SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3705-16T2

IN THE MATTER OF THE
COMMITMENT OF C.F.

Argued April 16, 2018 – Decided May 2, 2018

Before Judges Sabatino and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 80-09-0552.

Molly O'Donnell Meng, Assistant Deputy Public Defender, argued the cause for appellant C.F. (Joseph E. Krakora, Public Defender, attorney; Molly O'Donnell Meng, of counsel and on the briefs).

Jenny X. Zhang, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent State of New Jersey (Dennis Calo, Acting Bergen County Prosecutor, attorney; Jenny X. Zhang, of counsel and on the brief).

PER CURIAM

After a periodic Krol[1] hearing, the trial court denied C.F.'s motion to be released from Krol status, and ordered his continued Krol status and psychiatric treatment at the Bergen Regional

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

Medical Center. C.F. appeals from the trial court's April 11, 2017 order. He contends the trial court applied an incorrect legal standard by considering C.F.'s possible dangerousness if he discontinued his medication. Although we reject C.F.'s claim of legal error, we nonetheless remand for reconsideration and more specific findings of fact.

I.

C.F. was found not guilty by reason of insanity (NGI) in the April 1980 murder of his father, and the attempted murder and aggravated assault of his mother. C.F. stabbed both parents while in the throes of a psychotic episode. C.F. suffers from paranoid schizophrenia.

After his acquittal, C.F. was placed on Krol status, where he has remained after periodic reviews by the court. We gather from the record that at some point prior to 2013, C.F. was released into the community. We presume he was not entirely discharged from Krol status, however. Subsequent events, which we discuss below, led to his recommitment to Bergen Regional.

In advance of a January 2017 periodic hearing, C.F.'s counsel filed a motion to terminate his Krol status. At the hearing, both the State's expert, Dr. Maria Saiz, and the defense expert, Dr. Azariah Eshkenazi, supported C.F.'s removal from Krol status.

Although Dr. Saiz testified that C.F. should be removed from Krol status, she stated that he still needed long-term psychiatric care, structure, and medication supervision. She had known C.F. for four years, but had been his treating psychiatrist only since September 2015.[2] Dr. Saiz stated that since that time, C.F.'s behavior had been appropriate with no behavioral disturbances. "He is calm and controlled, very religious minded and demonstrates a willingness to be helpful to his peers." Dr. Saiz explained that C.F., who was then sixty-seven years old, was "one of the highest-functioning patients . . . in [her] unit," which treated many patients with dementia, who needed assistance in activities of daily living. She saw C.F. help other patients and positively interact with nursing staff.

Dr. Saiz said that C.F. was aware of his mental illness and the need for him to take medications, and he was compliant with medication. So long as that continued, he was "not a danger to self, others or property." Dr. Saiz conceded that C.F. would need psychiatric treatment and psychotropic medication "for the rest of his life." If he stopped taking his medication he could become delusional, depressed, or would probably "develop a crisis."

[2] Dr. Saiz stated that her unit provided "extended care . . . for those patients who become stable for discharge, in terms of their compliance with their medications and demonstrated behaviors."

Dr. Saiz admitted that C.F. would continue to need a structured environment and medication supervision, but Krol status made it difficult to find placements for less restrictive environments. "We are going to continue his care. We are going to give him a structured environment. We are going to make sure that he continue with the medications." She explained that C.F.'s admission to long-term care would benefit him, but, "[t]he only place that I think that at this point we can consider is the boarding home because long term care . . . they are not going to accept him."[3] Dr. Saiz admitted that a boarding home would be an unlocked facility; and even if C.F. were reminded to take medication, he could not be compelled to do so.

C.F.'s stability was a relatively recent development. He was hospitalized twice in 2013. According to psychiatric reports

[3] Dr. Saiz's January 2017 testimony echoed her assessment in a May 2016 letter to C.F.'s attorney, in which she stated:

> [C.F.]'s admission to long term care would provide him with greater access to social and religious activities in the Chapel and auditorium. His continued KROL status poses a barrier to achieving this goal since the long term care division will not accept him back as long as he remains on KROL status. As his treating psychiatrist, I would recommend that his KROL status be removed, as he is no longer a threat to anyone and in order to refer him back to our long term care facility at Bergen Regional.

prepared at the time, C.F. presented himself to the hospital "due to depressive symptoms that led to perpetuation of guilty persecutory thoughts and ideations of self-harm." He thought people "were coming into his house and putting 'something' into his drinking water." But, "[h]e denied thoughts of self-harm, and perpetual disturbances."

He was released into the community in June 2014. As a result of an acute decompensation of psychotic symptoms, he was involuntarily committed and placed in the acute care unit for geriatric patients.

In early 2015, C.F. was transferred briefly to Dr. Saiz's unit and then to a long term care unit several months later. However, C.F. resisted medication and suffered from paranoid and grandiose delusions. In one incident, he became verbally aggressive with a staff member, prompting a response by psychiatric emergency services. He also physically injured one patient, by pulling out a chair the patient was sitting on, and he engaged in a physical altercation that left another patient with a superficial laceration to the face. He was transferred back to the acute care unit. A few months later, he returned to Dr. Saiz's unit. In late 2015, Dr. Saiz supported continued Krol status, writing that C.F. needed a safe, secure, structured environment, and "required extended psychiatric hospitalization upon stabilization of his

acute condition." Dr. Saiz admitted at the 2017 hearing that her assessment of C.F.'s needs was unchanged.

The defense expert, Dr. Eshkenazi, agreed with Dr. Saiz that C.F. did not need to remain on Krol status and could be transferred to a residential facility. The expert met with C.F. for an hour and a half, and reviewed recent charts. He noted that C.F. "showed very good insight into the need of taking medication, realizes how much medication is helping him." Dr. Eshkenazi expressed confidence that C.F. would continue to take his medication. He agreed with Dr. Saiz that C.F. needs to be on psychiatric medication for the rest of his life, and if he stops taking his medication, the symptoms of his mental illness will reappear. Furthermore, Dr. Eshkenazi explained that even if there is compliance, medication may cease being effective and may need to be adjusted.

Dr. Eshkenazi said C.F.'s ideal placement would be a supervised residential facility, with medical staff who can monitor his medications, and seek his commitment to a hospital if he decompensates. Dr. Eshkenazi explained that a supervised setting was important so that somebody would notice and could respond promptly if C.F. decompensated and became psychotic again. Dr. Eshkenazi agreed that C.F. could not live on his own.

In summation, C.F.'s attorney lamented the lack of community resources for someone still on Krol status. She contended that C.F. was no longer a danger to himself or others and should be discharged entirely from Krol status. The prosecutor disagreed, contending instead that the next appropriate step was commencement of discharge planning.

The trial judge framed the threshold issue as "whether [C.F.] has a mental illness and remains a danger to himself or others absent proper medication and treatment." The court found the experts credible, highlighting Dr. Saiz's statement that if C.F. stopped his medication he could decompensate. The court found that C.F. had been "in and out of the hospital." He was "subject . . . to paranoid delusions, depressions, suicidal ideations. He can display some form of aggressive behaviors." She added, "He has been prone to decompensate when . . . his medication is not properly regulated or he's not on medication, and therefore, if he is not properly medicated he does remain a danger to himself and others."

The court surmised that Dr. Saiz and Dr. Eshkenazi had recommended discharge from Krol status because of their concern that the status prevented C.F. from securing an appropriate residential placement. "That unfortunately is not a reason to take [C.F.] off Krol . . . ." Nor was C.F.'s current compliance

with medication the end of the court's analysis. The court found, "[C.F.] needs [a] social support system," which he had in the hospital, but would lack outside it. The judge did not disagree that C.F. should be in "some form of residential housing," but only if he had the "proper support." The judge concluded, "[B]ased upon [a] preponderance of the evidence . . . the State has shown that [C.F.] remains a danger to himself and others and property if he is not properly medicated and therefore [C.F.] is going to remain on Krol status."

This appeal followed.

II.

We are guided by well-settled principles of law governing NGI acquittees. Such persons "may be held in continued confinement if the person is a danger to self or others and is in need of medical treatment." In re Commitment of W.K., 159 N.J. 1, 2 (1999). The purpose is not to punish, but "to protect society against individuals who, through no culpable fault of their own, pose a threat to public safety." Krol, 68 N.J. at 246.

Once committed, NGI acquittees "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. 430 (2006). One important exception is "that the burden for establishing the need for

continued commitment is by a preponderance of the evidence, whereas in a civil commitment proceeding it is by clear and convincing evidence." W.K., 159 N.J. at 4; see also N.J.S.A. 2C:4-8(b)(3) (establishing preponderance of the evidence standard of proof). "[A]n NGI defendant may remain under Krol commitment for the maximum ordinary aggregate terms that defendant would have received if convicted of the offenses charged, taking into account the usual principles of sentencing." W.K., 159 N.J. at 6.

"'Commitment requires that there be a substantial risk of dangerous conduct within the reasonably foreseeable future.'" M.M., 377 N.J. Super. at 76 (quoting Krol, 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, 68 N.J. at 247; see also M.M., 377 N.J. Super. at 76.

The determination of "dangerousness" is "a legal one, not a medical one." Krol, 68 N.J. at 261. "The risk of danger . . . must be substantial within the reasonably foreseeable future." Id. at 260. "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." Id. at 260. The statutory standard incorporates those two variables.

> "Dangerous to self" means that by reason of mental illness the person has threatened or attempted suicide or serious bodily harm, or has behaved in such a manner as to indicate that the person is unable to satisfy his need for nourishment, essential medical care or shelter, so that it is probable that substantial bodily injury, serious physical harm or death will result within the reasonably foreseeable future . . . ."
>
> [N.J.S.A. 30:4-27.2(h) (emphasis added).]

Notably, "no person shall be deemed to be unable to satisfy his need for nourishment, essential medical care or shelter if he is able to satisfy such needs with the supervision and assistance of others who are willing and available." Ibid.

"'Dangerous to others or property' means that 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." N.J.S.A. 30:4-27.2(i) (emphasis added).[4]

Unavoidably, "[d]etermination of dangerousness involves prediction of defendant's future conduct rather than mere characterization of . . . past conduct." Id. at 260-61. Yet, a "defendant's past conduct is important evidence as to his probable future conduct." Id. at 261. As the statute directs, the

[4] Notably, the statute employs three distinct concepts: "serious bodily harm," "substantial bodily injury," and "serious physical harm."

dangerousness determination "shall take into account a person's history, recent behavior and any recent act, threat or serious psychiatric deterioration." N.J.S.A. 30:4-27.2(h), -27.2(i).

The determination requires a "delicate balancing of society's interest in protection from harmful conduct against the individual's interest in personal liberty and autonomy." Id. at 261. In crafting restraints to reduce the risks an NGI acquittee poses, "[d]oubts must be resolved in favor of protecting the public, but the court should not, by its order, infringe upon defendant's liberty or autonomy any more than appears reasonably necessary to accomplish this goal." Krol, 68 N.J. at 261; see also State v. Ortiz, 193 N.J. 278, 292 (2008).

Also, "[o]rders, either requiring institutionalization or imposing lesser restraints are subject to modification on grounds that [the] defendant has become more or less dangerous than he was previously, or termination, on grounds that he is no longer mentally ill and dangerous, on the motion of either the State or the defendant." Id. at 263. And, an NGI acquittee may be conditionally released if the court deems it appropriate. Id. at 262. If conditionally released, an NGI acquittee may still remain subject to periodic review by the court. Ortiz, 193 N.J. at 293.

The Court has recognized that in almost all cases where a committee has demonstrated improvement, gradual reduction of

restraints is almost always appropriate, and sudden, complete removal of them almost never is. See State v. Fields, 77 N.J. 282, 303 (1978).

> [E]ven where the committee's condition shows marked improvement, only the most extraordinary case would justify modification in any manner other than by a gradual deescalation of the restraints upon the committee's liberty. For example, where the State is unable to justify the continuance of an order for restrictive confinement, the outright release of the committee into the community without the use of any intermediate levels of restraint, would normally constitute a manifestly mistaken exercise of the reviewing court's discretion.
>
> [Ibid. (citation omitted).]

See also In re Civil Commitment of E.D., 183 N.J. 536, 551 (2005).

"[T]he scope of appellate review of such judgments will be 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." Fields, 77 N.J. at 311. The reviewing court has the "responsibility to canvass the record inclusive of the expert testimony to determine whether the findings made by the trial judge were clearly erroneous." In re J.M.B., 395 N.J. Super. 69, 90 (App. Div.) (citing In re D.C., 146 N.J. 31, 58-59 (1996)), aff'd, 197 N.J. 563 (2009). We will modify a commitment order

"only if the record reveals a clear mistake." D.C., 146 N.J. at 58.

III.

Applying these principles, we first address C.F.'s claim that the court applied the wrong legal standard. Citing In re Commitment of J.R., 390 N.J. Super. 523 (App. Div. 2007), C.F. argues a court may not "speculat[e] about a [NGI] committee's dangerousness when he is not medicated . . . ." C.F. misinterprets the trial court's reasoning, and misreads our decision in J.R.

First, the trial court did not "speculate" about C.F.'s dangerousness if not appropriately medicated. "What's past is prologue."[5] As we have noted, both Krol and the statute authorize reference to past events in predicting future behavior. The trial court here relied on C.F.'s history. In the past, C.F. failed to comply with his medication regimen, or his regimen needed adjustment. Dr. Eshkenazi explained C.F.'s psychosis could return if he ceased medication compliance, or if the medication simply stopped being effective.

Second, J.R. did not involve a person like C.F., who was found NGI in connection with a violent crime. J.R. involved a person who was civilly committed after he sought treatment for his

[5] William Shakespeare, The Tempest, Act II, Scene 1.

bipolar disorder. 390 N.J. Super. at 525. The evidence demonstrated that if J.R. ceased taking his medication, he might neglect his personal hygiene, smoke carelessly and become verbally aggressive. Id. at 526. There was no evidence of physical violence. Also, J.R. and his girlfriend testified about measures they had taken to assure he did not run out of medication or cease taking it in the future. Id. at 532-33. In that context, we held that the State expert's testimony that "there is a possibility J.R. may stop taking his medication" fell short of establishing, by the heightened clear and convincing standard of proof, that J.R. posed a danger to himself or others warranting his continued civil commitment. Ibid. We did not establish a blanket rule that the risk of medication non-compliance, or medication ineffectiveness, may never be considered. In sum, J.R. does not compel reversal.

The record also amply established that C.F. suffers from schizophrenia and paranoia that has led to violent psychotic episodes. The homicide of his father, and aggravated assault of his mother led to C.F.'s initial commitment under Krol. Despite decades of treatment, C.F. continued to experience psychosis, requiring acute psychiatric care, and readjustment of his medication regimen. And as recently as 2015, he was non-compliant

with medication, verbally aggressive toward staff, and physically assaultive toward two patients.

Both experts conceded that if C.F. ceased medication compliance, he would inevitably decompensate, and require hospitalization. C.F.'s own expert agreed that to prevent that from happening, C.F. needed continued psychiatric treatment in a supervised setting, with medical staff who could address any deterioration in his condition, and seek his re-commitment. The court could reasonably find, based on the experts' testimony, that they favored C.F.'s discharge from Krol because they believed his Krol status interfered with appropriate placement in a less restrictive environment.

The court concluded that C.F. posed a danger to himself or others sufficient to warrant continued commitment under Krol. However, that conclusion was untethered to specific findings as to the essential elements of a danger to one's self or others. With respect to danger to self, the court did not expressly find that C.F. threatened suicide or serious bodily harm to himself, as opposed to suicidal ideation; nor did the court expressly find that it was "probable that substantial bodily injury, physical harm or death will result within the reasonably foreseeable future." N.J.S.A. 30:4-27.2(h).

With respect to danger to others, we do not minimize C.F.'s past violence against his parents while psychotic. However, defendant's recent violent episodes were in a substantially different category. In concluding that C.F. was a danger to others, the court was obliged to find there was a "substantial likelihood" he would "inflict serious bodily harm upon another person or cause serious property damage within the reasonably foreseeable future." N.J.S.A. 30:4-27.2(i).

Therefore, we are constrained to remand for reconsideration and for appropriate findings of fact and conclusions of law. See Strahan v. Strahan, 402 N.J. Super. 298, 310 (App. Div. 2008) (stating remand is appropriate where the trial court fails to making appropriate findings of fact); Barnett and Herenchak, Inc. v. State Dep't of Transp., 276 N.J. Super. 465, 473 (App. Div. 1994) (remanding for reconsideration, and essential findings of fact and conclusions of law).[6]

Finally, we note that the court recognized that it would be fruitful for Bergen Regional to focus on discharge planning, and explore options to transfer C.F. to a less restrictive environment.

[6] We leave it to the trial court to determine whether a clarification of the record is necessary on remand, with input from the parties. For the trial court's convenience, we direct the parties to provide the trial court with copies of their appellate briefs.

The record before us does not indicate what if anything has been done on that front since the trial court's decision in March 2017. "'The court's inquiry as to conditional release must be as broad as possible.'" Krol, 68 N.J. at 262 (quoting State v. Carter, 64 N.J. 382, 403 (1974)). In particular, the court on remand should consider the feasibility of conditional release or other alternatives under Rule 4:74-7(f)(1)(4) (permitting continued involuntary commitment if "other less restrictive alternative services are not appropriate or available to meet the patient's mental health care needs"); see also In re J.L.J., 196 N.J. Super. 34, 51 (App. Div. 1984) (noting the court's ability to "creatively mold the . . . conditions of restraint according to the patient," including "plac[ing] restrictions . . . even outside" the institutional setting).

Remanded for reconsideration and appropriate findings of fact and conclusions of law. We do not retain jurisdiction.