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IN THE SUPREME COURT FOR THE STATE OF ALASKA

ETTA BAVILLA,)
Petitioner,) Supreme Court No. _____
)
vs.)
)
ALASKA DEPARTMENT OF)
CORRECTIONS)
Respondent.) Trial Court Case No. 3AN 04-05802 CI
_____)

PETITION FOR REVIEW

COMES NOW, Etta Bavilla, Plaintiff below, and petitions this court for review of the Superior Court's April 2, 2004, denial of her Motion for a Temporary Restraining Order.¹ Review is sought because postponement will result in an injustice that can not be corrected if appellate review is not obtained until after a final judgment has been entered.

I. FACTS

Ms. Bavilla entered a plea to first degree murder of her one year old son, Elihu, which occurred on July 21, 1998, in Ekuk, across the river from Dillingham. The court subsequently found her guilty but mentally ill.² She had been admitted to API previously

¹ The Order denying the temporary restraining order is attached hereto as Exhibit A (Order), the Complaint and the motion for temporary restraining order application is Exhibit B (TRO Motion), and the State's Opposition to Motion for Temporary Restraining Order is Exhibit C (TRO Opp.).

² Exhibit C, page 45.

with marijuana use implicated in her psychosis³ and the distinct possibility her crime was caused by her mental health treatment.⁴ Ms. Bavilla has been on and off neuroleptics since July of 1997.⁵ She was continuously on medication while in the Department of Corrections' (Corrections) custody from July of 1998 until April 5, 2003.⁶ Following her refusal to take medications on June 1, 2003, she was placed on involuntary medications on August 18, 2003.⁷

Prior to this involuntary medication order expiring, on February 23, 2004, James B. Gottstein, esq., of the Law Project for Psychiatric Rights (Counsel) wrote Corrections advising he was going to assist Ms. Bavilla in resisting being subject to another forced medication order and stated he needed copies of any paperwork that might be associated with such an effort, including her chart, which should be updated from time to time.⁸ Corrections never responded to this letter.

However, on Thursday, April, 1, 2004, Counsel was informed by Ms. Bavilla that Corrections was going to obtain an involuntary medication order against her at a "Due Process Hearing,"⁹ the following Monday, April 5, 2004, at 8:30 a.m., which resulted in a

³ Exhibit C, page 19, Exhibit F, page 6.

⁴ Exhibit F, page 11.

⁵ Id.

⁶ Id, at paragraph 5.

⁷ Id. Counsel does not at this point have the records concerning this involuntary medication order.

⁸ Exhibit B, page 45.

⁹ Exhibit C, page 26

letter from Counsel to Corrections.¹⁰ In this letter Counsel indicated he believed the procedures being employed violated Ms. Bavilla's constitutional rights, suggested Corrections consult with its own counsel to review compliance with constitutional requirements and moved for a one week continuance to allow for preparation of a defense.

The Alaska Department of Law responded at the end of the day, which response included as most relevant here (1) that some of the requested records would be provided early the following day, Friday, April 2, 2004, and the balance some time the following week, which is after the hearing would be over, (2) the one week continuance was denied, and (3) Counsel was directed to direct all further communications regarding the matter to Mr. Bodick, its attorney.¹¹ At this point, which was after the close of business on Thursday, April 1, 2004, Counsel still did not have any knowledge of the grounds for seeking the forced medication order, including no notice of any witnesses or other evidence Corrections intended to rely upon.¹²

Approximately 9:00 a.m., the following morning, Friday, April 2, 2004, a complaint and temporary restraining order application was filed and served upon counsel for Corrections.¹³ The Motion For Temporary Restraining Order requested an order:

¹⁰ See Exhibit B, page 47.

¹¹ See, Exhibit B, pages 48-9.

¹² There is a dispute as to what Corrections informed Ms. Bavilla. For example, Ms. Bavilla insists she was not told what medication(s) Corrections was seeking to force her to take, while Corrections says she was verbally informed.

¹³ Exhibit B, pages ____.

1. Prohibiting Defendant from proceeding with an involuntary psychiatric medication proceeding against Plaintiff until seven days after the requirements of the Temporary Restraining Order have been satisfied.
2. Ordering Defendant to allow Plaintiff's counsel unhindered access between counsel and Plaintiff, subject only to necessary restrictions such as curfew and meal times in order to allow Plaintiff to assist in the preparation of her defense.
3. Allowing Plaintiff to take the deposition of witnesses the Department intended to rely upon in support of subjecting Plaintiff to involuntary psychotropic medication.
4. Requiring the Defendant to provide Plaintiff with the specific facts to be relied upon by Defendant in support of subjecting Plaintiff to involuntary psychotropic medication.
5. Disclosing to Plaintiff the specific drug(s) and dosage(s) proposed to be involuntarily administered to Plaintiff.
6. Allowing Plaintiff's counsel to assist her in defense of the Defendant's involuntary psychotropic medication proceeding.
7. Staying any involuntary psychotropic medication order that might be issued for 2 full court days to allow Plaintiff to seek a further stay in the Superior Court and if such further stay is requested, the stay to remain in effect until such time as the court ruled on such further stay request.

Shortly after 3:00 p.m., Counsel faxed Mr. Bodick a letter which as most relevant here, (a) expressed concern about not being able to make formal submissions on behalf of his client directly to the Mental Health Review Committee, the decision making body, (b) noted that he had still not received the documentation which Mr. Bodick had indicated would be available early in the day, (c) designated Grace E. Jackson, M.D., a board certified psychiatrist with penal experience as a witness on behalf of Ms. Bavilla, and (d) designated other witnesses designed to ensure that Ms. Bavilla would be able to present

an effective defense.¹⁴

According to the Superior Court's file stamp, at 3:40 p.m., on April 2, 2004, Corrections filed its Opposition to the Motion for Temporary Restraining Order (TRO Opposition).¹⁵ At approximately 4:00 p.m., Counsel was notified by the Superior Court Judge's clerk the TRO Motion had been denied and the Order was faxed to Counsel.¹⁶ When the Judge's clerk was informed that Counsel had not received Corrections' TRO Opposition, she graciously volunteered to fax it.¹⁷

This fax also contained two letters. The first,¹⁸ responds to Counsel's April 2nd letter, stating (a) Dr. Jackson would not be allowed to testify,¹⁹ (b) refusing to allow Ms. Bavilla to call requested witnesses, and (c) that Counsel would not be allowed to represent Ms. Bavilla."²⁰

¹⁴ Exhibit D.

¹⁵ Exhibit C. While the TRO Opposition contains a certificate which states it had been faxed to Counsel, it had not been, as shown by the fax time stamp (which may be an hour off).

¹⁶ Exhibit A.

¹⁷ Exhibit E, which is the first page of the TRO Opposition faxed from the clerk. This has the time filed noted on it.

¹⁸ Exhibit C, Page 2.

¹⁹ In refusing to allow Dr. Jackson to testify, Mr. Bodick stated:

The Department already has three psychiatrists scheduled to appear at the hearing; two as witnesses and one as a decision-maker on the committee. These licensed Alaska professionals should be able to provide sufficient expertise to evaluate the risks involved in the recommended medication and compare these risks to the benefits of the medication.

²⁰ On this point, the letter states:

In regard to your requests regarding the designation of witnesses or other statements, it appears that you have misunderstood the nature of these hearings. This is not an adversarial hearing where attorneys will appear and

The TRO Opposition included an affidavit from Dr. Stallman, the Chief psychiatrist for Corrections. In justifying the forced medication, Dr. Stallman states:

Department staff has experience with previous decompensation by Bavilla and report behavior consistent with her decompensations such as calling them "freaks." Although Bavilla's decompensation is not especially serious yet, the longer she goes untreated, the more likely her delusions will worsen.²¹

The TRO Opposition also includes the affidavit of Laura Brooks, the Director of Mental Health Services for Corrections and who is also the chair of the Mental Health Review Committee which is the designated decision making body to conduct the "Due Process Hearing," under Corrections policy #807.16 and decide whether Ms. Bavilla should be forcibly medicated.²² In this affidavit, the chair of this hearing board, among other things, states:

Ms. Bavilla has a fixed delusion that she has a sexually transmitted disease. . . . There was a noticeable decline in her mental functioning [after she stopped taking medications in 2003] and she was placed on involuntary medications August 18, 2003. . . . When not taking medications, Ms. Bavilla has exhibited increased delusional thinking and maintains she has been injected with a manipulated sexually transmitted disease designed to keep her sick. She has claimed she is vulnerable to spirits and those spirits are responsible for her having been diagnosed with a mental illness. She becomes increasingly hostile towards staff, making nonsensical statements, gesturing and talking to "spirits" in her cell. . . .²³

argue on behalf of their clients. As approved by the Supreme Court in *Washington v. Harper*, Ms. Bavilla will be assisted by an independent lay advisor. Consequently, your participation will be limited to the telephonic testimony you provide as to your personal observations of Ms. Bavilla's behavior.

²¹ Exhibit C, page 40.

²² Exhibit C, pages 18-21.

²³ Exhibit C, pages 19-20.

Ms. Bavilla denies she believes she has been injected with a manipulated sexually transmitted disease designed to keep her sick; instead, she believes the doctors have not cured her of her sexually transmitted disease and haven't done all they can to do so and she also disputes other reports of her statements and beliefs, such as are contained in the affidavit testimony of the chief psychiatrist and the chair of the Mental Health Review Committee which is Corrections' decision making body in its proceeding.²⁴

On Sunday, April 4, 2004, Dr. Jackson issued her report, which was given to Ms. Bavilla to present to the Mental Health Review Committee.²⁵ This report describes the serious harm faced by Ms. Bavilla if involuntary medication is allowed to proceed. Among them are medication caused (iatrogenic) psychosis,²⁶ cognitive losses,²⁷ extreme weight gain,²⁸ diabetes, even apart from the weight gain,²⁹ and a shortened life.³⁰

II. QUESTION PRESENTED

The question presented for review is whether the Superior Court erred in denying the temporary restraining order.

III. REASONS FOR GRANTING REVIEW

Postponement of review will result in injustice because of impairment of Ms. Bavilla's right to due process; this right can not be corrected if appellate review is not

²⁴ Interview with Counsel.

²⁵ Exhibit F.

²⁶ Exhibit F, page 14.

²⁷ Exhibit F, page 15.

²⁸ Exhibit F, page 12.

²⁹ Id.

³⁰ Exhibit F, page 16.

obtained until after a final judgment has been entered.³¹ Final judgment in this matter is likely to be at least a year and a half away. If relief is not granted, she will almost certainly have been forced to take mind-altering, life sapping drugs with serious -- even life threatening -- side effects of dubious, at best, efficacy for the entire time period.³²

IV. REASONS WHY THE DECISION IS ERRONEOUS

There is no doubt but that even convicted prisoners have a constitutional right to some level of due process before psychotropic drugs can be involuntarily administered. *Washington v. Harper*, 494 U.S. 201, 110 S.Ct. 1028 (1990). Petitioner, respectfully suggests that characterizing the procedures employed here as a due process travesty -- even in the prison context -- is not an overstatement.

In *Alaska Public Utilities Commission v. Greater Anchorage Area Borough*, 534 P.2d 549, 554, (Alaska 1975), this Court held that where injury to the movant is certain and irreparable and harm to the non-movant inconsiderable, injunctive relief should normally be granted. In *Alaska v. United Cook Inlet Drift Association*, 815 P.2d 378 (Alaska 1991), this Court made clear this applied to temporary restraining orders if the movant showed "serious and substantial questions going to the merits of case" where injury to the non-movant is relatively slight in comparison to the injury which the person seeking the injunction will suffer if the injunction is not granted. This is known as the

³¹ Appellate Rule 402(b)(1).

³² In addition to Exhibit F, for an excellent review of the scientific evidence on this see, Exhibit B, pages 50-58, "The case against antipsychotic drugs: a 50-year record of doing more harm than good," in *Medical Hypotheses*, Volume 62, Issue 1, 2004. Many of the studies cited therein are included in subsequent exhibits in Exhibit B.

"balancing of hardships" test. *A.J. Industries v. Alaska Public Service Commission*, 470 P.2d 537 (Alaska 1970). Otherwise, "probable success on the merits" is required. *United Cook Inlet*, *supra*.

Thus there are two relevant inquiries; (1) balancing the respective hardships of the parties and then, only if the movant doesn't suffer irreparable harm or the non-movant suffers harm that can not be protected against, (2) probable success on the merits.³³ Ms. Bavilla respectfully suggests not only do the balancing of hardships weigh extremely heavily in her favor, but she has also shown probable success on the merits.

A. Balancing of Hardships.

The potential great harm to Ms. Bavilla is apparent. She is faced with the involuntary modification of her very thought processes.³⁴ She will become lethargic. She faces serious side effects, including the irreversible neurologic disease known as Tardive Diskenesia that affects approximately 5% of patients a year on an additive basis, which is essentially neuroleptic induced Parkinsons Disease. She will be faced with a diminished chance to recover from mental illness and the increased likelihood of psychotic relapse caused by the medications.³⁵ Depending on which medications are

³³ Counsel has not found any more recent cases that modify this analysis after looking, but allows that the short time frame necessitated by the exigency of the situation may have prevented him from finding such a case that a longer time frame might have revealed.

³⁴ *Steele v. Hamilton County Community Mental Health Board*, , 736 N.E.2d 10, 16-17 (Ohio 2000)

³⁵ Exhibit F.

forced on her, she faces a great risk of diabetes and extreme weight gain.³⁶ A shortened life span is also to be expected.³⁷

Balancing against this, Corrections has asserted it will be harmed because it can't provide care it wants to (or is obligated to)³⁸ and allowing her to be represented by counsel will be an administrative burden.³⁹ Moreover, Corrections admits that it is facing no immediate harm because "Bavilla's decompensation is not especially serious yet."⁴⁰

Ms. Bavilla respectfully submits the balancing of hardships weighs extremely heavily in her favor.

B. Probable Success on the Merits

The gravamen of Ms. Bavilla's complaint is that her United States and Alaska constitutional rights to due process are being violated by the procedures being employed by Corrections. The 1990 United States case of *Washington v. Harper*, speaks directly to this question with respect to the United States constitution and, it is respectfully submitted, the 2003 United States case of *Sell v. United States*, *Sell v. United States*, 123 S.Ct. 2174 (2003), can be looked to for more recent guidance on the level of deference to be given institutional psychiatrists in forced medication proceedings, generally. There are no Alaska cases directly on point.

³⁶ See, e.g., Exhibit F, page 12.

³⁷ Exhibit F, page 16.

³⁸ Ms. Bavilla respectfully suggests the obligation to require care is completely irrelevant where the proposed patient declines the treatment. The chief psychiatrist testified in his affidavit that Ms. Bavilla is competent. Exhibit C, page 41.

³⁹ Exhibit C, page 14.

⁴⁰ Exhibit C, page 40.

Washington v. Harper holds "the forcible injection of medications into a nonconsenting person's body represents a substantial interference with that person's liberty."⁴¹ Any over-riding of this fundamental interest by "medical personnel"⁴² in the penological setting,⁴³ must be under "fair procedural mechanisms."⁴⁴ Even though in the prison setting "constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied,"⁴⁵ only having to be "reasonably related to legitimate penological interests,"⁴⁶ the "Due Process Clause does require certain essential procedural protections."⁴⁷ These essential procedural requirements include (i) an unbiased, independent decision maker,⁴⁸ (ii) "notice, (iii) the right to be present at an adversary hearing, and (iv) the right to present and cross-examine witnesses."⁴⁹ It was also relevant in Washington v. Harper that (v) the prisoner in question had "a long history of serious, assaultive behavior," there being "a likelihood of serious harm to others,"⁵⁰ and (vi) judicial review of the decision was available.⁵¹ While it is clear Washington v. Harper does not require the provision of counsel, it is less clear it is constitutionally permissible

⁴¹ 494 US at 229, 110 S. Ct. at 1041.

⁴² 494 US at 231, 110 S. Ct. at 1042.

⁴³ 494 US at 223, 110 S. Ct. at 1037.

⁴⁴ 494 U.S. at 231, 110 S. Ct. at 1042.

⁴⁵ 494 US at 225, 110 S. Ct. at 1038.

⁴⁶ 494 US at 223, 110 S. Ct. at 1037.

⁴⁷ 494 US at 236, 110 S. Ct. at 1044.

⁴⁸ 494 US at 233, 110 S. Ct. at 1043.

⁴⁹ 494 US at 225, 110 S. Ct. at 1044.

⁵⁰ FN 11.

⁵¹ 494 US at 235, 110 S. Ct. at 1044.

to exclude counsel.⁵²

The procedures employed by Corrections here fail to satisfy every one of the "essential procedural protections" required in Harper. Here, the chair of the decision maker has clearly pre-judged the case and even filed testimony against Ms. Bavilla in resisting the temporary restraining order.⁵³ This is not an unbiased, independent decision maker. Notice has been totally absent, to the point of Corrections flouting any such requirement.⁵⁴ Ms. Bavilla has yet to be given anything in writing regarding the forced medication proceeding by Corrections.⁵⁵ Corrections admits the hearing is not adversary in nature.⁵⁶ Ms. Bavilla's request to have a psychiatrist testify on her behalf was denied because, inter alia, Corrections' "professionals should be able to provide sufficient expertise." Moreover, while Policy #807.16 allows Ms. Bavilla to present "relevant evidence"⁵⁷ and cross-examine witnesses, the form used to implement this provision only allows Ms. Bavilla to submit written questions in advance to be asked by the Mental

⁵² 494 US at 236, 110 S. Ct. at 1044.

⁵³ See, references to Ms. Brooks affidavit above and Exhibit C, pages 18-21.

⁵⁴ Counsel wrote Corrections as long ago as February 23, 2004, requesting notice. There was never any response to this letter and it wasn't until after the temporary restraining order had been denied without Counsel having received a copy of Corrections' opposition that he was informed by Corrections that he would not be allowed to participate in the "Due Process Hearing."

⁵⁵ It is unclear if there are any grounds for the forced medication petition other than contained in the affidavits of the chair of the decision making committee and the chief psychiatrist; as of the filing of this, neither Ms. Bavilla, nor Counsel have received copies of any paperwork associated with the Policy #807.16 proceeding and there is a dispute over what Ms. Bavilla was verbally told. Policy#807.16 doesn't require disclosure of the evidence to be used against her until the hearing. Exhibit C, page 26.

⁵⁶ See, above and Exhibit C, page 2.

Health Review Committee, which is the decision maker.⁵⁸

Moreover, the State admits Ms. Bavilla is not a present danger: "Bavilla's decompensation is not especially serious."⁵⁹ Tthe only behavior she has been accused of is calling staff members "freak,"⁶⁰ and "making nonsensical statements, gesturing and talking to 'spirits' in her cell."⁶¹ There is nothing in the record we have indicating there has been any violence whatsoever since the original crime almost 6 years ago when Ms. Bavilla was 17, which may very well have been the result of a cannabis or even neuroleptic induced psychosis and/or other stressors.⁶² With respect to the last Washington v. Harper factor, judicial review, no such provision is provided for in Policy #807.16 and there is no right to a stay of the medication order even with respect to the internal appeal process. Even if there is an implied right to appeal the Medical Advisory Committee's decision after the internal Corrections appeal to the Superior Court, that right clearly wouldn't attach until after the prisoner has been forcibly medicated for a period of time.⁶³

Frankly, while Counsel likes to think he does not engage in hyperbole, the "Due

⁵⁷ Exhibit C, page 26.

⁵⁸ Exhibit C, page 33.

⁵⁹ Exhibit C, page 40. In this regard it is extremely important to recognize that any untoward "symptoms" are most likely the result of her abrupt discontinuation of medication and do not necessarily point to any increased problems. Exhibit F.

⁶⁰ Exhibit C, page 40,q

⁶¹ Exhibit C, page 20.

⁶² Exhibit F.

⁶³ Exhibit C, page 28.

Process Hearing" as it is called in Policy #807.16⁶⁴ and related procedures seems a travesty of due process; a total sham. What is clear beyond cavil is the procedures employed by Corrections here totally fail to meet even the diminished due process requirements afforded prisoners required under *Washington v. Harper*.

While there are no decisions of this Court directly on point, *McGinnis v. Stevens*, 543 P.2d 1221 (Alaska 1975), and *Abruska v. Alaska Dep't. of Corrections*, 902 P.2d 319 (Alaska 1995) are instructive. There is insufficient space here to fully explore how Alaska constitutional law might be applied, but a few points can be made. First, in *McGinnis*, this Court found a right to counsel in circumstances in which the United States Supreme Court did not require it. Second, in both *McGinnis* and *Abruska*, the right to call and cross-examine witnesses was discussed and found a very fundamental due process right.⁶⁵ Third, in *McGinnis*, this court found the failure to provide written notice of the grounds against the prisoner violated due process. If the Petition for Review is granted these issues under Alaska constitutional law can be fully explored and the task of balancing of Corrections' legitimate penological interests can be carefully weighed against prisoners' fundamental right to be free of forced psychotropic medication.

What can be said is it seems there can be little doubt the procedures employed by

⁶⁴ Exhibit C, page 26.

⁶⁵ 543 P.2d at 1231 and 902 P.2d at 322, respectively. In *McGinnis*, 543 P.2d at 1229, this Court noted the importance of the right to call witnesses to combat the "severe credibility problem" an inmate faces when trying to disprove the charges of a prison guard. The credibility problems of such a prisoner pales in comparison to one who is assumed to be mentally ill and delusional.

Corrections here to forcibly medicate Ms. Bavilla do not comport with applicable constitutional standards, both federal and Alaskan, and she has met the even tougher probability of success on the merits standard entitling her to preliminary injunctive relief.

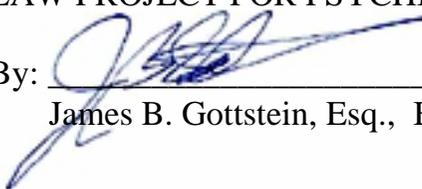
V. RELIEF REQUESTED AND REASONS FOR EXPEDITED CONSIDERATION

Ms. Bavilla is requesting this court grant review and reverse the Superior Court's denial of her motion for a restraining order and prohibit Corrections from force medicating her until such time as her due process rights are being honored.

Ms. Bavilla's forced medication "Due Process Hearing" is presumably underway or already over and she is facing immediate harm through enforcement of a forced medication order (assuming it is issued). Ms. Bavilla has simultaneously filed an Emergency Motion for Interim Injunctive Relief, which it is hoped this Court will see fit to issue posthaste. If not, the urgency to resolve this Petition for review is great from Ms. Bavilla's perspective and every day lost is critical.⁶⁶ If the Court does grant Interim Injunctive Relief that prohibits Corrections from force medicating her until such time as her due process rights are being honored, the exigency will have been resolved from Ms. Bavilla's perspective

Dated this 5th day of April, 2004 at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: 

James B. Gottstein, Esq., Bar No. 7811100

⁶⁶ Dr. Jackson notes at Exhibit F, page 13 that re-introduction of neuroleptics may impede her recovery.