RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2383-20

IN THE MATTER OF THE CIVIL COMMITMENT OF K.S.

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Argued March 7, 2022 – Decided March 9, 2023

Before Judges Messano, Accurso and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. ESCC00066918.

Renee J. Bissonnette, Assistant Deputy Public Defender, argued the cause for appellant K.S. (Joseph E. Krakora, Public Defender, attorney; Renee J. Bissonnette and Cynthia Seda-Schreiber, Deputy Public Defender, on the briefs).

Thomas M. Bachman, Chief, Mental Health & Governmental Affairs Section, argued the cause for respondent State of New Jersey, County of Essex (Jerome St. John, Essex County Counsel, attorney; Thomas M. Bachman, on the brief).

The opinion of the court was delivered by

ACCURSO, J.A.D.

K.S. appeals from orders of March 18 and April 15, 2021 (the latter subsequently memorialized on May 13, 2021) involuntarily committing him to treatment at Ann Klein Forensic Center. He does not dispute the court correctly determined he qualified for involuntary civil commitment pursuant to Rule 4:74-7. K.S. contends the court erred in maintaining him at Ann Klein despite testimony from his treating psychiatrist that treatment at a less restrictive state hospital was medically appropriate. Finding no reversible error in the court's analysis on this record, we affirm.[1]

The record is remarkably thin, consisting only of the orders of commitment and continuing commitment and the transcripts of two very brief hearings, one a motion for reconsideration. There are no medical reports. We do not know what prompted K.S.'s involuntary commitment to Trenton Psychiatric Hospital in early August 2018 or what kept him there for nearly eighteen months until he was administratively transferred to Ann Klein in late

[1] We reject county counsel's recommendation to dismiss the appeal as moot. Although our decision will have no practical effect on the controversy in light of K.S.'s discharge, see In re J.S., 444 N.J. Super. 303, 313 (App. Div. 2016) (defining mootness), the legal issue raised is significant, impelling us to address it even in the face of the skimpy record, see City of Plainfield v. N.J. Dep't of Health & Senior Servs., 412 N.J. Super. 466, 484 (App. Div. 2010) (noting courts may decline to dismiss a matter based on mootness when the issue on appeal is important and of public interest).

February 2020. We have no idea why he was transferred to the highly secure facility at Ann Klein Forensic Center or any information about his history there.

At the time of the March 18, 2021 review hearing, K.S. had been at Ann Klein for a little less than a year. Because the doctor's testimony was so brief, we reprint it in full.

> COUNTY COUNSEL: Doctor, are you the patient's treating psychiatrist?
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> WITNESS: Yes.
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> COUNTY COUNSEL: And when was your last examination?
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> WITNESS: Yesterday.
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> COUNTY COUNSEL: Thank you. And would you provide the court with an update regarding his condition since the last hearing?
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> WITNESS: Yes. So, [K.S.] has been in good control of his behavior since the last court hearing. His risk assessment was completed and he is now awaiting approval for a less restrictive.
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> COUNTY COUNSEL: Okay. And when you say less restrictive, what did you have in mind?
>
> WITNESS: [Trenton Psychiatric Hospital]
>
> COUNTY COUNSEL: Okay. Thank you. Is he – is his – how is his insight?

WITNESS: So, insight. It's adequate for the current circumstances. I mean, he doesn't have great insight into his mental illness overall, but he has been taking his medications via IMAR [involuntary medication administration report] and he understands that he needs to maintain control of his behavior to go.

COUNTY COUNSEL: Okay. Thank you. And, so, at the present time is he a danger to himself or to others or to property if he were placed in a less restrictive environment? With (indiscernible) —

WITNESS: If he were released to the community, yes, but we are in the process of referring him to a less restrictive hospital.

COUNTY COUNSEL: Okay. But and so would it – would he be a danger to himself or to others or to property —

WITNESS: To others.

COUNTY COUNSEL: Okay. Thank you. Nothing further, Your Honor.

THE COURT: Cross-examine?

PUBLIC DEFENDER: Doctor, it's your opinion as his treating psychiatrist that he could be transferred to a less restrictive facility, right?

WITNESS: Correct.

PUBLIC DEFENDER: So, if a bed were open at [Trenton Psychiatric] today and there wasn't a waiting list, it would be your opinion that he should go there.

WITNESS: Yes.

Following that testimony, the public defender stated K.S. was "not contesting continued commitment," but asked the order indicate he "be transferred to a less restrictive hospital, at this time, given his treating psychiatrist's testimony . . . that he meets the criteria for that least restrictive setting." County counsel objected. Although some of county counsel's remarks were not discernible to the transcriber, we gather the gist of the objection was that the doctor's testimony represented a good example of how circumstances regarding a patient can change and questioning the appropriateness of entering an order requiring "the doctor to follow her opinion today, tomorrow if the circumstances change."

Counsel thereafter presented their positions on whether the court could or should order K.S. transferred to a less restrictive setting. The public defender argued K.S. had "the right to the least restrictive setting according to In re S.L.," 94 N.J. 128 (1983), that Ann Klein was "the most secure setting for people with mental illness," and because K.S.'s "treating psychiatrist, the State's own witness" testified "he meets criteria for a less restrictive setting," the court should order his transfer to that less restrictive setting if a bed was available. County counsel countered the purpose of the hearing was to

determine only whether K.S. remained subject to continued commitment, which he did not contest, and the distinction K.S. was raising as to the place of his confinement was not appropriate for the court to consider at a review hearing.

After hearing the testimony and counsels' arguments, the court continued K.S.'s commitment. The judge found the doctor's testimony credible, noting he'd read the doctor's report and adopted her findings. As to the issue of K.S.'s transfer from Ann Klein, the judge noted it was the doctor's intent to move K.S. "to a less restrictive setting," and "[t]hat will be done administratively, not by court order."

K.S. made a motion for reconsideration, which the court heard on April 15, 2021. K.S.'s counsel repeated her argument the court was both allowed and required to consider less restrictive treatment alternatives at a review hearing pursuant to N.J.S.A. 30:4-27.15a(a), -27.16(a) and Rule 4:74-7(f)(1), and that K.S. was entitled pursuant to the Patient Bill of Rights, N.J.S.A. 30:4-24.2(e)(2), "[t]o the least restrictive conditions necessary to achieve the purposes of treatment." Counsel stressed K.S., in seeking the less restrictive treatment alternative his treating psychiatrist deemed appropriate, was not asking the transfer be "done immediately," but only "once a bed is available."

K.S.'s counsel also emphasized K.S. was not asking the court to designate a specific state hospital to which K.S. would be ordered transferred. She noted the State had failed to present any evidence as to why the less restrictive alternative his psychiatrist deemed appropriate could not be accomplished, and only the court, not the Special Status Patient Review Committee (SSPR) or the Clinical Assessment and Review Panel (CARP), could make the legal determination as to K.S.'s commitment status.[2] Finally, counsel argued other judges routinely enter orders directing patients be transferred to a less restrictive facility.

County counsel argued reconsideration was not appropriate under Rules 1:7-4(b) and 4:49-2, objected to any reference to the Special Status Patient

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[2] "The SSPRC provides review of recommendations made by a patient's treatment team balancing the patient's needs to 'successfully participate in treatment and rehabilitative programs, while maintaining a safe and secure therapeutic milieu for patients and staff . . . .'" In re Commitment of T.J., 401 N.J. Super. 111, 114 n.2 (App. Div. 2008) (quoting N.J.A.C. 10:36-1.1). The Clinical Assessment and Review Panel advises the Medical Director, Dr. Feibusch at the time of K.S.'s commitment, "on the review of SSPRC decisions." N.J. Dep't of Hum. Servs., Div. of Mental Health Servs., Admin. Bull. 3:29: Designation of Special Status Patients 1, 3 (May 12, 2005) (delineating the authority of the Special Status Patient Review Committee and the Clinical Assessment and Review Panel to closely oversee patients at greatest risk of violent behavior at various stages of treatment and leaving the treatment teams "the authority to make privileging and discharge decisions with little or no SSPRC oversight" in the case of low risk patients).

Review Committee or the Clinical Assessment and Review Panel, as there was no showing either was delaying decision on K.S.'s transfer to another hospital, and asserted no trial court should be ordering a person committed to inpatient treatment to any specific hospital pursuant to the 2011 memo from the Acting Administrative Director prohibiting the practice, Admin. Off. of the Cts., Civil Commitment Orders - Form Order Not to Be Amended to Designate Specific State Hospitals for Placements. (June 20, 2011).

The judge, while thanking counsel for their "very cogent and clear" arguments, denied the motion for reconsideration. He emphasized the matter was a review of an uncontested commitment. The judge explained he denied K.S.'s counsel's request to transfer K.S. to a less restrictive facility because that was "the purpose and function of the administration." Acknowledging the right of a patient to the least restrictive conditions necessary to achieve treatment, the judge refused "to bypass the administrative procedure" for transfer to a less restrictive facility because of the importance of the treatment team's and hospital staff's observations, on which "treatment is formulated" as well as "other factors that come into play." The judge noted his familiarity with the Director's 2011 memo that "direct placement of a patient . . . is

beyond the jurisdiction of the court," and opined that was, in essence, what K.S. sought here.

K.S. was conditionally discharged two weeks later. Although not part of the record, the public defender asserts, over objection by county counsel, that the Special Status Patient Review Committee recommended K.S.'s transfer to a less restrictive State hospital before the judge heard K.S.'s reconsideration motion, but the Clinical Assessment and Review Panel denied it four days after the motion hearing. K.S. has included in his appendix the Clinical Assessment and Review Panel's April 19, 2021 reasons for disapproving K.S.'s transfer. The memo, which is signed by Evan Feibusch, M.D., Department of Health/Division of Behavioral Health Services Medical Director and John O'Brien, Clinical Assessment and Review Panel Coordinator, states:

> CARP does not concur with a transfer to a regional hospital at this time. We note that there has been some respite from [K.S.'s] assaultive behaviors, though he required seclusion in late March. He continues to require contraband checks multiple times a day to ensure safety and other measures to help ensure adherence with his medication regimen. These sources of conflict are too dangerous to engage in at a regional hospital for a patient with this degree of violence in his history, including recent history at the maximum-security hospital.

K.S. asserts, without any reference to the record, that his treatment team was still recommending his continued commitment to a less restrictive facility at the time of his conditional discharge.

We review a commitment determination only for abuse of discretion, In re D.C., 146 N.J. 31, 58-59 (1996), recognizing the judges who hear these cases are usually well-versed in the intricacies of the controlling law, see In re Civil Commitment of T.J.N., 390 N.J. Super. 218, 226 (App. Div. 2007) (reviewing commitment of a sexually violent predator). To the extent the questions presented are procedural or legal ones, however, our review is de novo. In re Commitment of J.L.J., 196 N.J. Super. 34, 49 (App. Div. 1984).

Title 30 defines "least restrictive environment" as "the available setting and form of treatment that appropriately addresses a person's need for care and the need to respond to dangers to the person, others, or property and respects, to the greatest extent practicable, the person's interests in freedom of movement and self-direction." N.J.S.A. 30:4-27.2(gg). The language made its way into N.J.S.A. 30:4-27.15a; N.J.S.A. 30:4-27.16(a) and Rule 4:74-7(f), the statutes and Rule on which K.S. relies, when the Legislature established involuntary commitment to outpatient treatment in 2009.

After the Legislature made outpatient treatment an option, it became incumbent on the court to consider whether a patient otherwise qualifying for involuntary commitment "should be assigned to an outpatient setting or admitted to an inpatient setting for treatment," considering "the least restrictive environment for the patient to receive clinically appropriate treatment that would ameliorate the danger posed by the patient and provide the patient with appropriate treatment." N.J.S.A. 30:4-27.15a(a). If the court determined "the least restrictive environment for the patient to receive clinically appropriate treatment would be in an inpatient setting," the statute provides "the court shall issue an order for admission to a psychiatric facility." N.J.S.A. 30:4-27.15a(c).

Our Supreme Court amended Rule 4:74-7(f) consonant with the statute, requiring the State prove a person otherwise qualified for involuntary commitment required "outpatient treatment as defined by N.J.S.A. 30:4-27.2(hh) or inpatient care at a short-term care or psychiatric facility or special psychiatric hospital because other less restrictive alternative services are not appropriate or available to meet the patient's mental health care needs." R. 4:74-7(f)(1). Thus, "least restrictive environment" as included in the quoted statutes and Rule 4:74-7 refers to the choice between inpatient and outpatient

treatment and not a patient's placement in a particular psychiatric hospital. See S. Health, Hum. Servs. & Senior Citizens Comm. Statement to S. 735 (June 8, 2009) (explaining "the bill shifts the sense of involuntary commitment from commitment to an inpatient facility to commitment to clinically appropriate treatment, which may be inpatient care, outpatient care, or a combination of inpatient and outpatient care."); Governor's Signing Statement to S. 735 (Aug. 11, 2009) ("The bill, S-735/A-1618, provides for clinically appropriate treatment in the least restrictive environment for individuals in need of mental health services who may not meet the threshold of in-patient care.")

Although the court's consideration of "least restrictive environment" became a part of the paradigm at the initial commitment hearing and periodic reviews only after the advent of outpatient commitment, the concept has deeper roots, having been included in the Patient's Bill of Rights first enacted in 1965, N.J.S.A. 30:4-24.2(e)(2) (guaranteeing each patient receiving treatment pursuant to Title 30 shall have the right "[t]o the least restrictive conditions necessary to achieve the purposes of treatment"), and one of the factors a court must consider in placing a patient on CEPP (conditional extension pending placement) status pursuant to Rule 4:74-7, S.L., 94 N.J. at 140; see also State v. Krol, 68 N.J. 236, 258 n.10 (1975) (noting "recent

decisions" holding the due process clause requires "persons may not be transferred to maximum security wards within mental institutions without consideration of less restrictive alternatives" without comment on "the soundness of this construction of the due process clause").

Nevertheless, we are convinced the court was correct to step gingerly in responding to K.S.'s request that the court order him transferred out of Ann Klein, so as to avoid infringing on the powers of the Executive Branch, specifically the Commissioner of Health.[3] Knight v. Margate, 86 N.J. 374, 388 (1981) (explaining each branch of government should "exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch"). As we noted nearly forty years ago, "[a]lthough the committability of persons suffering from mental illness is ultimately a legal decision, their care and treatment during hospitalization or while in a supervised residency are matters properly within the realm of medical expertise." K.P. v. Albanese, 204 N.J. Super. 166, 177 (App. Div. 1985) (holding "the exercise of clinical judgment in assigning a privilege level to effectuate treatment goals" did not

[3] The state psychiatric hospitals moved from the Department of Human Services to the Department of Health in 2017. Reorganization Plan No. 001-2017 (June 29, 2017). The Department of Health thereafter created the Division of Behavioral Health Services.

infringe the "appellants' right under N.J.S.A. 30:4-24.2, the Patient's Bill of Rights, to the least restrictive conditions necessary to achieve the purposes of treatment, or their federal constitutional right to liberty").

We have previously reversed a trial court's transfer of convicted inmates receiving treatment at the Vroom Building, the predecessor to Ann Klein, to other state psychiatric hospitals based on their "right to treatment under the least restrictive conditions as patients of the state mental hospital system, pursuant to N.J.S.A. 30:4-24.2(e)(2)," explaining the assignment of prison inmates to psychiatric hospitals was a function legislatively committed to the discretion of the Commissioner of Human Services not subject to review by the trial court. In re Patterson, 156 N.J. Super. 91, 93 (App. Div. 1978). We held "[t]he statutory scheme contemplates a fundamental distinction between commitment in contrast to placement and treatment. Commitment is properly a judicial function, but questions of placement and transfers within the system are the Commissioner's responsibility." Id. at 97.

Although K.S. distinguishes Patterson as it addressed the rights of prison inmates receiving treatment in the state psychiatric hospitals, we have not viewed our holding in Patterson so narrowly. See In re Civil Commitment of U.C., 423 N.J. Super. 601, 612-13 (App. Div. 2012) (noting "[t]he statutory

sections governing civil commitments," specifically N.J.S.A. 30:4-27.21(a) and (b), "which confer authority upon the Commissioner to transfer a person committed to a State psychiatric facility" to another psychiatric facility, "reinforce our conclusion . . . that the Legislature has delegated exclusive authority to the Commissioner of Human Services to determine appropriate services for developmentally disabled persons, including residential services, which may not be overridden by a trial court presiding over a civil commitment proceeding"). The Administrative Director's 2011 memo reminding trial judges "[t]he statutes and the Rules of Court governing civil commitments do not authorize the courts to determine where involuntarily committed individuals should be placed for treatment," likewise repudiates K.S.'s narrow interpretation of Patterson.

That is not to say trial courts hearing commitment matters may never consider a claim like this one that assignment to Ann Klein is not appropriate in light of testimony of a patient's treating psychiatrist that treatment at a less restrictive state hospital was medically indicated. See T.J., 401 N.J. Super. at 120 (holding the trial court erred in maintaining patient on CEPP "when faced with the SSPRC's inexplicable four-month delay in providing any review of [the patient's] needs"). But a court considering such a request must be mindful

both of the comprehensive regulations governing the management and transfer of patients within the state psychiatric hospitals, N.J.A.C. 10:36-1.1 to -3.5, and that Title 30 defines "least restrictive environment" in a manner that takes into account both the patient's "need for care" and the institution's "need to respond to dangers to the person, others, or property," N.J.S.A. 30:4-27.2(gg). Given the authority the Commissioner has delegated to the Special Status Patient Review Committee and the Clinical Assessment and Review Panel for ensuring patient care and safety in the state psychiatric hospitals, we do not agree with K.S. that a trial court could appropriately transfer a patient from Ann Klein to another state psychiatric hospital without considering their positions on the transfer.

Having reviewed the record, albeit meager, in this case, we are confident the judge was appropriately sensitive to the separation of powers issue presented, and he did not err in permitting the treating physician's recommendation to transfer K.S. to a less restrictive hospital to proceed administratively in the circumstances presented.

Affirmed.