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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1927**

In the Matter of the Civil Commitment of:
Bruce C. Faust

**Filed May 5, 2009
Reversed; motion denied
Ross, Judge**

Otter Tail County District Court
File No. 56-PR-08-3048

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Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Bruce Faust challenges his mental-health commitment by contesting the district court's finding that he is a mentally ill person as defined by the Minnesota Commitment and Treatment Act. Faust argues that the district court's decision should be reversed and

his commitment vacated because (1) clear and convincing evidence does not support the finding that he failed to obtain necessary shelter or medical care and that he poses a substantial likelihood of physical harm to himself or others; and (2) even if clear and convincing evidence supports the finding that he is a mentally ill person, his commitment is improper because the district court did not consider a range of less restrictive alternatives. Because clear and convincing evidence does not support the finding that Faust failed to obtain necessary shelter or medical care demonstrating that he poses a substantial likelihood of physical harm to himself or others, we reverse.

FACTS

Faust is 52 years old and has a history of mental health problems. In September 2008, Officer Nick Stromme encountered Faust at the Super 8 Motel in Perham, after receiving reports about Faust's odd behavior. A motel staff member reported that Faust had stayed at the motel for approximately three weeks and that staff felt threatened by him. Officer Stromme's report indicates that he approached Faust and explained that police had received complaints regarding Faust's behavior. He noted that Faust, "would not make eye contact with me and kept talking about some type of conspiracy the government had against him." After Faust became defensive and accused Officer Stromme of lying to him, Stromme explained to Faust that "he was no longer welcome in the hotel" and that Stromme "was going to take him to the hospital to be evaluated."

After observing Faust's defensive, agitated, and repetitive behavior, the hospital personnel placed him on a 72-hour hold for evaluation and transferred him to the Grace Unit at St. Joseph's Medical Center in Brainerd. The staff at St. Joseph's perceived that

Faust “was quite delusional and ha[d] no insight into why he [was being] hospitalized.” Faust refused medication.

Otter Tail County petitioned the district court to commit Faust as a mentally ill person. Dr. Gerald Ziesemer, a psychologist, reviewed Faust’s records and interviewed him to make a recommendation regarding Faust’s mental status. Dr. Ziesemer observed Faust’s “very paranoid and suspicious” behavior, learned that Faust believed that the government was conspiring against him, and noted that Faust refused to acknowledge having any mental problem. Dr. Ziesemer concurred with Faust’s prior diagnoses of paranoid schizophrenia.

On September 25, 2008, the district court conducted a commitment hearing. Dr. Ziesemer, Faust’s case manager from Otter Tail County Human Services, and Faust’s brother testified. Dr. Ziesemer testified that Faust suffered from paranoid schizophrenia, that he needed treatment, and that Faust should be involuntarily committed. Faust’s case manager testified that Faust displays behavior indicating paranoid schizophrenia, that he refuses to take medication for his condition, and that involuntary commitment is necessary as the least restrictive alternative available. Faust was present at the hearing, and although he was represented by counsel, he constantly interrupted the county’s attorney, his own attorney, the witnesses, and the district court judge.

The district court found that Faust “has failed to obtain medical care and does not understand the need to obtain care for his severe mental illness”; “may not be able to provide for his own shelter as noted by his recent eviction from the Super 8 Motel”; and is likely to bring harm to himself by “carrying large sums of money” and “leaving notes

for staff at the [Super 8] motel . . . as well as calling other residents to evacuate their children and reporting suspicious activity that is delusion[al].” As a result of its findings, the district court ordered that Faust be committed to the Fergus Falls Community Behavioral Health Hospital as a mentally ill person as defined by Minnesota Statutes sections 253B.02, subdivision 13, .09, subdivision 1(a) (2008). This appeal follows.

DECISION

I

Faust argues that the commitment order must be reversed because the evidence does not show that he is a mentally ill person, as defined by the Minnesota Commitment and Treatment Act. An appellate court’s review of a judicial commitment is limited to determining whether the commitment was justified by findings based on evidence presented at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). This court “will not reverse a district court’s findings of fact unless they are clearly erroneous.” *In re Janckila*, 657 N.W.2d 899, 902 (Minn. App. 2003). To commit a person the district court must find “clear and convincing evidence that a person is mentally ill.” *Id.* Whether the evidence is sufficient to meet the standard for commitment is a question of law, which we review de novo. *Knops*, 536 N.W.2d at 620.

Commitment as a “Mentally Ill Person”

A person is “mentally ill” under the commitment statute if he has a substantial psychiatric disorder and “poses a substantial likelihood of physical harm to [him]self or others.” Minn. Stat. § 253B.02, subd. 13(a) (2008). A substantial likelihood of harm may be demonstrated by:

(1) a failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment;

(2) an inability for reasons other than indigence to obtain necessary food, clothing, shelter, or medical care as a result of the impairment and it is more probable than not that the person will suffer substantial harm, significant psychiatric deterioration or debilitation, or serious illness, unless appropriate treatment and services are provided;

(3) a recent attempt or threat to physically harm self or others; or

(4) recent and volitional conduct involving significant damage to substantial property.

Id. When clear and convincing evidence establishes that a person is mentally ill, and no suitable alternative to judicial commitment exists, then a district court “shall commit the [person] to the least restrictive treatment program.” Minn. Stat. § 253B.09, subd. 1(a) (2008).

Clear and convincing evidence establishes that Faust has a substantial psychiatric disorder. Dr. Ziesemer examined Faust, reviewed his clinical history, and diagnosed him with paranoid schizophrenia. Faust appears to concede that his paranoid schizophrenia qualifies as a substantial psychiatric disorder. We therefore consider Faust’s challenge to the district court’s finding that Faust poses a substantial likelihood of physical harm to himself or others.

The district court found specifically that Faust “is likely to attempt physical harm to self or others, or to fail to provide necessary shelter, or medical care unless a commitment is ordered.” Faust argues that there is no evidence of any incident where he failed to provide shelter for himself. He is correct. The record shows that since Faust

moved from his mother's house in 2007, he has stayed in various hotels. Dr. Ziesemer indicated that shelter had not yet become a problem, only that he believed it might become a problem in the future because Faust will likely repeat the behavior that got him evicted from the Super 8 Motel. But "speculation as to whether the person may, in the future, fail to obtain necessary . . . shelter . . . is not sufficient to justify civil commitment." *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995). On this record, we conclude that the district court relied on speculation alone when it found that Faust "may not be able to provide for his own shelter as noted by his recent eviction from the Super 8 Motel in Perham, Minnesota." Faust provided for his own shelter previously despite having a psychological disorder, and the record does not support a reliable prediction that this will change. That he "may not" continue to provide his own shelter is no basis to order his commitment.

Because no evidence proves that Faust failed to obtain shelter, his commitment depends on whether he failed to obtain necessary medical care. The Commitment and Treatment Act allows commitment when a person (1) has either an organic brain disorder or a substantial psychiatric disorder and (2) "poses a substantial likelihood of physical harm to self or others." Minn. Stat. § 253B.02, subd. 13(a). The Act expressly establishes that a substantial likelihood of physical harm to self or others may be demonstrated by "a failure to obtain necessary . . . medical care." Though the statute does not define "necessary," it must mean something more than medication designed to alleviate an individual's brain disorder or psychiatric disorder. To construe the statute otherwise, the separate harm requirement in the Act would be superfluous, and an

individual could be committed solely because of his mental illness—something that not only fails to meet the statutory threshold, it also is prohibited by the Constitution. *See O'Connor v. Donaldson*, 422 U.S. 563, 575, 95 S. Ct. 2486, 2493 (1975) (stating that Constitution prohibits committing persons “if they are dangerous to no one and can live safely in freedom”). Because the Act has a separate harm requirement, medical care is “necessary” if the care is essential to prevent physical harm to the individual or others.

The district court found that “there’s no testimony that Mr. Faust has physically harmed himself or others.” Yet it concluded that “the Court is satisfied that [Faust] has failed to obtain necessary medical care to deal with his . . . condition of paranoid schizophrenia.” But neither the findings nor the record suggest that the rejected medication was necessary to prevent physical harm to Faust or others; there was no showing that Faust had harmed himself or anyone else by failing to take medication. The only finding that hinted at harm to Faust was that he “carr[ies] large sums of money,” which “is likely to bring him harm by others.” But Faust has never been harmed by his carrying money in the past and speculation as to possible future harm is insufficient to justify commitment. *McGaughey*, 536 N.W.2d at 623. It is evident that the district court was moved by the compassion of Faust’s family, whose efforts to help Faust appear to be motivated by legitimate concern for his safety. On this record, however, we observe that Faust’s commitment was based on his mental illness alone, because no clear and convincing evidence proves that he poses a substantial likelihood of physical harm to himself or others. We therefore reverse his commitment.

Because we reverse his commitment, we need not reach his argument regarding whether commitment was the least restrictive alternative.

II

Faust filed a motion with this court to strike two items from the respondent's appendix: Officer Stromme's police report and Faust's handwritten notes that he left with the Super 8 staff. Faust argues that the items must be stricken because they are not part of the district court record.

The record on appeal contains, "[t]he papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. Appellate courts may not consider matters outside the record on appeal and will strike references to such matters from the parties' briefs. *Fabio v. Bellomo*, 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd* 504 N.W.2d 758 (Minn. 1993). Faust's motion to strike Officer Stromme's police report has no basis. Officer Stromme's report is in the record attached to the pre-petition screening report. Because the report is part of the record, we deny Faust's motion to strike it.

Similarly, Faust's motion to strike his handwritten notes is denied. Although the notes are not included in the district court file, they are referenced in the transcript. When the county attorney asked Faust's case manager about the notes, the district court interrupted and said, "The notes can speak for themselves, counsel. I believe they are part of the record." The county attorney asked if the notes would be marked as an exhibit or just indicated as part of the record, and the district court responded, "They were

already part of the record. I believe they were attached as part of the petition.” The notes were considered by the district court as part of the record.

Faust’s motion to strike is denied and his commitment is reversed.

Reversed; motion denied.