6.) Dr. Morcos opined that appellant suffers from a schizoaffective disorder, and thought/mood disorders, which grossly impair his judgment and behavior. (Tr. 10.) Dr. Morcos further opined that appellant's illness(es) impair his ability to recognize reality, and meet the ordinary demands of day-to-day life. (Tr. 11.)

{¶13} Appellant cites Dr. Morcos' testimony as "rigid," and implies that it is therefore unreliable. (Appellant's brief, at 8.) "Even when presented with [a] logical sequence of events indicating [that] Appellant would not have been in jail * * * [and] would not have been transferred to the [psychiatric hospital], Dr. Morcos indicated [that] his opinion still would have remained the same[.]" Id. This, however, does not support an inference that Dr. Morcos' testimony was unreliable; in fact, it is equally plausible to infer that appellant's mental illness was so severe that the alleged criminal activity was irrelevant. After all, the statutory requirements for court-ordered hospitalization are in no way dependent on the individual's culpability in connection with the commission of a crime. Although criminal activity can be a basis for satisfying some of the criteria in R.C.

5122.01(B), criminal activity is not a prerequisite. Furthermore, Dr. Morcos opined that appellant is a danger to himself because of his inability to make good judgments regarding his own medical condition, treatment, and mental state. (Probate Court, at 5.)

{¶14} Appellant argues that the probate court nearly entirely disregarded the expert testimony of Louis B. Hoyer, Ph.D., whom the court appointed at appellant's request, to render an independent clinical opinion. (Appellant's brief, at 8.) "[T]he Probate Court found Dr. Morcos' testimony 'most convincing' despite the fact that, consistent with Dr. Hoyer's opinion, Appellant has never harmed himself." Id. Appellant's argument lacks merit, however, because just as the statute does not require criminal activity, neither is actual harm a requirement. Furthermore, it is the probate court's function—and prerogative—to evaluate the credibility of the witnesses, which includes the opinions of any experts. See generally *Bruce v. Junghun*, 182 Ohio App.3d 341, 2009-Ohio-2151, ¶17-19 ("Absent an abuse of discretion and material prejudice to appellant, an appellate court will not disturb a trial court's ruling as to the admissibility of evidence, including expert scientific evidence."); see also *General Elec. Co. v. Joiner* (1997), 522 U.S. 136, 141-42, 118 S.Ct. 512 ("[U]nder the Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.") (Citing *Daubert v. Merrell Dow Pharm., Inc.* (1993), 509 U.S. 579, 588, 113 S.Ct. 2786.)

{¶15} The probate court stated the following with regard to the two opposing medical opinions:

> * * * Dr. Morcos stated that he feels [T.B.] represents a harm to himself because of his inability to make good judgments regarding his medical condition, medical treatment, and his mental state. Dr. Hoyer stated that he does not believe [T.B.] to represent a harm to himself. Instead, Dr. Hoyer testified that [T.B] is capable of taking care of his basic physical needs if released from the hospital. After considering all testimony, the magistrate found that [T.B.] continued to lack insight in to his mental illness[,] which prevented [him] from being able to obtain satisfactory care anywhere other than the hospital. The court finds Dr. Morcos [sic] testimony most convincing[,] and that such finding by the magistrate is consistent with [T.B.]'s history of mental illness and recent disregard of a protective order. * * *

(Probate Court, 5-6 (citing Tr. 12, 29 & 30).)

{¶16} It appears, thus, from the probate court's decision that the court did consider both expert opinions, but that the court was more persuaded by the opinion of Dr. Morcos. This is the trial court's determination, and not that of the appellate court. If it appeared from the record that the trial court abused its discretion in arriving at this conclusion, only then could we revisit that. The probate court's decision appears sound and credible, and therefore we will not disturb it.

{¶17} In essence, this first assignment of error is challenging the probate court's decision to rely on Dr. Morcos' opinion over that of Dr. Hoyer, which obviates any need to distinguish between the seemingly conflicting standards of review we discussed above.

Nonetheless, even if we were to apply the most stringent of the standards discussed, based on our review of the transcript and expert testimony, there is clear and convincing evidence to support the probate court's decision that appellant is mentally ill within the meaning of R.C. 5122.01, and therefore subject to court-ordered hospitalization. Accordingly, we overrule the first assignment of error.

> [SECOND ASSIGNMENT OF ERROR]:
>
> THE TRIAL COURT'S DECISION TO FORCIBLY MEDICATE APPELLANT WAS NOT SUPPORTED BY COMPETENT, CREDIBLE EVIDENCE[,] AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶18} Although the evidence and standard of review for the second assigned error is essentially the same as that used for the first assigned error, the question of whether to compel the administration of psychotropic drugs upon a patient should be considered separately from the court's determination of whether the individual is mentally ill. See generally *In re Milton* (1987), 29 Ohio St.3d 20, 22 ("Commitments to a mental institution and adjudications of incompetency are distinct legal proceedings[,] which determine separate issues and often lead to different results."). This is because individuals who are admitted to mental hospitals "retain all civil rights not specifically denied by statutes[,] or removed by separate adjudications of incompetency." Id. at 23 (citing R.C. 5122.301).

{¶19} The Supreme Court of Ohio recognizes an Ohioian's fundamental right to refuse medical treatment on the basis that "personal security, bodily integrity, and

autonomy are cherished liberties." *Steele* at 180. "These liberties were not created by statute or case law. Rather, they are rights inherent in every individual." Id. at 180-81 (citing Section 1, Article I, Ohio Constitution). The court has further held that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." Id. at 181 (quoting *Schloendorff v. Soc. of N.Y. Hosp.* (1914), 105 N.E. 92, 93). And the principle is furthered by Ohio's recognition of the tort of lack of informed consent. See, e.g., *Nickell v. Gonzalez* (1985), 17 Ohio St.3d 136, syllabus (setting forth the test for establishing the tort of lack of informed consent); *Milton*, paragraph two of the syllabus (holding that the "state may not compel a legally competent adult to submit to medical treatment which would violate that individual's religious beliefs even though the treatment is arguable life-extending."). However, the right to refuse medication or medical treatment is not absolute, "and it must yield when outweighed by a compelling governmental interest." *Steele* at 181 (citing *Cruzan v. Dir., Mo. Dept. of Health* (1990), 497 U.S. 261, 278-79, 110 S.Ct. 2841; *State v. Williams*, 88 Ohio St.3d 513, 523, 2000-Ohio-428.

{¶20} The first step in a court's analysis of whether to order forced administration of psychotropic drugs is to weigh the competing interests—the State's interest in compelling treatment, versus the individual's interest in avoiding forced medication. *Steele*, supra. This is because an individual's interest in declining treatment with psychotropic drugs is significant, taking into consideration the physical intrusion (e.g., with

a needle, injection, intravenous tube, etc.), and also the effect and side effects these drugs have on the human body. See id. (citing *Washington v. Harper* (1990), 494 U.S. 210, 221, 229, 110 S.Ct. 1028; *Riggins v. Nevada* (1992), 504 U.S. 127, 134, 112 S.Ct. 1810). Antipsychotic drugs, in particular (one of which is at issue in this case), alter the chemical balance in a patient's brain, producing changes in cognitive processes. *Steele* (citing *Riggins* at 134); *Harper* at 229; Winick at 61-65. Some of the side effects accompanying antipsychotic drugs can be severe. *Steele* (citations omitted).

{¶21} Prolixin (fluphenazine) and perphenazine, for example—two of the antipsychotics prescribed for appellant—are known to cause side effects such as Parkinson's Disease, pseudoparkinsonixm, akathisia (restlessness), and other tremors, cerebral palsy, tardive dyskinesia (involuntary, irregular muscular movements, primarily in facial muscles), and other muscular irregularities such as dystonia (neck spasms), and oculogyric crises (tongue and jaw spasms). Some of these conditions can be lasting, if not permanent. See id.

{¶22} Fluphenazine is also associated with causing neuroleptic malignant syndrome (NMS), a potentially-fatal neurological disorder, which is difficult to diagnose, and becomes deadlier the longer it goes undetected. See *Steele* at 183, citing Winick at 74, *Harper* at 230; see also N.R Schooler & J. Levine, The Initiation of Long-Term Pharmacotherapy in Schizophrenia: Dosage and Side Effect Comparisons Between Oral and Depot Fluphenazine (1976), Pharmakopsych., at *159-69; Medpedia, Clinical:Prolixin

decanoate (Fluphenazine Decanoate) at http://wiki.medpedia.com/Clinical:Prolixin decanoate%28FluphenazineDecanoate%29 (last visited July 8, 2010).

{¶23} These known risks notwithstanding, the Supreme Court of Ohio has held that a court may authorize the forced administration of *antipsychotic*[3] drugs to an involuntarily committed mentally ill person if it finds, by clear and convincing evidence that: (1) the patient lacks the capacity to give or withhold informed consent regarding treatment; (2) it is in the patient's best interest to take the medication, i.e., the benefits of the medication outweigh the side effects; and that (3) forced administration of drugs is the least intrusive means of effective treatment.

{¶24} In this case, Dr. Morcos and Mary McCafferty, M.D., appellant's treating physician at Twin Valley, both testified that appellant lacked the mental capacity to give or withhold informed consent regarding his treatment. (Probate Court, at 7.) Dr. Hoyer testified that appellant does have the requisite capacity, but also stated that because of his delusions, appellant's insight as to his own mental condition is limited. (See id. at 8, citing Tr. 74-75.) All three doctors opined that the medications could be beneficial to appellant, and Drs. Morcos and McCafferty went on to state that the taking of the

[3] Although the *Steele* court chose the specific (antipsychotic) class of psychotropic medications, the court generally uses the two terms interchangeably, and does not draw a clear distinction that would justify a strict interpretation of the language in paragraph three of the syllabus. See, e.g., *Steele* at 188 ("[W]e took into consideration not only the potential severe side effects of antipsychotic drugs, but also the well-documented therapeutic benefits of antipsychotic medication. " 'Psychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia.' "). (Internal quotation marks omitted.) (Citation omitted.)

medications was in appellant's best interest. (Probate Court, at 8.) The trial court noted that the magistrate considered appellant's past use of the psychotropic medications, and their effectiveness, and then determined that the benefits of ordering their administration outweighed the risks. Id. Finally, Drs. Morcos and McCafferty testified that forced administration of the drugs was the least restrictive means of effectively treating appellant. Id. at 8-9. Dr. Hoyer disagreed. (Id. at 9, citing Tr. 77.) The probate court, thus, made its determination based on the testimony of two qualified physicians who were familiar with appellant, and his condition; moreover, Dr. Hoyer's testimony, although different from Drs. Morcos and McCafferty, was not directly contradictory.

{¶25} Again, we need not decide whether to apply the *C.E. Morris Co.* standard of review or the more stringent clear and convincing standard, because the evidence here sufficiently meets the more stringent standard. After thoroughly reviewing the transcript and clinical opinions of the three professionals called to opine on the issue of whether appellant should be forcibly medicated, we find that there is clear and convincing evidence to support the trial court's order. We therefore overrule the second assignment of error.

{¶26} Having overruled both assignments of error, we affirm the judgment and order entered by the Franklin County Court of Common Pleas, Probate Division.

Judgment affirmed.

CONNOR, J., concurs.
BRYANT, J., concurs separately.

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BRYANT, J., concurring separately.

{¶27} On appeal, we are to examine the record to determine whether clear and convincing competent, credible evidence supports the probate court's determination that appellant be involuntarily hospitalized and involuntarily medicated. Because clear and convincing competent, credible evidence in the testimony of John Morcos, M.D., supports the probate court's judgment in both respects, I concur in the majority's conclusion that the judgment of the probate court be affirmed.

{¶28} Indeed, appellant does not suggest Dr. Morcos' testimony, if believed, fails to support the judgment of the probate court. Rather, appellant contends the probate court should have found the testimony of his expert witness more persuasive. Because we cannot substitute our judgment for that of the trial court in assessing credibility, I, too, would affirm the judgment of the trial court.

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