Law Project for Psychiatric Rights
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IN THE SUPREME COURT FOR THE STATE OF ALASKA

FAITH J. MYERS, Appellant, vs. ALASKA PSYCHIATRIC INSTITUTE Appellee.	)	Supreme Court No. S-11021

Trial Court Case No. 3AN 03-00277 PR

OPPOSITION TO MOTION TO SUPPLEMENT THE RECORD ON APPEAL
With
ALTERNATIVE SUGGESTIONS

COMES NOW, Appellant, Faith Myers, by and through her attorney and opposes the State's Motion to Supplement the Record on Appeal (Motion) and offers alternative suggestions. As will be shown, the Motion presents very problematic material, which demonstrates the wisdom of the rule against allowing a party to interject new evidence on appeal.[1]

[1] As will be discussed, the stated purpose of the State's motion can be accomplished through the judicial notice mechanism which does not raise the problems of interjecting disputed issues of fact that have never been considered by the trial court into this appellate proceeding.

Opposition to Motion to Supplement the Record on Appeal.

The Motion recites the reason for the Motion is because "since the date of filing this appeal, events have happened and facts have changed that cause this appeal to have become moot," and that the affidavit "informs the court of" such facts. The problem is the affidavit is demonstrably inaccurate and unnecessary.

Paragraph, 6 of the Affidavit of Ronald M. Adler (Adler Affidavit), which is the material the state desires to supplement the record with, states:

> 6. On July 7, 2003, after it was determined that Ms. Myers no longer met the statutory criteria for involuntary commitment, she was discharged from the facility against medical advice, with the recommendation that she see Dr. Aron Wolf for follow-up care.

The truth is that Ms. Myers was discharged on July 3, 2003, under a Dismissal with Prejudice entered "pursuant to the oral stipulation of counsel" on July 3, 2003. See, Exhibit A. This was after jury selection had occurred in the trial of the State's 180 day commitment and forced medication petitions and opening statements had been given.

More specifically,

1. On June 11, 2003, the State filed a Petition for 180 Day Commitment (Initial 180 Day Commitment Petition). This petition did not allege Ms. Myers was likely cause harm to herself or others and listed "none" in the place where the State's witnesses are required to be set forth. See, Exhibit B.

2. On June 18, 2003, the State filed a Petition for Court Approval of Administration of Psychotropic Medication. See, Exhibit C.

3. In the morning on June 30, 2003, the day jury selection occurred for the trial on the Initial 180-day Commitment Petition and Forced Medication Petition, Ms. Myers filed a document styled Pre-Trial Motions and Brief,[2] in which, among other things, she moved that (a) the Initial 180-Day Commitment Petition be dismissed because it was legally defective in a number of respects, (b) the State be precluded from calling any witnesses because it designated "none" as the witnesses to be called, and (c) the State be precluded from presenting testimony regarding Ms. Myers dangerousness because it was not alleged in the Initial 180-Day Commitment Petition. See, Exhibit D.

4. Later that day, June 30, 2003, in the afternoon, a couple of hours after the trial day had concluded, the State faxed counsel a Second Amended Petition for 180-day Commitment (Second Amended Petition), which attempted to correct the legal deficiencies noted in the Pre-Trial Motions and Brief.[3] This Second Amended Petition, among other things, alleged dangerousness and listed a whole slew of witnesses. See, Exhibit E.

5. The next morning, July 1, 2003, counsel's notes and memory reflect that in the State's opening statement, counsel for the state informed the jury the State would present evidence that Ms. Myers was unpredictably volatile and the State had a concern about

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[2] There was a flurry of other pre-trial proceedings involving Ms. Myers attempts to gain a different judge, which were the occasion of proceedings in this court as well, including a Petition for Review in S-11116, a related motion for stay and a motion to disqualify that precluded filing this particular pleading prior to the start of trial.

safety,[4] and that Ms. Myers condition had gotten worse since she had been admitted to API in February of 2003.[5]

6. Following opening statement by Ms. Myers' counsel, the State's counsel, after a side-bar conversation with Dr. Hanowell, announced[6] that the hospital had utilized the emergency medication procedures that are only to be used in "crisis situations" and had injected Ms. Myers with Haldol the previous night.[7] Because Ms. Myers had the right under AS 47.30.725(e) "to be free of the effects of medication and other forms of treatment to the maximum extent possible," the trial was immediately suspended until Monday, July 7, 2003, to allow Ms. Myers to get free of the effects of this medication. However, the court scheduled an hour at 1:30 on Thursday, July 3, 2003, to hear matters that might be dealt with at that time.

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[3] Counsel was never served with a first amended petition.

[4] Counsel's notes reflect this occurred just a little before 8:49 on the court recording time counter.

[5] Counsel's notes reflect this was a little after 8:49 on the court recording time counter.

[6] Counsel's notes reflect this was essentially immediately after Ms. Myers opening statement was concluded at 9:21:41 on the court recording time counter.

[7] AS 47.30.838(a)(1) provides that the State may do this only if:

> there is a crisis situation, or an impending crisis situation, that requires immediate use of the medication to preserve the life of, or prevent significant physical harm to, the patient or another person, as determined by a licensed physician or a registered nurse.

7. On July 2, 2003, Ms. Myers filed a pleading styled Motions Occasioned by State's Improper Second Amended Petition and Related Matters, which included a motion to strike the Second Amended Petition as totally improper to file after the trial had commenced. See, Exhibit F.

8. Then, on July 3, 2003, as indicated above, the State agreed to a dismissal with prejudice in open court. Paragraph 9 of the Dismissal with Prejudice states that if Ms. Myers was discharged and released that day (July 3rd), she would not make application for attorneys fees. See, Exhibit A. No application for attorneys fees was made, indicating that Ms. Myers was released that day.

Thus, contrary to Mr. Adler's Affidavit, not only was Ms. Myers released on a different day than stated in the affidavit, but it is quite clear the release was the result of a negotiated stipulation and not because the State had determined Ms. Myers no longer met commitment criteria.[8] Ms. Myers has not had the opportunity to depose Mr. Adler or otherwise subject his proffered testimony to examination, other than the apparent conflict with the State's representations to the trial court and jury made at the time of the event in question as disclosed by the record as set forth above. This conflict with the State's

[8] As indicated, just two days before, the State had told the jury in opening statement that Ms. Myers was dangerous and her condition had worsened since she had been admitted in February of 2003. And just three days before, on June 30th, the State had filed its Seconded Amended Petition for 180 Day Commitment where it made all kinds of allegations that Ms. Myers met commitment criteria.

conduct and statements in these subsequent proceedings demonstrates the peril of just allowing this affidavit to "supplement" the record in this way.

Moreover, it is not necessary. The stated reason for "supplementing" the record is so the State can argue this appeal is moot because Ms. Myers has been released and the Forced Medication Order was never implemented. Ms. Myers does not dispute that Ms. Myers was released and the Forced Medication Order was never implemented. Nor does she object to the State making its mootness argument. In fact, on July 11, 2003, in her Partial Dismissal filed in this case because of the July 3, 2003, Dismissal With Prejudice , at footnote One, she states:

> Appellant believes this appeal should proceed as to these two remaining points on appeal. If the State disagrees, perhaps it would be best raised by it bringing a motion to dismiss or addressing the issue in its Brief on Appeal.

See, Exhibit G. The fact that Ms. Myers was released with the Forced Drugging Order never having been implemented can be brought to this court in manner other than through a motion to supplement the record with a new affidavit that was never presented to the trial court and, as has been shown, is, on its face, inconsistent with the actual record. Ms. Myers would not have objected to this.

Ms. Myers respectfully suggests this court can take judicial notice that Ms. Myers has been released from API without the Forced Medication Order ever being

implemented from its own file in this matter pertaining to the stay,[9] and from the subsequent proceedings in the Superior Court as set forth above.[10]

Alternative Suggestion.

Ms. Myers respectfully suggests as one possible alternative to the State's Motion to Supplement the Record with the new Adler Affidavit, that this court order the State to include the Dismissal with Prejudice in the Excerpt instead and make the minor modifications to its Brief that might be necessary because of this substitution. This actually is part of the court file in the subsequent proceedings and does not suffer from the accuracy problems noted with the Adler Affidavit. The Adler Affidavit is two pages as is the Dismissal with Prejudice, so references to the Excerpt will not even have to be changed.

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[9] In particular, this Court issued an Order on April 30, 2003, pertaining to the stay pending appeal, remanding the issue to the Superior Court for consideration, while at the same time making clear that even if the Superior Court denied the stay, an interim stay would remain in force for seven days to allow Ms. Myers the opportunity to have this Court review the matter. Due to a number of events, the Superior Court never acted upon this remand and the issue disappeared when the Dismissal with Prejudice was entered.

[10] The Motion doesn't mention the reason for paragraph 7 of Mr. Adler's Affidavit, but the Affidavit of Counsel does. Paragraph 7 is Mr. Adler testifying that he has no knowledge of any challenge to the statutory authority under which psychotropic medication is administered other than this case. One problem with this is Mr. Adler has been CEO of API for well under a year so his lack of knowledge is not particularly probative. However, the Court can certainly take judicial notice that no appeal has ever been filed on any case involving involuntary commitment or forced medication under AS 47.30. So, again, it is not necessary for this court to supplement the record with Mr. Adler's affidavit, which has the problem of dubious probity and has never been subjected to the crucible of the trial court process.

Another alternative is for this Court to simply take judicial notice from its and the Superior Court's files regarding the subsequent proceeding that Ms. Myers was released pursuant to the Dismissal with Prejudice without the Forced Medication Order ever having been implemented. It would appear this would necessitate somewhat more of a revision to the State's Brief than merely substituting the Dismissal with Prejudice for the Adler Affidavit.

Conclusion

For the foregoing reasons, Ms. Myers respectfully requests the Court DENY the State's Motion to Supplement the Record. As the alternative suggestion that seems most easily implemented, Ms. Myers proposes this court (1) take judicial notice that Ms. Myers was released without the Forced Medication Order ever having been implemented, (2) Order the State to substitute the Dismissal with Prejudice for the Adler Affidavit in the Appellee's Excerpt of Record, and (3) Order the State to make the minor modifications to its brief necessitated by this substitution. A form of Order to accomplish this is lodged herewith for the Court's consideration.

Dated this 2nd day of December, 2003 at Anchorage, Alaska.

LAW PROJECT FOR PSYCHIATRIC RIGHTS

By: _____
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