# In The
# Court of Appeals
# Seventh District of Texas at Amarillo

No. 07-21-00144-CV

ROBERT COOK, APPELLANT

V.

THE STATE OF TEXAS, APPELLEE

On Appeal from the 364th District Court
Lubbock County, Texas
Trial Court No. 2019-416,811, Honorable Mark J. Hocker, Presiding

March 31, 2022

## OPINION

Before QUINN, C.J., and PARKER and DOSS, JJ.

Appellant, Robert Cook, appeals the trial court's order of temporary civil commitment pending criminal charges. Finding the State failed to prove by clear and convincing evidence that Cook is a person with mental illness under Texas Health and Safety Code section 574.034(a)(1) we reverse the order of the trial court and render an order denying the State's application for temporary court-ordered inpatient mental health services.

## Background

In February 2019, Cook was indicted for the offense of aggravated sexual assault of a child.[1] Thereafter, his counsel filed a suggestion of Cook's incompetency to stand trial. After finding evidence existed supporting a finding of incompetency, the trial court ordered Cook examined by Greg Hupp, Ph.D. In Dr. Hupp's opinion, Cook was "currently not competent but [was] restorable in the foreseeable future." Dr. Hupp further opined Cook did "not have a serious mental illness but [was] intellectually disabled."

On May 23, 2019, the trial court signed a document entitled "Agreed Judgment of Commitment Following Competency Exam—Incompetent but Likely to Regain Competency." Therein the court found Cook was "a person who [was] presently incompetent to stand trial but likely to regain competency." It ordered Cook committed to the North Texas State Hospital at Vernon, Texas, for a period no longer than 120 days.

Cook was admitted to the state hospital on February 19, 2020. In an April 27, 2020 evaluation, a hospital clinician found Cook competent to stand trial. According to the evaluation, Cook's "attending psychiatrist and treatment team concur that maximum benefit from hospitalization for trial competency has been achieved at this time. There are, therefore, no contraindications to this defendant returning to court to respond to his charge. Therefore, I would offer for adjudication the opinion that [Cook] is presently Competent to Stand Trial." Cook was released to the custody of the Lubbock County Detention Center in May 2020.

[1] *See* TEX. PENAL CODE ANN. § 22.021.

In April 2021, on the motion of the State, the trial court found Cook remained incompetent following competency restoration.[2] It ordered Cook evaluated and two certificates of medical examination for mental illness to be prepared. The examining physicians were directed to provide opinions of whether Cook was mentally ill and, whether as a result of that mental illness, Cook was likely to cause serious harm to himself or others.

The examining physicians were Dana A. Butler, M.D., and Shiraj Vahora, M.D. Dr. Butler listed Cook's then-current physical and mental condition to be "psychotic disorder, unspecified (by history); depressive disorder, unspecified (by history); intellectual development disorder (IDD), mild." Dr. Vahora diagnosed Cook's condition as "psychosis nos,[3] depression nos, mild IDD, psych symptoms in remission." Neither physician opined that Cook was mentally ill, likely to cause serious harm to himself, or likely to cause serious harm to others. Dr. Butler, in fact, concluded the opposite, assessing Cook as:

> presently is stable psychiatrically without presence of active psychosis or major mood disturbance. He denies hallucinations and does not express delusions. He denies desire to harm himself or others. He is compliant in taking prescribed medications. He does not meet criteria for inpatient psychiatric hospitalization.

[2] The record does not indicate why the trial court found Cook to be incompetent.

[3] Medical professionals sometimes use the abbreviation "nos" as a shorthand for "not otherwise specified." *See In re D.S.*, No. 02-17-00446-CV, 2018 Tex. App. LEXIS 1782, at *8 (Tex. App.—Fort Worth Mar. 8, 2018, no pet.) (mem. op.) (defining "NOS" in conjunction with psychosis diagnosis as "not otherwise specified."). The Third Court of Appeals states that "NOS is an abbreviation for Not Otherwise Specified, indicating a cluster of symptoms that do not clearly fit in any single diagnostic category. NOS is often a provisional *diagnosis* pending additional information or testing." *C.S.F. v. Tex. Dep't of Family & Protective Servs.*, No. 03-14-00597-CV, 2015 Tex. App. LEXIS 2397, at *15-17 n.6 (Tex. App.—Austin Mar. 13, 2015, pet. dism'd w.o.j.) (mem. op.).

Dr. Shiraj similarly offered the opinion that Cook "does not meet critirea [sic] for inpatient psychiatric treatment . . . ." Dr. Shiraj recommended that Cook receive "outpatient psychiatric treatment with MHMR for med checks and counseling. Plans on living with his brother and no children at home[.] Suggest MHMR case management[.]"

A civil commitment hearing on Cook's behalf was conducted June 21 and 22, 2021. Dr. Butler and six lay witnesses testified for the State. Cook presented no witnesses. Before the presentation of evidence, at the State's request, Cook stipulated that Dr. Butler was an expert in psychiatry.

Dr. Butler testified via Zoom. On direct examination, he testified that Cook had been treated at the state hospital in Vernon "for what's called psychosis, psychotic disorder not otherwise specified in depressive disorder, not as specified in addition to his primary diagnosis of mild intellectual deficiency disorder." Dr. Butler opined he was not convinced Cook had a psychosis, noting the patient history and record caused him to question the accuracy of the historic psychotic disorder and depressive disorder diagnoses. Dr. Butler said he agreed with the conclusion of the competency evaluation by Dr. Nyberg[4] that Cook's primary diagnosis was intellectual disfunction. According to Dr. Butler, Dr. Nyberg did not list the historic psychotic disorder and depressive disorder diagnoses in his evaluation. However, Dr. Butler acknowledged on questioning by the State that Cook continued receiving treatment for the psychotic disorder and the depressive disorder identified in Cook's medical records.

[4] The record does not contain Dr. Nyberg's evaluation, nor does it provide his credentials.

When asked by the State if, as a result of mental illness, Cook was likely to "cause a substantial risk of serious harm to himself or others" if released, Dr. Butler responded, "No, I don't believe so." Dr. Butler reiterated this opinion when asked a second time. Dr. Butler also opined:

> Cook does not have a current psychosis or depression or mood disorder that would contribute to him to be a danger to himself or others. Certainly his primary diagnosis is intellectual dysfunction, which does increase somewhat the chances of recidivism compared to other people charged with sexual crimes. But not having any further information about his prior history, I can't comment on his potential, but he's certainly now, at this point, not a danger to himself or others.

Dr. Butler acknowledged he had not seen Cook unmedicated or outside a secure setting. When asked about a previous episode in which Cook had said he saw the face of his father and a voice telling him to kill himself, Dr. Butler explained:

> It's not unusual for people with mild or intellectual dysfunction to misidentify things and misperceive things. Such as, it's not uncommon for people to see a dead relative encouraging them or telling them to go on. That is the only isolated visual hallucination that he has had. What he told me is also consistent with his records. And the same goes with his . . . supposedly hearing or reportedly hearing a voice telling him to kill himself. He has difficulty describing that. I'm not convinced those were not his own thoughts. And what supports that is the fact that, to my knowledge, he had never been treated for psychosis disorder.

Dr. Butler's direct examination concluded with his opinion that Cook should receive continuing mental health treatment on an outpatient basis.

None of the State's six lay witnesses had seen Cook since his inpatient hospitalization in February 2020. Two of these witnesses—the complainant and an outcry witness—testified of the substance of the underlying sexual assault allegations. The complainant's sister described Cook as "weird" and agreed he "wasn't all there." A cousin

of Cook's testified Cook was "a little off," and said Cook made inculpatory statements of the underlying sexual assault charge. Four of the lay witnesses described Cook as having poor hygiene.

In addition, the Shallowater, Texas police officer who responded to the 2019 call reporting sexual assault testified that when he went to Cook's house to investigate, found Cook holding a "steak knife" to his stomach. The officer agreed with the State that he considered Cook a "suicide subject," and a danger to himself or others.

Finally, a mental health officer with the Lubbock County Detention Center testified that in a conversation with Cook in May 2019, he allegedly reported hearing voices telling him to jump from the upper level of the jail.

In an order signed June 22, 2021, the trial court committed Cook to the North Texas State Hospital for a period of inpatient treatment lasting no longer than ninety days. Cook timely noticed this appeal.

## Analysis

### Jurisdiction

We first take up the matter of our jurisdiction because it appears the ninety-day period of Cook's temporary commitment would have expired if Cook presented for hospitalization in compliance with the trial court's order. We cannot determine from the record before us whether Cook so presented. Nevertheless, we have jurisdiction. The expiration of the time for which Cook was ordered to receive mental health services does not require dismissal of the appeal for mootness. *See State v. K.E.W.,* 315 S.W.3d 16,

20 (Tex. 2010) (citing *State v. Lodge,* 608 S.W.2d 910, 912 (Tex. 1980)); *Moore v. State,* No. 07-10-00507-CV, 2011 Tex. App. LEXIS 6504, at *2 & n.1 (Tex. App.—Amarillo Aug. 16, 2011, no pet.) (mem. op.) (noting collateral consequences exception to mootness doctrine).

**Sufficiency of the Evidence**

By his first issue, Cook argues the trial court's order of commitment is unsupported by clear and convincing evidence of a mental illness. Section 15-a of the Texas Constitution provides, "No person shall be committed as a person of unsound mind except on competent medical or psychiatric testimony. The Legislature may enact all laws necessary to provide for the trial, adjudication of insanity and commitment of persons of unsound mind and to provide for a method of appeal from judgments rendered in such cases." TEX. CONST. art. I, § 15-a. The relevant legislative enactment relating to temporary inpatient mental health services is found in Texas Health and Safety Code section 574.034(a), which reads in part:

> 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 a person with mental illness; and
>
> (2) as a result of that mental illness the proposed patient:
>
> (A) is likely to cause serious harm to the proposed patient;
>
> (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 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
>
> (iii) unable to make a rational and informed decision as to whether or not to submit to treatment.

TEX. HEALTH & SAFETY CODE ANN. § 574.034(a). "'Mental illness' means an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: (A) substantially impairs a person's thought, perception of reality, emotional process, or judgment; or (B) grossly impairs behavior as demonstrated by recent disturbed behavior." TEX. HEALTH & SAFETY CODE ANN. § 571.003(14). Absent a waiver not here applicable, the hearing must include competent medical or psychiatric testimony. TEX. HEALTH & SAFETY CODE ANN. § 574.031(d-1) ("If the proposed patient or the proposed patient's attorney does 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.").[5]

Under the clear and convincing standard, a reviewing court applies a heightened standard of review to sufficiency of the evidence challenges. *See In re C.H.,* 89 S.W.3d 17, 25 (Tex. 2002). Clear and convincing evidence is that measure or degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established. *State v. K.E.W.,* 315 S.W.3d at 20. *See also State v. Addington,* 588 S.W.2d 569, 570 (Tex. 1979) (per curiam) (requiring application

[5] The court may also consider the testimony of a nonphysician mental health professional in addition to medical or psychiatric testimony. TEX. HEALTH & SAFETY CODE ANN. § 574.031(f).

of clear and convincing standard in civil mental commitment cases). The statute also requires the following:

> To be clear and convincing under [§ 574.034(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.

TEX. HEALTH & SAFETY CODE ANN. § 574.034(d).

When interpreting a statute, we look to the literal text for its meaning. *Martin v. State*, 635 S.W.3d 672, 677-78 (Tex. Crim. App. 2021). The plain meaning of the statute controls unless the language is ambiguous or its application "would lead to absurd consequences that the Legislature could not possibly have intended." *Id.* "To determine plain meaning, we read the statute in context and give effect to each word, phrase, clause, and sentence if reasonably possible, and construe them according to any applicable technical definitions and otherwise according to the rules of grammar and common usage." *Lopez v. State*, 600 S.W.3d 43, 45 (Tex. Crim. App. 2020). When the terms used in a statute are general but possibly susceptible to a construction that would run afoul of the Texas Constitution, "the language will be restrained in its operation so as to harmonize the statute with the Constitution, though, literally, it be susceptible of a broader meaning which would conflict with the Constitution." *Maud v. Terrell*, 109 Tex. 97, 100, 200 S.W. 375, 376 (1918).

Here, the plain language of the statute, read in such a way to ensure it does not conflict with the Texas Constitution, makes it essential that the State present expert testimony that opines Cook is presently suffering from a mental illness. *See In re Best Interest & Prot. of K.G.,* No. 05-20-01053-CV, 2021 Tex. App. LEXIS 1297, at *13 (Tex. App.—Dallas Feb. 23, 2021, pet denied) (mem. op.) (citing *State v. K.E.W.,* 315 S.W.3d at 20; *State ex rel. D.W.,* 359 S.W.3d 383, 386 (Tex. App.—Dallas 2012, no pet.)). The Constitution sets a floor that Cook cannot be committed as a person of unsound mind "*except on* competent medical or psychiatric testimony." TEX. CONST. art. I, § 15-a (emphasis supplied). We read the relevant statutory provisions with this in mind because a broader meaning would be inconsistent with the Constitution's protections. Because the word "on" does not have a technical meaning and is not defined in the Constitution or relevant statutes, we may look to standard dictionaries to determine the common usage. *Lopez*, 600 S.W.3d at 46. Webster's offers nearly two dozen definitions, but only one reasonable meaning can be gleaned given from the context. "On," in this context, means "with the relation of reliance or dependence; as, to depend on a person for help; to rely on; hence, indicating the ground or basis of anything; as, on authority, on purpose." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 1249 (1983). *See also* MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/on (last visited March 23, 2022) (defining "on" as "used as a function word to indicate a source of dependence [example:] you can rely on me; feeds on insects; lives on a pension"). Applying the plain language in this case, we hold the State may not commit Cook for being "of unsound

mind" without presenting the testimonial opinion from a competent[6] medical or psychiatric expert that Cook presently suffers from a mental illness.

Dr. Butler, the only mental health professional to testify at the hearing, disagreed with the State's contention that Cook presently suffers from a *disease or condition* that: (A) substantially impairs his thought, perception of reality, emotional process, or judgment; or (B) grossly impairs his behavior as demonstrated by recent disturbed behavior. TEX. HEALTH & SAFETY CODE ANN. § 571.003(14). Instead, Dr. Butler opined at the hearing that Cook's "primary mental illness [was] his intellectual dysfunction." But mental illness and intellectual dysfunction are legally separate concepts. *See* TEX. HEALTH & SAFETY CODE ANN. § 571.003(14) (defining "mental illness" to include "illness, disease, or condition" but to exclude "intellectual disability"); *In re Commitment of J.A.A.,* No. 11-20-00142-CV, 2021 Tex. App. LEXIS 7497, at *3 (Tex. App.—Eastland Sept. 9, 2021, no pet.) (mem. op.).[7] Further, Dr. Butler disagreed with the suggestion that Cook posed a substantial risk of serious harm to himself or others and disagreed that evidence of Cook's overt acts (all of which took place before he was hospitalized in 2020) were caused by a mental illness. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034(d).

[6] We believe it axiomatic that the competent-expert-testimony requirement of section 574.034(d) and (f) and section 574.031(d-1) means a qualified witness whose opinions prove reliable and relevant. *See* TEX. R. EVID. 702; *Vela v. State,* 209 S.W.3d 128, 131 (Tex. Crim. App. 2006) (trial judge as gatekeeper must make inquires of qualification, reliability, and relevance before admitting expert testimony). In the present case, Cook stipulated that Dr. Butler was an expert in psychiatry. The record contains no inquiry into or challenge of Dr. Butler's qualifications or the reliability and relevance of his opinions.

[7] The statutory requirements for the temporary inpatient commitment of a proposed patient allegedly suffering mental illness differ from those authorizing commitment of a proposed resident allegedly presenting an intellectual disability. *Compare* Health and Safety Code section 574.034(a) (temporary inpatient commitment for mental illness) *with* Health and Safety Code section 593.052 (commitment for intellectual disability).

The State urges it met the civil commitment standard because the statute merely requires the evidence to "include" expert testimony. But as we observed above, this construction—essentially, that it is unnecessary an expert opine the proposed patient suffers from a mental illness so long as the expert testifies about *something*—would be contrary to the Constitutional floor that a person cannot be civilly committed "except on competent medical or psychiatric testimony." TEX. CONST. art. I, § 15-a. In discussing the predecessor version of the statute, this Court observed this constitutional protection means the petitioning party must present expert medical or psychiatric testimony that the patient is mentally ill and in need of care or treatment. *State for Interest & Prot. of Ellenwood*, 567 S.W.2d 251, 253 (Tex. Civ. App.—Amarillo 1978, no writ) ("This statutory requirement safeguards the rights of the proposed patient as provided by Texas Constitution art. I, § 15-a . . . ."); *see also C.V. v. State*, 616 S.W.2d 441, 443 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (holding in temporary civil commitment case that because improperly admitted testimony from psychiatrist "was the only medical testimony offered by the State, the judgment of the trial court must be reversed" and the commitment order could not be upheld) (citing TEX. CONST. art. I, § 15-a).

Even if the statute could be read in such a manner consistent with the State's proffered construction, we would hold in this appeal that no legally sufficient evidence supports the trial court's finding that Cook suffers from a mental illness. None of the lay witnesses, whose testimony characterized Cook as "weird," "not all there," "a little off," and having poor hygiene, offered evidence creating more than surmise or suspicion that Cook is a person presently suffering from mental illness. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034(a)(1). The lay witnesses had not observed Cook's behavior since before

his 2020 inpatient hospitalization and had no present basis for his condition or alleged overt acts. While we agree with the State that the finder of fact holds the power to disregard the testimony of a physician or psychiatrist, the opinions of non-experts are not competent to fill the evidentiary lacuna.[8] When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of the fact's existence, the evidence is no more than a scintilla and, in legal effect, is no evidence. *See, e.g., Harrison v. State,* No. 07-99-00259-CR, 1999 Tex. App. LEXIS 8332, at *6 (Tex. App.—Amarillo Nov. 2, 1999, no pet.) (not designated for publication) (citing *Niswanger v. State,* 875 S.W.2d 796, 799 (Tex. App.—Waco 1994, no writ)).

The State also argues, "[e]ven without agreeing with or 'endorsing' a mental illness finding, Dr. Butler's testimony—along with the North Texas State Hospital medical records—show that [Cook] is a person diagnosed with both psychosis and depressive disorder, both of which meet the definition of mental illness." We disagree that such evidence satisfies the burden of proof. The evidence shows the records Dr. Butler reviewed contain diagnoses of others that Cook suffered from psychotic disorder and depressive disorder prior to his release from the state hospital in 2020. But none of these mental health professionals took the stand; the records do not constitute "testimony." TEX. CONST. art. I, § 15-a; TEX. HEALTH & SAFETY CODE ANN. § 574.031(d-1). And as with the testifying lay witnesses, these records fail to satisfy the State's requirement to prove

[8] A similar conclusion was reached by the Court of Criminal Appeals, albeit for another purpose, in *Petetan v. State*, 622 S.W.3d 321, 360 (Tex. Crim. App. 2021) (holding in capital murder case involving defense per *Atkins v. Virginia*, 536 U.S. 304 (2002), and its progeny, that appellant is intellectually disabled and categorically ineligible for the death penalty that "a factfinder cannot substitute its opinion for that of all of the examining doctors" when the testifying medical community "was of one mind.").

that Cook *presently* suffers from a mental illness. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034(a)(1).

We additionally note the record reflects the trial court took judicial notice of its "file," which contained the certificates of medical examination from Drs. Butler and Vahora, to which Cook objected. Rule of Evidence 201(b) permits a trial court to judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." It is unclear whether the trial court intended to take judicial notice of the certificates, particularly given that they were subject to Cook's objection and thus subject to reasonable dispute. Nevertheless, they would not discharge the State's requirement to elicit medical or psychiatric testimony at the hearing. TEX. HEALTH & SAFETY CODE ANN. § 574.031(d-1); *In re C.V.*, 616 S.W.2d at 443 (holding the petitioner was required to present expert testimony once the certificates received opposition). Neither the certificate of medical examination prepared by Dr. Butler nor Dr. Vahora find that Cook was mentally ill, likely to cause serious harm to himself, or likely to cause serious harm to others.

We conclude the State failed to present competent, clear and convincing evidence that Cook is a person with mental illness. We sustain Cook's first issue. Because disposition of that issue requires reversal and rendition, it is unnecessary to discuss Cook's remaining issues. TEX. R. APP. P. 47.1.

## Conclusion

We reverse the trial court's June 22, 2021 "Order of Civil Commitment (Temporary): Charges Pending" and render an order denying the State's motion for temporary mental health services. TEX. R. APP. P. 43.2(c).

Lawrence M. Doss
Justice