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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

IN THE MATTER OF GARY MOHR,
ALLEGED TO BE SERIOUSLY MENTALLY IMPAIRED,
Respondent-Appellant.

Filed October 29, 1985

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5-438
85-249

Appeal from the Iowa District Court for Johnson County - Ansel J. Chapman, Judge.

Gary Mohr appeals from a court order directing that he be involuntarily hospitalized pursuant to Iowa Code chapter 229. **REVERSED.**

William D. Werger of Hayek, Hayek, Hayek & Holland, Iowa City, for respondent-appellant.

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

Heard by Oxberger, C.J., and Snell and Sackett, JJ.

SNELL, J.

In January of 1985, Gary Mohr was voluntarily hospitalized at the Veterans Administration Hospital in Iowa City for a highly infectious form of pneumonia. He initially accepted treatment, but began to resist intravenous treatment after an episode of phlebitis which he believed resulted from the intravenous treatment. Because Mohr displayed delusionary ideas during his hospitalization for pneumonia, he was diagnosed as suffering from chronic undifferentiated schizophrenia. His doctor testified that Mohr had suffered from this disease since at least 1972. Mohr's records include several psychiatric hospitalizations; however, for the thirteen months prior to his voluntary hospitalization for pneumonia, Mohr had lived without incident in a trailer which he owns. His records also showed instances of sexually inappropriate comments to strangers, and an assault against his father in 1972 which was accompanied by accusations that his father had murdered his mother. During the hearing in the present case, Mohr accused his father of Nazi war crimes and made allegations of sexual abuse by the hospital staff.

After the hearing, the district court ordered that Mohr be involuntarily hospitalized pursuant to Iowa Code chapter 229. Mohr appeals from this order. He contends that the commitment was not supported by substantial evidence that he was "seriously mentally impaired" within the meaning of Iowa Code chapter 229.

An involuntary commitment proceeding is triable as an ordinary action at law. Matter of Oseing, 296 N.W.2d 797, 800-801 (Iowa 1980). The trial court's findings of fact have the effect of a special verdict and, therefore, will be upheld if substantial evidence exists in the record to support them. Id. The respondent's welfare is paramount and commitment is not warranted unless each of the

elements of serious mental impairment are proven by clear and convincing evidence. Iowa Code § 229.12(3) (1985); Oseing, 296 N.W.2d at 799.

Iowa Code section 229.1(2) defines "serious mental impairment":

> "Seriously mentally impaired" or "serious mental impairment" 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:
>
> a. Is likely to physically injure the person's self or others if allowed to remain at liberty without treatment; or
>
> b. Is likely to inflict serious emotional injury on members of the person's family or others who lack reasonable opportunity to avoid contact with the afflicted person if the afflicted person is allowed to remain at liberty without treatment.

In Oseing, the Iowa Supreme Court stated that this statutory definition contains three express elements: (1) respondent must be found to be afflicted with a mental illness; (2) respondent must lack sufficient judgment to make responsible decisions; and (3) respondent must be likely, if allowed to remain at liberty, to inflict physical or emotional injury on himself or others. 296 N.W.2d at 799.

Mohr does not seriously contest the finding of mental illness but contends that the remaining elements were not supported by substantial evidence.

A. Judgmental Capacity. The trial court found Mohr "lacks sufficient judgment to make responsible decisions with respect to his hospitalization and treatment." This element requires the state to prove that the person is unable to make a rational decision about treatment. Oseing, 296 N.W.2d at 801, citing Bezanson, Involuntary Treatment of the Mentally Ill in Iowa: The 1975 Legislation, 61 Iowa L. Rev. 261, 275 (1975).

Mohr testified that he never had schizophrenia and believed he was "quite mentally healthy." He also stated that he did not want to stay in the hospital and doesn't feel that he needs any help. Dr. Klauburg, psychiatrist in residency at the Iowa City Veterans Hospital, testified that Mohr's illness was characterized

by exacerabations and remissions, and Mohr was currently suffering a remission which was treatable. He testified that Mohr refused to continue with the prescribed treatment for pneumonia, suffers deviant sexual delusions, and refuses to communicate with the hospital staff on more than a superficial basis. In the past, Mohr was treated with antipsychotic drugs and his illness remitted. In Dr. Klauburg's opinion Mohr's judgmental capacity is so impaired that he cannot choose the proper course of treatment. Upon this record, the trial court's finding that Mohr lacked capacity to make a rational judgment about treatment is supported by substantial evidence.

B. Dangerousness. The trial court found that Mohr "is likely to physically injure himself or others if allowed to remain at liberty without treatment." Therefore, we are not concerned with dangerousness involving emotional injury. "Likely" means probable or reasonably to be expected. Oseing, 296 N.W.2d at 801. The element of dangerousness requires a "predictive judgment 'based on prior manifestations but nevertheless ultimately grounded on future rather than past danger.'" Id., quoting Bezanson, at 304. The threat of harm which the respondent poses to himself or others must have been evidenced by a recent overt act, attempt or threat to satisfy due process requirements. Stamus v. Leonhardt, 414 F. Supp. 439, 451 (S.D. Iowa 1976).

The record shows only one incident where Mohr displayed violence overtly. In 1972 he shot a gun over his father's head in an attempt to cause his father to confess to his mother's murder. This incident occurred after his mother died of cancer. There is no other evidence of Mohr physically assaulting or threatening anyone. In 1976, Mohr was brought into the hospital by police because of his making sexual remarks to people on the street. Dr. Klauburg testified that Mohr was presently harassing people in the hospital lobby and members of the hospital staff regarding his sexual delusions. Dr. Klauburg stated that

Mohr told him and others that "the Veterans Hospital was holding several young women for white slavery and also that the nurses had forcibly masturbated him in the hallway on several accounts, and that he was refusing his medications because he didn't enjoy being in the company of such morally demeaning people." Mohr also mentioned to Dr. Klauberg on more than one occasion that the staff people at the hospital were all rapists and that he would see them burn in hell. Dr. Klauburg acknowledged that Mohr was not suicidal, nor has Mohr attempted to harm or actually harmed anyone during his present admission. However, Dr. Klauburg concluded that in his judgment Mohr presents a danger to himself and others because his judgment is significantly impaired by his illness and his behavior could not be predicted if he were discharged at this time.

No evidence appears that Mohr's current views on sexual matters have been translated into physically harmful acts toward anyone. Dr. Klauburg's opinion that continued confinement for treatment is necessary emanated from his training and experience in the psychiatric discipline. We recognize that his opinion is understandable and appropriate from the medical standpoint. Our task, however, is to determine if the legal requirements for continued involuntary confinement have been met.

The aforementioned facts concerning Mohr's statements and conduct are very different from those upon which the Oseing court relied to affirm a finding of dangerousness. There, the respondent suffered frequent violent outbursts of temper where he injured his mother and damaged property. Oseing, 296 N.W.2d at 801. He also believed a group of people were conspiring to kill him, threatened to kill the conspirators in defense, and his psychiatrist testified that a definite possibility existed that his threats would be carried out. Id. at 802.

By contrast, Dr. Klauburg's conclusion in this situation was apparently based solely on Mohr's one violent outburst in 1972. His psychiatric testimony is not enough to support a finding of dangerousness. It is not couched in terms of probability nor could Dr. Klauburg specify what Mohr could reasonably be expected to do that would be likely to physically injure himself or others.

The court's comments in Stamus are particularly apposite:

> May the state fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the state, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

414 F. Supp. at 450.

We hold that the evidence was not sufficient to support the trial court's finding that Mohr is likely to physically injure himself or others if allowed to remain at liberty. The order for involuntary hospitalization of Gary Mohr is vacated; he is released from custody.

REVERSED.

Oxberger, C.J. concurs; Sackett, J. dissents.

SACKETT, J. (dissenting)

I would affirm the trial court. The majority finds the evidence is insufficient to support a finding Mohr is dangerous to himself or others. Dr. Kurt Klauburg a resident in psychiatry testified:

> Q. Doctor, is it your opinion at this time that Mr. Mohr presents a danger to himself? A. I believe a danger to himself in that his judgment is significantly impaired by his illness and that we could not predict his behavior if he were discharged right now.
>
> Q. What type of behavior do you think he could engage in that you could predict? A. Like I said, all we can really go on is by his past history and numerous times in the past he's been admitted through local police departments for harassing people on the street, making sexual overtures to women and never physically or violently assaulting somebody, but like I said being sexually overt nonetheless. Based on this recurrent past history we feel that he should undergo a course of therapy at this time.

The majority may determine that a man who is predicted to continue to be sexually overt, harass persons on the street with his sexual delusions and make sexual overtures to women is merely different and is not dangerous to others. I cannot agree with their conclusion.

The doctor's opinion, coupled with evidence of past and present actions, presents clear and convincing evidence of his danger to others.