STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1593

In the Matter of the Civil Commitment of:
Derek Marshall Siewert.

Filed January 13, 2014
Reversed
Cleary, Chief Judge

Hennepin County District Court
File No. 27-MH-PR-13-598

Gregory R. Solum, Edina, Minnesota (for appellant Derek Marshall Siewert)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent Hennepin County Medical Center)

Considered and decided by Cleary, Chief Judge; Stoneburner, Judge; and Hooten, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellant Derek Marshall Siewert challenges the district court's order committing him as a person who is mentally ill and also challenges a separate order authorizing use of neuroleptic medication in his treatment. The district court found that there is clear and convincing evidence that he is "mentally ill" within the meaning of Minn. Stat. § 253B.02, subd. 13(a) (2012). Because the evidence does not support a finding that Siewert meets the statutory requirements for commitment, we reverse.

FACTS

On August 18, 2012, appellant was transferred by ambulance to respondent Hennepin County Medical Center (HCMC) at the request of police officers present at the scene of a disturbance. The police had received a call from appellant's ex-girlfriend after appellant showed up at her home uninvited. When the police arrived, appellant was threatening to kill himself and others, and he was uncooperative. Appellant was diagnosed with post-traumatic stress disorder and remained hospitalized for six days until he was discharged on August 24, 2012.

In early June of 2013, appellant's mother, M.D., called the police after observing appellant exhibiting unusual behavior. The police brought appellant to HCMC where he appeared to have an "altered mental" state and where he provided nonsensical responses. Appellant was eventually transferred to HCMC's inpatient psychiatry unit. On June 14, during an interview with HCMC staff, appellant "took a posture such that the interview was terminated for fear of violence." HCMC subsequently filed a petition to have appellant committed as mentally ill.

At appellant's commitment hearing, M.D. testified that she had observed appellant display behavioral problems since he moved in with her in 2011. Appellant would became "very verbal" with M.D., asking her to "get out of his space" and leave the room he was in. As a result, M.D. spent most of her time while she was home in her bedroom. M.D. testified that she observed appellant leave the house for an hour and a half while he had spaghetti cooking on the stove. She would sometimes return home from work to discover that appellant had left the house unsecured with all of the windows and doors

open. Appellant would water the grass for hours at a time and during the middle of the night. M.D. also testified that appellant would leave chicken and beef sitting on the counter to defrost all day, seasoning the meat and letting it sit out for four or more hours. He would then grill the food in the middle of the night. M.D. had not observed appellant display any of these behaviors before he moved in with her in 2011. According to M.D., she has not been threatened or harmed by appellant. M.D. believes appellant was employed for a short period of time and might have a bank account with an unknown amount of funds.

At appellant's commitment hearing, the court-appointed psychological examiner diagnosed appellant with "psychosis not otherwise specified with a possibility of bipolar disorder manic with psychosis." She also testified that during her evaluation and in appellant's records, he "has demonstrated disorganized and illogical thought patterns, engaged in nonsensical speech[,] . . . appeared paranoid and guarded[, and] . . . been irritable[,] and . . . it has seemed as though he might be responding to some kind of internal stimulation." The examiner was not aware of appellant having threatened or having attempted to harm other people and was "not aware of any particular concerns that he would pose an imminent risk" of exhibiting such behavior.

On June 27, 2013, the district court granted the commitment petition and authorized the administration of neuroleptic medication in his treatment. This appeal follows.

D E C I S I O N

In reviewing a civil commitment, this court is limited to examining whether the district court complied with the requirements of the commitment statute. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). "An appellate court will not reverse a district court's findings of fact unless they are clearly erroneous." *In re Civil Commitment of Janckila*, 657 N.W.2d 899, 902 (Minn. App. 2003). The district court must find by clear and convincing evidence that a person is "mentally ill," for that person to be civilly committed under the statute. Minn. Stat. § 253B.09, subd. 1(a) (2012). "We review de novo the question of whether the evidence is sufficient to meet the standard of commitment." *Janckila*, 657 N.W.2d at 902.

A "person who is mentally ill" is defined in Minn. Stat. § 253B.02, subd. 13(a) as

> any person who has an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which is manifested by instances of grossly disturbed behavior or faulty perceptions and poses a substantial likelihood of physical harm to self or others as demonstrated by:
>
> (1) a failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment;
>
> . . . .
>
> (3) a recent attempt or threat to physically harm self or others; or
>
> . . . .

The statutory definition contains two requirements: (1) the person has "an organic disorder of the brain or a substantial psychiatric disorder," and (2) the person "poses a substantial likelihood of physical harm to self or others." Minn. Stat. § 253B.02, subd. 13(a). The district court concluded that appellant "is ill with psychosis NOS versus bipolar disorder with psychosis." Appellant does not challenge the district court's conclusion as to appellant's mental impairment. The issue on appeal is whether HCMC established by clear and convincing evidence that appellant poses a substantial likelihood of physical harm to himself or others.

The district court concluded that "[w]ithout commitment, it is substantially likely that [appellant] will be unable to meet his basic needs or cause physical harm to others." Appellant argues that the record does not support a finding that he will be unable to meet his needs or that he will cause physical harm to others.

The commitment statute "requires that the substantial likelihood of physical harm must be *demonstrated* by an overt failure to obtain necessary food, clothing, shelter, or medical care or by a recent attempt or threat to harm self or others." *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995). This requirement is not met by "speculation as to whether the person may, in the future, fail to obtain necessary food, clothing, shelter, or medical care or may attempt or threaten to harm self or others." *Id.* Yet, the statute does not require "that the person must either come to harm or harm others before commitment as a mentally ill person is justified." *Id.*

A failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment

Appellant argues that the record does not support a finding of clear and convincing evidence of a failure to obtain necessary food, clothing, shelter, or medical care to support commitment. We agree. The record does support the district court's finding that appellant's "judgment is impaired, leading to unsafe choices like leaving food cooking on the stove when he leaves the house, . . . and leaving the windows and doors of the house wide open." However, there is no evidence in the record that appellant has failed to obtain clothing, shelter, or food.

Until appellant was hospitalized, he was living with his mother. HCMC did not present any evidence to the district court of a past instance of homelessness. The district court's determinations regarding leaving food cooking unattended, and leaving the windows and doors open, are not findings of a failure to obtain necessary food, clothing, or shelter. While these behaviors appear to be strange and unsafe, they do not represent an overt failure to obtain necessities. Lastly, there is no evidence related to any failure by appellant to obtain medical care.[1]

The record does not contain clear and convincing evidence of appellant having failed to obtain necessary food, clothing, shelter, or medical care to support a holding that appellant is mentally ill under Minn. Stat. § 253B.02, subd. 13(a)(1).

[1] Although the district court, in its order authorizing the administration of neuroleptic medication, found that appellant does not take neuroleptic medication voluntarily, this is not evidence of appellant's failure to obtain medical care under Minn. Stat. § 253B.02, subd. 13(a)(1). Additionally, HCMC conceded at oral argument that the state was not relying on appellant's failure to take medication while hospitalized for commitment as failing "to obtain . . . medical care."

A recent attempt or threat to physically harm self or others

Appellant argues that there is not clear and convincing evidence to support commitment on the basis of "a recent attempt or threat to physically harm self or others." *See id.*, subd. 13(a)(3). We again agree. The district court determined that appellant "engages in grossly disturbed behavior or experiences faulty perceptions, and he poses a substantial likelihood of causing physical harm." The court concluded that while hospitalized in 2013, appellant was "nonsensical, rambling[,] . . . paranoid[,] . . . agitated and angry." In its order, the district court specifically cited the incident on June 14, 2013, stating that appellant "was so belligerent – glaring and posturing – that his psychiatrist terminated an exam because he was concerned [appellant] would act out violently."

Additionally, the district court considered an incident that led to appellant's brief hospitalization in August of 2012. The court determined that, "Because of a delusional belief . . . [appellant] showed up at an ex-girlfriend's home uninvited and she was so fearful that she called police," and when police arrived, appellant "was making homicidal and suicidal statements and would not cooperate." At the hospital, appellant "was still unmanageable and security had to intervene to restrain him." Appellant's ex-girlfriend did not testify at the commitment hearing in June of 2013.

There is not clear and convincing evidence that appellant has recently attempted to or threatened to physically harm himself or others. M.D. testified that appellant never threatened or struck her. Additionally, the psychological examiner stated at the commitment hearing that she was not aware of appellant having threatened or attempted to harm other people and was not aware of particular concerns that he would pose an

imminent risk of exhibiting such behavior. The incident from August of 2012 upon which the district court relies is too remote to constitute "recent" for purposes of Minn. Stat. § 253B.02, subd. 13(a)(3). There is no evidence of appellant attempting or threatening to commit physical harm to anyone between the August of 2012 incident, which led to a six-day hospitalization followed by discharge, and his hospitalization in June of 2013. Without intervening occurrences of attempts or threats of physical harm, we believe that the 2012 incident is too remote to substantiate a finding of "a recent attempt or threat."[2]

Appellant's actions during the terminated psychiatrist exam do not provide clear and convincing evidence of an attempt or threat of physical harm. Persons who believe they have been wrongly hospitalized might reasonably exhibit angry and defiant behavior as the district court described. The record does not clearly indicate that a threat was made or implied and, in light of the lack of other evidence of appellant attempting or threatening physical harm, this incident does not provide clear and convincing evidence of a threat.

[2] As one legal commentator has stated, "Though the act requires that recent behavior be demonstrated, it does not define 'recent.' In determining whether demonstrated behavior is recent for purposes of this definition, one should refer to the purpose of the recency requirement. The reason for requiring proof of behavior is to ground the prediction of future harm. . . . In general, however, the more remote the last incident of harmful behavior, the less predictive of future harm it will be. This follows from the fact that there has been an intervening harm-free period during which the past behavior has not been predictive of harm." Eric S. Janus, *Civil Commitment in Minnesota* 31 (Butterworth Legal Publishers, 2d ed. 1991).

HCMC argues that leaving food cooking unattended, consuming meat left unrefrigerated for hours, and leaving the doors and windows open while away from home constitutes sufficient evidence of a threat or attempt of physical harm. In support of this assertion, HCMC urges this court to rely on *In re Burmeister*, 391 N.W.2d 89 (Minn. App. 1986). In *Burmeister*, the person to be committed put a large amount of paper in his family's fireplace and lit a fire, scorching the front of the fireplace and filling the room with smoke. 391 N.W.2d at 90. His family also discovered that he had closed the damper while the fire was still burning. *Id.* This court upheld the district court's determination that this incident constituted an attempt or threat of physical harm, stating that "the statute requires only that an individual pose a threat of harm to others or himself." *Id.* at 91 (emphasis omitted). HCMC's reliance on *Burmeister* is misplaced. Leaving pasta cooking on the stove, cooking and consuming improperly thawed meat, and leaving windows and doors wide open, is not the same type of life-threatening conduct as setting a fire and closing the damper. Although the three behaviors HCMC relies upon present cause for concern, they do not rise to the level of posing a threat of harm sufficient to support a determination that appellant is mentally ill under the commitment statute.

HCMC established with clear and convincing evidence that appellant has exhibited unusual behavior and suffers from a mental impairment. However, civil commitment is only appropriate in those cases where it can be shown by clear and convincing evidence that, as a result of a mental illness, an individual "poses a substantial likelihood of physical harm to self or others," as demonstrated by a failure to obtain

statutorily enumerated necessities or by a recent attempt or threat of physical harm. Minn. Stat. § 253B.02, subd. 13(a). While we are cognizant of appellant's ongoing mental health needs, based on this record there is not clear and convincing evidence that appellant has demonstrated the requisite behavior to meet the statutory requirements of a "person who is mentally ill" for purposes of a civil commitment. The district court erred by committing appellant. In addition, the district court issued an order authorizing the use of neuroleptic medication at the same time that it issued the commitment order. The statutory provision governing authorization of neuroleptic medication states that "[n]euroleptic medications may be administered to patients subject to . . . civil commitment as mentally ill." Minn. Stat. § 253B.092, subd. 1 (2012). Consequently, the order authorizing the use of neuroleptic medication is also reversed.

Reversed.