

STATE OF MICHIGAN
COURT OF APPEALS

In re DANNY PHILLIP GRAY.

GABRIEL HERNANDEZ,
Plaintiff-Appellee,

UNPUBLISHED
September 30, 2021

and

STEPHANIE LEONE,
Petitioner,

v

DANNY PHILLIP GRAY,
Respondent-Appellant.

No. 356326
Kent Probate Court
LC No. 20-928637-MI

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

Respondent, Danny Phillip Gray, appeals by right the probate court order finding that he required treatment on the basis of his mental illness and ordering hospitalization. We affirm.

This case arises out of a petition seeking mental health treatment for respondent. Petitioner alleged that, as a result of respondent's mental illness, he was in danger of harming himself or others, did not believe that he had a mental illness, refused medication, minimally engaged in treatment, threatened medical staff and officers, and had delusional thoughts and illogical speech.

At the beginning of the hearing on the petition, respondent and his attorney told the probate court that respondent wanted to represent himself. The probate court explained that the hearing could affect respondent's liberty and that respondent had significant rights, so the probate court wanted respondent's attorney to monitor and participate if necessary to protect respondent's constitutional rights.

Thereafter, testimony was presented to the court. Dr. Sameh Dwaikat, a psychiatrist at St. Mary's Hospital, testified as an expert in the field of psychiatry. Dr. Dwaikat testified about his

interactions with and observations of respondent. Dr. Dwaikat thought that respondent's delusions could increase, making him "very dangerous" to himself and others.

After Dr. Dwaikat's direct examination, respondent stated that he wanted to make an opening statement, but the court stated that there were no opening statements, though it would allow respondent a closing statement. Respondent did not have any questions for Dr. Dwaikat, so the probate court asked respondent's attorney to question the doctor.

After Dr. Dwaikat finished testifying, respondent requested an independent clinical evaluation and a jury trial. Respondent also explained that he had written a letter in accordance with the statute to request that he be permitted to represent himself formally. The probate court denied respondent's request for a jury trial and independent clinical evaluation because he did not formally request them before the hearing commenced. The probate court found clear and convincing evidence that respondent required treatment because of his mental illness and ordered a combination of hospitalization and outpatient treatment.

Respondent first argues that the probate court erred by denying his request for an independent clinical evaluation. This Court "reviews for an abuse of discretion a probate court's dispositional rulings and reviews for clear error the factual findings underlying a probate court's decision." *In re Bibi Guardianship*, 315 Mich App 323, 328; 890 NW2d 387 (2016). "A probate court abuses its discretion when it chooses an outcome outside the range of reasonable and principled outcomes." *Id.* at 329 (quotation marks and citation omitted). A probate court's finding is clearly erroneous when this Court is left with a definite and firm conviction that the court made a mistake. *Id.* We review de novo whether a trial court properly interpreted and applied statutes, *Kaeb v Kaeb*, 309 Mich App 556, 564; 873 NW2d 319 (2015), and whether a person was afforded due process. *In re Moroun*, 295 Mich App 312, 331; 814 NW2d 319 (2012).

Courts must strictly comply with the statutory provisions for the involuntary commitment of individuals. *In re Wojtasiak*, 375 Mich 540, 544; 134 NW2d 741 (1965). MCL 330.1517(3) provides the following:

The individual asserted to meet the criteria for treatment is entitled to be represented by legal counsel in the same manner as counsel is provided under section 454, and is entitled to all of the following:

- (a) To be present at the hearing.
- (b) To have upon demand a trial by jury of 6.
- (c) To obtain a continuance for any reasonable time for good cause.
- (d) To present documents and witnesses.
- (e) to cross-examine witnesses.
- (f) To require testimony in court in person from 1 physician or 1 licensed psychologist who has personally examined the individual.

(g) To receive an independent examination by a physician or licensed psychologist of his or her choice on the issue of whether he or she meets the criteria for treatment.

Further, MCL 330.1517(2)(d) provides that a respondent must receive the following:

[A] copy of the petition, a copy of the report, unless the individual has previously been given a copy of the petition and the report, notice of the right to a full court hearing, notice of the right to be present at the hearing, notice of the right to be represented by legal counsel, notice of the right to demand a jury trial, and notice of the right an independent clinical or psychological evaluation.

MCL 330.1448(1)(c) provides that a respondent must receive a written statement explaining his or her rights, including to a full court hearing and jury trial, to be present at the hearing, to be represented by counsel, and to an independent clinical evaluation. MCL 330.1453 provides that the respondent must receive notice of the petition and of the respondent's rights, including the right to demand a jury trial and the right an independent clinical evaluation.

Additionally, MCL 330.1463(1) provides the following:

If requested before the first scheduled hearing or at the first scheduled hearing before the first witness has been sworn on a petition, the subject of a petition in a hearing under this chapter has the right at his or her own expense, or if indigent, at public expense, to secure an independent clinical evaluation by a physician, psychiatrist, or licensed psychologist of his or her choice relevant to whether he or she requires treatment, whether he or she should be hospitalized or receive treatment other than hospitalization, and whether he or she is of legal capacity.

Finally, pursuant to MCL 330.1462, a request for a continuance for a reasonable time must be granted for good cause.

Although respondent argues that there was no record evidence that he had been informed of his right to an independent clinical evaluation, the lower court record included the notice of hospitalization and certificate of service, which indicated that respondent had been served with a statement explaining his rights. Additionally, a proof of service indicated that, among other documents, respondent was personally served with the petition for hospitalization/notice of hearing and the order appointing his attorney. The notice of hearing clearly informed respondent of his right to request an independent medical evaluation and a jury trial. Additionally, respondent's attorney was served with this notice of hearing, which included respondent's rights to an independent clinical evaluation and jury trial. Although the notice form did not include the deadline for making the request, petitioner complied with the statutory requirements and informed respondent of his right to make the requests.

Additionally, the record establishes that respondent was aware prior to the hearing that he could assert certain rights. Specifically, before Dr. Dwaikat testified respondent and his attorney informed the probate court of respondent's request to represent himself, indicating that they had discussed respondent's rights and prepared respondent for the hearing, but respondent did not include a request for an evaluation until *after* Dr. Dwaikat testified. Respondent's preparation of

a letter to formally request to represent himself further supports a finding that he was aware of his rights and the procedures for exercising them.

Contrary to respondent's argument, respondent's first opportunity to speak did occur before testimony began, and at that time respondent only requested to represent himself, without requesting the independent clinical evaluation (or a jury trial). And, the record shows that respondent was previously advised by his attorney about some or all of his rights, as his right to self-representation was raised at the start of the hearing. Further, respondent's request to make an opening statement only occurred after Dr. Dwaikat's direct examination, which would have been an untimely request for either an independent clinical evaluation or jury trial. See MCL 330.1463(1).

Respondent has also not established that he should have been granted a continuance pursuant to MCL 330.1462 and MCL 330.1455(6), which permits a respondent to defer a hearing for up to 60 days in order to receive treatment. MCL 330.1455(6) specifically requires that a request to defer "shall include" an agreement to accept treatment and that the request "shall be on a form provided by the department signed by the individual in the presence of his or her legal counsel and shall be filed with the court by legal counsel." See *Matter of Moriconi*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 356037); slip op at 6. Respondent failed to meet the statutory requirements for requesting a deferral, including filling out the required form and filing it with the probate court, and there was no indication that respondent was *willing to accept treatment*, as required in order to agree to the deferral. See MCL 1455(6). But see *Matter of Moriconi*, ___ Mich App at ___; slip op at 5-6.¹ The probate court did not err by denying petitioner's request for an independent clinical evaluation. See *In re Bibi Guardianship*, 315 Mich App at 328.

We reject the respondent's argument that the probate court erred by denying him a jury trial for much of the same reasons. MCL 330.1458 provides that "[t]he subject of a petition may demand that the question of whether he requires treatment or is legally incompetent be heard by a jury." MCR 5.740 provides that an individual alleged to need involuntary mental health treatment may demand a jury trial "before testimony is received at the hearing for which the jury is sought." "A jury is waived if trial or hearing is commenced without a demand being filed." MCR 5.158(B).

In addressing this argument, we recognize factually that respondent's attorney did not request a jury trial on his behalf. But, we also recognize that, based upon respondent's attorney statement at the commencement of the hearing that respondent told him that he wanted to represent himself, respondent and his attorney *had* spoken before the hearing, despite respondent's argument that there was no indication that respondent met with his attorney within the statutory timeframe because respondent's attorney did not file a certificate after consulting with respondent, as required

¹ Indeed, respondent testified that when mental health professionals told him to stop reading aloud in the hospital or that they would need to inject him with medication, respondent told them that he "would resist physically." Respondent denied physically assaulting anyone, but admitted to pushing a doctor out of the way, and testified that he had said that he "would physically resist anyone who tried to put a needle into [his] veins."

by MCL 330.1454(9). The record reflects that respondent did have the opportunity to tell his attorney that he wanted to request a jury trial.

With respect to respondent's argument that MCR 5.740 is unconstitutional because it allows for an unknowing waiver of the right to a jury trial, *Addington v Texas*, 441 US 418; 99 S Ct 1804; 60 L Ed 2d 323 (1979), what *Addington* held was that in civil commitment cases the standard of proof must be greater than preponderance of the evidence, but reasonable doubt was not constitutionally required because "it may impose a burden the state cannot meet and thereby erect an unreasonable barrier to needed medical treatment" because of the "uncertainties of psychiatric diagnosis." *Addington*, 441 US at 432-433. *Addington*, therefore, does not support respondent's argument that civil commitment cases are held to the same standard as criminal cases, even if the liberty interest at stake is significant. See *In re Martin*, 450 Mich 204, 226-227; 538 NW2d 399 (1995). Moreover, the Michigan Constitution specifies that the right to a jury trial "shall be waived in all civil cases *unless demanded by one of the parties in the manner prescribed by law.*" Const 1963, art 1, § 14. (emphasis added). Respondent did not demand a jury trial as required by statute, and, therefore, waived the right. See *Davis v Chatman*, 292 Mich App 603, 616, 619; 808 NW2d 555 (2011). Therefore, the probate court did not abuse its discretion by denying respondent's untimely demand for a jury trial. See *In re Bibi Guardianship*, 315 Mich App at 328.²

The enforcement of the statutory requirements for invoking a jury trial did not deny respondent of the right to due process of law. Although he refers to *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), for the proposition that due process is a flexible concept, respondent has not shown that the notice form is constitutionally defective or that his liberty interest required a jury trial. As this Court explained in *In re KB*, 221 Mich App 414, 419; 562 NW2d 208 (1997), the Mental Health Code procedures satisfied due-process guarantees concerning rehospitalization without an additional hearing because of the measures that protected an individual's rights during the treatment determination, the individual's right to appeal during treatment, and the brief duration of the treatment period, all providing a minimal risk of "erroneous deprivation of liberty" or erroneous actions by the probate court. *Id.* at 421.

² Although respondent argues that the lack of a jury trial prejudiced him because "jurors may have had more empathy for [respondent] and carefully listened to his testimony," the probate court appeared to be quite empathetic and attentive to respondent's testimony. The probate court stated that it found respondent's testimony to be credible, but that it "underscore[d] the testimony of Dr. Dwaikat." The probate court found respondent's potential to be a mentor and have a positive impact on his community to be significant, but it also found that respondent's lack of treatment was impacting his ability to be effective. The probate court specifically stated that when respondent was healthy, he was polite, articulate, and could advocate for himself, but that he needed treatment and encouraged respondent not to be ashamed of his diagnosis.

The probate court did not err by denying respondent's request for a jury trial. *In re Bibi Guardianship*, 315 Mich App at 328.

Affirmed.

/s/ Christopher M. Murray

/s/ Michael J. Kelly

/s/ Colleen A. O'Brien