

Opinion issued December 31, 2008



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-08-00371-CV  
NO. 01-08-00372-CV

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**K.E.W.**

**V.**

**THE STATE OF TEXAS**

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**On Appeal from the Probate Court of  
Galveston County, Texas  
Trial Court Cause Nos. 3318 & 3318A**

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**DISSENTING OPINION**

I respectfully dissent. In these two accelerated appeals, the majority reverses

the judgment of the trial court ordering temporary inpatient mental health services and the trial court's order to administer psychoactive medications to appellant, K.E.W., a paranoid schizophrenic. I believe the State fully satisfied the statutory criteria for proving from clear and convincing evidence that at the time of his involuntary commitment, appellant was mentally ill and, as a result, was likely to cause serious harm to others, was suffering severe and abnormal mental and emotional distress, and was unable to make a rational informed decision as to whether or not to submit to treatment, and, therefore, should be involuntarily committed to inpatient psychiatric services.<sup>1</sup> My dissent is broader than this one case, however.

The majority opinion carries forward a recently developed line of cases in this Court that, in my view, misconstrues the "clear and convincing" standard of proof of involuntary psychiatric commitment, set out in section 574.034 of the Texas Health and Safety Code, in contravention of the purpose and plain language of the statute, raising the standard so high that a commitment order cannot survive a legal or factual sufficiency challenge in this Court. The result is the routine overturning of the involuntary commitments of mentally ill patients who present immediate threats to their own health and welfare and the safety of the community and the generation of a direct conflict with our sister court, the Fourteenth Court of Appeals, demonstrating

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<sup>1</sup> See TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 2003).

the arbitrary and capricious application of the statute. I would affirm both the judgment of the trial court ordering temporary inpatient mental health services and the order to administer psychoactive medications to appellant, rather than reversing both.

### **Analysis**

Section 574.034 of the Texas Health and Safety Code, governing orders for temporary mental health services, provides as follows for involuntary commitment to inpatient mental health services:

- (a) The judge may order a proposed patient to receive court-ordered temporary inpatient mental health services only if the judge or jury finds, from clear and convincing evidence, that
  - (1) the proposed patient is mentally ill; and
  - (2) as a result of that mental illness, the proposed patient:
    - (A) is likely to cause serious harm to himself;
    - (B) is likely to cause serious harm to others; or
    - (C) is:
      - (i) suffering severe and abnormal mental, emotional, or physical distress;
      - (ii) experiencing substantial deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for

reasons of indigence, to provide for the proposed patient's basic needs, including food, clothing, health, or safety; and

- (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

.....

(c) If the judge or jury finds that the proposed patient meets the commitment criteria prescribed by Subsection (a), the judge or jury must specify which criterion listed in Subsection (a)(2) forms the basis for the decision.

(d) *To be clear and convincing under subsection (a), the evidence must include expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm:*

(1) *the likelihood of serious harm to the proposed patient or others; or*

(2) *the proposed patient's distress and the deterioration of the proposed patient's ability to function.*

.....

(f) The proposed patient and the proposed patient's attorney, by a written document filed with the court, may waive the right to cross-examine witnesses, and, if that right is waived, the court may admit, as evidence, the certificates of medical examination for mental illness. The certificates admitted under this subsection constitute competent medical or psychiatric testimony, and the court may make its findings solely from the certificates. If the proposed patient and the proposed patient's attorney do not waive in writing the right to cross-examine witnesses, the court shall

proceed to hear testimony. The testimony must include competent medical or psychiatric testimony. In addition, the court may consider the testimony of a non-physician mental health professional as provided by Section 574.031(f).

.....

TEX. HEALTH & SAFETY CODE ANN. § 574.034 (Vernon 2003) (emphasis added).

In construing the “clear and convincing” standard of review set out in subsection 574.034(d), the majority opinion states:

[A]n expert opinion recommending involuntary commitment must be supported by the showing of the factual bases on which it is grounded and not simply recite the statutory criteria. *Id.*; *K.T. v. State*, 68 S.W.3d 887, 893 (Tex. App.—Houston [1st Dist.] 2002, no pet.). *Thus the expert should describe the specific behaviors of the proposed patient on which the expert’s opinion is based. See In re K.D.C.*, 78 S.W.3d 543, 550 (Tex. App.—Amarillo 2002, no pet.). It is also well established that *evidence that merely reflects that a person is mentally ill and in need of hospitalization is no evidence that the statutory standard for involuntary commitment has been met and will not suffice to support the statutory requirement for an overt act or continuing pattern of behavior. See J.M.*, 178 S.W.3d at 194–96; *G.H. v. State*, 96 S.W.3d 629, 634 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *K.T.*, 68 S.W.2d at 892; *Johnstone*, 961 S.W.2d at 388–90.

*K.E.W. v. State*, Nos. 01-08-00371-CV & 01-08-00372-CV, slip. op. at 12–13 (Tex. App.—Houston [1st Dist.] Dec. 31, 2009, no pet. h.) (emphasis added); *see also M.S. v. State*, 137 S.W.3d 131, 135 (Tex. App.—Houston [1st Dist.] 2004, no pet.).

I acknowledge that cases upon which the majority relies do count expert testimony that “merely reflects that a person is mentally ill and in need of

hospitalization” as “no evidence” or insufficient evidence to justify involuntary commitment. The majority’s error, however, is to misconstrue expert and fact witness testimony that “describe[s] the specific behaviors of the proposed patient,” his “recent overt act[s],” and “a continuing pattern of behavior that tends to confirm: either (1) the likelihood of serious harm to the proposed patient or others; or (2) the proposed patient’s distress and the deterioration of the proposed patient’s ability to function” as “merely” evidence that “a person is mentally ill and in need of hospitalization” and, therefore, as *no evidence* satisfying the standard of proof for involuntary commitment. On this interpretation of the evidentiary requirement, *nothing* can satisfy the “clear and convincing evidence” standard of proof required for involuntary commitment under section 574.034(d).

By its plain language, subsection 574.034(d) requires “clear and convincing . . . expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm: either (1) the likelihood of serious harm to the proposed patient or others; or (2) the proposed patient’s distress and the deterioration of the proposed patient’s ability to function.” TEX. HEALTH & SAFETY CODE ANN. § 574.034(d). It thus plainly seeks to assure that a person is not deprived of his liberty and committed to involuntary medical care *unless* he has been evaluated by a medical expert and has not merely been shown by a description of his overt acts

or pattern of behavior to satisfy a clinical standard of a mentally ill person but has demonstrated that his confinement and treatment are necessary for his own safety or that of others or for his well-being because of his demonstrated dangerousness or distress and inability to function. It is absurd to read the statute as stating that the expert testimony of a proposed patient's treating physician of recent overt acts (including statements and agitated behavior) demonstrating the proposed patient's danger to others and a pattern of behavior that tends to confirm the patient's distress and inability to function are *no evidence* under the statute *because* they come from experts who have recently observed and treated the proposed patient and who are trained to recognize the indicia of dangerousness and dysfunction caused by mental illness.

What the majority has actually done, by reading the statute and prior case law in this way, is to substitute its own unsupported lay conclusions as to the dangerousness of K.E.W. and his ability to function for the inferences that can reasonably be drawn from the record. That is, the majority simply disregards as irrelevant or "insufficient" the testimony of the personnel who witnessed appellant's search for his step-daughter at the MHMR and the opinions of K.E.W.'s doctors based on treatment sessions with K.E.W., and, relying on nothing at all but its interpretation of the requirements of past case law, the majority concludes that at the

time of the commitment hearing K.E.W. was not shown to be dangerous to others or distressed and unable to function. Not a scintilla of evidence from the record supports the majority's conclusion that K.E.W. was not shown to be dangerous or distressed and unable to function. Indeed, the record contradicts the majority's conclusion.

Michael Fields, an employee of the Gulf Coast Center MHMR where appellant was searching for his stepdaughter, testified at the commitment hearing that he was present when K.E.W. came into the Center on the day of the incident. When asked to "describe what behaviors you saw him engage in," he testified:

[Mr. Fields]: He was—he appeared to be extremely paranoid. He was difficult to redirect. I noticed a lot of pacing on his part. He was also asking numerous times for a certain female staff that worked there, and we ended up having to place her in the back behind a closed door until we were able to have [K.E.W.] escorted off by the mental health deputies. . . .

. . . .

[The State]: As a result of those behaviors you had to call the police?

[Mr. Fields]: Yes, the police were called out and at one point they had to place him in the back of the vehicle because, again, he was uncooperative. And I am assuming that was probably for his safety as well as others.

The following testimony by Dr. Michael Stone, one of K.E.W.'s treating



psychiatrists, is likewise illustrative of the evidence the majority finds to be “*no evidence*” of “a recent overt act or a continuing pattern of behavior” tending to show either “the likelihood of serious harm” by appellant to himself or others or appellant’s “distress and the deterioration of [his] ability to function.” See TEX. HEALTH & SAFETY CODE ANN. § 574.034(d). Dr. Stone testified that he psychiatrically evaluated K.E.W. when he was involuntarily committed and that K.E.W. suffered from schizophrenia. When asked on cross-examination whether he could give an example of “either his behaviors or what he said directly to you” that led him to the opinion K.E.W. was a danger to others, Dr. Stone testified:

[Dr. Stone]: Yes. He has said to me on several occasions in talking to him that he believes that there are a flock or group of women, including his step-daughter, who he is—who he needs to find and impregnate. He needs to find these women and impregnate them. He said he needs to marry his step-daughter and impregnate her, as well.

.....

[The State]: Any other behaviors that alerted you or makes you believe that he could be a harm to others?

[Dr. Stone]: One of the reasons he was brought here in the MHMR appointment on the day he was admitted here he was meeting with Doctor Pugh and Doctor Pugh, he was very threatening to the point Doctor Pugh felt he needed to be admitted here immediately.

....

[The State]: Because of his delusions is the delusion such he could harm others?

[Dr. Stone]: Yes. He has a very firm belie[f] that there are these women he needs to track down and impregnate. That he feels very strongly about this. This is either a mission he needs to be on or in some ways compelled to do this. But there are women he needs to track down and impregnate them. I am concerned in his delusional state, because he is very delusional, that he will act on this. He has been out of the State hospital for a relatively brief period of time and my concern is with these delusions active still that he is very likely to act on them. I am very concerned if he were to find a female that he believed was promised him that he would then try to impregnate her.

Dr. Stone also testified to K.E.W.'s inability to function independently:

[K.E.W.]: You said he was not capable of functioning independently and you didn't give details why it was you said that.

[Dr. Stone]: It's because I believe that he, first of all, does not believe he has a mental illness does not understand he has a mental illness; that he is very set on continuing to work on what he feels are the needs to find these people and have his flock of women and impregnate them. He is very concerned with his delusions. I don't think he can function outside a hospital setting at this time.

Dr. Stone also testified to his belief that women in general in the society would be at risk if K.E.W. were not treated. He testified,

In fact on the unit we're very careful when female medical staff go to talk to him to keep the door open. Not because he is homicidal, but in his confused belief he could believe a woman is there and someone promised to him that does want to be impregnated.

In addition, Dr. Waleska Ortiz, another of K.E.W.'s treating psychiatrists, testified that he had seen K.E.W. daily during the week preceding the hearing. When asked to testify what he had seen in general, he replied:

[Dr. Ortiz]: With him in general there was the particular concern regarding the women, and I wanted to know more about his particular beliefs regarding that. And what I noticed is that he would become very agitated regarding the belief of the women. For instance, when he was in the emergency room he experienced—I say “experienced” because it's unclear if he heard it or just information that was provided to him, but he experienced the knowledge that some of the women that he was seeking were actually in the emergency room and that he had just missed them and that certain staff members in the emergency room had that information about where their whereabouts were and they were withholding that information from him and that it was some sort of conspiracy to keep those women. So he was very upset because he had just missed them.

[The State]: How did he act when he was upset?

[Dr. Ortiz]: I wasn't present in the emergency room but according to the clinical record he became very agitated.

.....

[The State]: His behavior was of agitation?

[Dr. Ortiz]: Yes.

[The State]: Did you see the same type of agitation on the unit when you met with him personally?

[Dr. Ortiz]: Not to the degree that was described in the medical record, and I say that because of the emergency room setting he required PRN medications at that time. In the times where I personally interacted with him he became agitated in that his body status was very tense. He was very intrusive. He invaded my space on several occasions because it was very important to him to stress that he needed to leave from here. And there were also additional times where he had an experience where he heard or experienced that I knew where the women were located. And when I continually denied that, I knew then he was convinced that I was able to access these special agents that would have the key that would take him to the portal where some of the women were particularly located at.

[The State]: How did he convey that to you?

[Dr. Ortiz]: He told me.

.....

[The State]: You wrote a narrative, you have memorialized as of April 21 some findings and some recommendations. Do you recall writing a narrative?

[Dr. Ortiz]: Yes.

[The State]: In that narrative you indicated on the second page,

“The potential dangerousness of this behavior is concerning to the treatment team.” What behavior did you think was a potential danger?

[Dr. Ortiz]:

The two behaviors were, one, the women themselves. They are actually on his person because some of the papers I have on the chart were from papers he himself wanted me to share with the Court. And so I made copies of that for the record which has several of the names of the women he is searching for. One of them is his step-daughter. He has a picture of her in her person and he showed them. I saw pictures of the step-daughter when she was age four or five and I have also seen her as an adult.

Those are one of the women that he was searching for. I don't know—my concern with those specific women, I don't know if the sexual interaction that would occur if he were to find them would be consensual or not. And because he has very intrusive I don't know he would understand no means no, given his state of mind at the time.

The other concern that I had was related to his misperception regardless how he got that information, whether he heard it from brain waves or—because he has these special abilities, from what he tells me. I don't know if he perceives or misperceives certain information he can get very angry and agitated.

The unit is a very organized and safe setting so a lot of things that could have happened in the external world haven't happened because of that order. My concern is if he is in another situation given another stimulus, perhaps something would happen, and I

wasn't convinced it wouldn't. That's what was concerning.

I cannot disregard either such eyewitness testimony or such expert testimony by appellant's attending psychiatrists as *no evidence*, or legally insufficient evidence, of either the likelihood of appellant's causing serious harm to others *or* appellant's "distress and the deterioration of [his] ability to function." I think it is clear and convincing evidence of both, and I do not think section 574.034(d) permits a court to disregard such evidence. I believe the quoted testimony by Drs. Stone and Ortiz, appellant's treating psychiatrists, even without the other evidence set out in the majority opinion, is sufficient to establish a firm conviction that appellant at the time of his involuntary commitment both committed overt acts and showed a continuing pattern of behavior that tended to confirm both his likelihood of causing serious harm to others and his distress and the deterioration of his ability to function. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034(d).

In addition, I would point out that section 574.034(f) provides that, if the proposed patient and his attorney file a waiver of the right to cross-examine witnesses, certificates of medical examination for mental illness "constitute competent medical or psychiatric testimony, and the court may make its findings *solely* from the certificates." TEX. HEALTH & SAFETY CODE ANN. § 574.034(f)

(emphasis added). Alternatively, if, as here, the proposed patient does not waive the right to cross-examine witnesses, “[t]he testimony *must* include competent medical or psychiatric testimony” and, additionally, “the court *may* consider the testimony of a nonphysician mental health professional.” *Id.* (emphasis added).

I find it impossible to reconcile the mandate of section 574.034(f) that expert medical testimony is both necessary and sufficient to sustain an order of involuntary commitment when there is no live testimony, and necessary when there is, with the majority’s construction of section 574.034(d) and its conclusion that expert testimony from treating physicians regarding the proposed patient’s mental illness is simply irrelevant or legally insufficient to prove his tendency to harm himself or others or his inability to function due to mental illness.

In addition, I note that in *G.H. v. State*, a case upon which the majority relies in this case, this Court acknowledged a split in the courts of appeals on the interpretation of the “clear and convincing” standard of proof in section 574.034. *G.H. v. State*, 96 S.W.3d 629, 635 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The panel in that case refused to follow our sister court *even with respect to the same patient*, stating:

In reaching our holding, we note the recent decision from our sister court affirming a prior temporary commitment order concerning appellant. *See In re G.H.*, 94 S.W.3d 115 (Tex. App.—Houston [14th

Dist.] 2002, no pet.). In its majority opinion, the court of appeals concluded, based on testimony concerning appellant's delusional behavior and her refusal to take prescribed medications, that the evidence was legally and factually sufficient to support the trial court's decision to temporarily commit appellant. *Id.* at 116–17. Because the majority opinion in that case does not follow the reasoning of *K.T.* or of the cases cited therein, which hold that mere evidence of a patient's mental illness and refusal to take medication is not sufficient to sustain the State's statutory burden, we disagree with the analysis applied by the majority opinion of that court. *See K.T.*, 68 S.W.3d at 892.

*Id.*

I have been unable to find a single recent case from this Court affirming an involuntary commitment order. Thus, I infer that the standard of review established by this Court for involuntary commitment of a mental patient is not only contrary to the plain language of the statute, out of harmony with its other provisions and purpose, and in conflict with our sister court's construction of the same standard, but so high that no commitment order can survive a legal or factual sufficiency of the evidence challenge made in this Court. If so, the Court's criterion for "clear and convincing" evidence of behavior satisfying the requirements of the statute vitiates the statute. I also note that the fact that a sister court has reached an opposite conclusion with respect to the *same* patient under the *same* statute indicates that commitment under the statute has become arbitrary—a matter of which appellate court receives the case and what evidence of mental illness it will recognize as



tending to confirm that a prospective patient presents a likelihood of harm to himself or others or exhibits distress and the deterioration of his ability to function.

I would hold that, under a plain language reading of section 574.034, evidence of appellant's overt acts leading to his hospitalization, testified to by two members of the staff of the Center, and of his ongoing pattern of threatening and distressed and dysfunctional psychotic behavior, on which the expert opinions of Drs. Stone and Ortiz were based, plainly satisfies the "clear and convincing" standard of review of evidence tending to establish the likelihood of serious harm being caused by the proposed patient or the proposed patient's distress and the deterioration of his ability to function. *See K.T.*, 68 S.W.3d at 890 ("The clear and convincing standard is the degree of proof that will produce in the mind of the trier of fact 'a firm belief or conviction' as to the truth of the allegations sought to be proved.").

## **Conclusion**

I would affirm the judgment of the trial court ordering temporary inpatient mental health services and the order to administer psychoactive medications.

Evelyn V. Keyes  
Justice

Panel consists of Justices Taft, Keyes, and Alcalá.

Justice Keyes, dissenting.

Publish.