

DA 19-0119

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 141N

IN THE MATTER OF:

W.R.,

Respondent and Appellant.

APPEAL FROM: District Court of the Thirteenth Judicial District,
In and For the County of Yellowstone, Cause No. DI 18-0091
Honorable Jessica T. Fehr, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Danny Tenenbaum, Assistant Appellate
Defender, Helena, Montana

For Appellee:

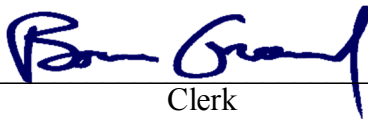
Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant
Attorney General, Helena, Montana

Scott D. Twito, Yellowstone County Attorney, Levi A. Robison, Deputy
County Attorney, Billings, Montana

Submitted on Briefs: May 5, 2021

Decided: June 8, 2021

Filed:


Clerk

Justice Ingrid Gustafson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 W.R. appeals from the Findings of Fact, Conclusions of Law and Order issued December 27, 2018, by the Thirteenth Judicial District Court, Yellowstone County, finding W.R. to suffer from a mental disorder with resultant inability to care for himself and committing him to the Montana State Hospital (MSH). We affirm.

¶3 W.R. asserts the District Court erred by failing to provide him an independent psychological evaluation, denying him sufficient time to find new counsel, in concluding the State satisfied its burden of proof, by committing him to MSH, and by failing to provide a detailed statement of facts. He further asserts he received ineffective assistance of counsel (IAC).

¶4 We review civil commitment orders to determine whether the district court's findings of fact are clearly erroneous and its conclusion of law are correct. *In re N.A.*, 2013 MT 255, ¶ 12, 371 Mont. 531, 309 P.3d 27. We will not disturb findings in a commitment proceeding unless they are clearly erroneous when viewed in the light most favorable to the prevailing party. *In re Mental Health of M.C.D.*, 2010 MT 15, ¶ 9, 355 Mont. 97, 225 P.3d 1214. We review claims of IAC de novo. *In re N.A.*, ¶ 12. Finally,

we review rulings regarding granting or denying continuances for an abuse of discretion. *In re Mental Health of T.M.*, 2004 MT 221, ¶ 7, 322 Mont. 394, 96 P.3d 1147.

¶5 A district court may involuntarily commit a person to the state hospital if the person suffers from a mental disorder and because of such disorder is substantially unable to provide for his own basic needs of food, clothing, shelter, health, and safety. Section 53-21-126(1)(a), MCA. Here, the District Court determined W.R. to be an 84-year-old man, suffering from a mental disorder, a major neurocognitive disorder due to dementia, and that because of this disorder he was unable to care for himself—not able to provide for his basic needs of food, clothing, shelter, health, and safety.

¶6 First, W.R. asserts the District Court erred by failing to provide him with an independent psychological evaluation and denying him sufficient time to secure his own attorney. The State filed its petition for involuntary commitment on December 21, 2018, and W.R. was appointed counsel to represent him. At evidentiary hearing on December 26, 2018, W.R. indicated he desired to hire his own counsel and obtain his own psychologist. Following testimony of Diane Goedde, a nurse practitioner with the Billings Clinic, the District Court continued the remainder of the hearing to permit W.R. opportunity to obtain counsel and a psychologist of his choosing. When the hearing reconvened the next day, W.R.'s court-appointed counsel advised W.R. had not been able to hire new counsel. At conclusion of the hearing, W.R. again requested continuance to provide him additional time to retain counsel. This request was denied.

¶7 From the record before us, we do not find the District Court abused its discretion in denying W.R.’s request for a continuance. At the point when the continuance was denied, the District Court had heard evidence that W.R. was 84 years old and suffering from a significant neurocognitive disorder—dementia. He had difficulty with memory and confabulated to account for memory loss. Although he asserted to having a home in Seattle and extensive financial resources, his family reported the home was foreclosed upon and he was upside down financially with \$50,000 of credit card debt. From Goedde’s observations and those of Billings Clinic staff, he was delusional, had no insight or severely limited thought processes and poor judgment, he could not remember where his was, and needed ongoing prompting. Goedde believed W.R. was unable to care for himself because of his neurocognitive disorder and he refused to voluntarily go to a skilled nursing facility such that MSH was the least restrictive placement available. W.R.’s behavior at the hearing only reinforced Goedde’s testimony and observations. He volunteered statements, which made no sense and exhibited mental confusion, disorientation, and fabrication. It is likely that W.R.’s impaired function related to his dementia was the primary barrier to him securing alternate counsel, rather than lack of additional time—indeed, W.R. admitted he had already contacted numerous attorneys none of which were willing to accept his case.

¶8 The same is likely true with regard to W.R. securing his own psychologist. As noted by the State, § 53-21-118(1), MCA, provides that the respondent may secure a professional person of his choice to conduct an evaluation and testify at the hearing. Pursuant to § 53-21-118(2), MCA, if the respondent is unable to obtain an evaluator of his choice due

to financial reasons, the court shall, upon request, appoint a professional person other than the professional person requesting the commitment to perform the examination. Here, neither W.R. nor his attorney made any formal request pursuant to § 53-21-118(2), MCA, that the court appoint an independent professional person to conduct an evaluation of W.R. Instead, W.R. insisted he had the financial resources to hire his own evaluator, albeit this assertion was delusional. To the extent that W.R.'s assertion of wanting to hire his own psychologist could be interpreted as a request to the court to appoint an independent evaluator, we agree with the State that not all statutory errors amount to deprivation of procedural due process. *See In re N.A.*, ¶ 23. In involuntary commitment proceedings, we use a balancing test to determine whether a particular safeguard, such as an independent evaluator, is required based on the particular circumstances present. *See In re N.A.*, ¶ 23. Here, it is clear W.R. suffered from dementia, lacked insight and understanding of his impairment, and was unable to meaningfully interact with the court, his counsel, and potential evaluators. Any statutory error in not appointing an independent evaluator or failing to provide W.R. additional time to secure one was *de minimus* and did not affect his liberty interest. *See In re N.A.*, ¶ 23. In sum, the District Court did not abuse its discretion in denying W.R.'s request for a continuance.

¶9 Next, W.R. challenges the sufficiency of the evidence, asserting the State did not meet its burden of proof for commitment. Based on the forgoing discussion of the evidence presented, we are not persuaded by this assertion. In the light most favorable to the State, the findings of the District Court that W.R. suffered from a mental disorder, which resulted

in his inability to provide for his basic needs such that he required commitment, were not clearly erroneous.

¶10 Next, W.R. asserts the District Court improperly committed him to MSH. W.R. does not contest he suffers from the neurocognitive disorder of dementia but rather asserts MSH is a mental health facility, which provides care and treatment only for *mentally ill* persons. He argues that as he only has a mental disorder—dementia—he is not mentally ill and cannot be committed to MSH. The purpose of Title 53, chapter 21, part 1, is to secure care and treatment for persons suffering from a mental disorder and requiring commitment. Section 53-21-101, MCA. Dementia is a mental disorder pursuant to § 53-21-102(9), MCA. Pursuant to § 53-21-127(2), MCA, a district court may place a person suffering from a mental disorder in MSH. Further, W.R. refused voluntary treatment in a skilled nursing facility, leaving MSH as the least restrictive setting to obtain care and treatment.¹ We find no error with the District Court placing W.R. at MSH based on his dementia and its manifestations.

¶11 Next, W.R. asserts the District Court erred by failing to provide a detailed statement of facts as required by § 53-21-127(8), MCA. While the District Court’s findings of fact could have been more detailed, we conclude they were sufficiently detailed to support W.R.’s commitment. The District Court found W.R. suffered from a mental disorder, a

¹ Unfortunately, MSH is at times the only initial placement option for individuals suffering from dementia and is the means by which individuals may be transferred to a skilled nursing facility upon stabilization. See § 53-21-414(2), MCA.

major neurocognitive disorder due to dementia. His thoughts were disorganized. He had significant memory problems and difficulty performing tasks. Because of his mental disorder, he was in need of care and he was unable to care for himself. These facts were at least minimally sufficient to support W.R.'s involuntary commitment and we find no error by the District Court in this regard.

¶12 Finally, W.R. asserts his appointed counsel provided him IAC by failing to meet with him for more than a few minutes prior to the commitment hearing and remaining essentially silent during his hearing. W.R. primarily takes issue with counsel's failure to cross-examine Goedde but does not indicate questions counsel should have asked or identify any particular testimony to which he should have objected. Further, he does not assert how he was specifically prejudiced by counsel's failure to assert objections or cross-examine Goedde. The unfortunate situation is that W.R. is a man of advanced age who suffers from a progressive, incurable neurocognitive disorder—dementia—which has left him highly compromised. He is delusional and his thought pattern disorganized. At hearing, he at times volunteered unsolicited rambling thoughts and comments which made no sense.² Under these circumstances, we understand counsel's difficulty in meaningfully

² When asked by the court if his family could assist him in hiring an attorney or psychologist, he replied:

No, I have to work at it. And guess what? My daughter was here, cuts hair, lives down the street, she's part of this family rumble. I can get -- I could walk up to the airport, I can fly free right now to Seattle. I'm a Mason, I can stay in -- what, they got about 10,000 Masons, but I can stay with my partner. And you know what happened the other day? I was in the other hospital, over there, and then I was in the hospital in Big Timber, and what the situation was, we had a family rumble, and I -- when they picked me up and brought my dogs over -- oh,

I shouldn't talk here because my son runs a billion dollar company and he's got all kinds of lawyers.

I can fly free to Seattle, I can have -- what do you call somebody that -- are you taping this?

Later, when the court again inquired about his ability to hire counsel, the following ensued:

THE RESPONDENT: When they picked me up, brought over here, I bought two Yorkies, because when I got divorced, after 65 years of marriage, she took my Chinese Pugs and went to live with my daughter. I got over here and she's got one with a big mouth down here cutting hair, and the word got out that I had two Yorkies. So I -- Stacie has got my two Chinese Pugs, and now she has got my two Yorkies.

The girls down at the beauty shop says Stacie's got to get rid of some dogs, so a girl from Florida came here and come up to the ranch and said, I want your dogs. And so she got on the phone and called Florida and she was going to take them to Puerto Rico --

THE COURT: Okay. So here's --

THE RESPONDENT: -- and then the next day I said to Stacie, what's the story? She said, I give them away. I just bought them.

THE COURT: But here's what we're going to do --

THE RESPONDENT: No, but here's the deal -- she --

THE COURT: No, no.

THE RESPONDENT: -- she's giving my dogs away.

THE COURT: I get that, but here's the deal here, this gentleman here is going to be your assigned attorney --

. . . .

THE RESPONDENT: I have a home, it's for \$800,000. I am proved mentally stable because of my divorce, after 65 years my wife left. You know why? She said she was tired of living with me, goes and lives with my daughter. So here's what I got to do, I might even have to call 911, I -- you're giving me only 24 hours, I am 84 and a half, disabled, and you're just squashing me. I had three neurologists in the last six months, four months, they put those mushrooms on my brain, I went through all of it, thousands, there has been thousands and thousands spent on me.

So what I want is the hearing -- if it's going to be next week, I want the Masons there --

THE COURT: It can't be next week.

THE RESPONDENT: You can't press me, you can't press me, it's not legal, I have rights. I told my daughter, I have rights, I wanted to -- you know what she did, she drove me here by accident.

And I want a criminal lawyer and a psychologist to cross-examine this woman, I want everything to be taped, I want her to say it over again and over again so I have some backup. I don't have any backup here.

interacting with W.R. and we cannot conclude counsel's representation to be ineffective or prejudicial to W.R.

¶13 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶14 Affirmed.

/S/ INGRID GUSTAFSON

We concur:

/S/ JAMES JEREMIAH SHEA

/S/ LAURIE McKINNON

/S/ DIRK M. SANDEFUR

/S/ JIM RICE

This girl, I hate to say the word babbled, I don't care if she went to Harvard, Yale --

. . .

-- I have been laying in bed and you know -- you know what doctor -- or, Judge, here I'm laying there day after day after day, never seen him, she gives me a picture and says write the circle, go 1, 2, 3, 4, a number of 50, back up to 48.

This lady got -- down the hall, I think you're the one that when the cops brought in the contract to put me away, and then -- then Brinks (phonetic) came in with my money.