IN THE COURT OF APPEALS OF IOWA

No. 0-171 / 09-0922
Filed April 8, 2010

IN THE MATTER OF E.R.,
Alleged to be Seriously
Mentally Impaired,

E.R.,
Respondent-Appellant.

Appeal from the Iowa District Court for Cherokee County, Donavon D. Schaefer, Judge.

E.R. appeals from various orders regarding his civil commitment. **AFFIRMED.**

E.R., Cherokee, pro se.

Peter M. Parry of Forker and Parry, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Gretchen Witte Kraemer, Assistant Attorney General, and Ryan Kolpin, County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

E.R. appeals from appeals from various orders regarding his civil commitment under Iowa Code chapter 229 (2009). He contends the district court erred in authorizing the medical staff to administer medications against his will and in ordering his continued commitment and placement for treatment. We affirm.

One of the problems in this proceeding is deciphering what orders E.R. is intending to appeal from. E.R. filed a first notice of appeal on June 2, 2009,[1] attempting to appeal the initial order that was filed on May 21. The May 21 order adjudicated him as seriously mentally impaired and required him to be hospitalized for treatment, including "oral and/or injectible meds," if necessary.

On June 15, E.R. filed a second notice of appeal "to the Supreme Court" that we believe seeks to appeal the May 21 order, as well as one of the two orders entered on June 10. Both June 10 orders were entered by a district associate judge—the first order (mailed by the clerk on June 10) concludes that E.R.'s May 26 notice of appeal was untimely and dismissed the appeal; the second order (mailed by the clerk on June 12) continues E.R.'s hospitalization and commitment after receipt of a report from the chief medical officer of the Cherokee Mental Health Institute.

Although E.R.'s second notice of appeal was filed on June 15, we note that E.R.'s proof of service reflects the date of June 11. Thus, at the time that E.R. mailed his June 15 notice of appeal, he clearly had not received the June 10 order continuing his commitment (as that order was not mailed by the clerk until

[1] All orders and appeals mentioned hereinafter were filed in 2009.

June 12). As a result, we believe E.R.'s appeal is with regard to the June 10 order dismissing his May 21 appeal.

As provided in the May 21 order, E.R. was entitled to appeal by providing "written notice of the appeal to the clerk of the district court within ten days after the date of this order." *See* Iowa Code § 229.21(3)(d). E.R.'s notice of appeal was filed on June 2—one day late.

We also observe that E.R.'s pro se notice of appeal includes a motion to the court "to extend any limitation days to file these motions at hand." Additionally, in the body of the order he indicates that, "also no one delivered these said documentations to Respondent until on May 29, 2009." However, the clerk of court's proof of mailing reflects that the May 21 order was mailed on May 21.

Notwithstanding the fact that Iowa Code section 229.21(3)(a), (b) provides that a respondent "may" appeal the referee's order to the district court, our supreme court has stated:

> The right to appeal is strictly governed by statute. *See James v. State*, 479 N.W.2d 287, 290 (Iowa 1991). The hospitalization statute does not specifically authorize an applicant to appeal. However, the hospitalization process is a civil proceeding under the jurisdiction of the district court. Under our appellate rules, a final civil judgment of the district court may be appealed to the supreme court. Iowa R. App. P. 1(a). Therefore, we must decide if the dismissal order by the referee constituted a final judgment of the district court for the purposes of an appeal.
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> We have previously considered whether juvenile court referees and probate referees could issue final decisions for the purpose of appeal. In *In re D.W.K.*, 365 N.W.2d 32 (Iowa 1985), we held that a juvenile court referee had concurrent jurisdiction to issue a final decision for the purposes of appeal since our legislature, in defining the authority of a referee, specified the referee had "the same jurisdiction to . . . issue orders . . . as the judge of the juvenile court." *D.W.K.*, 365 N.W.2d at 33-34. On the

> other hand, we found no direct appeal existed from a decision by a probate referee because the governing statute reflected no similar grant of concurrent jurisdiction. *In re Estate of Willis*, 418 N.W.2d 857, 859 (Iowa 1988). Instead, we held a party needed to first seek district court review of a decision of the probate referee before invoking appellate jurisdiction. *Id.*
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> Although jurisdiction over hospitalization proceedings exists with the district court, our legislature established hospitalization referees to assist the district court in discharging the general duties of the hospitalization process. It specifically provided that the orders issued by referees in the discharge of those duties have the "same force and effect as if ordered by a district judge." Iowa Code § 229.21(2). Furthermore, except for commitment orders under section 229.21(3), the legislature did not provide for district court review of orders entered by referees. This lack of review reveals that an order for dismissal by the referee constitutes a final judgment for the purposes of appeal. *See D.W.K.*, 365 N.W.2d at 34. Thus, this case is properly before us to consider the authority of the referee to dismiss the case.

In re Melodie L., 591 N.W.2d 4, 6-7 (Iowa 1999).

Thus, an applicant, and by extension a respondent, may directly appeal a referee's order to the supreme court. *Id.* at 7. Therefore, we conclude that E.R.'s June 15 notice of appeal serves as a direct appeal of the referee's May 21 order. E.R.'s June 2 notice of appeal to the district court that was subsequently dismissed as untimely does not impair his present appeal.

In attempting to review the referee's decision, we first note that E.R. states that there is no transcript for the May 21 hearing. No further explanation has been provided for the absence of a transcript. Iowa Supreme Court Rule 12.20 provides that:

> An electronic recording or other verbatim record of the hearing provided in Iowa Code section 229.12 shall be made and retained for three years or until the respondent has been discharged from involuntary custody for 90 days, whichever is longer.

Iowa Ct. R. 12.20 (2010). Our appellate rules provide that where there is no record of the proceedings at a hearing or trial, the appellant "may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection," subject to objections or amendments by the appellee. Iowa R. App. P. 6.806(1), (2). No showing has been made that E.R. or his appellate counsel attempted to comply with Iowa Rule of Appellate Procedure 6.806 to prepare a statement of the evidence when a record of the proceedings or transcript is unavailable.

We observe that E.R.'s appellate counsel and trial counsel were different, and this further handicaps E.R.'s appeal. *See In re T.V.*, 563 N.W.2d 612, 614 (Iowa 1997). Our supreme court has noted:

> Even though a complete transcript cannot be created, we must still determine whether this warrants a reversal. Unavailability of a transcript does not automatically entitle an appellant to a reversal. *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). The entire transcript is not required if the record is sufficiently complete to permit full and fair appellate review. *Id.* at 164.
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> However, when appellate and trial counsel are different, the United States Supreme Court has emphasized the importance of appellate counsel having a complete trial transcript. *See Hardy v. United States*, 375 U.S. 277, 282, 84 S. Ct. 424, 428, 11 L. Ed. 2d 331, 335-36 (1964). In *Hardy*, the concurring opinion discussed the importance of a complete transcript:
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> > [T]he most basic and fundamental tool of [an appellate advocate's] profession is the complete trial transcript, through which his trained fingers may leaf and his trained eyes may roam in search of an error, a lead to an error, or even a basis upon which to urge a change in an established and hitherto accepted principle of law. Anything short of a complete transcript is incompatible with effective appellate advocacy.
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> *Id.* at 288, 84 S. Ct. at 431, 11 L. Ed. 2d at 339 (Goldberg, J., concurring). One court described the difficulties an appellate counsel encounters when the record or transcript is not complete:

> The attorney, [who is] present at trial, should be expected to be aware of any errors or improprieties which may have occurred during the portion of the proceedings not recorded. But when a defendant is represented on appeal by counsel not involved at trial, counsel cannot reasonably be expected to show specific prejudice . . . . Often, . . . even the most careful consideration of the available transcript will not permit us to discern whether reversible error occurred while the proceedings were not being recorded. In such a case, to require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to notice plain errors or defects, and render merely technical his right to appeal.
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> *United States v. Selva*, 559 F. 2d 1303, 1306 (5th Cir. 1977) (citation omitted).
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> Here, through no fault of Staudt or T.V., Staudt was unable to review important portions of the record of the hearing. Further, he had no independent knowledge of trial events except as revealed by the incomplete, uncertified transcript. With these impediments, Staudt is unable to establish whether substantial evidence of guilt was presented during the inaudible or unrecorded portions of the adjudicatory hearing. Therefore, we conclude the unavailability of a complete transcript in this case entitles T.V. to a new hearing.

Id. at 614-15.

However, a failure to comply or a failure to make a reasonable effort to comply with Iowa Rule of Appellate Procedure 6.806 precludes relief on appeal. *In re F.W.S.*, 695 N.W.2d 134, 136 (Iowa 2005). Here, there is no indication that any effort was made to comply with rule 6.806. As E.R. has failed to provide a proper record or make any effort to comply with our appellate rule, we affirm the referee's decision. *Id.*

AFFIRMED.