

MEMORANDUM

September 21, 2006

A New York State intermediate appellate court, the Appellate Division, Second Judicial Department, has rejected a challenge by MHLS to a lower court order authorizing involuntary electro-shock treatment of Simone D., a patient at Creedmoor Psychiatric Center, a state hospital in Queens, New York. The Appellate Division, in its 3-to-2 September 19, 2006 decision, Matter of Simone D. (Anonymous), affirmed the lower court, with a strong dissent by two justices.

The trial court's order had authorized the administration of up to 30 shock treatments over a period of six months, with the frequency to be determined by the hospital's "ECT team." Simone D. previously had been given at least 148 shock treatments over her objection by Creedmoor under previous court orders.

The testimony of the hospital psychiatrist before the hearing court had established that previous shock treatment had neither brought about a remission of Simone D.'s depression nor restored her capacity to make her own treatment decisions, that the claimed benefits always dissipated upon the discontinuation of shock, and that the treatment had never brought Simone D. to a condition where Creedmoor was willing to discharge her to the community. At the conclusion of that doctor's testimony she was asked:

Do you have any hope to offer Simone [D.] . . . other than a lifetime of court ordered electroshock treatment and depression at . . . Creedmoor Psychiatric Center?

The doctor answered:

I don't have, at this particular time, I don't have anything else to offer her.

Cross examination of the doctor also revealed that shock treatment was discontinued in 1996, due to a frontal organic brain syndrome secondary to ECT.

The court severely limited the cross examination of the Creedmoor psychiatrist by Simone D.'s MHLS attorney, disallowing many questions about the nature of shock treatment and its effect. For example, when the doctor was questioned about the nature of grand mal seizures and epilepsy, objections from the hospital's attorney were sustained and the court stated that it was "familiar with that". At another point, in precluding questioning about shock treatment, the judge declared, "The court is familiar with how it is done".

The court also denied MHLS's repeated requests that an independent psychiatrist be appointed to assess the desirability of giving Simone D. further shock treatment.

The Appellate Division's majority decision ruled that the trial court "did not improperly curtail the cross-examination" of the hospital psychiatrist, noting that the cross-examination covered 44 pages of the hearing transcript while the direct examination took only 13 pages. The three appellate justices also rejected MHLS's argument that the hearing judge improperly relied upon his own presumed knowledge of shock treatment. Finally, the panel found the denial of the application for the appointment of an independent psychiatrist to be a proper exercise of the court's discretion.

The two dissenting justices argued that the trial judge "prevented Simone D. from making a record that could be reviewed on appeal and instead became a silent witness relying on its own knowledge of ECT." The dissent found that to be reversible error, "particularly because of the extensive course of ECT treatments to which Simone D. has been subjected since 1995 without long-range benefit."

Since the Appellate Division decision was 3 to 2, and the ruling was on points of law and not just on the facts, Simone D. may appeal to the state's highest court, the Court of Appeals, as a matter of right. The Appellate Division had earlier stayed enforcement of the forced shock order pending appeal, and that stay will remain in effect while the decision is appealed to the high court.

While we are disappointed with the outcome of our first level appeal, we believe that Simone D. has a very strong case, and we are encouraged by the forceful dissent. We hope that, with the support of one or more briefs from friends of the court, we will ultimately prevail.