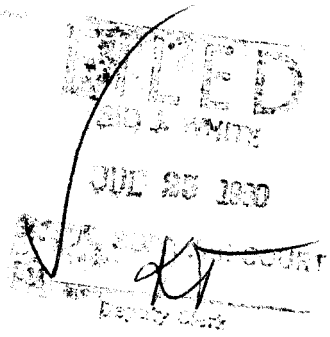
IN THE SUPREME COURT OF FLORIDA



SHIRLEY GODWIN,

Petitioner,

v. CASE NO. 75,881

STATE OF FLORIDA,

Respondent.

_____/

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. ARGUMENT

ISSUE I

WHETHER GODWIN'S RELEASE FROM INVOLUNTARY CONFINEMENT DURING THE PENDENCY OF HER APPEAL RENDERS THE CASE MOOT

Respondent, in its answer brief, reviews the mootness doctrine in general and then surveys mootness cases in Florida as applied to civil commitment proceedings (Answer Brief, pages eight through fourteen). Respondent then offers by way of contrast State v. Lodge, 608 S.W.2d 910 (Tex. 1980), a case cited by Petitioner as persuasive authority.

Respondent posits that in Texas, there is a collateral legal consequence flowing from the state's statutory scheme, i.e. a past commitment can impact on a future commitment. Since there is no similar codified consequence in Florida, Respondent finds the Texas authority unpersuasive.

In point of fact, the Texas Supreme Court was concerned with those situations where the previous commitment did not meet the criteria under Texas law to effect a future indefinite commitment, and thus were being dismissed as moot.

The Texas court in Lodge lays out the statutory scheme in its opinion. The court quotes Art. 5547-40 of the Texas Mental Health Code, Texas Revised Civil Statutes Annotated, as follows:

> No person may be committed to a mental hospital for an indefinite period unless he has been under observation and/or treatment in a mental hospital for at least sixty (60) days pursuant to an Order of Temporary Hospitalization entered within the twelve (12) months immediately preceding the filing of the Petition or unless he has been under observation and/or treatment in a mental hospital under an Order entered pursuant to Section 5 of Article 46.02, Code of Criminal Procedure, 1965, for at least sixty (60) days with the twelve (12) months immediately preceding the date of the indefinite commitment hearing.

Thus, the Texas procedure, along with the statutorily (and constitutionally) required findings that a person is mentally ill and a danger to himself or others, also requires a person be committed under an Order of Temporary Hospitalization as a prerequisite to being committed under an order of indefinite commitment. Further, the person must be in the hospital pursuant to that commitment for sixty days before this temporary commitment can be utilized to satisfy the prerequisite for indefinite commitment.

The commitment under review in Lodge was pursuant to an Order for Temporary Hospitalization.

As Lodge was released from the hospital thirteen days after she was committed, it cannot be said the Court relied on the collateral consequence of that commitment on a future permanent commitment, because under Texas law there was no such statutory consequence for a previous commitment under sixty days. (See the lower court decision in Lodge v. State, 597 S.W.2d 773 (Tex.Civ.App. 4 Dist. 1980) where the fact that Lodge was released after thirteen days is stated).

Furthermore, it is clear the Texas court was not relying on the consequence of the temporary commitment under review, on a subsequent order of indefinite commitment, in dealing with the mootness question. Just the opposite is shown in the following statement in the Court's opinion:

> For all practical time frames, then, only orders for an indefinite commitment would afford persons an effective appeal. Under Art. 5547-40, however, an indefinite commitment may not be ordered unless the person has been under observation and/or treatment in a mental hospital for at least 60 days pursuant to an order of Temporary Hospitalization within the immediately preceding 12 months. Thus, the necessary predicate for an order of indefinite commitment, and hence, the availability of an effective appeal, can always be defeated by discharge from the mental hospital within the first 60 days of the temporary confinement. And, this would continue to be true if successive temporary commitments are ordered.

State v. Lodge, 608 S.W.2d at 911-912.

Thus, the decision in Lodge, 608 S.W.2d 910, was not based on a unique statutory scheme with a built in legal collateral consequence but in the end revolved around due process, illustrated by the court's statement:

> We are mindful of the difference in the consequences of an adjudication of delinquency, as in Carillo, as well as those in the context of the cases cited immediately above, and an involuntary commitment to and confinement in a mental hospital for care and treatment, as here. Each, however, is manifestly severe and prejudicially unfair if the commitment is one that would not stand upon review in an effective appeal.

State v. Lodge, 608 S.W.2d at 912.

Further citing deprivation to the right of redress of persons adversely effected, the lack of any public policy which would be enhanced by mooting the appeal, and the removal of collateral consequences (presumably from the opinion these collateral consequences were "social"), the Court ruled the appeal was not moot.

The state has failed to show any legal distinction between Lodge, 608 S.W.2d 910, and the case at bar, and thus appellant submits it remains persuasive authority in this case.

Respondent also argues that potential liability for fees under Section 394.457(8) and Section 402.33(1)(g), Florida Statutes (1989) is not a consequence of appellant's commitment.

Citing Section 402.33 (2)(g), Florida Statutes, Respondent states that indigents may not be charged fees (Answer

brief, page fifteen). This gives the actual statutory provision too broad a reading. In point of fact, the section in relevant portion states:

> Fees, other than third-party benefits and benefit payments, may not be charged for services provided to indigents whose only sources of income are from state and federal aid.

Section 402.33 (1)(g), Florida Statutes (1989).

Elsewhere, "state and federal aid" is specifically defined as:

> cash assistance or cash equivalent benefits based on an individual's proof of financial need, including, but not limited to, aid to families with dependent children and food stamps.

Section 402.33(1)(g), Florida Statutes (1989).

Other than the exceptions delineated in Section 402.33(2) (a)-(g), Florida Statutes (1989), which includes indigents whose only income is state and federal aid, all persons receiving services from the Department of Health and Rehabilitative Services are charged or assessed a fee.

Respondent implies that Godwin is exempt from the fee because she was represented by the Public Defender.

The exception for individuals whose sole income is state and federal aid is not the same determination which is made when a person qualifies for the services of the public defender. Compare, for example, Section 27.52, Florida Statutes (1989) (dealing with eligibility for a public defender) and Rule 10C-1.098, F.A.C.; Rule 10C-1.099, F.A.C.; Rule

10C-1.103, F.A.C. (dealing with eligibility for aid to families with dependent children).

Moreover, under the plain language of the statute a person who has no income can still have the fee assessed.

Respondent further asserts that Petitioner suffers no consequence because the Department is precluded by statute from collecting fees which exceed the client's ability to pay. See (Answer brief, page 15); Section 402.33(6)(a), Florida Statutes (1989). This provision has no effect on the Department's duty to assess fees unless excepted as above. Thus, even though an assessed fee is not collected at a given point in time, the fee is nonetheless assessed and constitutes a lien on property owned by the client, carries interest, is not subject to the homestead exemption, and survives the patient's death. See Section 402.33(6)(a), Florida Statutes (1989); Section 402(8), Florida Statutes (1989).

Respondent finds petitioner's citation of foreign jurisdiction unpersuasive citing perceived differences between the out of state decisions and factors present in the case at bar.

Respondent asserts that some of the cases, while discussing social stigma, were actually decided on the basis of collateral legal consequences and cites, among other cases, People v. Nunn, 438 N.E.2d 1342, 108 Ill.App. 3d 169, 64 Ill.Dec.23 (Ill. App. 1 Dist. 1982). (See Answer brief, page nineteen).

Petitioner suggests this presents too narrow a reading of the case law cited.

For instance, in Nunn, the court decided the case was not moot stating, "we are unable to determine, as the mootness doctrine requires (citation omitted) that no legal consequences will attend the order of the trial court". People v. Nunn, 438 So.2d at 1344. However, in the very next sentence the court uses as examples collateral "legal" consequences which petitioner contends apply to the case at bar stating:

> The record offers no guidance as to whether the commitment order in question may, for example, impair respondent's employment opportunities or reputation or increase the probability of recommitment. Accordingly, we will consider the present case as being not moot.

People v. Nunn, 438 N.E.2d at 1344.

To the extent the cases were decided on adverse collateral "legal consequences", such exist in Florida. As well as the consequence of statutory liability for care, discussed above, Florida has codified one of the collateral consequences relied on in In re Ballay, 482 F.2d 648 (D.C.Cir. 1973). The court in In re Ballay ruled Ballay's discharge did not moot his appeal from the commitment and found a consequence of commitment included, among several other examples, limitations on access to a gun license." Id. at 651. Similarly, Section 790.06(2)(j) Florida Statutes (1989) precludes issuance of a license to carry a concealed firearm or weapon to someone who has been "committed to a mental institution under chapter 394, unless he possesses a certificate from a psychiatrist licensed

in this state that he has not suffered from disability for a period of five years".

Respondent distinguishes Matter of Z.O., 484 A.2d 1287 (N.J. Super A.D. 1984), another case cited by Petitioner, noting that it involved issues, other than sufficiency of the evidence, which were of great public importance and/or capable of repetition but evading review.

However, in its decision the New Jersey court found the issue was not moot not only because the problem was capable of repetition but evading review, but also because of potential liability of patients for the cost of their care. In ruling on the mootness issue the court stated:

> The first question is whether these cases have been rendered moot by the discharge from hospitalization of the three patients involved. They have not. The cases present problems that are capable of repetition and yet of evading review. The same problems may be expected to arise in other cases and to continue to divide the trial courts. (citations omitted). Moreover, the liability of these and perhaps many other patients for the cost of their care may arguably be affected by the propriety of their commitment proceedings. N.J.S.A. 30:4-49 et. seq. We do not answer the question of liability now because it is not before us (emphasis supplied).

Id. at 1290.

Respondent further dismisses State v. Van Tassel, 484 P.2d 1117, 5 Or.App. 376 (Or. App. 1971) and Lodge v. State, supra, on the grounds that they involved statutory interpretation of the respective state statutes (Answer brief page 19-20).

Petitioner has discussed, supra, why the Texas case of State v. Lodge, 608 S.W.2d 910, is persuasive authority for this Court to consider.

A review of the decision in Van Tassel also shows why that decision is analogous to the case at bar.

Notably, the court in Van Tassel itself characterized its decision on mootness, stating, "The question of mootness is basically a policy question" (emphasis supplied) State v. Van Tassel, 484 P.2d 1119. The bulk of the Court's opinion, discussed more fully in Petitioner's initial brief, focuses on their rationale for concluding public policy is best served if the case is not dismissed for mootness.

The court does reference, in discussing mootness, Oregon's statutory scheme which provides that Van Tassel was subject to potential financial liability for his commitment. Oregon, as does Florida, assesses fees for services, imposes some limitation on collection of those fees during the patient's lifetime, and holds the estate liable subsequent to the patient's death. Or.Rev.Stat. s. 179.620; Or.Rev.Stat. s. 179.640.

Petitioner submits the case cannot be distinguished on statutory grounds and in fact, given the similarity of the Florida and Oregon statutes in regard to potential financial liability of patients, lends strong support to petitioner's position.

Respondent cites, in support of its position that a number of foreign jurisdictions apply the mootness doctrine

similarly to Florida, the following cases: Radulski v. State v. Delaware State Hospital, 541 A.2d 562 (Del. 1988); In re Faucher, 558 A.2d 705 (Me. 1989); In re Robledo, 341 N.W.2d 278 (Minn. 1983); State ex rel. D.W. v. Hensley, 574 S.W.2d 389 (Mo. 1978); Diamond v. Cross, 662 P.2d 828 (Wash. 1983); In re. G.S., 348 N.W.2d 181 (Wis. 1984).

None of these cases discuss whether or not a person committed under their statutory scheme is subject to financial liability for the costs incurred for their care. This direct consequence of commitment either is not provided for in the respective state statutes or was not litigated in the above-cited cases.

Diamond v. Cross is further distinguishable. There the court, in discussing mootness, stated:

> Moreover, while most civil commitment appeals will be saved from mootness by the significant and adverse collateral consequences to which commitment gives rise (see e.g., In re Ballay, 482 F.2d 648, 651-53 (D.C. Cir. 1973); cf. State v. Turner, supra, 98 Wash.2d at 733, 658 P.2d 658 (citation and resulting commitment for civil contempt)),such consequences do not exist here. The invalidation of less than 60 days out of the minimum year and a half during which Ms. Cross has been detained seems to us of minimal significance.

Id. at 831. Thus, the court limited its decision to facts peculiar to Cross's case, including her commitments subsequent to the order appealed from.

Petitioner also submits that other facts distinguishing Respondent's cited cases from the case at bar exist in State ex. rel D.W. v. Hensley, (petitioners in case did not avail

selves of statutory right to appeal or other statutory relief but some time after commitment filed habeas corpus) and In re G.S., (the court, in ruling the case moot, notes that both parties during oral argument conceded the issues presented were moot.)

Respondent notes that petitioner moved for an extension of time to file the initial brief and suggests an expedited appeal could alleviate the problem.[1] However, this begs the question because even an expedited appeal process can result in a patient's discharge before the appellate process is complete. This will be most likely for those patients who were wrongfully committed in the first place as they will be the quickest to "recover".

Based on the foregoing argument and citation of authority, Petitioner submits her appeal from the order of commitment is not moot. The District Court of Appeal's opinion so holding deprives appellant of her right to access to the courts and due process of law, as guaranteed by Article 1, Sections 9 and 21 of the Florida Constitution and Amendment XIV of the United States Constitution.

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[1]One day after undersigned counsel received the record on appeal in this case, Petitioner was released from the State Hospital. At that time, undersigned counsel chose to place this case on the briefing schedule, because given Petitioner's release, there did not appear to be any justifiable reason to put her case ahead of other cases, all criminal cases, in which in many cases the appellant was serving a prison sentence.

Petitioner relies on her argument presented in the Initial Brief on the question of the sufficiency of the evidence to support the commitment order, and submits it was insufficient.

This Court should reverse the order of commitment.

II. CONCLUSION

Petitioner submits that the issue of the sufficiency of the evidence to support the commitment of petitioner is not moot, and that the commitment order entered in this case should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Reply Brief has been furnished by hand-delivery to Ms. Kathleen E. Moore, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Ms. Shirley Godwin, 3000 N. 17th Street, Haines City, Florida 33844, on this 25th day of July, 1990.

Lynn A Williams
LYNN A. WILLIAMS