MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

In re the Matter of the Commitment of:

D.E.,

Appellant-Respondent,

v.

Evansville State Hospital, Indiana Family and Social Services Administration, Division of Mental Health and Addiction,

Appellees-Petitioners.

June 30, 2023

Court of Appeals Case No. 22A-MH-2271

Appeal from the Brown Circuit Court

The Honorable Mary Wertz, Judge

Trial Court Cause No. 07C01-1710-MH-2

Memorandum Decision by Chief Judge Altice
Judges Riley and Pyle concur.

Altice, Chief Judge.

Case Summary

[1] D.E. appeals the trial court's order of continued confinement at the Evansville State Hospital (the Hospital), following his involuntary commitment to the Indiana FSSA Division of Mental Health and Addiction (DMHS). D.E. claims that the order must be set aside because the trial court erred in determining that he knowingly, intelligently, and voluntarily waived his right to be represented by counsel at the commitment review hearing.

[2] We affirm.

Facts and Procedural History

[3] D.E., who is presently sixty-five years old, suffers from bipolar and narcissistic personality disorders. In October 2017, D.E. was committed to Logansport Hospital (Logansport), following a verdict of not responsible by reason of insanity on charges of attempted murder, aggravated battery, and battery resulting in serious bodily injury.

[4] On September 19, 2018, D.E. was transferred to the Hospital from Logansport, where he continues to reside. The trial court continued D.E.'s regular

commitment on December 19, 2018, February 26, 2021, and August 25, 2021, after conducting review hearings. [1]

[5] Dr. Kari Kernek, a psychiatrist, began treating D.E. on a regular basis at the Hospital after the transfer. She examines D.E. for about fifteen minutes to one hour every three to four weeks. Sometime in 2021, D.E. began writing threatening letters to Dr. Kernek, stating that she would regret what she had done to him. D.E. asserted that Dr. Kernek was incompetent and paranoid, accused the Hospital staff of posting false information on his medical records, and claimed that he should never have been arrested for any criminal activity because "the police had it out for him." *Transcript Vol. II* at 29.

[6] Between June 2021 and June 2022, D.E. did not exhibit any signs of mania, which Dr. Kernek attributed to the medication regimen. During this time, however, D.E. exhibited some signs of psychosis. D.E. has questioned his disorder diagnoses and the need to be on antipsychotic medication. D.E. denies having a personality disorder, and he has poor insight into his past violent behavior. In fact, D.E. does not recognize that he displays any symptoms of his disorders until they become severe.

[7] On February 24, 2022, D.E. filed a request for review or dismissal of commitment. At a hearing that was conducted on April 8, 2022, D.E.

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[1] D.E. appealed the order of continued commitment in February of 2021. This court affirmed that order in an unpublished memorandum decision on October 21, 2021. *See Commitment of D.E. v. Evansville State Hosp.,* No. 21A-MH-496 (Ind. Ct. App. Oct. 21, 2021).

described the performance of his previous public defender as "nonsensical," asserted his right to proceed pro se, and testified that he was capable of representing himself. *Transcript* at 6-7. In response, the trial court explained to D.E. that attorneys had skills, knowledge, and experience to investigate cases, interrogate witnesses, find favorable witnesses, gather documents, and prepare and file motions to keep unfavorable information from being admitted into evidence. The trial court also pointed out to D.E. that attorneys know how to cross-examine witnesses, object to inadmissible evidence, and preserve the record for appellate review.

[8] When D.E. acknowledged that he lacked the skills of an attorney, the trial court explained to D.E. that it would treat him as an attorney and that he would have to follow the court's rules. D.E. responded that he understood and would "not expect any less." *Id.* at 7. As the trial court was explaining that litigants generally fared better when represented by counsel, D.E. interjected and stated that his public defenders had "never done . . . [an] adequate job." *Id.* at 7-8.

[9] When the trial court asked D.E. if he was familiar with the rules of evidence, D.E. stated that he had "seen it done," and that he would be able to object to inadmissible evidence. *Id.* at 8. D.E. and the trial court also discussed the "preponderance" and "clear and convincing" standards of evidence. *Id.*

[10] D.E. agreed that no one had threatened him or forced him to forego his right to legal counsel and that he had not been offered any special treatment in exchange for giving up that right. The trial court told D.E. that he would be

permitted to proceed pro se, but that he could change his mind at any time and request legal representation.

[11] It was also determined that D.E. had asked for transcripts and exhibits that had been admitted into evidence at the previous commitment review hearings. D.E. then inquired about offering evidence via Zoom and presenting witness testimony in that manner. In response, the trial court explained how the admission of documents could be accomplished during an online hearing.

[12] On April 11, 2022, the court entered an order granting D.E.'s request to proceed pro se. In relevant part, the order provided:

> The Court advised [D.E.] of the benefits of being represented by counsel, including the skills that an attorney possesses to assist him and the disadvantages of self-representation. The Court also advised [D.E.] that he would be held to the same standards of an attorney. The Court is concerned that [D.E.] does not have adequate knowledge of the applicable statutes, the rules of evidence, and the rules of trial procedure. The Court takes judicial notice of the record of these proceedings and finds that [D.E.] is well aware of the nature of the proceedings and the manner in which the proceedings are conducted. *The Court finds that sufficient evidence does exist to support a finding that [D.E.] is capable of knowingly, voluntarily and intelligently waiving his right to counsel and now accepts his waiver. The Court advises [D.E.] that he may withdraw his waiver at any time and counsel will be appointed. The Court further advises the parties that, should circumstances change, the Court may appoint counsel to represent [D.E.].*

Appendix Vol. II at 48 (emphasis added).

[13] At the commitment review hearing on June 14, 2022, Dr. Kernek testified that D.E. continues to exhibit symptoms of schizoaffective and narcissistic personality disorders, psychosis, and paranoid and delusional thinking. Dr. Kernek noted that there had been instances where D.E. acted inappropriately towards some Hospital employees and was verbally abusive to others. Dr. Kernek further testified that it was questionable whether D.E. would continue taking his medication if he did not remain in the Hospital because of past noncompliance with his medication protocol.

[14] Dr. Kernek also testified that there is a moderate to high risk that D.E. is a danger to others and that he would "decompensate within a week" if he did not take his medication. *Id.* at 36. Thus, Dr. Kernek recommended that D.E.'s regular commitment continue because he is mentally ill and remains a danger to others. Dr. Kernek believed that the Hospital is the least restrictive environment suitable for D.E.'s care, protection, and treatment.

[15] Clinical psychologist Dr. Jeremy English conducted risk assessments on D.E. on August 30, 2019, November 2, 2020, and September 3, 2021. Those results showed that D.E. is unstable and has limited support in the community. D.E. told Dr. English that he has experienced high levels of anxiety and stress throughout his lifetime. Dr. English believed that D.E. considers himself a victim of the system, even though the most recent assessment indicated that D.E. had thirteen out of the possible twenty risk factors that placed him at a moderate to high risk for future violence. Dr. English maintained that while D.E. has shown some improvement in complying with treatment, he continues

to "lack sufficient self-monitoring and self-regulation of symptoms to realistically manage future decompensation on his own." *Id.* at 55-56.

[16] D.E. cross-examined Drs. Kernek and English and testified on his own behalf. Following the hearing, the trial court entered an order on June 21, 2022, which provided in part that:

> The Court . . . finds by clear and convincing evidence that:
>
> > 2. The Respondent is dangerous to others as defined [in the Indiana Code].
> >
> > 3. The Respondent continues to be in need of custody, care, and treatment at Evansville State Hospital for a period of time expected to exceed 90 days.
> >
> > 4. [The] Hospital is determined to be the least restrictive environment suitable for care, treatment and stabilization as well as protecting the Respondent while restricting the Respondent's liberty to the least degree possible.
> >
> > 5. The treatment plan for the Respondent has been fully evaluated, including alternate forms, and is believed to result in benefiting the Respondent while outweighing any risk of harm.

Notice of Appeal, appealed order at 1-2. It was further ordered that the Hospital or D.E.'s attending physician submit a periodic report to the trial court within six months "at which time the treatment plan will be re-evaluated by the Court." *Id.* at 2.

[17] D.E. now appeals. Additional facts will be supplied as necessary.

Discussion and Decision

[18] Ind. Code § 12-26-2-2 grants a person alleged to have mental illness the right to counsel in a civil-commitment proceeding. In determining whether a person may waive counsel in a commitment proceeding, "a principal concern must be whether the patient is capable of making such a decision." *Id.* The trial court must expressly find, on the record, that a civil commitment respondent is capable of knowingly, voluntarily, and intelligently waiving his right to counsel. *Id.; see also Commitment of L.B.,* 191 N.E.3d 281, 284-85 (Ind. Ct. App. 2022). In *L.B.,* it was observed that "how capability is determined will depend on the circumstances of the case. 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." *Id.* at 285. Invalid waivers of counsel are not subject to a harmless error analysis. *Id.*

[19] In this case, the trial court questioned D.E. and advised him of the dangers and pitfalls of self-representation. The record shows that D.E. was articulate and adamant that he wanted to represent himself. D.E. provided the trial court with reasons for wanting to do so, and he testified that he felt capable of representing himself.

[20] During the exchange with the trial court, D.E. understood that attorneys had various skills that he did not possess and that he would not be afforded "special treatment or any leniency about following the applicable rules and procedures in the case," by foregoing his right to be represented by counsel. *Transcript* at 7.

D.E. further acknowledged that no one had threatened him or forced him to give up his right to counsel. D.E. also expressed his familiarity with the rules of evidence, in that he knew how to present evidence and object to inadmissible evidence.

[21] It was also determined that D.E. was familiar with the legal system and that he intended to call witnesses at the commitment review hearing. After D.E. asked if he could present evidence via Zoom, the trial court explained how documents and exhibits could be admitted at an online hearing.

[22] Various factors demonstrated D.E.'s familiarity with the legal system, including the filing of criminal charges against him and his trial, his guilty plea to a criminal offense in Wisconsin, and prior hearings on his involuntary commitment. In fact, D.E. proceeded pro se during a prior commitment review hearing in 2018. At the conclusion of the hearing, the trial court told D.E. that he could proceed pro se but if he changed his mind and desired legal representation, counsel would be appointed.

[23] Although D.E. relies on *L.B.,* where a panel of this court determined that the patient had not knowingly, intelligently, and voluntarily waived his right to counsel at a commitment hearing, the circumstances there markedly differ from those presented here. In *L.B.,* the trial court asked only one question that could have been construed as an inquiry about the patient's mental competency. 191 N.E.3d at 285. Hence, it was determined that because the trial court did not establish whether L.B. was capable of knowingly, voluntarily, and intelligently

waiving his right to counsel before the trial court accepted his waiver, L.B. was denied due process. *Id.* Here, however, there was a lengthy colloquy between D.E. and the trial court regarding the request to proceed pro se, including precise explanations as to what benefits an attorney could provide, as well as the pitfalls and potential consequences of proceeding pro se.

[24] Finally, there is nothing in the record demonstrating that D.E. was suffering from mania or psychosis during either the waiver of counsel hearing or at the commitment review hearing. D.E. testified on his own behalf at the commitment hearing, cross-examined Drs. English and Kernek, and he called a physician to testify during his case-in-chief. Dr. Kernek also testified that D.E.'s medication would not affect his ability to assist in his defense.

[25] In sum, we conclude that the trial court did not err in concluding that D.E. knowingly, voluntarily, and intelligently waived his right to counsel at the commitment review hearing. Thus, the trial court's ruling allowing D.E. to proceed pro se was not error, and D.E.'s claim that he was denied due process fails.

[26] Judgment affirmed.

Riley, J. and Pyle, J., concur.