

NO. 12-16-00183-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

<i>THE STATE OF TEXAS FOR</i>	§	<i>APPEAL FROM THE</i>
<i>THE BEST INTEREST AND</i>	§	<i>COUNTY COURT AT LAW</i>
<i>PROTECTION OF B. A.</i>	§	<i>CHEROKEE COUNTY, TEXAS</i>

MEMORANDUM OPINION

B.A. appeals from an order for temporary inpatient mental health services, and an order authorizing the Texas Department of State Health Services (the Department) to administer psychoactive medication. In three issues, B.A. asserts the evidence is legally and factually insufficient to support the trial court's orders. We reverse and render.

BACKGROUND

On June 3, 2016, an application for court ordered temporary mental health services was filed requesting the trial court to commit B.A. to the Rusk State Hospital (the Hospital) for a period not to exceed ninety days. At the time the application was filed, B.A. was a patient at the Hospital. The application was supported by two physician's certificates of medical examination for mental illness. The first certificate stated that Robert Bouchat, M.D. examined and evaluated B.A. and diagnosed her with schizoaffective disorder. Nora Davis, M.D. also examined and evaluated B.A. and diagnosed her with schizoaffective disorder.

According to Dr. Bouchat and Dr. Davis, B.A. was mentally ill and (1) was suffering severe and abnormal mental, emotional, or physical distress; (2) was experiencing substantial mental or physical deterioration of her ability to function independently; and (3) was unable to make a rational and informed decision as to whether or not to submit to treatment. Dr. Bouchat also stated that B.A. was likely to cause serious harm to herself. As the basis for his opinion, Dr. Bouchat reported that B.A. (1) admitted hearing ongoing "voices," (2) expressed delusional ideas

about the Mafia, (3) was devoid of insight, (4) told nurses that she would not take her medications unless she was compelled to do so, (5) refused to allow the nurses to take her vital signs, (6) refused assessments for a pulmonary disorder despite having symptoms such as coughing, (7) accepted medical treatments in a supervised and court ordered setting only, and (8) refused fasting blood sugar tests.

Dr. Davis stated that the bases for her opinion included, among others, that B.A. said she heard bad voices but that they were getting better, that there was a death warrant against her every day, and that the doctors were at war with drug lords. Further, Dr. Davis reported that B.A. expressed ego-dystonic auditory hallucinations, circumstantial tangential thinking, and persecutory and bizarre delusions. Dr. Bouchat also signed an application for an order to administer psychoactive medications to B.A.

The trial court conducted a hearing on the applications. After the hearing, the trial court found, by clear and convincing evidence, that B.A. was mentally ill, (1) was likely to cause serious harm to herself; (2) was suffering severe and abnormal mental, emotional, or physical distress; (3) was experiencing substantial mental or physical deterioration of her ability to function independently, exhibited by B.A.'s inability, except for reasons of indigence, to provide for her basic needs, including food, clothing, health, or safety; and (4) was unable to make a rational and informed decision as to whether or not to submit to treatment. The trial court rendered an order for temporary inpatient mental health services, committing B.A. to the Hospital for a period not to exceed ninety days. The trial court also rendered an order authorizing the Department to administer psychoactive medications to B.A. This appeal followed.

SUFFICIENCY OF THE EVIDENCE

In her first and second issues, B.A. argues that the evidence is legally insufficient to support the order for temporary inpatient mental health services.

Standard of Review

In a legal sufficiency review where the burden of proof is clear and convincing evidence, we must look at all the evidence in the light most favorable to the finding to determine whether a reasonable trier of fact could have formed a firm belief or conviction that its findings were true. *In re J.F.C.*, 96 S.W.3d 256, 266 (Tex. 2002). We must assume that the fact finder settled

disputed facts in favor of its finding if a reasonable fact finder could do so and disregard all evidence that a reasonable fact finder could have disbelieved or found incredible. *Id.* This does not mean that we are required to ignore all evidence not supporting the finding because that might bias a clear and convincing analysis. *Id.*

Temporary Inpatient Commitment Order

The trial 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 the proposed patient is a person with mental illness, and, as a result of that mental illness, she is likely to cause serious harm to herself, is likely to cause serious harm to others, or is (i) suffering severe and abnormal mental, emotional, or physical distress, (ii) experiencing substantial mental or physical deterioration of her ability to function independently, which is exhibited by her inability, except for reasons of indigence, to provide for her 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) (West Supp. 2016).

“Clear and convincing evidence” means the measure or 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 established. *State v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979). To be clear and convincing under this statute, 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 either the likelihood of serious harm to the proposed patient or others, or the proposed patient’s distress and the deterioration of her ability to function. TEX. HEALTH & SAFETY CODE ANN. § 574.034(d) (West Supp. 2016). The statutory requirements for an involuntary commitment are strict because it is a drastic measure. *In re C.O.*, 65 S.W.3d 175, 182 (Tex. App.—Tyler 2001, no pet.).

Regarding a finding that a proposed patient is likely to cause serious harm to herself, the threat of harm must be substantial and based on actual dangerous behavior manifested by some overt act or threats in the recent past. *State ex rel. S.W.*, 356 S.W.3d 576, 579 (Tex. App.—Texarkana 2011, no pet.); *State ex rel. K.D.C.*, 78 S.W.3d 543, 547 (Tex. App.—Amarillo 2002, no pet.). Overt acts include both physical acts and verbal statements. *State v. K.E.W.*, 315 S.W.3d 16, 21-22 (Tex. 2010).

Analysis

At the hearing, Dr. Bouchat's and Dr. Davis's certificates of medical examination for mental illness were admitted into evidence. We note that nothing in the Texas Health and Safety Code authorizes a trial court to base its findings solely on the physicians' certificates. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.001-.047 (West 2010 & Supp. 2016). Pleadings, such as the application here, are not evidence that the statutory standard has been met. *See id.* § 574.031 (West 2010) (stating that the Texas Rules of Evidence apply to the hearing for court ordered mental health services unless the rules are inconsistent with the subtitle); *In re E.T.*, 137 S.W.3d 698, 700 (Tex. App.—San Antonio 2004, no pet.); *see also Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995) (noting that, generally, pleadings are not competent evidence, even if sworn or verified).

Further, expert testimony confirming mental illness, standing alone, will not support an involuntary commitment. *See T.G. v. State*, 7 S.W.3d 248, 252 (Tex. App.—Dallas 1999, no pet.). Evidence of continuing delusional or paranoid behavior merely reflects that an individual is mentally ill and in need of hospitalization, but does not provide the overt act or continuing pattern of behavior necessary to support a commitment. *See In re C.O.*, 65 S.W.3d at 182; *Broussard v. State*, 827 S.W.2d 619, 622 (Tex. App.—Corpus Christi 1992, no writ). An expert opinion recommending commitment must be supported by the factual bases on which it is grounded and not simply recite the statutory criteria. *See J.M. v. State*, 178 S.W.3d 185, 193 (Tex. App.—Houston [1st Dist.] 2005, no pet.). What is necessary is the expert's description of the patient's specific behaviors on which the expert's opinion is based. *See id.* We must examine the record to determine whether there is clear and convincing evidence showing a recent overt act or a continuing pattern of behavior that tends to confirm the likelihood of serious harm to B.A. and of her distress and the deterioration of her ability to function. *See* TEX. HEALTH & SAFETY CODE ANN. § 574.034(d).

At the hearing on the application, Dr. Bouchat testified that he examined B.A. and diagnosed her with schizoaffective disorder. He believed that she (1) was likely to cause serious harm to herself, (2) was suffering severe and abnormal mental, emotional, or physical distress, (3) was experiencing substantial mental or physical deterioration of her ability to function independently, and (4) was unable to make a rational and informed decision as to whether or not to submit to treatment. Dr. Bouchat testified that he believed B.A.'s condition was likely to

deteriorate if she did not remain in the Hospital and receive treatment. He explained that when B.A. refused medications in the past at a care facility, she became very agitated and aggressive, and had to be transferred to the Hospital. Dr. Bouchat stated that the overt act or pattern of behavior that led to B.A.'s being hospitalized was medication noncompliance at the previous facility. He stated that she has not been aggressive at the Hospital, but continued to resist taking her medications. She also refused to allow the staff to check her vital signs and fasting blood sugar. Dr. Bouchat stated that he needed to be sure B.A. would cooperate with the next facility regarding routine medical testing such as taking blood and checking vital signs. He testified that B.A. recently declined to have a possible pulmonary disorder investigated. He stated that he would recommend discharging her as soon as he believed it was medically appropriate.

B.A. testified that she made a mistake in her judgment concerning her medications. She believed that she became toxic due to the medications and suffered from withdrawals. She described her toxicity to certain drugs including Lithium and Thorazine. B.A. stated that she took care of her body including taking a bath or a shower every day. She stated that she would try to work with the staff at the Hospital.

Dr. Bouchat offered no specific evidence that B.A. posed a substantial threat of harm to herself or that she demonstrated any actual dangerous behavior manifested by some overt act or threats in the recent past. *See State ex rel. S.W.*, 356 S.W.3d at 579; *State ex rel. K.D.C.*, 78 S.W.3d at 547. Moreover, Dr. Bouchat offered no specific evidence of an overt act or a continuing pattern of behavior that would generally affect B.A.'s ability to function independently on a daily basis without the imposition of mental health services. *See Broussard*, 827 S.W.2d at 622. To the contrary, Dr. Bouchat testified that he considered discharging B.A. from the Hospital due to her behavior. He refused to discharge her, however, because he was not sure she would cooperate with the next facility regarding routine medical testing. Even though B.A. refused to take her medications and refused to allow the facility to conduct routine medical testing, her refusal is legally insufficient evidence of an overt act or a continuing pattern of behavior that demonstrates her distress or a deterioration of her ability to function. *See State ex rel. E.R.*, 287 S.W.3d 297, 306 (Tex. App.—Texarkana 2009, no pet.) (“Evidence of refusal to take medication, alone, is not an overt act or continuing pattern of behavior tending to confirm a proposed patient's distress or a deterioration of the ability to function.”). Nor was there any testimony or evidence that B.A. was unable to provide for her basic needs, including food,

clothing, health, or safety. See TEX. HEALTH & SAFETY CODE ANN. § 574.034(a)(2)(C)(ii). The State must show more than delusions or other facts that merely confirm B.A.'s mental illness to meet the evidentiary standard for a temporary commitment. See *In re C.O.*, 65 S.W.3d at 182.

Because Dr. Bouchat's opinions were not supported by a factual basis or by a description of specific behaviors on which his opinions about B.A. were based, we cannot say that his opinions would lead a reasonable trier of fact to have formed a firm belief or conviction of a continuing pattern of behavior tending to confirm the likelihood of serious harm to B.A. or her distress and the deterioration of her ability to function. See TEX. HEALTH & SAFETY CODE ANN. § 574.034(d). Therefore, viewing the evidence in the light most favorable to the findings, we conclude a reasonable trier of fact could not have formed a firm belief or conviction that B.A. (1) was likely to cause serious harm to herself; (2) was suffering severe and abnormal mental, emotional, or physical distress; (3) was experiencing substantial mental or physical deterioration of her ability to function independently; and (4) was unable to make a rational and informed decision as to whether or not to submit to treatment. See TEX. HEALTH & SAFETY CODE ANN. § 574.034(a), (d); *In re J.F.C.*, 96 S.W.3d at 266. Consequently, the evidence is legally insufficient to support the trial court's finding based upon section 574.034(d) of the Texas Health and Safety Code. We sustain B.A.'s first and second issues.

Order to Administer Psychoactive Medication

In her third issue, B.A. challenges the legal sufficiency of the evidence to support the trial court's order to administer psychoactive medication. A trial court may issue an order authorizing the administration of psychoactive medications only if the proposed patient is under an order for inpatient mental health services. See TEX. HEALTH & SAFETY CODE ANN. § 574.106(a)(1) (West 2010). Because we reverse the trial court's order for temporary inpatient mental health services, we must also reverse its order to administer psychoactive medications. See *G.H. v. State*, 96 S.W.3d 629, 635 (Tex. App.—Houston [1st Dist.] 2002, no pet.). We sustain B.A.'s third issue.

CONCLUSION

Based upon our review of the record, we conclude that the evidence is legally insufficient to support the trial court's order for temporary inpatient mental health services, and order authorizing the Texas Department of State Health Services (the Department) to administer

psychoactive medication. We *reverse* the trial court's order for temporary inpatient mental health services and order to administer psychoactive medication, and *render* judgment denying the State's application for court ordered temporary mental health services and its application for an order to administer psychoactive medication.

JAMES T. WORTHEN
Chief Justice

Opinion delivered September 7, 2016.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)



COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

SEPTEMBER 7, 2016

NO. 12-16-00183-CV

**THE STATE OF TEXAS FOR THE
BEST INTEREST AND PROTECTION OF B. A.**

Appeal from the County Court at Law
of Cherokee County, Texas (Tr.Ct.No. 41942)

THIS CAUSE came to be heard on the appellate record and the briefs filed herein, and the same being considered, it is the opinion of this Court that there was error in the judgment as entered by the trial court below and that the same should be reversed and judgment rendered.

It is therefore ORDERED, ADJUDGED and DECREED by this Court that the trial court's order for temporary inpatient mental health services and its order to administer psychoactive medication in favor of Appellee, **THE STATE OF TEXAS**, be, and the same are, hereby **reversed**; judgment is **rendered** denying the State's application for court ordered temporary mental health services and the State's application for an order to administer psychoactive medication; and that this decision be certified to the court below for observance.

James T. Worthen, Chief Justice.

Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.