2016 IL App (2d) 150185-U
No. 2-15-0185
Order filed September 8, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re DARON W., Alleged to be a Person Subject to Involuntary Treatment	)	Appeal from the Circuit Court of Kane County.
	)	No. 14-MH-135
(The People of the State of Illinois, Petitioner-Appellee, v. Daron W., Respondent-Appellant).	)	Honorable Robert K. Villa, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Schostok and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not reversibly err in denying respondent's request to represent himself: although the court found that he lacked the capacity to represent himself more than two months after it had conducted the required inquiry, it made that finding, as required by statute, before hearing the State's petition to involuntarily admit him.

¶ 2 Respondent, Daron W., appeals a judgment involuntarily admitting him for treatment in the Department of Human Services. He contends that the trial court erred in denying his requests to represent himself and asks that, when an inquiry into capacity to waive counsel is made, we require trial courts to state their determinations about that capacity on the record at that time. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In October 2013, respondent was found unfit to stand trial in a criminal case and was sent for inpatient treatment. He was diagnosed as having a psychotic disorder, not otherwise specified, and remained hospitalized for a year. On October 15, 2014, a petition for involuntary admission was filed with a notice of hearing for October 17, 2014. On that date, the public defender appeared and stated that she had submitted interrogatories. The matter was not set for a hearing on the merits and was continued because of the interrogatories.

¶ 5 At an October 24, 2014, status hearing, respondent requested to hire his own counsel. He told Judge Elizabeth Flood that he was in the process of calling an attorney and had sent a letter, but did not yet have a response. The court said that it would not discharge the public defender at that time since respondent did not have another attorney to represent him. Respondent then asked to represent himself. The court replied: "All right. One of the things I have to determine is whether you understand what you are doing by representing yourself." The court then inquired into respondent's knowledge about interrogatories that were filed, the type of petition filed, what respondent would do during a hearing, what questions he would ask in his defense, the law he would be applying, and what the State would be required to prove. Respondent answered each of the questions, exhibiting some knowledge of the proceedings and an ability to communicate with the court.

¶ 6 The court next asked: "Do you feel that you are prepared to go to hearing today or are you asking for time to prepare for hearing?" After a brief discussion about why respondent was not at the last hearing, he replied, "I definitely need time in order to put it together." The court then stated:

"This is what we are going to do today then. I would like you to meet briefly—I am not going to discharge the public defender today because you are not ready to go to hearing yet anyway.

Your attorney has requested more information on your behalf. I would like you to speak with your attorney today to find out what she has done on your behalf. If you hear back from one of the private attorneys that you tried to contact, then you can make a request again to have your own attorney represent you.

If you believe on the next date that you are prepared to represent yourself at a hearing, you can make that request then also. But since you are not prepared today, and since your attorney is assisting in gathering information for hearing, I am going to deny your request to represent yourself today."

¶ 7 On October 31, 2014, a status hearing was held before another judge, Robert K. Villa. Respondent requested to represent himself, and the court stated that the previous judge denied that. Respondent began to argue the matter, and the court stated that it would continue the matter for status on whether respondent had obtained private counsel but that it was not going to allow respondent to represent himself. Respondent stated that he would like to represent himself until then, and the court denied that request without making an inquiry into respondent's capacity to waive counsel. At the next hearing, respondent still had not obtained private counsel, but told the court about efforts he had made to do so. He also had refused to work with the public defender. The court observed that respondent's request to represent himself was previously denied. The court told him that he would have either a private attorney or the public defender and encouraged him to work with the public defender.

¶ 8 On November 14, 2014, respondent appeared before a third judge, Alice Tracy, and again requested to represent himself. Noting the previous ruling, the court denied his request. On November 21, 2014, Judge Villa again gave respondent more time to obtain private counsel. On December 12, 2014, a fourth judge, Donald Tegler, continued the case, also noting the previous denial of respondent's request. Thereafter, respondent's case was continued several more times by various judges, with the court noting the previous denial of respondent's request. No inquiries into respondent's capacity to waive counsel were made, but on multiple occasions respondent appeared to confuse the criminal proceedings against him with the involuntary commitment proceedings.

¶ 9 On January 9, 2015, respondent appeared for a status hearing before Judge Flood and again explained his difficulty in obtaining private counsel and expressed a desire to represent himself. The court stated that it was not going to grant further continuances for respondent to hire a private attorney, indicating that respondent lacked understanding of what the case was about and noting that respondent had attempted to retain municipal attorneys who would not be able to represent him. Without making a new inquiry into respondent's capacity to waive counsel, the court stated, "I'm going to deny your motion to represent yourself without having an attorney to assist you. It does not appear to me that you understand fully your rights, the issues in this case, and what type of representation you need." The court stated the need to set a hearing date on the petition and continued the case to the next week for the hearing. On January 16, 2015, the hearing was held before Judge Villa and, on February 6, 2015, respondent was involuntarily admitted for a period of 90 days. Respondent appeals.

¶ 10 II. ANALYSIS

¶ 11 Respondent contends that the trial court failed to comply with section 3-805 of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/3-805 (West 2012)) when it denied his request to represent himself without making a determination on the record of his capacity to do so. He asks that we create a rule of law that, when a respondent subject to involuntary admission requests to proceed *pro se*, a trial court must not only make an inquiry into the matter, but must also put its capacity determination on the record at that time. Respondent recognizes that the matter is moot because his involuntary admission was for 90 days, which time has passed. However, he argues that the public-interest and capable-of-repetition exceptions to the mootness doctrine apply. The State agrees that the public-interest exception applies.

¶ 12 "An appeal is considered moot where it presents no actual controversy or where the issues involved in the trial court no longer exist because intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party." *In re J.T.*, 221 Ill. 2d 338, 349-50 (2006). Generally, courts of review do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of how those issues are decided. *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998).

¶ 13 Reviewing courts, however, recognize exceptions to the mootness doctrine: (1) the public-interest exception, applicable where the case presents a question of public importance that will likely recur and whose answer will guide public officers in the performance of their duties, (2) the capable-of-repetition exception, applicable to cases involving events of short duration that are capable of repetition, yet evading review, and (3) the collateral-consequences exception, applicable where the order could have consequences for a party in some future proceedings. See *In re Alfred H.H.*, 233 Ill. 2d 345, 355-62 (2009). There is no *per se* exception to mootness that

universally applies to mental health cases; however, most appeals in mental health cases will fall within one of the established exceptions. *Id*. at 355. Whether a case falls within an established exception is a case-by-case determination. *Id*.

¶ 14 "The public interest exception allows a court to consider an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative determination for the future guidance of public officers; and (3) there is a likelihood of future recurrence of the question." *Id*. "The 'public interest' exception is 'narrowly construed and requires a clear showing of each criterion.' " *Id*. at 355-56 (quoting *In re Marriage of Peters-Farrell*, 216 Ill. 2d 287, 292 (2005)). Questions about compliance with the Code involve matters of substantial public interest. *In re Nicholas L*., 407 Ill. App. 3d 1061, 1071 (2011).

¶ 15 Here, respondent requests that we create a specific rule of law that would require trial courts to state their capacity determinations on the record when the issue is raised. Because respondent asks this court create a new rule of law, he raises a matter of a public nature. Also, there are no cases directly addressing respondent's argument, showing a need for an authoritative determination of the matter. Further, the State concedes that, given that multiple judges did not state a capacity determination on the record at the time that respondent sought to proceed *pro se*, it is an issue that is likely to recur. We agree. Accordingly, the public interest exception applies to the extent that respondent argues that the law requires or should require that the trial court state its capacity determination on the record at the time that an inquiry is made.

¶ 16 However, the question of whether the court ultimately erred in denying respondent's request to represent himself is moot. Such an individual matter is not a question of public nature. Respondent contends that the capable-of-repetition exception would apply. To meet this exception, the complaining party must demonstrate that: (1) the challenged action is in its

duration too short to be fully litigated prior to its cessation and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *In re Barbara H.*, 183 Ill. 2d at 491. Here, while the duration is too short for the action to be fully litigated, there is no reasonable expectation of repetition, because the facts concerning respondent's desire to represent himself and his capability to do so would necessarily be different in any future commitment hearing. Thus, the court's finding that respondent lacked capacity would have no bearing on similar issues presented in subsequent cases. See *In re Alfred H.H.*, 233 Ill. 2d at 360. Respondent has not argued that the collateral-consequences exception applies.

¶ 17 As to the merits, respondent contends that the trial court failed to make a proper determination of his capacity to waive counsel when it initially made an inquiry into his capacity but then failed to contemporaneously state a clear determination on the record. He argues that the problem was compounded when other judges then also denied his requests without making an inquiry or stating a finding about capacity.

¶ 18 All adults, including those adjudicated mentally ill, are presumed legally competent and are presumed competent to direct their legal affairs. *In re Phyllis P.*, 182 Ill. 2d 400, 401-402 (1998). The Code affords all persons alleged to be subject to involuntary commitment a right to counsel. 405 ILCS 5/3-805 (West 2012); *In re Lawrence S.*, 319 Ill. App. 3d 476, 480 (2001). The right to counsel can be waived by a respondent, but only if the court is satisfied that the respondent has the capacity to make an informed waiver. 405 ILCS 5/3-805 (West 2012). Specifically, section 3-805 provides:

> "Every respondent alleged to be subject to involuntary admission on an inpatient or outpatient basis shall be represented by counsel. If the respondent is indigent or an appearance has not been entered on his behalf at the time the matter is set for hearing, the

> court shall appoint counsel for him. A hearing shall not proceed when a respondent is not represented by counsel unless, after conferring with counsel, the respondent requests to represent himself and the court is satisfied that the respondent has the capacity to make an informed waiver of his right to counsel." *Id.*

¶ 19 When a respondent seeks to waive counsel, the trial court is obligated to determine whether he or she has the capacity to make an informed waiver. *In re Lawrence S.*, 319 Ill. App. 3d at 480-81 (citing 405 ILCS 5/3-805 (West 2012)). "In making such a determination, the trial court must ask the respondent questions concerning his mental ability, intelligence, and understanding of the basic purpose of counsel." *In re Kurtis C.*, 2015 IL App (3d) 130605, ¶ 24. "A court commits error if it rules on a respondent's request to waive counsel before making such an inquiry." *Id.* When the court makes a proper inquiry, the determination of whether a respondent has the capacity to waive his or her right to counsel is within the discretion of the trial court. *Id.*

¶ 20 In the context of whether factual findings are stated on the record, an appellate court is not precluded from reviewing an involuntary treatment order when the ultimate ruling, but not the underlying findings, is disclosed. *In re Rita P.*, 2014 IL 115798, ¶ 50. "[I]t is the 'judgment' of the lower court that is reviewed, and 'not what else may have been said.' " *Id.* ¶ 51 (quoting *In re Estate of Funk*, 221 Ill. 2d 30, 86 (2006)). Also, when the record does not contain anything to the contrary, we presume that a court followed the law and had a factual basis for its ruling. *In re Alexander R.*, 377 Ill. App. 3d 553, 556-58 (2007). However, in the context of choice of counsel in criminal cases, while there are no " 'magic words' " or formal findings required, the trial court must make an adequate record to allow meaningful review of its exercise of discretion. *People v. White*, 395 Ill. App. 3d 797, 825 (2009).

¶ 21 The Code does not require specific findings of fact for review of the trial court's exercise of discretion in denying a respondent's request to waive counsel. But the trial court must at a minimum make a record of its decision. Otherwise there would not be anything meaningful to review. Here, the initial trial judge asked respondent questions in order to ascertain his capacity to waive counsel. However, the court stopped short of making a clear ruling on the record at that time. Instead of making a finding that respondent did not have capacity, the court denied the request because respondent was not ready to proceed and was continuing to try to obtain private counsel. Thus, the court asked him to consult with his counsel and stated that he could renew his request at the next hearing. Doing so was permissible, given that the Code states that a hearing shall not proceed "unless, *after conferring with counsel*, the respondent requests to represent himself and the court is satisfied that the respondent has the capacity to make an informed waiver of his right to counsel." (Emphasis added.) 405 ILCS 5/3-805 (West 2012). But after that point, although respondent repeatedly renewed his request, no determination as to his capacity was made until January 9, 2015. Instead, each judge who heard the matter for status simply adopted the original denial without making a finding as to respondent's capacity. Regardless, on January 9, 2015, the initial judge did place a determination on the record that respondent lacked the capacity to represent himself. Thus, ultimately, respondent got what he requests on appeal, except that it did not occur contemporaneously with the initial inquiry.

¶ 22 The Code does not put a time limit on reaching a capacity determination, other than that the hearing cannot proceed unless the respondent is afforded counsel or a capacity determination is made. See *In re Blume*, 197 Ill. App. 3d 552, 557 (1990); *In re Elkow*, 167 Ill. App. 3d 187, 195-96 (1988). Here, no hearing on the merits occurred before the court determined that respondent lacked the capacity to represent himself. Thus, there was no reversible error in the

delay. We decline to create a rule that would require a ruling on the record at the time that the initial inquiry is made. See *In re Estate of Schlenker*, 209 Ill. 2d 465, 466 (2004) (we may not legislate under the guise of statutory construction). We note, however, that while not required by the Code, it certainly was in respondent's interest to have any findings about his capacity made in a timely fashion. Thus, we suggest that trial courts make clear rulings on such matters in a timely fashion in order to avoid problems such as those that arose in this case.

¶ 23 III. CONCLUSION

¶ 24 The trial court did not err when it delayed ruling on respondent's request to waive counsel. Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 25 Affirmed.