Opinion issued October 19, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00161-CV
NO. 01-17-00163-CV

C.S., Appellant

V.

STATE OF TEXAS, Appellee

On Appeal from the Probate Court
Galveston County, Texas
Trial Court Case Nos. MH-4661-A, MH-4661

MEMORANDUM OPINION

In two appeals, C.S. challenges orders temporarily committing him for inpatient mental health services (01-17-00163-CV) and authorizing the administration of psychoactive medication during his commitment (01-17-00163-CV). He suggests the invalidity of his written waiver of various rights, including

the right to require the State to meet its legal burden through evidence of an overt act or a continuing pattern of behavior.[1] He further contends that without such evidence, the evidence adduced was legally and factually insufficient to support the orders.

We conclude that C.S. has not presented a record or legal argument that justifies disregarding the effect of his written waiver admitted into evidence at trial. Accordingly, we affirm.

Background

C.S. is a 69-year-old man with a long history of mental-health and substance-abuse issues. His psychiatric history includes diagnoses of schizoaffective disorder, bipolar type; multiple suicide attempts; and noncompliance with treatment regimens. He has a history of inpatient treatment at Austin State Hospital for chronic suicidal and self-injurious behavior, as well as outpatient treatment by the Gulf Coast Mental Health and Mental Retardation Center. Multiple psychoactive medications have been prescribed to him. During the year prior to the filing of the applications at issue in these appeals, C.S. was admitted to Mainland Medical Center for inpatient psychiatric care eight times.

One day after being discharged from Mainland to a residential treatment center in early February 2017, C.S. informed his caseworker that he was suicidal

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[1] *See* TEX. HEALTH & SAFETY CODE § 574.034(d).

and planned to take his life by walking into traffic. A sheriff's deputy brought him back to Mainland, where he was readmitted for a psychiatric evaluation. C.S. told the sheriff's deputy that he intended to end his life by cutting his wrists, and he told a physician that he intended to overdose on cocaine.

The State filed an application for court-ordered temporary inpatient mental health services to administer psychoactive medication. Section 574.034 of the Texas Health and Safety Code is entitled "Order for Temporary Mental Health Services" and provides, in relevant part:

> (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:
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> (1) the proposed patient is mentally ill; and
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> (2) as a result of that mental illness the proposed patient:
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> (A) is likely to cause serious harm to himself;
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> (B) is likely to cause serious harm to others; or
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> (C) is:
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> (i) suffering severe and abnormal mental, emotional, or physical distress;
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> (ii) experiencing substantial mental or physical 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
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> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.
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> . . . .

> (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.
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> (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.
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> . . . .

The trial court appointed an attorney to represent C.S. Both the attorney and C.S. signed a document waiving the rights to be present at the hearing and to cross-examine witnesses. The same document stated an intention to "waive evidence of either a recent overt act or continuing pattern of behavior in either case tending to confirm the likelihood of serious harm to others or to me, the proposed patient, or my distress and deterioration of ability to function."

At the hearing on the State's applications, Dr. Hilary Akpudo, a board-certified psychiatrist, testified that she had conducted a psychiatric evaluation of C.S. She testified that he was mentally ill with schizoaffective disorder, bipolar type, and that this opinion was based on her personal knowledge as well as C.S.'s history and records.

The State's attorney asked if the court wanted him to "go through all of these . . . overt acts" in light of C.S.'s waiver. C.S.'s attorney suggested that they

"just touch on one of them." The State's attorney then asked Dr. Akpudo, "Does a recent overt act or continuing pattern of behavior tend to confirm the likelihood of his causing harm to himself?" Responding "yes," she explained that C.S.:

> . . . has made multiple suicide attempts recently. He has cut on himself with razor blades. He has overdosed on cocaine and alcohol and medications. He has threatened to walk into traffic. It's just an ongoing thing. He has assured us that it's only a matter of time before he kills himself.

Dr. Akpudo also testified that in a continuing pattern of suicide attempts, C.S. had attempted suicide ten times in the prior year.

Dr. Akpudo testified that C.S. was suffering severe or abnormal mental or emotional physical distress, and he was experiencing substantial mental or physical deterioration of his ability to function independently as a result of his illness. She also affirmed that C.S.'s deterioration was exhibited by his inability, except for reasons of indigence, to provide for his basic needs such as food, clothing, health, or safety, and that as a result of his mental illness, he was unable to make a rational and informed decision about whether or not to submit to treatment.

Finally, Dr. Akpudo testified about the medications that C.S. was taking, which included antipsychotics and antidepressants. Her treatment plan was to move C.S. "to Austin State Hospital for further psychiatric evaluation and med stabilization." On cross-examination by C.S.'s attorney, Dr. Akpudo testified that her main concern was that C.S. would hurt himself. She also testified that C.S was

"impulsive" and unpredictable. For example, Dr. Akpudo had deescalated a situation with C.S. that morning when he was exhibiting paranoia.

Ariel Gills, a mental health liaison with the Gulf Coast Center, also recommended inpatient care at Austin State Hospital for C.S. because it was the least restrictive environment with the greatest possibility of care.

Both sides rested and the court announced its ruling:

> Based on the testimony that we've heard today, then we've determined that [C.S.] is, in fact, mentally ill. And due to his mental illness, he is likely to cause serious harm to himself. He's likely to cause serious harm to others. He is suffering severe and abnormal, mental, emotional, and physical distress. He is experiencing substantial mental or physical deterioration of his ability to function independently. He is unable to provide for his basic needs, including food, clothing, health, or safety. And he's unable to make a rational and informed decision as to whether or not to submit to treatment. And as a result we're committing him to Austin State Hospital, which is the least restrictive appropriate setting available for a period . . . not to exceed 90 days.

The court then proceeded immediately to a hearing on the application for administration of psychoactive medications. Dr. Akpudo testified that C.S. lacked the capacity to make decisions regarding the administration of psychoactive medications because he "has impaired reality." She said C.S. was "unable to differentiate between fantasy and reality," and that he "doesn't know what he's doing." Dr. Akpudo's prognosis for C.S. was "fair to guarded" if he was treated with the recommended medications. Without treatment, Dr. Akpudo opined that C.S. likely would kill himself or die from a treatable medical condition due to his

history of noncompliance with medical regimens. Finally, Dr. Akpudo testified that there were no effective alternatives to treatment with psychoactive medications.

The court ruled from the bench, stating:

> Based on the testimony that we've heard today, we've determined that it's in the patient's best interest to be treated with psychoactive medications; and his mental illness renders him incapable of making those medicinal treatment decisions. And as a result, it would be antidepressants, antipsychotics, anxiolytics, sedatives, hypnotics, and mood stabilizers.

The court signed an order committing C.S. to Austin State Hospital for inpatient mental health care for a period not to exceed 90 days. The court also signed an order for administration of medication.

C.S. appealed.

Analysis

On appeal, C.S. challenges the validity of the waiver of various rights he had in the proceedings for court-ordered mental health services. Relatedly, he also challenges the sufficiency of the evidence to support the court's commitment and medication orders.

I. Appellate jurisdiction

By the time the initial briefs were filed in this appeal, the 90-day period for which C.S. was ordered to receive services had expired. Nevertheless, because of

the collateral consequences of an involuntary commitment, the appeals are not moot.[2]

II. Validity of waiver

C.S. challenges the validity of a written document which waived some of his procedural rights at trial, including the right to be present at the hearing and the right to require the state to present evidence of a recent overt act tending to confirm the justifications for entering the commitment order. The Health and Safety Code acknowledges those rights but also expressly provides that they may be waived by the proposed patient.[3]

The form waiver stated:

> We, the undersigned proposed patient and attorney representing said proposed patient, in the above-referenced cause, hereby waive the right to cross-examine witnesses and file same with the Court. Accordingly, at the hearing on the Application for Court-Ordered Temporary Mental Health Services, the Court may admit into evidence the Certificates of Medical Examination for Mental Illness based on examinations conducted within the preceding 30 days, and, if so admitted, the Certification shall constitute competent medical or psychiatric testimony and the Court may make its findings on the basis of these Certificates.
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> We further waive evidence of either a recent overt act or a continuing pattern of behavior in either case tending to confirm the

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[2] *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980); *see also State v. K.E.W.*, 315 S.W.3d 16, 20 (Tex. 2010).

[3] *See* TEX. HEALTH & SAFETY CODE §§ 574.031(c), 574.034(d).

> likelihood of serious harm to others or to me, the proposed patient, or my distress and deterioration of ability to function.
>
> I, [C.S.], proposed patient do not desire to be present at the hearing on the Application for Court-Ordered Temporary Mental Health Services. . . .

The document was signed by both C.S. and his appointed attorney. C.S. did not appear at the commitment hearing. His appointed counsel offered the waiver into evidence at the hearing, and the trial court admitted it into evidence without objection.

On appeal, C.S. contends that the court should not have accepted his written waiver because there was no evidence demonstrating that he had capacity to knowingly and intelligently relinquish his rights. In light of the State's allegation that C.S. suffered from mental illness that rendered him incapable of making a rational and informed decision as to whether or not to submit to treatment,[4] he suggests that due process requires "some legally sufficient evidentiary development of the proposed patient's capacity to understand and intentionally relinquish" particular waivable rights related to the proceeding.[5]

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4 TEX. HEALTH & SAFETY CODE § 574.031(a)(2)(C)(iii).

5 *See, e.g., Crosstex Energy Servs., LP. v. Pro Plus, Inc.*, 430 S.W.3d 384, 391 (Tex. 2014) (observing that waiver entails "an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right"); *see also In re L.W.*, No. 02-14-00338-CV, 2015 WL 135571, at *3 (Tex. App.—Fort Worth Jan. 9, 2015, no pet.) (applying definition of waiver in the context of the review of a commitment order).

After entry of the commitment order, a new lawyer was appointed to handle C.S.'s appeal. Contemporaneously with the filing of the notice of appeal, appellate counsel filed a one-sentence motion for rehearing which stated that C.S. "would show the Court that his waiver of his right to appear, to cross-examine witnesses, and to require clear and convincing evidence of the grounds for the order was not made knowingly, intelligently, and voluntarily." No evidence was attached to the motion for rehearing, and the appellate record does not reflect any request for an evidentiary hearing on the motion.

Despite the fact that appellate counsel identified this waiver challenge in the motion for rehearing, he failed to support it with any evidence to suggest that the waiver was invalid due to some actual defect in C.S.'s mental capacity that prevented him from knowingly and intelligently waiving his procedural rights. Moreover, the arguments in the motion for rehearing and in the appellate brief are essentially devoid of actual legal argument to support a due process challenge,[6] other than the brief's conclusory assertion that "[o]ur jurisprudence should not

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[6] *See, e.g.*, *Harrell v. State*, 286 S.W.3d 315, 319–20 (Tex. 2009) (applying three-factor test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), to assess the constitutional sufficiency of procedures). C.S.'s brief quotes at length from the dissenting opinion in *Greene v. State*, 537 S.W.2d 100 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ) (Evans, J., dissenting), but he does not suggest that this dissenting opinion, or its reasoning, is controlling. We are not persuaded that reference to the *Greene* dissent supplies any legal analysis that justifies disregarding C.S.'s written waiver as legally ineffective.

allow the acceptance of a written waiver without some legally sufficient evidentiary development of the proposed patient's capacity to understand and intentionally relinquish the rights." The brief does not suggest that the civil commitment statutory framework is punitive in nature,[7] and it offers no legal argument to justify applying to these circumstances heightened due-process requirements applicable to the waiver of rights in the context of criminal proceedings.[8]

C.S. acknowledges the statutory presumption of a proposed patient's competency in the context of mental-health commitment proceedings. "The provision of court-ordered, emergency, or voluntary mental health services to a person is not a determination or adjudication of mental incompetency and does not limit the person's rights as a citizen, or the person's property rights or legal capacity."[9] Furthermore, there is a rebuttable statutory presumption that "a person

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7 The categorization of a particular proceeding as civil or criminal is a typical starting place for evaluating due process challenges. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S. Ct. 2072, 2081 (1997); *In re Commitment of Fisher*, 164 S.W.3d 637, 645 (Tex. 2005).

8 *See, e.g.*, *Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969) (conviction must be reversed when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving); *see also United States v. Dominguez Benitez*, 542 U.S. 74, 84, 124 S. Ct. 2333, 2341 (2004); *Davison v. State*, 405 S.W.3d 682, 686 (Tex. Crim. App. 2013).

9 TEX. HEALTH & SAFETY CODE § 576.002(a).

is mentally competent unless a judicial finding to the contrary is made under the Texas Probate Code."[10] We have not been presented with a record suggesting a judicial finding that C.S. was incompetent to execute the waiver. He presents no legal argument to explain why it should not be accepted.[11]

At the time he executed the waiver, C.S. was represented by counsel who also signed the waiver. As relevant to this appeal, the statutory duties of the attorney included:

- interviewing the proposed patient within a reasonable time before the date of the hearing on the application;
- thoroughly discussing with the proposed patient the law and facts of the case, the proposed patient's options, and the grounds on which the court-ordered mental health services are being sought;
- informing the proposed patient that he may obtain personal legal counsel at his expense instead of accepting the court-appointed counsel;
- advising the proposed patient of the wisdom of agreeing to or resisting efforts to provide mental health services;
- using all reasonable efforts within the bounds of law to advocate the proposed patient's right to avoid court-ordered mental health services if he expressed a desire to avoid the services; and

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10 *Id*. § 576.002(b).

11 *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 26(1) (2000) (a lawyer's act is "considered to be that of a client in proceedings before a tribunal" when "the client has expressly or impliedly authorized the act").

- advising the proposed patient of his right to attend a hearing or to waive the right to attend a hearing.[12]

The statute emphasizes that "the proposed patient shall make the decision to agree to or resist the efforts."[13] C.S.'s brief does not address the adequacy of the court-appointed lawyer as a due-process safeguard of his right to participate in the proceeding and to resist—or not resist—efforts to provide him mental health services.[14]

In the absence of evidence that C.S.'s waiver was not actually a knowing and intelligent relinquishment of his rights, and in the absence of a legal argument justifying the requirement of an alternative procedure to satisfy due process, we overrule the challenge to the validity of the waiver.

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12 *See* TEX. HEALTH & SAFETY CODE § 574.004. The trial court was required to inform the appointed attorney of these duties, *id*. § 574.003(b), and the appointed attorney was required to "inform the court why a proposed patient is absent from a hearing," *id*. § 574.004(e). While these matters are not affirmatively demonstrated by the appellate record before us, there likewise is no record demonstrating that these requirements were not met, and we have no reason to doubt that they were.

13 *See id*. § 574.004(c).

14 *Cf. Harrell*, 286 S.W.3d at 319 (requiring evaluation of "the risk of an erroneous deprivation" of a private interest "through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards").

III. Sufficiency of the evidence

C.S. argues that the commitment order must be reversed because the evidence is legally and factually insufficient to support the trial court's findings in support of its order for temporary inpatient mental health services.[15] If the commitment order is not supported by sufficient evidence, C.S. contends that the medication order likewise must be reversed.[16]

Both an order for temporary inpatient mental health services and an order for the administration of psychoactive medication must be based on clear-and-convincing evidence.[17] C.S.'s argument that the evidence was insufficient in this case is premised entirely on the statutory requirement that to be clear and convincing, the State's evidence was required to include "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."[18] C.S. contends that the State's evidence was limited to his medical

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15 *See* TEX. HEALTH & SAFETY CODE § 574.034(a).

16 *See id.* § 574.106(a); *cf. K.E.W.*, 315 S.W.3d at 26 (disposition of commitment order controlled disposition of medication order).

17 *See* TEX. HEALTH & SAFETY CODE §§ 574.034(a), 574.106(a-1).

18 *Id*. § 574.034(d).

history and verbal threats to harm himself, which he argues was insufficient to prove the necessary "overt act."

The sufficiency challenge must fail because C.S. waived the requirement that the State prove an overt act, as specifically contemplated by the statute.[19] He presents no argument that the evidence was not otherwise sufficiently clear and convincing to support the commitment and medication orders.

We overrule C.S.'s second issue.

Conclusion

We affirm the orders of the trial court.

Michael Massengale
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

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19 *See id.*