IN THE SUPREME COURT OF THE STATE OF NEVADA

PHONG T. VU,

Petitioner,

v.

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; THE HONORABLE CHUCK WELLER, DISTRICT JUDGE, FAMILY DIVISION,

Respondents,

and

RICHARD A. GAMMICK, DISTRICT ATTORNEY,

Real Party in Interest.

_____/

No. 65498

RESPONSE TO SUPPLEMENTAL BRIEF REGARDING STANDARD OF REVIEW

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RESPONSE TO SUPPLEMENTAL BRIEF REGARDING STANDARD OF REVIEW

Richard A. Gammick, Real Party in Interest herein, by and through his Deputy District Attorney, Herbert B. Kaplan, hereby responds to the supplemental briefing of Petitioner regarding this Court's standard of review.

Introduction

The Court has requested supplemental briefing regarding the proper level of proof that controls the review of the district court's commitment order.

The Supreme Court of the United States held in *Addington v. Texas,* 441 U.S. 418 (1979), that due process requires that, at the least, clear and convincing evidence be shown at the initial hearing to justify involuntary commitment to a mental health facility, as opposed to the preponderance of the evidence standard. That holding applied to the standard at the commitment hearing and did nothing to establish any heightened standard of review in cases of involuntary commitment.

It is acknowledged and conceded that some state appellate courts have applied a heightened standard of review in such cases. However, it is also pointed out that that application is not universal and is certainly not binding on this Court.

In his supplemental brief, Petitioner states that the standard to be applied should be "clearly erroneous" or "against the manifest weight of the evidence." However, Petitioner does little more than recite the standard applied by some courts in other jurisdictions. Petitioner does little to say *why* any heightened standard should apply.

For the reasons that follow, there is no need for a heightened or elevated standard of review in involuntary commitment cases.

Discussion

I. Heightened Standard on Review Not Supported

There is no doubt that the deprivation of one's liberty is a serious concern. At the same time, in determining what standard should govern in the appellate review of a civil commitment proceeding, consideration must be given also to the state's interest in protecting not only society from a potentially harmful individual, but also in protecting the individual who, due to a mental illness, is a threat to harm themselves.

In this setting, Petitioner was discharged from the mental health facility 12 days after being committed. It was a short deprivation of his liberty to protect society and Petitioner from Petitioner. That short duration stay at the mental health facility is the norm. In fact, it is consistent with the average stay at the facility.

While the District Attorney's Office has no interest in depriving any individual of his or her liberty without the appropriate basis, the office does have an interest in protecting Petition and society from Petitioner while his mental illness causes him to be a threat. That interest must come to the forefront in light of events in the recent past.

First, in April 2007, a Virginia Tech student shot and killed 32 people and injured 17 others before committing suicide on the college campus in Blacksburg, Virginia. "Mass Shootings at Virginia Tech," April 16, 2007, Report of the Review Panel Presented to Governor Timothy M. Kaine 5 (Aug. 2007), at

http://www.governor.virginia.gov/TempContent/techPanelReport.cfm. Prior to the massacre, a Virginia special justice had declared Cho mentally ill and ordered him to attend treatment; however, because he was not institutionalized, he was still able to purchase firearms through two licensed dealers after two background checks.

On July 20, 2012, a mass shooting occurred inside of a Century 16 movie theater in Aurora, Colorado, during a midnight screening of the film The Dark Knight Rises. James Holmes, dressed in tactical clothing, set off tear gas grenades and shot into the audience with multiple firearms. 12 people were killed and 70 injured. James Holmes, who "was seeing a psychiatrist specializing in schizophrenia" before he opened fire in a crowded theater. Mental health and the Aurora shooting. The Brian Lehrer Show. July 31, 2012. Available at: http://www.wnyc.org/story/226661-mental-health-and-auroracolorado-shooting/?utm_source=sharedUrl&utm_media=metatag&utm_campaign=sharedUrl.

On January 8, 2011, U.S. Representative Gabrielle Giffords and eighteen others were shot by Jared Loughner during a constituent meeting held in a supermarket parking lot in Casas Adobes, Arizona. Classmates felt unsafe around Jared Loughner because he would "laugh randomly and loudly at nonevents" in the weeks before the shooting. Pickert K, Cloud J. If you think someone is mentally ill: Loughner's six warning signs. Time. January 11, 2011. Available at: http://content.time.com/time/nation/article/0, 8599, 2041733,00.html.

Moreover, "Officers across the country are reporting an increase in encounters with mentally ill people who are deemed a threat to themselves or

others. Police and mental health specialists blame the trend in part on sharp cuts in mental health programs, as well as an influx of war veterans returning home with PTSD and other psychological scars." Cynthia Hubert, "Police say violent encounters with mentally ill people on rise," Sacramento Bee, August 25, 2014, http://www.sacbee.com/news/local/crime/article2607642.html.

"Through July 1, [2015,] police have fatally shot 462 civilians nationwide. In 124 of these situations, mental illness played a role, either because the person expressed suicidal intentions or the person's mental illness was confirmed by police or family members. In 45 of these shootings, relatives, friends and neighbors initially called the police, requesting medical treatment for the deceased." Andy Jones, Report: 124 people with mental illness shot by police so far in 2015, July 17, 2015, http://www.rootedinrights.org/report-124-people-with-mental-illness-shot-by-police-so-far-in-2015/.

The threat is real to both society and to the mentally ill individual. Again, while the mentally ill individual's liberty interest is extremely important, so is protecting society and that same mentally ill individual from themselves.

It is with that in mind, that our Legislature has determined that involuntarily committing someone requires clear and convincing evidence. Why not extend that same standard to appellate review of a commitment? Because it is unnecessary.

There are already numerous protections for the individual's liberty interest built into the statutory scheme. For instance, the statutory scheme requires the petition for involuntary commitment "executed by a psychiatrist, licensed

psychologist or physician, including . . . a sworn statement" supporting holding the individual. NRS 433A.210.

The petition is filed after a 72 hour period of observation. NRS 433A.150. Professionals, and only professionals with the appropriate expertise, can initiate such a petition, providing another layer of protection against potential inappropriate potential commitment.

Moreover, upon the filing of the petition, the individual is examined by "two or more physicians or licensed psychologists, one of whom must always be a physician," and who must submit a report to the court prior to the hearing explaining their findings. NRS 433A.240. Those individuals are designated as experts for the purposes of the hearing. Yet another level of protection.

In addition, the individual is appointed counsel. NRS 433A.270. At the hearing, clear and convincing evidence is required to support the involuntary commitment. NRS 433A.310.

However, the protections do not stop there.

Petitioner relies in part on "the serious stigma and adverse social consequences that accompany" an involuntary commitment. Supplemental Brief at p. 3. However, that is not a concern in Nevada, as the records relating to the involuntary commitment are sealed by the court. NRS 433A.715(1). Finally, NRS 433A.715(6) provides that "Following the sealing of records pursuant to this section, the admission of the person who is the subject of the records to the public or private hospital, mental health facility or program of community-based or outpatient services, is deemed never to have occurred, and the person may answer accordingly any question related to its occurrence," with very limited exception.

A commitment order, such as the one entered in connection with Petitioner in this case, is interlocutory until such time as the individual is hospitalized for 30 days. NRS 433A.310(1)(b).

The protections for the individual in this system are abundant throughout the commitment process and even afterwards. The statutory scheme provides numerous protections that eliminate for the most part concerns about an individual suffering an inappropriate involuntary commitment or any stigma possibly attached to that commitment.

Considering the rising number of cases involving the mentally ill and shootings, both of others and the mentally ill individual being killed, there is no need for any heightened scrutiny of an involuntary commitment on appeal.

II. Abuse of Discretion Appropriate Standard

An abuse of discretion is the appropriate standard, especially considering the standard applied in similar type proceedings.

A. Standard of Review in Guardianship Cases

Involuntary commitment cases are very similar to guardianship cases. A guardianship, much like the involuntary commitment, is geared toward protecting the individual from themselves. In this respect, the State has an interest in protecting those who are unable to protect themselves. *In re Guardianship of L.S. & H.S.,* 120 Nev. 157, 164, 87 P.3d 521, 526 (2004). The countervailing concern is the interest in the individual's liberty to live life without government interference.

The standard of review in guardianship cases is that absent a showing of abuse, the appellate court will not disturb the district court's exercise of discretion

concerning guardianship determinations. *See Matter of Guardianship & Estate of D.R.G.*, 119 Nev. 32, ——, 62 P.3d 1127, 1130 (2003). However, the appellate court must "be satisfied that the district court's decision was based upon appropriate reasons." *Id. (quoting Locklin v. Duka*, 112 Nev. 1489, 1493, 929 P.2d 930, 933 (1996)). Essentially, the standard is one for abuse of discretion. *In re Guardianship of D.R.G.*, 119 Nev. 32, 38, 62 P.3d 1127, 1130–31 (2003).

"An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found." *Rabkin v. Oregon Health Sciences Univ.,* 350 F.3d 967, 977 (9th Cir. 2003) (citation and internal quotation marks omitted). Under the abuse of discretion standard, a reviewing court cannot reverse absent a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors. *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011). The abuse of discretion standard requires an appellate court to uphold a district court determination that falls within a broad range of permissible conclusions. *See Kode v. Carlson*, 596 F.3d 608, 612-13 (9th Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315 F.3d 1081, 1091 (9th Cir. 2002), *amended* by 334 F.3d 795 (9th Cir. 2003) (order).

The abuse of discretion standard utilized in guardianship cases is appropriate in involuntary commitment cases, as the concerns in guardianship cases is most like the interests involved in involuntary commitment. In fact, the interests involved in a guardianship are of even greater concern because the

deprivation may be permanent. The deferential abuse of discretion standard should be applied in involuntary commitment cases.

B. Standard of Review in Custody Cases

Furthermore, it is clear that parents have a fundamental liberty interest in the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *see also In re Parental Rights as to C.C.A.*, 128 Nev. ——, ——, 273 P.3d 852, 854 (2012). Yet, the district court's decision regarding child custody is also reviewed for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009); *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007).

Clearly, deprivations of similar constitutionally protected rights to that involved in involuntary commitment cases do not warrant any heightened standard of appellate review. Neither do cases of involuntary commitment.

C. Standard of Review In Similar Cases

In New Jersey, commitment under the Sexually Violent Predator Act is similar to involuntary commitment at issue here and must be based on "clear and convincing evidence that an individual who has been convicted of a sexually violent offense[ ] suffers from a mental abnormality or personality disorder[ ] and presently has serious difficulty controlling harmful sexually violent behavior such that it is highly likely the individual will reoffend." *See In re Civil Commitment of T.J.N.*, 390 N.J.Super. 218, 226, 915 A.2d 53 (App.Div.2007).

In *T.J.N.*, the court recognized that "The consequences of a commitment under the Act and the significant liberty interests at stake require protection as a

matter of due process." *Id.,* 390 N.J.Super at 225, 915 A.2d at 57-58.(citations omitted). The appellate court also recognized that review of commitments pursuant to the Act is limited and that they can only reverse a commitment for an abuse of discretion or lack of evidence to support it. *Id., citing A.E.F., supra*, 377 N.J.Super. at 493, 873 A.2d 604 (applying "clear abuse of discretion" standard).

Likewise, similar interests are at stake in the involuntary commitment cases. The liberty interest, while significant, does not necessarily require a heightened standard on appeal.

D. Standard of Review in Termination of Parental Rights

On the other hand, this Court closely scrutinizes whether the district court properly preserved or terminated an individual's parental rights. *See, e.g., Matter of Parental Rights as to Carron*, 114 Nev. 370, 956 P.2d 785 (1998). This Court will uphold termination orders based on substantial evidence, and will not substitute its own judgment for that of the district court. *See Kobinski v. State,* 103 Nev. 293, 296, 738 P.2d 895, 897 (1987).

The heightened standard of review in those cases is warranted as it has been said that termination of parental rights is "an exercise of awesome power," *Smith v. Smith*, 102 Nev. 263, 266, 720 P.2d 1219, 1220 (1986), that is "tantamount to imposition of a civil death penalty." *Drury v. Lang*, 105 Nev. 430, 433, 776 P.2d 843, 845 (1989).

The right involved in a termination of parental rights is fundamental. The termination of that right is final and forever. Accordingly, this Court applies a heightened standard and closely scrutinizes whether the district court properly preserved or terminated the parental rights at issue.

On the other hand, while involuntary commitments involve a deprivation of the liberty interest, which is undoubtedly very important, *the deprivation is of limited duration* for the purpose of protecting the individual from him/herself and protecting society from a dangerous individual. For instance, in the case at hand, Petitioner was discharged from the hospital after just twelve (12) days. He was not committed indefinitely. The processes involved in the involuntary commitments differ significantly in this regard from the permanent deprivation of having the care, custody and control of a child. No heightened standard of review is appropriate for this temporary deprivation.

III. Specialized Area Warrants Deferential Review

In addition, the area of mental health is undoubtedly a specialized one. It requires, even from the finder of fact, this specialized knowledge. As set forth herein, that level of specialized knowledge is met by virtue of the appointment of qualified professionals, in this case Drs. Lewis and Piasecki, to act as the district court's experts.

New Jersey Courts have recognized that "The judges who hear [Sexually Violent Predator Act] cases generally are "specialists" and "their expertise in the subject" is entitled to "special deference." *See In re Civil Commitment of T.J.N.*, 390 N.J.Super. 218, 226, 915 A.2d 53 (App.Div.2007).

Determinations that are specifically within any area of expertise are entitled to deferential review. *Clements v. Airport Auth. of Washoe County*, 896 P.2d 458, 461 (Nev.1995).

In North Dakota, the court of appeals has recognized a "district court's acceptance of unrefuted expert testimony showing [a committed individual] is mentally ill is not clearly erroneous." *In re D.P.*, 636 N.W.2d 921 (N.D. 2001).

The area of involuntary commitments is an area of expertise entitled to deferential review. No Heightened standard is appropriate as a result.

CONCLUSION

Clear and convincing evidence established that Petitioner could not meet his basic needs for safety and self-protection. Regardless of the appellate standard of review utilized, the commitment must be upheld.

However, for the reasons set forth herein, it is clear that there is no need in the State of Nevada for a heightened standard to be applied on appeal. The protections of the individual set forth in the statutory scheme go beyond what is required. The area of involuntary commitments is a specialized one warranting deferential review. No heightened standard on review is necessary or appropriate.

DATED: July 31, 2015.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

/s/ Herbert B. Kaplan
By: HERBERT B. KAPLAN
Deputy District Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this biref complies with the formatting requirements of NRAP32(a)(4), the typeface requirement of NRAP32(a)(5) and the type style requirements of NRAP 32(a)(6) becasue this brief has been prepared in a proportionally-spaced typeface using Times New Roman in 14 point font. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionateley spaced, has a typeface of 14 points or more, and contains 2732 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the page and volume number, if any, of the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 31st day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on July 31, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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