

No. 09-0236

IN THE
SUPREME COURT
OF TEXAS

THE STATE OF TEXAS,
Petitioner

v.

K.E.W.,
Respondent

On Petition for Review from the First Court of Appeals at Houston, Texas

AMICUS CURIAE BRIEF

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STATEMENT OF THE CASE

Nature of the Case: Commitment for involuntary temporary inpatient mental health services and administration of psychoactive medication.

Trial Court: Probate Court of Galveston County Texas, the Honorable Gladys Burwell, presiding

Trial Disposition: (1) Order for commitment to an inpatient mental health facility for temporary mental health services, upon finding that the patient was mentally ill, and as a result of that mental illness, was likely to cause serious harm to others, and
(2) Order to administer psychoactive medications, based on a finding that the patient's mental illness rendered him incapable of making medical treatment decisions, and that such treatment would be in the patient's best interest.

Parties to Appeal: K.E.W., Patient and Appellee, and the State of Texas, Appellant

Court of Appeals: First Court of Appeals, Justices Taft, Keyes and Alcala

Court of Appeals Disposition: Reversed and rendered, per opinion by Taft

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to Texas Government Code § 22.001(a)(1) because of a dissenting opinion in the Court of Appeals, in which one of the justices disagreed on a question of law material to the decision.

ISSUE PRESENTED

Did the Court of Appeals significantly depart from the statutory requirement of clear and convincing evidence of a likelihood of serious harm to others, established by a recent overt act or continuing pattern of behavior?

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AMICUS CURIAE BRIEF

TO THE HONORABLE SUPREME COURT OF TEXAS:

Advocacy, Incorporated, the federally mandated Protection and Advocacy agency for people with disabilities in Texas,¹ respectfully submits this amicus curiae brief in support of Respondent K.E.W.’s position that the Court of Appeals did not significantly depart from the statutory requirement of clear and convincing evidence of a likelihood of serious harm to others established by a recent overt act or continuing pattern of behavior in reversing the trial

¹ Advocacy, Inc.’s authority is found in three statutes: the Protection and Advocacy of Individuals with Developmental Disabilities (“PADD”) Act, 42 U.S.C.A. §§ 15041-15045 (West 2006); the Protection and Advocacy for Individual Rights (“PAIR”) Act, 29 U.S.C.A. § 794e (West 2006); and the Protection and Advocacy for Individuals with Mental Illness (“PAIMI”) Act, 42 U.S.C.A. §§ 10806 *et seq.* (West 2006).

court's judgment committing Respondent for temporary inpatient mental health services and authorizing the administration of psychoactive medication.

I. INTEREST OF AMICUS

Advocacy, Inc. is the federally-funded Protection and Advocacy organization charged by Congress with the responsibility of protecting the legal rights of people with disabilities in Texas. Advocacy, Inc. respectfully urges this Court to uphold the Court of Appeals' decision that this case did not demonstrate a recent overt act or continuing pattern of behavior that tended to confirm the likelihood of serious harm to others, and the State thus failed to meet the clear and convincing standard of proof required to involuntarily commit K.E.W.

At stake in this case is the potential dilution of the standard needed before the State deprives an individual of their most basic right – liberty. The United States Supreme Court has repeatedly recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that can only be intruded upon when the state can show by clear and convincing evidence that, not only does the individual have a mental illness, but that they are currently dangerous. *See, e. g., Addington v. Texas*, 441 U.S. 418 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972); *Humphrey v. Cady*, 405 U.S. 504 (1972); *In re Gault*, 387 U.S. 1 (1967); *Specht v. Patterson*, 386 U.S. 605 (1967). Texas codified this right in the Texas Health and Safety Code by requiring the State to produce evidence of a recent overt act that tends to confirm dangerousness before a person can be confined for mental health treatment against their will. *See Tex. Health & Safety Code Ann. § 574.034(d)* (Vernon 2003). Any

change to this standard is not only against the plain language of the statute, but would also run afoul of the Constitution.

II. STATEMENT OF FACTS

After a brief commitment hearing, K.E.W. was determined to be mentally ill and, as a result of that mental illness, likely to cause serious harm to others. This finding was based almost exclusively on the testimony of two physicians, because the trial court appropriately excluded the hearsay testimony of some allegedly inappropriate comments made towards one female Gulf Coast MHMR staff member. As a result, the testimony to the effect that K.E.W. was looking for a female employee and was removed from the building by police does not include a description of the specific behavior, event or act that led to his detention by police.

K.E.W. did not go to the MHMR Center that day unannounced – he had a scheduled appointment. In fact, if he did not make the appointment he may have been withdrawn from services. It was during his scheduled appointment that he supposedly asked about a particular female MHMR Center employee. At the commitment hearing, an MHMR Center employee testified and was asked why staff thought it was necessary to protect a female staff person from K.E.W., but the response was stricken and is not part of the record. The allegedly dangerous behavior of record that the employee observed consisted only of K.E.W. smoking cigarettes and pacing. Because the court can only weigh the evidence the trial court could consider, and no additional information was elicited at the hearing, it is impossible to know all of the factors that contributed to K.E.W.'s detention by police.

Dr. Michael Stone conducted a psychological evaluation of K.E.W. at the University of Texas Medical Branch hospital, where K.E.W. was transported by police from the Gulf Coast MHMR Center. He testified that K.E.W. had a diagnosis of schizophrenia and was a danger to others due to a delusional thought pattern in which aliens had directed him to impregnate women to help populate a new and better race of humans. However, Dr. Stone acknowledged on cross-examination that he had not verified the existence of the women and, as far as he knew, K.E.W. had not taken any concrete steps to locate the women he had been directed to impregnate. Further, K.E.W. had not revealed any intention to impregnate anyone against their will and Dr. Stone could not point to any threatening behavior by K.E.W. during his hospital stay.

K.E.W. was agitated when he arrived in the emergency room because he believed that the women he sought had been in the emergency room and felt that hospital staff, including Dr. Waleska Ortiz, were trying to keep him from them. On cross-examination, however, Dr. Ortiz admitted that K.E.W. had not stated that he intended to impregnate anyone against their will. She further testified that he did not make any sexual advances towards any of the hospital staff. Dr. Ortiz's second concern related to K.E.W.'s misperception that he received information from brain waves or special abilities. She felt that he could get angry or agitated if he perceived or misperceived certain information and "perhaps something would happen."

The Court of Appeals reversed the trial court judgment for want of legally sufficient evidence of the statutory elements of a recent overt act or continuing pattern of behavior tending to confirm the likelihood of serious harm to others.

III. SUMMARY OF THE AGRUMENT

Based on longstanding state and federal jurisprudence, the Court of Appeals accurately applied the statutory criteria that must be satisfied before a court can order a person involuntarily confined for mental health treatment and accurately applied the clear and convincing standard of proof in finding that the State had not met its burden and that K.E.W. was not sufficiently dangerous to commit based on a recent overt act.

The Court of Appeals also appropriately disregarded Petitioner's attempt to have the court infer dangerousness from facts that had been stricken from the record as inadmissible hearsay, leaving a record that only supports a factual inference that something happened at the Gulf Coast MHMR Center that caused the police to be called, an unfortunately common occurrence for individuals with mental illness. Based on a record that contained insufficient evidence of an overt act, the Court of Appeals correctly found that the State failed to meet its burden in reversing the trial court's involuntary commitment order and order authorizing the administration of psychoactive medication.

IV. ARGUMENT

A. The Court of Appeals Correctly Found that Deprivation of Liberty Must be Predicated on a Finding of Dangerousness by Clear and Convincing Evidence

While Petitioner does not argue that a finding of dangerousness is not required to civilly commit an individual with a mental illness, the Petitioner's argument does seek a significantly diluted dangerousness standard that would not pass constitutional muster and would result in the involuntary commitment of individuals who are mentally ill, but who are not dangerous.

The United States Supreme Court has repeatedly stated that civil commitment for any purpose constitutes a significant deprivation of liberty. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). This right is not absolute. A person's liberty interest in involuntary commitment for mental health treatment can be outweighed by a state's "overriding justification." *Riggins v. Nevada*, 504 U.S. 127, 134 (1992). In *O'Connor*, the Court determined that the proper balance of an individual's personal liberty interests in unwanted confinement for mental health treatment and the state's overriding justification, (protection of society and the individual), was to allow a person to be involuntarily confined only if the state was able to prove that, not only does the individual have a mental illness, but that they are dangerous. *O'Connor*, 422 U.S. at 576. In so holding, the Court established the constitutional boundaries of the right to liberty and, along with its decision in *Addington v. Texas*, 441 U.S. 418 (1979), formed the basis of all civil commitment laws. This required state legislators to

rewrite state commitment statutes in order to codify what standard of dangerousness is necessary to authorize deprivation of a person's physical liberty.²

Texas was one of the states that re-wrote its commitment statutes in order to codify what standard of dangerousness is necessary to authorize deprivation of a person's physical liberty. Prior to this, Texas' statutory standard for civil commitment was not very specific, only requiring that the state prove an individual was dangerous by a mere preponderance of the evidence. *See State v. Turner*, 556 S.W.2d 563 (1977). This standard was forever changed after *Addington*. In *Addington*, the Supreme Court defined the standard of proof to be the clear and convincing standard, "an intermediate standard—usually employing some combination of the words "clear," "cogent," "unequivocal," and "convincing" – since it is used in other cases to "protect particularly important individual interests." *Addington*, 441 U.S. at 424. In assessing the appropriate standard, the Court considered both the "extent of the individual's interest in not being involuntarily confined and the state's interest in committing the emotionally disturbed under a particular standard of proof," *Id.* at 425, keeping in mind "that the function of the legal process is to minimize the risk of erroneous decisions. *Id.* Thus, the theoretical or inferred harm, which it appears is the standard that Petitioner would have this Court adopt, is constitutionally insufficient to deprive an individual with mental illness of their liberty interest.

² Eight states rewrote their mental health involuntary civil commitment statutes within one year of the *O'Connor* decision. *See Overt Dangerous Behavior as a Constitutional Requirement for the Involuntary Civil Commitment of the Mentally Ill*, 44 U. Chi. L. Rev. 562 (1977).

Consistent with the constitutionally permissible burden set forth in *O'Connor* and *Addington*, and Texas' definition of clear and convincing, ("that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established),³ the Texas Legislature revised its commitment statutes in 1983. The plain language of the Texas civil involuntary commitment statute since 1983 states that, in order for the state to prove by clear and convincing evidence that a person is both mentally ill and dangerous, the state must produce "expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm the likelihood of serious harm to the proposed patient or others."⁴

Several reasons favor the overt act language set forth by the Texas Legislature in Health and Safety Code § 574.034(d). The first concerns due process interest balancing between the state and the individual, as an overt act requirement adequately assures that the probability of future dangerous behavior is sufficiently high to warrant involuntary confinement. The overt act requirement also combats vagueness issues in that it provides reasonable specificity of the sort of conduct upon which a civil commitment can be ordered.

More importantly, this requirement acknowledges that the future dangerousness is extremely difficult to predict, even for psychiatric professionals, and forces the state to articulate a contemporaneous factually-based reason, apart from the person simply being mentally ill, for moving to restrict the individual's liberty interest. *See Heller v. Doe*, 509

³ *Texas v. Addington*, 588 S.W.2d 569, 570 (Tex. 1979).

⁴ See Tex. Health & Safety Code §574.034(d). Amicus will substitute the term "dangerousness" for the phrase "the

U.S. 312 (1993) (“psychiatric predictions of future violent behavior by the mentally ill are inaccurate”); *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985) (psychiatry is not an exact science and psychiatrists “disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness”). The literature on the ability of psychiatrists or other mental health professionals to testify reliably as to an individual’s dangerousness is anything but certain. To illustrate, one study opined that, “psychiatrists have absolutely no expertise in predicting dangerous behavior – indeed, they be *less* accurate predictors than laymen – and they usually err by overpredicting violence.”⁵

Consistent with the literature, this case illustrates the infallibility of psychiatric professional predictions of dangerous behavior and underscores the importance of ensuring that courts do not erode the clear and convincing evidentiary standard. In this case, the Court of Appeals did not disregard the evidence presented at trial concerning K.E.W.’s behavior or create a standard that is nearly impossible to achieve, as suggested by Petitioner and the dissenting opinion – it found that, on the record before them,⁵ the evidence did not meet the clear and convincing evidentiary burden given the statutory requirement of a recent overt act. Further, the danger articulated by Petitioner and the dissenting opinion that individuals in need of inpatient psychiatric care will go without treatment if courts apply the standard used by the Court of Appeals is unfounded as evidenced by the fact that Texas courts involuntarily

likelihood of serious harm to the proposed patient or others” throughout the rest of this brief.

⁵ See Ennis and Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 Calif. L.

commit people with people with mental illness every day using precisely the standard applied in this case. Not only does the clear and convincing standard coupled with an overt act or a continuing pattern of behavior pass constitutional muster, it is appropriate given the massive curtailment of liberty at issue in civil commitment cases.

B. The Texas Mental Health Code Requires an Overt Act that the Trial Evidence Did Not Establish

The Texas Legislature determined that an overt act or continuing pattern of behavior is required before a mentally ill individual's right to liberty can be significantly curtailed by a commitment order. It is not the province of the courts to interfere with or second guess the balancing act between public safety and patient rights reached by the Legislature – it is up to the Legislature to change the commitment standard to the extent such modification would be constitutionally permissible. Until that time, the facts must demonstrate a recent overt act or continuing pattern of behavior and the absence of facts that would tend to confirm dangerousness are appropriate grounds for reversal on appellate review.

When analyzing the meaning of a statute, a court must give effect to the plain meaning of the statute's language unless the plain meaning would lead to absurd consequences that the Legislature could not have possibly intended. *See Cannady v. State*, 11 S.W.3d 205, 217 (Tex.Crim.App.2000); *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App.1991). When interpreting a statute courts should strive to ascertain the legislature's intent. *Ex parte Roloff*,

Rev. 693 (1974).

510 S.W.2d 913, 915 (Tex. 1974). Legislative intent begins by looking at the words of the statute itself.

They [courts] must find its intent in its language and not elsewhere. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.

St. Luke's Episcopal Hosp. v. Agbor, 952 S.W.2d 503, 505 (Tex. 1997) (quoting *Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (Tex. 1920)). If the statute is clear and unambiguous, it must be interpreted to mean what it says and it is not up to the courts to add or subtract from it. See *Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). After all, every word of a statute must be presumed to have been written for a purpose, and every word excluded is presumed to have been excluded for a purpose. *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995); *Walker v. City of Georgetown*, 86 S.W.3d 249, 255 (Tex.App.—Austin 2002, pet. denied).

In the instant case, the statute in question states:

To be clear and convincing under Subsection (a), the evidence must include expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior that tends to confirm: (1) the likelihood of serious harm to the proposed patient or others...

Texas Health and Safety Code § 547.034(d). The unambiguous language of the statute clearly indicates that the only way a court can order an individual involuntarily committed

against their will is if the court finds evidence of a recent overt act that tends to confirm dangerousness.

This Court must presume that the Legislature knew what it was doing when it included the clause “evidence of a recent overt act or a continuing pattern of behavior that tends to confirm [dangerousness].” *See Texas Workers’ Comp. Ins. Fund v. Del Indus., Inc.*, 35 S.W.3d 591, 593 (Tex. 2000) (every sentence, clause, and word in a statute is presumed to have been used for a purpose); *Morrison v. Chan*, 699 S.W.2d 205, 208 (Tex. 1985) (every word excluded from the statute must be presumed to have been excluded for a purpose).

Therefore, as happened in this case at the trial court level, the state’s burden is not met by testimony of “possible” or “potential” harm to the proposed patient or others.⁶ To the contrary, when the state alleges that a proposed patient may harm himself or others, it must provide proof, by clear and convincing evidence, that the proposed patient is likely to do so.⁷ Further, the threat of harm must be substantial and based on *actual dangerous behavior manifested by some overt act or threat*.⁸ In addition, expert testimony alone is insufficient to show an overt act on the part of a patient. *See Johnson v. State*, 961 S.W.2d 385 (Tex.App.–Houston [1st Dist.] 1997, no pet.). In this case, given the appropriate evidentiary exclusions made by the trial court, the commitment order was predicated almost *exclusively* on expert

⁶ *See J.M. v. State*, 178 S.W.3d 185, 196 (Tex.App.–Houston [1st Dist.] 2005, no pet.); *Broussard v. State*, 827 S.W.2d 619, 622 (Tex.App.–Corpus Christi 1992, no writ).

⁷ *See C.O.*, 65 S.W.3d 175, 181; *P.W.*, 801 S.W.2d 1, 3 (Tex.App.–Fort Worth 1990, writ denied).

⁸ *See J.M.*, 178 S.W.3d at 193; *State ex. rel. K.D.C.* 78 S.W.3d 532, 547 (Tex.App.–Amarillo 2002, no pet.); *Taylor v. State*, 671 S.W.2d 535, 538 (Tex.App.–Houston [1st Dist.] 1983, no writ) (emphasis added).

testimony and the possibility that “perhaps something would happen.” This is not sufficient to show dangerousness by clear and convincing evidence.

In this case, even if the Court considers the evidence that was properly excluded from consideration, there still would not be sufficient evidence of an overt act that tended to confirm dangerousness. The mere fact that K.E.W. went to the Gulf Coast MHMR Center and asked about a female employee, without more, does not demonstrate a recent overt act that tends to confirm a finding of dangerousness. This is especially true when one considers that the only reason he was at the Gulf Coast MHMR Center was because he was required to be there – he had a scheduled appointment. Additionally, there is absolutely no indication that he said or did anything to suggest that he would have harmed anyone, including the female employee, or that he intended to impregnate her against her will. Here, the only overt act was that he asked about a female employee, nothing more. Odd beliefs and an individual’s uncomfortableness in a person’s presence alone cannot support a finding of dangerousness to others. Apart from delusions incident to mental illness, the evidence that K.E.W. engaged in a recent overt act which would justify significant infringement of his constitutionally protected liberty interest is only speculative and inferential. Consistent with the Court of Appeals’ decision, mental illness alone should not be, and is not, permissible grounds for commitment under current Texas law.

PRAYER

For the reasons stated above, amicus curiae Advocacy, Incorporated prays that the Supreme Court uphold the Court of Appeals' decision reversing the trial court judgment.

Respectfully submitted,

/s/ Beth Mitchell

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