DA 20-0092

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 262

IN THE MATTER OF:

F.S.,

Respondent and Appellant.

APPEAL FROM: District Court of the Eleventh Judicial District,
In and For the County of Flathead, Cause No. DI-19-050(A)
Honorable Amy Eddy, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Michael Marchesini, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Damon Martin, Assistant Attorney General, Helena, Montana

Travis R. Ahner, Flathead County Attorney, Stacy Boman, Deputy County Attorney, Kalispell, Montana

Submitted on Briefs: September 15, 2021

Decided: October 12, 2021

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Respondent F.S. appeals his involuntary commitment to the Montana State Hospital (MSH) following an evidentiary hearing at which the Eleventh Judicial District Court found that he met the criteria for involuntary commitment and that MSH was the least restrictive alternative necessary to protect him and provide for effective treatment. Although F.S. attended the commitment hearing with counsel, he was not present during the initial hearing on the State's petition and the District Court did not at any time thereafter advise F.S. of his statutory and constitutional rights in the proceeding. Concluding that the waiver of F.S.'s presence at the initial hearing was invalid, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Seventy-three-year-old F.S. was brought to the emergency room by providers at his Eureka, Montana nursing home after throwing a cup of hot chocolate at a staff member and frightening other residents. The nursing home staff reported that F.S. had a past history of verbal abuse and threats. F.S. was admitted to Pathways Treatment Center and evaluated.

¶3 Patty Kennelly, a Certified Mental Health Professional, submitted a report of F.S.'s condition, stating that he suffered from vascular dementia and that law enforcement had brought him to the emergency room due to his increasingly volatile and threatening behavior. Kennelly reported that F.S. was unable to care for his basic needs and required a nursing level of care. His nursing home had sent F.S. to Kalispell Regional Medical Center due to escalating behavior and threats that he was going to "kick your ass" and would "air punch" staff and residents. Kennelly indicated that F.S. had a history of refusing medications, was extremely hard of hearing, and was very difficult to communicate with.

She reported that he "is an imminent risk of harm to others and he is unable to care for his basic needs at this time."

¶4 The Flathead County Attorney filed a petition for involuntary commitment on December 4, 2019. The next day, the District Court convened an initial appearance. F.S. was not present in court. When the court inquired of counsel, his attorney responded, "He's very hard of hearing and he has dementia; I would like to waive his presence at the initial hearing." The District Court agreed to waive the initial appearance "under the circumstances, including the Respondent's current condition, as well as him being hard of hearing[.]" The court indicated that it would "re-advise [F.S.] of his rights" when he appeared in court for the adjudicatory hearing.

¶5 That hearing occurred December 16. F.S. appeared via video conference, represented by a new attorney, who was present in the courtroom. The State appeared through a new deputy county attorney. Everyone present apparently overlooked the fact that the District Court had not advised F.S. of his rights at the initial appearance, and the court did not do so at the adjudicatory hearing. The court took testimony from a professional person who had examined F.S. the day before the hearing and from a psychiatrist who had overseen F.S.'s care at Pathways. At the conclusion of the hearing, the court found that F.S. suffered from a mental disorder and required commitment because he could not care for his basic needs and would predictably deteriorate without treatment. Concluding that a nursing home placement was not available, the court committed F.S. to MSH. Its written order followed.

STANDARDS OF REVIEW

¶6 We review a district court's civil commitment order to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. *In re B.H.*, 2018 MT 282, ¶ 9, 393 Mont. 352, 430 P.3d 1006 (citation omitted). We may review an unpreserved claim under the plain error doctrine when a constitutional or substantial right is at issue. *In re B.A.F.*, 2021 MT 257, ¶ 13, ___ Mont. ___, ___ P.3d ___ (citing *In re M.K.S.*, 2015 MT 146, ¶ 13, 379 Mont. 293, 350 P.3d 27).

DISCUSSION

¶7 "We require strict adherence to our civil commitment statutes, 'given the utmost importance of the rights at stake[.]'" *In re B.A.F.*, ¶ 15 (quoting *In re B.H.*, ¶ 18). Because of the liberty interest at stake, civil commitment proceedings implicate a substantial right. Notwithstanding his attorney's acquiescence in waiving his right to be present at the initial hearing, we deem it appropriate to review F.S.'s claim for plain error. F.S. bears the burden to demonstrate that: "(1) the alleged error implicates a fundamental right[,] and (2) failure to review the alleged error would result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the proceedings, or compromise the integrity of the judicial process." *In re B.A.F.*, ¶ 14 (quoting *In re B.H.*, ¶ 16).

¶8 The involuntary commitment statutes provide strong "procedural safeguards[,] spelled out in §§ 53-21-115 to -118, MCA." *In re S.D.*, 2018 MT 176, ¶ 10, 392 Mont. 116, 422 P.3d 122. Although the statutes guarantee a respondent numerous procedural and substantive rights, the respondent may waive most of them, except for the right to counsel and the right to treatment. Section 53-21-119(1), MCA. Section 53-21-119, MCA,

governs the process for a valid waiver. Under subsection (2) of the statute, the respondent's right to be physically present at a hearing may be waived by the respondent's attorney and the friend of respondent, with the concurrence of the professional person and the judge, when the court makes "a finding supported by facts" that:

> (a)(i) the presence of the respondent at the hearing would be likely to seriously adversely affect the respondent's mental condition; and
> (ii) an alternative location for the hearing in surroundings familiar to the respondent would not prevent the adverse effects on the respondent's mental condition; or
> (b) the respondent has voluntarily expressed a desire to waive the respondent's presence at the hearing.

Section 53-21-119(2)(a)-(b), MCA.

¶9 We explained the process in *In re S.D.*:

> Breaking it down, this statute prescribes that: (1) all statutory rights afforded a respondent in a civil commitment proceeding may be waived, except for the right to counsel and the right to treatment . . . ; (2) if capable of doing so, a respondent may waive her own rights . . . ; (3) if the respondent is not capable, her rights may be waived only when her counsel and appointed friend agree on the waiver and make a record of it . . . ; and (4) if the court holds a hearing and the respondent is not there, the hearing may go forward in her absence only if the respondent's attorney and friend waive her presence, with the concurrence of the designated professional, and the presiding judge makes the factual findings required by subsection (2).

In re S.D., ¶ 11 (citations omitted). We upheld S.D.'s involuntary commitment despite her absence from the commitment hearing where S.D. had appeared with counsel via video-conference at the initial hearing, after which she signed a written waiver of her right to attend the adjudication hearing, "expressly acknowledg[ing] . . . her understanding of her rights and of the purpose of the proceedings." *In re S.D.*, ¶ 15. S.D.'s attorney affirmatively attested "to his satisfaction with her understanding and expressed no concern

that she was not capable of waiving her own rights." *In re S.D.*, ¶¶ 15-16. The court considered S.D.'s waiver in its commitment order and "expressed the court's satisfaction that S.D. was aware of the waiver of her rights after having consulted with her attorney and that S.D. was capable of making a knowing decision." *In re S.D.*, ¶¶ 15-16. Under those circumstances, we rejected S.D.'s claim on appeal that the district court violated her rights when it accepted S.D.'s waiver without a hearing. *In re S.D.*, ¶ 19.

¶10 Opposite *In re S.D.* and the prior decisions it discussed, F.S. was present at the commitment hearing but absent from the initial hearing. The initial hearing is required by § 53-21-122, MCA. Upon a district court's finding of probable cause for an involuntary commitment petition, "the respondent must be brought before the court with the respondent's counsel. The respondent must be advised of the respondent's constitutional rights, the respondent's rights under this part, and the substantive effect of the petition." Section 53-21-122(2)(a), MCA. The commitment hearing "may not be on the same day as the initial appearance[.]" Section 53-21-122(2)(a), MCA. As part of the procedural rights he was guaranteed by § 53-21-115(2), MCA, F.S. could not waive his right to be present at the initial hearing without compliance with § 53-21-119(2), MCA.

¶11 The State does not dispute that the District Court did not meet the statutory standards when it accepted counsel's waiver of F.S.'s presence. The statute allows counsel to waive a respondent's rights in some circumstances, but more than counsel's simple request to proceed in the absence of her client is required. The presiding judge must substantiate a record that allows it to make the factual findings that § 53-21-119(2), MCA requires. The court made none of those findings here. It made no inquiry or findings about why F.S.'s

dementia and hearing loss made it likely that his presence would "seriously adversely affect [his] mental condition" or otherwise justify a waiver without obtaining either F.S.'s waiver of his own rights or making a record-based finding that he was not capable of "making an intentional and knowing decision" whether to do so. Sections 53-21-119(1), -119(2)(a)(i), MCA. It considered no other alternatives that could allow F.S. to attend. Section 53-21-119(2)(a)(ii), MCA. And it did not inquire or make any finding whether F.S. "voluntarily expressed a desire" to waive his presence. Section 53-21-119(2)(b), MCA. The State asserts instead that F.S. does not contest his ultimate commitment and fails to demonstrate sufficient prejudice to warrant plain-error reversal.

¶12 F.S. counters that the initial hearing serves an important purpose, to ensure a respondent is advised of the rights he has in the proceeding and what is at stake ("the substantive effect of the petition," § 53-21-122(2)(a), MCA), so that he may "appreciate that his liberty [is] on trial and . . . prepare a meaningful defense."

¶13 We considered and rejected a plain-error argument in *In re B.H.* where the district court was unable to advise the respondent of his statutory rights after the respondent voluntarily left the initial hearing. *In re B.H.*, ¶¶ 4-5. Absent an objection at the subsequent adjudication hearing or at any other time, we conducted plain-error review to "weigh[] the risk of depriving an individual's liberty against the probable value of the procedure in question, which, in this case, is the statutory advisement of the respondent's rights." *In re B.H.*, ¶ 17 (internal citations and quotations omitted). B.H. argued, similar in part to F.S., that advising him of his rights "would have informed the nature of his discussions

with the professional person, and it would have informed his litigation choices at the evidentiary hearing." *In re B.H.*, ¶ 17. We emphasized that "a simple objection or even suggestion by counsel that a statutory requirement had not been satisfied would have alerted the District Court to the problem, which it then could have easily remedied, perhaps during the commitment hearing." *In re B.H.*, ¶ 22. We pointed out that "[t]he District Court attempted to advise B.H. of his rights but was interrupted by B.H.'s actions, after which the court discussed B.H.'s rights during the initial hearing and stated that B.H.'s rights would be protected. During the commitment hearing, the District Court admonished B.H. consistent with his rights." *In re B.H.*, ¶ 23. In the final analysis, we concluded that B.H. had not met his burden because "[t]here [was] little 'risk' that B.H.'s liberty interest was in any way deprived by the manner in which [the] proceeding was conducted, and the error did not result in substantial prejudice." *In re B.H.*, ¶ 23.

¶14 Though F.S. too urges plain error in the failure to advise him of his rights, his argument encompasses more. The "procedure in question" is the mandated initial hearing on the commitment petition. The probable value of that initial hearing is substantial. It is the first opportunity for a respondent to see the judge and learn about the legal process that could take away the respondent's liberty—the substantive effect of the petition. The right to be present was not at issue in *In re B.H.*, where the respondent was present for his initial hearing but left during parts of it on his own volition. We noted that "the court attempted to advise B.H. of his rights and the effect of the petition," but had been unable to do so because of B.H.'s actions. *In re B.H.*, ¶ 19.

¶15 Here, as in *In re B.H.*, had the court or the parties recalled at the outset of the commitment hearing that F.S. had not been advised of his rights, then much of the error could have been cured and the error may not have been "plain." But without a record substantiating that the essential purposes of the initial hearing were met, the absence of a valid waiver of his right to be present undermines the integrity of the commitment process. F.S. never had an introduction to the commitment proceeding. There was no record that anyone had discussed his rights with him—the statement of rights the State included with the petition contained notation that it was "served or read by" Kennelly—and the record shows that the day before the adjudication hearing F.S. "stated an understanding that he is supposed to talk to the judge tomorrow but does not appear to understand why." On this record, we conclude that the error prejudiced F.S.'s substantial rights and compromised the integrity of the judicial process required in commitment proceedings. F.S. has satisfied his plain-error burden.

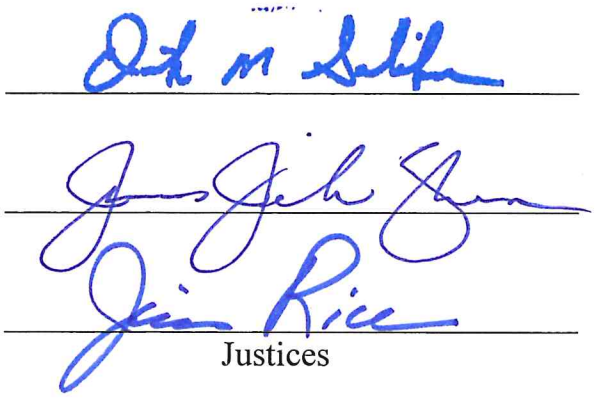
CONCLUSION

¶16 The District Court's December 19, 2019 order for F.S.'s involuntary commitment is reversed.

Justice

We Concur:

Chief Justice



Justices