SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1111-15T2

IN THE MATTER OF THE COMMITMENT
OF H.W.

Submitted January 25, 2017 – Decided March 1, 2017

Before Judges Accurso and Manahan.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. MK-02-7-04.

Joseph E. Krakora, Public Defender, attorney for appellant H.W. (John Douard, Assistant Deputy Public Defender, on the brief).

Carolyn A. Murray, Acting Essex County Prosecutor, attorney for State of New Jersey (Kayla E. Rowe, Special Deputy Attorney General/Acting Assistant Prosecutor, of counsel and on the brief).

PER CURIAM

H.W., twenty years old and back from two combat tours in Afghanistan, was indicted on charges of robbery, aggravated assault, attempted murder, receiving stolen property, resisting arrest and weapons charges arising out of a 2002 robbery of a convenience store. He was alleged to have threatened the clerk

with a gun in the course of that robbery, fled in a stolen taxi, and shot at pursuing police. He was found not guilty by reason of insanity (NGI) and committed to the custody of the Department of Human Services pursuant to N.J.S.A. 2C:4-8b(3). Diagnosed as suffering from schizoaffective disorder, bipolar type, and found dangerous to himself and the community, H.W. was committed to Anne Klein Forensic Center for treatment.

H.W. was moved to Greystone Park Psychiatric Hospital in May 2006 and less than three months later discharged to a supervised residence in Bloomfield. In 2009, following an altercation with a neighbor and threats to a staff member at his day program, H.W. was remanded to Greystone. He began to respond to medication in 2011 and was transferred to the cottages at Greystone in April 2012. Approved for discharge planning in July 2012, he began decompensating in September and had to be returned to the more restrictive setting of Greystone's main building.

In November 2012, H.W. assaulted a peer, and he was referred to Anne Klein for a higher level of care. After his condition stabilized, he returned to Greystone in June 2013. In June 2015, H.W. came under the care of Dr. Farrales.

At a Krol[1] hearing in October 2015, Dr. Farrales testified that although she had only assumed H.W.'s care in June, she was well familiar with him, having been his psychiatrist during his prior commitments to Greystone. Dr. Farrales testified that H.W.'s bipolar disorder was "in remission," and he had "not assaulted anyone since the last court hearing" in June 2015. She testified that H.W. was currently compliant with his medications, but would be a danger to himself or others should he cease taking them. She also noted that there had been some fluctuation in H.W.'s Depakote levels, causing concern that he might not be taking all of his medication. Nevertheless, she had agreed to his recent request to change his Depakote from syrup to capsules, because his most recent bloodwork revealed a good level of the drug. Nevertheless, she intended to "closely monitor the level" in the future to ensure his continued compliance.

Dr. Farrales also testified that H.W. was intensely focused on discharge and thus had become "very cautious in interacting" with his peers. He would often choose "to really avoid interactions with some of his peers" so as to ensure he would

[1] State v. Krol, 68 N.J. 236 (1975).

not "get[] into fights." She reported he was "beginning now to attend groups" but still had difficulty managing to appear for the morning "life management" group. She recommended that the court allow H.W. to move from Level Two to Level Three to allow him to leave the locked unit and move about the grounds without an escort. She also testified, in accordance with the recommendation of the Special Status Persons Review Committee and the Clinical Assessment Review Panel, that he be allowed to leave the Greystone campus for day trips escorted by staff.

Counsel for H.W. did not present an expert to testify on his behalf. Instead, he argued that Dr. Farrales had not testified that H.W. had a substantial disturbance of thought, mood or perception, and instead admitted he was fully oriented as to person, place and time. Counsel contended the State could not prove H.W. was either mentally ill or dangerous based on the testimony presented at the hearing. Because the State could not prove H.W. required continued commitment, counsel contended H.W. should be discharged or plans be put in place for his imminent release into the community.

The State countered that the parties had stipulated to the qualifications of the State's psychiatrist and the admission in evidence of her report. The prosecutor noted that the report detailed H.W.'s continuing mental illness and his significant

history of decompensating, requiring privileges to be curtailed and that H.W. be moved to more restrictive settings for higher levels of care. She noted that "this [was] the first time we've been here on a Krol [hearing] in a long time where [H.W.] is before this court without a problem having occurred."

The court was satisfied on the basis of the testimony of the "doctor who has treated this patient for an extended period of time in the past, as well as being [his] doctor" now, that H.W. suffers from a "mental condition the doctor is addressing." In addition to the bipolar diagnosis set out in the report in evidence, the court noted H.W.'s treating psychiatrist explained H.W. "needs certain limits and has explained what those limits are." The court found H.W. continued to have "mental impairments that require treatment." It concluded that to find H.W. "doesn't need treatment[]" or continued "restrictions as the doctor has recommended," "in light of all the history that we all know has gone on here," without H.W. having proffered another opinion, was "not appropriate."

The court, however, also noted the strides H.W. had made and that a six-month interval before the next hearing was too long in light of his progress. Accordingly, the court scheduled a hearing to take place in three months. At that hearing in January 2016, the court ordered that H.W. be permitted to leave

Greystone with his mother for day trips "supervised and/or unsupervised" as his treatment team determined and that Greystone submit "a detailed discharge plan" in anticipation of a March 2016 review hearing.

H.W. appeals from the October 27, 2015 order continuing his involuntary commitment pursuant to R. 4:74-7,[2] raising one issue:

> BECAUSE H.W. WAS FOUND BY THE STATE'S OWN PSYCHIATRIC WITNESS TO BE IN REMISSION FROM HIS MENTAL ILLNESS, COMPLIANT WITH HIS MEDICATION REGIMEN, AND NOT A DANGER TO HIMSELF OR OTHERS, HE CANNOT BE CONFINED PURSUANT TO STATE V. KROL AND STATE V. FIELDS.[3]

We reject his argument.

Although "defendants committed after an NGI finding are reviewed on a periodic basis under the same standards as those applied to civil commitments generally," In re Commitment of M.M., 377 N.J. Super. 71, 76 (App. Div. 2005), aff'd, 186 N.J.

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[2] Although Greystone was ordered to commence discharge planning for H.W., the relief H.W. seeks by this appeal, ninety days after entry of this order, we reject the State's argument that we should dismiss the appeal as moot. Our courts generally consider appeals challenging civil commitment because of the importance of the committee's liberty interest and the likelihood of repetition of error that will escape review. See In re Commitment of N.N., 146 N.J. 112, 124 (1996); see also In re commitment of P.D., 381 N.J. Super. 389, 393 (App Div. 2005), certif. granted and remanded, 186 N.J. 251 (2006).

[3] State v. Fields, 77 N.J. 282 (1978).

430 (2006), the State is not required to establish the need for continued commitment by clear and convincing evidence. In re Commitment of W.K., 159 N.J. 1, 4 (1999). Instead, it need shoulder only the lesser burden of the preponderance standard. N.J.S.A. 2C:4-8b(3); W.K., supra, 159 N.J. at 4 (noting "[t]he lesser burden of proof continues during the maximum period for which imprisonment could have been imposed as an ordinary term of imprisonment for the charges on which the defendant has been acquitted by reason of insanity, after giving credit for all time spent in confinement for the charges").

In order to justify continued commitment of a defendant found not guilty by reason of insanity on Krol status, the State must prove "the person is a danger to self or others and is in need of medical treatment." W.K., supra, 159 N.J. at 2. As the Court explained in Krol, because the statutory scheme is

> designed to protect the public against the risk of future dangerous behavior by persons acquitted by reason of insanity who are still suffering from mental illness, the principles of due process enunciated in Jackson [v. Indiana, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972),] and like cases require that the standard for commitment be cast in terms of continuing mental illness and dangerousness to self or others, not in terms of continuing insanity alone, and that some trier of fact make a meaningful determination as to whether defendant is actually within these standards.

> [Krol, supra, 68 N.J. at 249 (internal citations omitted).]

N.J.S.A. 30:4-27.1 to -27.23 and Rules 3:19-2 and 4:74-7 govern Krol reviews. State v. Ortiz, 193 N.J. 278, 281 (2008). Rule 4:74-7 requires, in accordance with Krol, that the State establish both that the NGI defendant remains mentally ill, and that his mental illness causes him to be dangerous to self, others or property as defined in N.J.S.A. 30:4-27.2h and i.

As used in the Court Rule, "mental illness" "means a current, substantial disturbance of thought, mood, perception or orientation which significantly impairs judgment, capacity to control behavior or capacity to recognize reality." N.J.S.A. 30:4-27.2r. A person is "dangerous to others or property" if

> by reason of mental illness there is a substantial likelihood that the person will inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future. This determination shall take into account a person's history, recent behavior and any recent act, threat or serious psychiatric deterioration.
>
> [N.J.S.A. 30:4-27.2i.]

Continued "'[c]ommitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future. Evaluation of the magnitude of the risk involves consideration both of the likelihood of dangerous

conduct and the seriousness of the harm which may ensue if such conduct takes place.'" M.M., supra, 377 N.J. Super. at 76 (quoting Krol, supra, 68 N.J. at 260). The focus is on whether the defendant "presently poses a significant threat of harm, either to himself or to others." Krol, supra, 68 N.J. at 247.

Appellate review of a Krol order is "extremely narrow, with the utmost deference accorded the reviewing judge's determination as to the appropriate accommodation of the competing interests of individual liberty and societal safety in the particular case." State v. Fields, 77 N.J. 282, 311 (1978). We give great deference to such determinations and set them aside "only where the record reveals a clear mistake in the exercise of the reviewing judge's broad discretion in evaluating the committee's present condition." Ibid.

Applying those standards here, we find no basis to disturb the Law Division's findings. There is no dispute that H.W. has long suffered from bipolar disorder, the symptoms of which he controls only by virtue of powerful medications. It is equally apparent based on H.W.'s history and Dr. Farrales report and testimony that without his medication, H.W.'s judgment would be impaired and his behavior would be uncontrolled and aggressive as in the past. Although the doctor testified that H.W. had recently been compliant with his medications in Greystone's

highly-structured environment, she also relayed concerns about fluctuations in the therapeutic levels of the Depakote that controls his aggressive symptoms and her desire to "closely monitor the level" going forward. The court's acceptance of that testimony was certainly within the broad discretion we accord a trial court's ability to evaluate the testimony and the evidence in the record.

And although it is true that Dr. Farrales testified that H.W. had not been violent or assaultive toward staff or peers in the preceding four months, a review of the transcripts of past review hearings makes clear that his good conduct was a new development. As the court noted and the record confirms, the history of H.W.'s commitment reveals both periods of progress and significant reversals.

Evidence of past conduct is evidential in predicting the likelihood of future dangerousness. Krol, supra, 68 N.J. at 261; N.J.S.A. 30:4-27.2h, i. Given H.W.'s long history of halting and intermittent progress in what is an admittedly highly structured environment, we cannot find the court erred in refusing to rely on a brief period of progress to conclude that H.W. was not substantially likely to inflict serious bodily harm on another person or cause serious property damage within the reasonably foreseeable future. N.J.S.A. 30:4-27.2i.

The evidence supported a finding that H.W. suffered from a mental illness, albeit one recently in remission, and absent his significant, hospital-administered medication regimen, would likely present a danger to himself and others in the foreseeable future. The record underscores the importance of the court's role in a Krol hearing to manage that "delicate balancing of society's interest in protection from harmful conduct against the individual's interest in personal liberty and autonomy." Krol, supra, 68 N.J. at 261. We find no error in the court determining to step H.W. through an escalating easing of restrictions over the course of three months before ordering Greystone to begin planning for his release into the community.

Affirmed.