

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 08AP-732
Plaintiff-Appellee,	:	(C.P.C. No. 05CR03-1455)
v.	:	No. 08AP-733
	:	(C.P.C. No. 04CR11-7488)
Jessica A. Salvatore,	:	
	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

O P I N I O N

Rendered on May 19, 2009

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, Jessica A. Salvatore ("appellant"), filed these consolidated appeals seeking reversal of a judgment by the Franklin County Court of Common Pleas revoking appellant's conditional release. For the reasons that follow, we affirm the trial court's judgment.

{¶2} Appellant has an extensive history of mental health problems, including several instances in which she was hospitalized. During one such hospitalization, on November 16, 1999, appellant assaulted another patient, which resulted in the other patient permanently losing the use of one eye. This incident resulted in appellant being indicted by the Franklin County Grand Jury on one count of felonious assault in case No. 04CR11-7488.

{¶3} On February 9, 2001, while appellant was being held on unrelated charges of murder arising from the death of her grandfather,¹ appellant assaulted a Franklin County Deputy Sheriff. This incident resulted in appellant being indicted by the Franklin County Grand Jury on a charge of assaulting a peace officer in case No. 05CR03-1455.

{¶4} Both case Nos. 04CR11-7488 and 05CR03-1455 came before the court for trial on September 21, 2005. Based on a stipulated psychological report, the court found appellant not guilty by reason of insanity on both cases. The court further found that appellant was a mentally ill person subject to hospitalization by court order.

{¶5} Appellant was initially placed at Twin Valley Behavioral Healthcare on level 3 status, which meant that appellant was allowed unsupervised movement within locked areas of the facility. In January 2006, the court, based on a recommendation by Twin Valley, granted appellant level 4 status, which meant that appellant would be allowed supervised movement off facility grounds. In June 2006, Twin Valley recommended that appellant be granted level 5 status and conditional release, which meant appellant could live in the community without supervision, as long as she met certain conditions as

¹ The murder charges against appellant were the subject of an appeal decided by us in *State v. Salvatore*, 10th Dist. No. 02AP-573, 2003-Ohio-957, in which we affirmed the trial court's grant of a motion to suppress appellant's confession to the charges.

spelled out in an aftercare agreement entered into between appellant and Twin Valley. The court referred the matter to Dr. Jaime Lai, who prepared a report concurring with the recommendation. The court then granted appellant level 5 status and conditional release.

{¶6} The record shows that by letter dated June 26, 2008, Twin Valley submitted a report updating appellant's status as required by R.C. 2945.401(C) and 2945.402. R.C. 2945.401(C) requires the hospital, facility or program to which a person has been committed after an acquittal by reason of insanity to provide periodic reports to the court regarding whether the person remains a mentally ill person subject to hospitalization by court order.² R.C. 2945.402 governs conditional release into the community of a person who has been acquitted by reason of insanity. The report referenced in the June 26, 2008 letter does not appear in the record before us. At a hearing held on July 31, 2008, the trial court made reference to the report, indicating that the report recommended that appellant be maintained on level 5 status, with conditional release. (Tr. 12.)

{¶7} On June 27, 2008, the trial court issued a *capias* for appellant's arrest based on a report or reports it had received from Twin Valley. The report or reports that triggered this action are also not in the record before us. However, in an order issued on that date, and subsequently at a hearing held on July 31, 2008, the trial court indicated that appellant had violated one of the conditions of her release by refusing to take all of her medication, and that appellant had refused to stay at the Community Support Network facility at which she was required to report to ensure that her medication was being taken. (Tr. 9.) The court further indicated that appellant had "decompensated showing active

² R.C. 2945.401(C) requires that status reports be submitted six months after commitment, and every two years thereafter.

psychotic symptoms as evidenced by increased profanity towards staff, wearing inappropriate clothing, so on and so forth." (Tr. 10.)

{¶8} Finally, the court indicated that the capias had been withdrawn after appellant flagged down members of the Columbus Police Department on the afternoon of June 27, 2008, and had been transported to Netcare Access. (Tr. 10.) On the afternoon of June 27, 2008, the trial court put on an order of detention directing that appellant be held at Twin Valley on an inpatient basis, finding that a more secure environment was in the best interests of appellant and the community. The court's order stated that, "if either party has any objection or wishes a hearing on the matter, a hearing will be scheduled as quickly as possible. However, based on the information available to this Court, it is clear that immediate steps must be taken to avoid a potentially more difficult situation. Any objection must be received by Wednesday, July 2, 2008."

{¶9} During the July 31, 2008 hearing, the court stated that:

I will note that I have reviewed at least the recommendations page of the report dated June 26th, signed June 25th. The cover letter was the 26th, the report was the 25th. Report - the two-year report says Level 5 movement conditional release. Two days after this thing was signed was when she went on the AWOL as I indicated in here.

Now, that timing is sufficient to give the Court grave concern over the appropriateness of the recommendations and I dare say that if Dr. Eshbaugh were aware of this, well I would be very interested to hear what he would have to say after that. But I would say as a Court I find his report out of date. Now, the question is where do we go from here because she is entitled to have her two-year review, but on the other hand the fact of the matter is very simple, I simply don't have to go along with the recommendation.

(Tr. 12-13.)

{¶10} The court then stated its intention to set the matter for further hearing for the purpose of obtaining testimony from Dr. Dennis Eshbaugh, who apparently had prepared the June 26, 2008 report. Ultimately, that hearing was scheduled for August 15, 2008. Prior to that date, by letter dated August 14, 2008, Twin Valley sent the court a report dated August 8, 2008 regarding appellant. The cover letter indicated that it had been prepared pursuant to R.C. 2945.402(A) and (B).

{¶11} In the August 8, 2008 report, Dr. Eshbaugh reviewed appellant's mental health history, including the June 27, 2008 incident. The report stated that:

The defendant's general status over the reporting period was provided in my prior report of [June 2008]. After that examination her mental status deteriorated. When I examined her on June 23, she was not grossly psychotic but was manifesting active symptoms of mental illness. She was religiously preoccupied and expressing quasi-delusional grandiose and paranoid ideation. Her mood was moderately unstable and she had difficulty tolerating the stress of being confronted with her history of severe mental illness and concomitant violent behavior. In my June report I noted that she had significant risk factors associated with future potential for violent behavior, particularly if psychotic. At that time, however, she appeared sufficiently mentally stable to remain on conditional release and to live in the community. To assure public safety and welfare of the defendant, I opined that she required very close supervision. Over the next four days after the examination, active of [sic] serious mental illness became more manifest. Her mood appeared more manic. Her religious preoccupation became more intense and she began to discuss religious delusions. Her behavior was noted as being sexually provocative. She became oppositional and defiant toward the staff at CSN. When confronted with increasing symptoms the defendant admitted to selective noncompliance with her psychotropic medication regimen. Because she was uncooperative with staff at that time, the forensic monitors requested a capias be issued to apprehend the defendant.

On June 27, 2008, the defendant waved down a Columbus police cruiser, apparently seeking assistance due to psychotic fears. The Columbus police subsequently took her to Netcare for a mental health evaluation. The records from Netcare indicated that the defendant reported she had not slept more than one or two hours a night for the past seven to nine days. She reported that she speaks with god, angels and spirits. The examining clinician noted pressured speech, expansive and labile mood, hyperactivity and flight of ideas. The examining clinician noted religious delusions and hallucinations. She was prescribed the psychotropic medication regimen of the antipsychotic Zyprexa, the mood stabilizer lithium carbonate, and the antidepressant Wellbutrin. She was also prescribed Benadryl for sleep. She met the criteria for hospitalization and was admitted to Twin Valley Behavioral Healthcare on that same date as an emergency admission.

The hospital chart reported that on admission her symptoms were showing some improvement. Her speech was slightly pressured but there was no flight of ideas. Her mood was expansive but not manic. She did seem preoccupied with internal stimuli. She also related about God talking to her through music. Her insight was fairly limited. For example, she stated that she may not need medication for the rest of her life. She also blamed her CSN psychiatrist for her decompensation by "messing" with her drugs. The defendant was prescribed the antipsychotic Zyprexa and the mood stabilizer Eskalith. She was also prescribed Vistaril for sleep. For the next 2 1/2 weeks she continued to show residual symptoms. She reported spiritual auditory hallucinations but denied commands. Her affect was usually pleasant but could become labile. Mood was somewhat expansive. Her speech was loud, tangential and circumstantial. Her sleep was poor. Around the middle of July her mental status began to significantly improve. Her mood stabilized although she reported occasional depressive feelings. Her speech was normal. Her thoughts were linear.

On July 22, 2008, the Vistaril was discontinued and Ambien was started. By the end of July her attending psychiatrist reported that she was no longer presenting active signs or symptoms of psychosis or mania. On July 30 her psychiatrist reported that the defendant with [sic] clinically stable and appropriate for discharge. Recently, the Ambien was

discontinued and Lunesta was prescribed for sleep. Vistaril was re-started on an as needed basis for anxiety. Also, her dose of Zyprexa was increased.

{¶12} Under the heading "Risk Assessment," Dr. Eshbaugh's report stated:

The risk assessment for my report of June 24 was valid at the time. For the next number of days, her risk of violent offending increased dramatically. Her symptoms of mania and psychotic thinking were became [sic] more pronounced. She was not fully medication compliant. Presently, her mental status has returned to baseline. She is not manic or grossly psychotic. Her thought process is organized. There is no evidence of hallucinations or floridly delusional thinking.

There are, however, significant residual symptoms of grandiosity and religious preoccupation. She is not fully insightful about the severity of her serious mental illness. Consequently, her tendency to fail to comply with her medication regimen remains a significant risk. Also, there is a risk indicated in her manipulation of treatment providers, by rationalizing her psychotic and aggressive behaviors and attempting to minimize her treatment needs and requirements.

{¶13} Dr. Eshbaugh's report concluded by stating that appellant continues to meet the definition of a mentally ill person subject to hospitalization by court order, but that her disorder "is in fair partial remission with treatment compliance." The report further concluded that the least restrictive alternative for placement, consistent with public safety and appellant's treatment needs, would be level 5 status and conditional release. Finally, Dr. Eshbaugh's report stated that, if the court determined that appellant should be continued on level 5 status and conditional release, the following recommendations could be considered:

- The court can order the defendant be prescribed an injected, long acting antipsychotic medication prior to discharge, and that she be maintained on an injected, long-

acting antipsychotic medication for the duration of court jurisdiction.

- If the defendant is returned to independent housing, ordering that she be assessed for signs and symptoms of mental illness at least twice daily. She should also be closely monitored for taking all of her daily medications (including pill counts and looking for "cheeking").
- If the court concludes that more stringent restrictions are necessary to assure public safety and the welfare of the defendant, she can be placed in a fully supervised mental health group home, as she was when initially placed in the community on conditional release.

{¶14} At the August 15, 2008 hearing, appellant's counsel offered to stipulate to the contents of the August 8 report. However, the assistant prosecuting attorney asked that she be allowed to call Dr. Eshbaugh as a witness and question him as if on cross-examination. The prosecuting attorney attempted to elicit testimony from Dr. Eshbaugh regarding the threat posed by appellant:

Q. I just have a few questions for you. Would it be fair to say -- and I've only gotten to read this once, but would it be fair to say that you have extreme reservations about this patient?

A. Well, in what sense?

Q. Her in her need to cooperate with her treatment regiment and her ability to function out in the world?

A. Well, actually when she is medication compliant and compliant with other forms of mental health treatment she's actually fairly functional in the community.

(Tr. 22-23.) Subsequently, during the hearing, the prosecuting attorney asked Dr. Eshbaugh for his opinion regarding the proper placement for appellant:

Q. * * * But in the best of all worlds, wouldn't it be better for Jessica Salvatore to be in a locked-up situation where she can't hurt people out in the world?

A. That is very difficult to answer. May I speak a little broader than that?

Q. As long as it is regarding Jessica.

THE COURT: Yes.

THE WITNESS: I think that psychology, psychiatry, the whole field of mental health has to look at the clinical side and that is whether someone meets the criteria for hospitalization. Meaning are they psychotic, are they at that point in time a danger to themselves or others. And of course we always have to think about public safety. At this point she is not psychotic and there are no indications or [sic] manic and there are no indications that she's an imminent risk of harm to herself or other people.

So that begins a process of beginning to looking [sic] at a least restrictive. In my recommendations I think the issue with me is not about her history and background, that's clear. That doesn't find great risk to the community. The issue to me has been the two episodes of noncompliance with medication. She decompensated, gradually decompensated. It was not terribly abrupt. Began to see signs and symptoms of decompensation and that was a concern although she wasn't violent during those episodes or when she was taken to Netcare or back to the hospital.

The critical issue for me in looking at a question about least restrictive is how can we assure that she's medication compliant. In reviewing her history it seems that when she is medication - - fully medication compliant that she is capable of functioning in the community without a significant major risk to the public safety or to herself. So to me, the psychologist looking at least restrictive alternative, I have to look at medication compliance, what level of insight, how compliant can they be. And that's why I recommended that the Court may want to consider that the Court order that she be maintained on and injected any [sic] long-acting medication which assures us that she's going to have any medication in her system over the period of time that she's kept on conditional release.

(Tr. 32-34.)

{¶15} Dr. Eshbaugh was then asked about the suggestions made at the end of the August 8 report, specifically the suggestion regarding the use of an injectable antipsychotic medication, Risperdal Consta. Dr. Eshbaugh explained that appellant would be injected with the medication every two weeks by the nursing staff at Community Support Network. (Tr. 40.) Dr. Eshbaugh also explained that appellant would continue to take a daily mood stabilizing medication, and that steps could be taken, including the use of liquid forms of the medication or more stringent monitoring of the administration of the daily medication, to ensure that appellant was actually taking the medication. (Tr. 41, 53.) Dr. Eshbaugh also stated that his recommendation would be that appellant would remain hospitalized until it could be confirmed that the injected Risperdal was effective, and that only then would she be returned to placement in the community. (Tr. 62-64.)

{¶16} Later in the day on August 15, the court issued an entry and order. The entry stated that "this case came on for a hearing pursuant to R.C. 2945.402(A) and (B). This is the two year hearing required by those statutes." The court concluded that, before she could be returned to independent housing, appellant had to: (1) remain hospitalized pending successful institution of the use of the injectable antipsychotic medication; (2) take all medications required by her treatment team; (3) remain hospitalized for three months, or until such time as the treatment team could determine that appellant could be placed on conditional release; and (4) once returned to level 5 status and conditional release, remain in a fully supervised mental health group home for six months. The court also directed that appellant be assessed for signs and symptoms of mental illness at least two times per day, and that appellant be closely monitored for medication compliance by

staff familiar with her history. Finally, the court directed that if appellant failed to comply with any of the stated conditions, Twin Valley would be authorized to take any steps necessary, including arrest, detention or hospitalization, pending further hearing by the court.

{¶17} Appellant filed this appeal, asserting a single assignment of error:

The trial court abused its discretion in revoking appellant's conditional release.

{¶18} Initially, we note that there is apparent confusion regarding the precise nature of the various proceedings before the court. The first event relevant to this appeal was Twin Valley's submission of the June 26 report, which was intended to comply with the R.C. 2945.401(C) requirement that appellant's commitment be reviewed every two years to determine whether appellant continued to be mentally ill subject to hospitalization by court order. Under the statute, the court was required to hold a hearing on appellant's continued commitment within 30 days of its receipt of the report from Twin Valley.

{¶19} However, the court never acted on the June 26 report as a result of the events that occurred on June 27. On that date, the court received a notice that appellant had violated the conditions of her release by refusing to take all of her medication.³ Later on that date, the court issued an order setting aside the *capias* that had been issued in response to the reports, but directing that appellant be detained at Twin Valley "on an inpatient basis." The June 27 order did not specifically state the court's intention to revoke appellant's conditional release.

³ As previously stated, the reports sent to the court do not appear in the record before us, but were quoted from at various times during the proceedings.

{¶20} Revocation of conditional release is governed by R.C. 2945.402. The statute allows a court that has received a report that terms of conditional release have been violated to issue a temporary order of detention or, if necessary, an arrest warrant. If the person is detained or arrested, the court is required to hold a hearing to consider whether conditional release should be modified or terminated within ten days of the arrest or detention. Pursuant to R.C. 2945.402(C), failure to hold the required hearing within ten days of the arrest or detention requires that the person be restored to the prior conditional release status.

{¶21} After the June 27 incident, the court did not hold a hearing until July 31. At that hearing, there was some discussion of Twin Valley's report that appellant had violated the terms of her conditional release and the June 27 detention order. The court initially speculated that the purpose for the hearing was to consider objections raised to appellant's continued detention under the June 27 order, but this was not confirmed during the hearing, and no objection appears elsewhere in the record. (Tr. 11.) The court focused most of its attention during the July 31 hearing on the need to hold the two-year review required by R.C. 2945.401(C), and the court's belief that the June 27 incident called into question the June 26 report that had been prepared for that review. (Tr. 12.) The court stated its wish to hold a hearing for the purposes of having Dr. Eshbaugh explain how the June 27 incident affected the validity of the June 26 report. (Tr. 13.)

{¶22} Ultimately, the court scheduled the hearing to consider Dr. Eshbaugh's testimony for August 15. During the interim period, Dr. Eshbaugh prepared the August 8 report, which in essence superseded the June 26 report. The cover letter accompanying

the August 8 report cites R.C. 2945.402(A) and (B) as the reason for its preparation, but also states that it was being submitted for appellant's "mandatory" hearing.

{¶23} Similarly, the court's August 15 order issued after the hearing refers to both R.C. 2945.402(A) and (B) as the statutory basis for the proceeding, but also states that its purpose was "the two year hearing required by those statutes." Given the purpose stated by the court, it is arguable that the court's August 15 order was not a revocation of appellant's conditional release, but was instead strictly a two-year review resulting in the court ordering a modification to appellant's commitment based on the August 8 report, an action contemplated by R.C. 2945.401(C). Under that characterization, there would be no assignment of error for us to consider, as appellant's single assignment of error only argues that the court abused its discretion in revoking appellant's conditional release. However, we will assume, as the state does in its brief, that the court's action was the combination into a single hearing of proceedings to: (1) revoke appellant's conditional release pursuant to R.C. 2945.402(A); and (2) to conduct the required two-year review pursuant to R.C. 2945.401(C).

{¶24} In her brief, appellant points out that the trial court did not hold a hearing within ten days of the issuance of the order of detention, but does not argue that this constituted error requiring reversal. Instead, appellant only argues that the court abused its discretion by rejecting Dr. Eshbaugh's recommendation that appellant be continued on level 5 status with conditional release.

{¶25} However, this somewhat mischaracterizes the action taken by the court. The court's order modifies the terms of appellant's conditional release, but does not terminate the release outright. The only term in the court's August 15 order inconsistent

with conditional release is the provision requiring that appellant remain hospitalized until such time as it has been confirmed that the injectable, long-lasting antipsychotic medication will be effective for appellant. However, assuming that the new antipsychotic medication is effective, and that appellant maintains compliance with the remainder of her medication regimen, according to the court's order, the ultimate result will be continuation of appellant's conditional release. Thus, the trial court's order continues appellant on conditional release, albeit on terms that have been modified from those in the original conditional release by, among other things, temporarily placing appellant in a more restrictive status.

{¶26} Based on the evidence in the record, we cannot say the trial court abused its discretion in modifying the terms of appellant's conditional release in the manner it did. For the most part, the court adopted the recommendations made by Dr. Eshbaugh at the conclusion of the August 8 report, by ordering that appellant be prescribed the injectable antipsychotic medication, that she be monitored closely for compliance with the rest of her medication regimen, and that she be placed in a supervised group home as she had been when initially placed in the community on conditional release. The only ways in which the court's order differed from the recommendations made by Dr. Eshbaugh in his August 8 report were that: (1) appellant was to remain hospitalized pending confirmation that the injectable antipsychotic medication would be effective, which was consistent with what Dr. Eshbaugh testified would be required during the August 15 hearing; and (2) the court's order placed a time limit on appellant's placement in a supervised group home, where Dr. Eshbaugh's recommendation did not.

{¶27} Appellant has demonstrated that conditional release into the community is appropriate as long as she remains compliant with her medication regimen. However, appellant has also demonstrated that there are periods of time in which she is not compliant with her medication regimen, and that she can pose a threat to herself and to the community when she is not compliant. Given these facts, the trial court did not abuse its discretion by modifying the conditions under which appellant can continue to be placed in the community on conditional release.

{¶28} Accordingly, appellant's assignment of error is overruled. Having overruled appellant's assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and BROWN, JJ., concur.
