**IN THE COURT OF APPEALS OF IOWA**

No. 0-811 / 10-0701
Filed November 10, 2010

**IN THE INTEREST OF E.S.,**
**Alleged to be Seriously Mentally Impaired,**

**E.S.,**
Respondent-Appellant,

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Appeal from the Iowa District Court for Dallas County, Darrell Goodhue, Judge.

E.S. appeals the district court's ruling that he is seriously mentally impaired. **AFFIRMED.**

Shane C. Michael of Michael Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Gretchen Witte Kraemer, Assistant Attorney General, Wayne Reisetter, County Attorney, and Sarah C. Pettinger, Assistant County Attorney, for appellee State.

Considered by Mansfield, P.J., and Danilson and Tabor, JJ.

**DANILSON, J.**

E.S. appeals from the district court's ruling that he is seriously mentally impaired.[1] He contends the district court erred in finding there was clear and convincing evidence of serious mental impairment as defined in Iowa Code section 229.1(17) (2009).[2]

An involuntary civil commitment proceeding is a special action that is triable to the court as an action at law. *In re Oseing,* 296 N.W.2d 797, 800-01 (Iowa 1980); *In re B.T.G.*, 784 N.W.2d 792, 796-98 (Iowa Ct. App. 2010). We review challenges to the sufficiency of the evidence for errors at law. *See* Iowa R. App. P. 6.907. The district court's findings of fact are binding upon this court if supported by substantial evidence. *In re J.P.,* 574 N.W.2d 340, 342 (Iowa 1998). Evidence is substantial if a reasonable trier of fact could conclude the findings were established by clear and convincing evidence. *Id.*

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[1] The State contends the issue may be moot based upon a July 9, 2010 periodic report, which indicates that E.S. has been recommended for release. We do not find the appeal moot because there is no indication the discharge has actually occurred.

[2] Section 229.1(17) provides:

> "Seriously mentally impaired" or "serious mental impairment" describes the condition of a person with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to the person's hospitalization or treatment, and who because of that illness meets any of the following criteria:
>
> a. Is likely to physically injure the person's self or others if allowed to remain at liberty without treatment.
>
> b. Is likely to inflict serious emotional injury on members of the person's family or others who lack reasonable opportunity to avoid contact with the person with mental illness if the person with mental illness is allowed to remain at liberty without treatment.
>
> c. Is unable to satisfy the person's needs for nourishment, clothing, essential medical care, or shelter so that it is likely that the person will suffer physical injury, physical debilitation, or death.

A person who has a "serious mental impairment" may be committed involuntarily. In determining whether a person has a serious mental impairment, the person must be found to have:

> (1) a mental illness, consequently (2) to lack "sufficient judgment to make responsible decisions with respect to the person's hospitalization or treatment" and (3) to be likely, if allowed to remain at liberty, to inflict physical injury on "the person's self or others," to inflict serious emotional injury on a designated class of persons, or be unable to satisfy the person's physical needs.

*J.P.,* 574 N.W.2d at 342-43 (citations omitted); *see also* Iowa Code § 229.1(17).

Dr. James Dennert's report indicates E.S. suffers from major depression, depressed mood, irritability, decreased energy, and poor sleep. E.S. does not dispute he has a mental illness. He does challenge the second and third elements, judgmental capacity and dangerousness to self or others.

The second element, judgmental capacity, "requires the State to prove that the person is unable because of the alleged mental illness, to make a rational decision about treatment, whether the decision is to seek treatment or not." *In re Mohr,* 383 N.W.2d 539, 541 (Iowa 1986). Here, the district court found that despite Dr. James Dennert's report, the testimony of E.S.'s wife and daughters provided support as to this element.

Ms. S. testified that E.S. had suffered from depression for at least ten years and had been hospitalized recently for suicidal statements made to his therapist. She testified that E.S. seemed different after a therapy session on Thursday (February 11) and then on February 13, 2010, despite the family having hidden his firearms after the previous hospitalization, E.S. obtained a gun and left the house stating it was going to be "suicide by cop." Police were called

and they subdued E.S. by shooting him with bean bag pellets. Ms. S. stated that when he was released on February 15, he stated "he wished the cops had finished it." She further testified that on Friday (February 19) she had returned home from work to find him lying on the bed. She called an ambulance and at the hospital it was determined he had overdosed. Ms. S. testified her husband was not able to make reasonable decisions with regard to his own treatment because of his mental illness.

E.S.'s daughters both testified as well and expressed concern about their father's depression and suicide attempts. His youngest daughter testified about the February 13 incident, and that since he had returned home E.S. stated, "too bad the cops failed." His eldest daughter, with whom he normally had a close relationship, testified E.S. would not look at her. She testified,

> I love him dearly, but he won't even look at me right now. So as close as we are, the fact that he won't look at me is huge . . . .
>
> . . . .
>
> He is not dumb. He tried it with guns or cop by suicide [sic]. He tried overdose in my mind. You can't tell me there is not a rope in the barn or the garage. That's what we're afraid of, is there is going to be something next.

The record indicates even when E.S. takes his medication, he has suicidal behavior. Although E.S.'s counsel indicated E.S. is voluntarily attending sessions with a therapist and taking his medications, E.S.'s family members expressed their belief he needs court-ordered treatment. Dr. Dennert's February 15, 2010 report, which indicated E.S. was not "likely to physically injure himself . . . or others if allowed to remain at liberty without treatment" and that E.S. could be released to the custody of relatives while receiving outpatient therapy, was contradicted by E.S.'s subsequent overdose. Based on the

evidence in the record, we conclude the second element of a serious mental impairment, lack of judgmental capacity, was satisfied.

The third element, dangerousness, involves "likely physical injury to oneself or others." *J.P.,* 574 N.W.2d at 343. The threat the patient poses to himself or others must "be evidenced by a recent overt act, attempt or threat." *Mohr,* 383 N.W.2d at 543 (citation omitted). Overt acts include behavior such as threats to kill. *In re Foster,* 426 N.W.2d 374, 379 (Iowa 1988). E.S.'s "suicide by cop" attempt on Febuary 13, and his attempted overdose on February 19, are examples of recent overt acts supporting the court's February 22, 2010 commitment.

The fact that there is conflicting evidence in the record does not preclude, as a matter of law, a finding of clear and convincing evidence. *See Green v. Harrison*, 185 N.W.2d 722, 723 (Iowa 1971). The State's burden to prove the allegations by clear and convincing evidence requires "'that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.'" *J.P.*, 574 N.W.2d at 342 (quoting *In re L.G.*, 532 N.W.2d 478, 481 (Iowa Ct. App. 1985)).

Because the second and third elements of "serious mental impairment" were satisfied, and the first element was undisputed, we affirm the commitment order under chapter 229.

**AFFIRMED.**