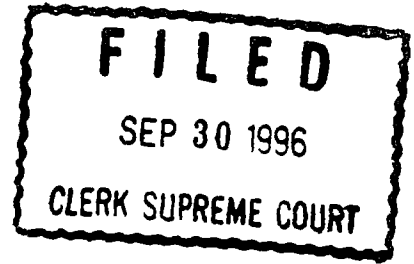


IN THE COURT OF APPEALS OF IOWA

No. 6-463/95-1439



IN THE INTEREST OF MICHAEL H. LANG,

MICHAEL H. LANG,
Appellant.

Appeal from the Iowa District Court for Johnson County, Thomas L. Koehler,
Judge.

Michael Lang appeals the district court's decision affirming the Judicial
Hospitalization Referee's order finding that he is seriously mentally impaired and
placing him in a mental health institute. **AFFIRMED BY OPERATION OF LAW.**

Robert S. Michael of Lynch, Greenleaf & Michael, Iowa City, for appellant.

Anne M. Lahey, Assistant County Attorney, for appellee-State.

Considered en banc.

PER CURIAM

The court being equally divided, the judgment is affirmed by operation of law.
Iowa Code § 602.5106(1) (1995).

AFFIRMED.

For affirmance: Sackett, C.J., and Habhab and Cady, JJ.

For reversal: Huitink, Streit, and Vogel, JJ.

VOGEL, J. (writing separately)

I do not believe affirming the trial court can be reconciled with the facts and holding in *In re Foster*, 426 N.W.2d 374 (Iowa 1988). I would reverse the trial court.

Michael Lang appeals the district court's ruling affirming the Judicial Hospitalization Referee's order finding he is seriously mentally impaired and placing him in a mental health institute. He argues there was insufficient evidence to show (1) he is afflicted with a mental illness, (2) he cannot make responsible decisions concerning his medical treatment, and (3) he is a danger to himself or others. I will only address whether there was sufficient evidence to show that he is a danger to himself or others.

Lang is serving a life sentence in the Iowa prison system at Fort Madison for first-degree kidnaping. In June of 1995 Mr. Hussan, a psychologist at Fort Madison, asked for Lang to be evaluated at the Iowa Medical and Classification Center (IMCC). Hussan's actions were prompted by Lang's worsening mental condition. Lang's

symptoms were thought disorder, rambling, rapid speech, obsessed by numbers, loose associations in his thinking, disorganized and delusional thoughts, irrelevant responses, and swift mood changes, ranging from being pleasant to hostile. Hussan also described Lang as being argumentative and at times very intimidating, making verbal threats toward the staff. Earlier, a psychiatrist at Fort Madison diagnosed Lang as having probable schizophrenia.

Upon Lang's arrival to the IMCC, Dr. Curtis C. Fredrickson, a medical doctor and staff psychiatrist, along with Lang's counselor, John Spence, interviewed Lang. They noted psychotic signs and symptoms but not the aggressive or threatening behavior. During his stay at the IMCC, Lang was somewhat of a management problem. He got into verbal fights, made some threats, and became very assaultive during a shakedown. During the shakedown, Lang spit in the face of one officer, broke the same officer's glasses, and bit a second officer, drawing blood. Not only was the aggressive behavior a problem, but Lang has Hepatitis C, which can spread from saliva to blood.

On July 19, 1995, the Judicial Hospitalization Referee ordered Lang to be placed in a mental health institute. Lang appealed the referee's findings.

A hearing was held before the district court on August 10, 1995. Dr. Fredrickson testified Lang had schizoaffective disorder, which he described as a mixture of schizophrenic symptoms and manic-like symptoms. He also testified Lang's judgmental capacity was so impaired that he had no insight into his illness and

could not choose the proper course of treatment for himself. Lang has consistently refused medication even though it was medically advisable. It was Dr. Fredrickson's opinion Lang was a danger to himself and others, based on his recent assaultive behavior and failure to take recommended medication. The district court affirmed the involuntary hospitalization order.

A person may be civilly committed only upon a finding by clear and convincing evidence a person is seriously mentally impaired. Iowa Code § 229.12(3) (1995). There is a presumption in favor of the respondent and the applicant has the burden of evidence to support the contentions made in the application. *Id.* Serious mental impairment, as defined in section 229.1(14), describes the condition of a person who is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to the person's hospitalization or treatment, and who because of that illness meets the following criteria:

- a. Is likely to physically injure the person's self or others if allowed to remain at liberty without treatment.

Iowa Code § 229.1(14) (1995).¹

Even with a finding that Lang is afflicted with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to his hospitalization or treatment, the commitment cannot be affirmed unless it is found

¹ Although I only quote criteria (a), there are three different criteria listed in section 229.1(14), any one of which may be satisfied in order to find serious mental impairment. Section 229.1(14)(a) is the criteria which is most applicable to this case.

Lang, because of his illness, is likely to injure himself or others if he is allowed to remain at liberty without treatment. “Likely” to injure himself or others, means probable or reasonably to be expected. *In re Mohr*, 383 N.W.2d at 542. The court must make a predictive judgment about whether the respondent poses a danger to himself or others. *In re Oseing*, 296 N.W.2d 797, 799 (Iowa 1980). Stringent proof under the dangerousness standard is necessary because predicting dangerousness is difficult and, at best, speculative. *In re Foster*, 426 N.W.2d at 377-78. An overt act connotes past aggressive behavior or threats by the respondent manifesting the probable commission of a dangerous act upon himself or others that is likely to result in physical injury. *Id.* at 378. Lang’s disorganized thinking and other bizarre conduct does not establish the necessary proof to satisfy Iowa Code section 229.1(14)(a) .

I next examine his assaultive conduct. Lang argues the single incident the doctors have to report was when he was reacting to inappropriate conduct forced upon him. During a shakedown, a corrections officer reached up Lang’s jumpsuit and squeezed his leg. When Lang asked the officer to not do that, the officer “smirked.” Lang bit the officer hard enough to draw blood and spit on another officer, then broke his glasses. While this conduct is assaultive in nature, it appears more reactive than aggressive. That is, there is nothing in the record that would indicate Lang is a danger to others if unprovoked. This case is strikingly similar to the *Foster* case, in that both Lang and Foster suffered from bizarre thought and conduct but neither was the aggressor in threatening conduct. For this reason, I believe our supreme court has

carefully analyzed the difference between aggressive and reactive conduct for the purpose of deciding whether a person is a danger to himself or others.

The danger to himself, according to Dr. Fredrickson, is in Lang's mental condition worsening because he refuses medication. The prison system keeps Lang in a locked unit for unspecified behavior problems, *none of which were made part of this record*. I would find the evidence was not clear and convincing that Lang is a danger to himself or others.