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IN THE
COURT OF APPEALS OF INDIANA

In the Matter of the Civil Commitment of:

L.B.,

Appellant-Respondent,

v.

Richard L. Roudebush Veterans Affairs Medical Center,

Appellee-Petitioner.

July 15, 2022

Court of Appeals Case No. 22A-MH-153

Appeal from the Marion Superior Court

The Honorable Steven R. Eichholtz, Judge

Trial Court Cause No. 49D08-2112-MH-41150

Weissmann, Judge.

[1] In this appeal, we consider what procedure a trial court must follow before accepting a civil-commitment respondent's waiver of the right to counsel. We conclude the court must expressly find, on the record, that the respondent is mentally capable of knowingly, voluntarily, and intelligently waiving the right. Because that did not happen in the trial court below, we reverse and remand.

Facts

[2] After experiencing "worsening, intensifying voices" and "wanting to escape the torture," L.B. threw his television out a window, shaved his head, and burned down his house. Tr. Vol. II, pp. 9-10. Police found L.B. on foot in a neighboring county. A few days later, he was admitted to the Richard L. Roudebush Veterans Affairs Medical Center (Hospital). The Hospital determined L.B. to be mentally ill, dangerous, and in need of immediate restraint. It therefore filed a petition for his regular commitment.[1]

[3] The trial court appointed counsel for L.B., and the two briefly spoke the day before L.B.'s commitment hearing. When the hearing commenced the following day, L.B.'s counsel advised the court that L.B. wanted to represent himself. The court then engaged in the following colloquy with L.B.:

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[1] The record indicates that L.B. was previously the subject of a commitment proceeding in case 49D08-1909-MH-038487. "If an individual has not previously been the subject of a commitment proceeding, the court may only order temporary commitment." Ind. Code § 12-26-3-9(a). But "[i]f an individual has previously been the subject of a commitment proceeding, the court may order a regular commitment if a longer period of treatment is warranted." I.C. § 12-26-3-9(b).

THE COURT: Ok, we're (sic) get to that in a minute. In addition to the right to an attorney, you do have the right to represent yourself. Though I advise against it personally, I would never go into court without a lawyer and I'm a Judge. So, if I was being brought to court for somebody, I would definitely want an attorney to assist me. Um, but you do have a right to participate in these proceedings in a room and at this hearing it's the burden on the hospital to establish by clear and convincing evidence, which is a very high standard of proof, that you suffer from a mental illness, and that as a result of your mental illness, you are either a danger to yourself, a danger to others, or gravely disabled. If the Court finds those facts are present, the burden of proof has been met, then the court can grant the request for commitment and if the court finds the burden of proof hasn't been established then the court cannot grant the request for temporary or regular commitment. Do you understand your rights?

[L.B.]: Yes, sir. I wish to represent myself also.

THE COURT: Why is that?

[L.B.]: Because uh, every other time I've ever been to court the lawyer down plays (sic) the incident. The war crime torture I've been experiencing, they downplay it and they're politically correct about it and I don't want to hear it anymore. I'd rather just represent myself at this point.

THE COURT: Understand that uh, just because the Court allows you to represent yourself, you'll be held to the same standard as if you were represented by an attorney. You'll be required to apply the proper rules of evidence. I mean, you just can't just start talking and you'll have to cross examine witnesses and you can't really argue with them but uh you'll be held to the same burden that any person, a lawyer would be held to in terms of presenting your case.

[L.B.]: I understand.

> THE COURT: Do you want [counsel] to remain on to assist if possible?
>
> [L.B.]: No.
>
> THE COURT: Ok, show the respondent will represent himself, thank you [counsel], you're released from your duty.

Id. at 6-7. The commitment hearing proceeded with L.B. acting pro se.

[4] During the hearing, a Hospital psychiatrist testified, in part, to the following facts. While at the Hospital, L.B. described "auditory and visual hallucinations of people talking to him . . . throughout the day" as well as "some vague command hallucinations to harm someone." *Id.* at 11. L.B. also relayed "several strongly held beliefs . . . which can be described as delusions of receiving messages from the military that are meant to torture him with the goal of recruiting him into service against the Chinese government or the globalists." *Id.* The psychiatrist diagnosed L.B. with Schizo-Affective Disorder, depressive subtype.

[5] The trial court ultimately found L.B. to be a danger to himself and others, gravely disabled, and in need of continuing care and custody. Accordingly, the court ordered L.B.'s regular commitment to the Hospital with a periodic report due no later than December 1, 2022. L.B. appeals.

Discussion and Decision

[6] L.B. challenges his commitment on due process grounds, arguing that the trial court erred in accepting his waiver of the right to counsel without first finding that he was competent to waive that right. We agree.

[7] Indiana Code § 12-26-2-2 grants a person alleged to have mental illness the right to counsel in a civil-commitment proceeding. Ind. Code § 12-26-2-2(b)(4). To effectively waive this right, the person must be "capable of making such a decision," and the waiver must be made "knowingly, voluntarily, and intelligently." *GPH v. Giles*, 578 N.E.2d 729, 737 (Ind. Ct. App. 1991). Though Indiana's appellate courts have not had occasion to consider what procedure a trial court must follow before accepting a civil-commitment respondent's waiver of the right to counsel, our Supreme Court has considered an analogous issue that we find instructive.

[8] In addition to the right to counsel, Indiana Code § 12-26-2-2 grants a person alleged to have mental illness the right to be present at a civil commitment proceeding. I.C. § 12-26-2-2(b)(3). In *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606 (Ind. 2018), our Supreme Court ruled that a person may waive this right if they are "capable of knowingly, voluntarily, and intelligently making that decision." *Id.* at 613 (citing *GPH*, 578 N.E.2d at 737). According to the Court:

> This requires the trial court to expressly find those prerequisites on the record—though how that is done will depend on the particular circumstances of the case. In some cases, mental

> competency may be more doubtful, and the court may need to diligently observe and question the respondent in person. Other cases may not require such a deep inquiry.

Id.

[9] We see no reason to require a different procedure when a civil-commitment respondent is waiving the right to counsel rather than the right to appear. Both are due process rights provided by Indiana Code § 12-26-2-2, and both implicate the same concerns. As our Supreme Court explained in *A.A.*:

> a civil-commitment respondent could exhibit the necessary competency to personally waive an appearance. Yet we are mindful that once an individual is at risk of commitment, that person's mental condition is necessarily at issue. . . . And, a respondent may suffer from both mental illness and mental incompetency. Accordingly, stringent safeguards are critical to guarantee that a respondent is capable of personally waiving the right to appear and, in turn, to guarantee the integrity of the proceeding as a whole.
>
> Safeguards also bolster the State's ability to protect and care for a respondent. . . . If a commitment hearing proceeds without the respondent, the State's ability to exercise this power is hindered, as an individual's presence will often yield vital information on the most appropriate treatment plan.
>
> Of course, these concerns are also implicated when a civil-commitment respondent wishes to personally waive other due process rights, *such as the right to counsel*. . . .

Id. (emphasis added).

[10] Accordingly, we conclude that a trial court must expressly find, on the record, that a civil-commitment respondent is capable of knowingly, voluntarily, and intelligently waiving the right to counsel before accepting the respondent's waiver of that right. How that is done will depend on the circumstances of the case, as with waiver of the right to appear. When mental competency is more doubtful, the court may need to diligently observe and question the respondent in person. Other cases may not require such a deep inquiry. *See id.* at 613.

[11] Here, the Hospital's petition for L.B.'s regular commitment alleged him to be "psychotic" and experiencing "command auditory hallucinations." App. Vol. II, p. 16. The petition described this as "[a] substantial impairment or obvious deterioration in judgment, reasoning, or behavior that results in [L.B.'s] inability to function independently." *Id.* Yet during its waiver colloquy with L.B., the trial court asked only a single question that can be construed as an inquiry into his mental competency. And L.B.'s "war crime torture" response did little to resolve the issue. Tr. Vol. II, p. 6.

[12] Because the trial court did not establish that L.B. was capable of knowingly, voluntarily, and intelligently waiving the right to counsel before accepting his waiver of that right, L.B. was denied due process. *See Bumbalough v. State*, 873 N.E.2d 1099, 1102 (Ind. Ct. App. 2007) (finding due process violation where probation revocation defendant proceeded without counsel and record was silent on whether he knowingly, voluntarily, and intelligently waived statutory right to counsel).

[13] The Hospital does not meaningfully argue against requiring a competency determination before a trial court accepts a civil-commitment respondent's waiver of the right to counsel. Instead, it claims the trial court's failure to do so was harmless because "the evidence still supports a finding that L.B. suffers from a mental illness and is both gravely disabled and a danger to himself." Appellee's Br. p. 9. "[I]nvalid waivers of counsel are not subject to a harmless error analysis." *Bumbalough*, 873 N.E.2d at 1102. We therefore reverse the trial court's judgment and remand for a new commitment hearing.

Robb, J., and Pyle, J., concur.