29 A.D.3d 221
Supreme Court, Appellate Division, First Department, New York.

The STATE of New York ex rel. Stephen J. HARKAVY on behalf of John Does 1 through 12, Petitioners–Respondents–Appellants,
v.
Eileen CONSILVIO, Executive Director, Manhattan Psychiatric Center and Kirby Forensic Psychiatric Center,
Respondent–Appellant–Respondent.

March 30, 2006.

Synopsis

Background: Writ of habeas corpus was sought on behalf of former prisoners who had been involuntarily committed to psychiatric treatment centers immediately after their prison terms ended. The Supreme Court, New York County, Jacqueline W. Silbermann, J., 10 Misc.3d 851, 809 N.Y.S.2d 836, granted petition in part, and parties cross-appealed.

Holdings: The Supreme Court, Appellate Division, Malone, J., held that:

[1] Correction Law governing transfer of mentally ill prisoners to mental hospitals was not applicable;

[2] Department of Correctional Services (DOCS) had standing to make application for involuntary commitment of prisoners;

[3] procedure for involuntary civil psychiatric commitment did not deprive prisoners of their due process rights under the Fourteenth Amendment;

[4] writ of habeas corpus should have been brought pursuant to habeas statute directed exclusively to those retained in psychiatric facilities, rather than general habeas statute; and

[5] review as to the state of each prisoner's mental disability was required.

Reversed.

Attorneys and Law Firms

****498** Eliot Spitzer, Attorney General, New York (Julie Loughran, Caitlin J. Halligan and Daniel Smirlock of counsel), for appellant-respondent.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Sadie Zea Ishee, Stephen J. Harkavy and Karen Gomes Andreasian of counsel), for respondents-appellants.

PETER TOM, J.P., DAVID FRIEDMAN, JOSEPH P. SULLIVAN, JAMES M. CATTERSON, BERNARD J. MALONE, JR., JJ.

Opinion

MALONE, J.

***222** We are asked on this appeal to determine whether petitioners, all of whom at least three doctors have found so dangerously mentally ill as to require their involuntary civil commitment to inpatient psychiatric facilities, are subject to procedures under Mental Hygiene Law (MHL) article 9, which applies to the general public, or Correction Law § 402, which applies to mentally ill prisoners. On the facts presented, we find no basis to provide petitioners heightened due process protections not afforded to their non-incarcerated counterparts and thus would hold that respondent Eileen Consilvio properly proceeded pursuant to the MHL in committing petitioners for involuntary psychiatric hospitalization.

Much publicized in the news, this is an appeal and cross appeal from the partial grant of a habeas corpus petition, denominated one under CPLR article 70, for the release of 12 individuals currently committed to Office of Mental Health (OMH) psychiatric facilities. Each of the 12 petitioners was, immediately ***223** prior to his commitment, in the custody of the Department of Correctional Services (DOCS). Each was a felony sex offender about to be released from prison when two OMH physicians certified his need for commitment pursuant to MHL § 9.27 based upon their examinations and their findings that in each case, petitioner suffered from a mental illness and without inpatient psychiatric treatment would likely seek additional sexual victims upon his release from prison into the broader community. And in each case, before the individual's release, the prison superintendent completed an Application for Involuntary Commitment on Medical Certification. Then, upon the expiration of his sentence, each petitioner was transported to the OMH facility where he was examined by a third OMH physician, who found him in need of commitment.

None of the petitioners challenged his retention. Rather, over a month after the first petitioner was committed, Mental Hygiene Legal Service (MHLS) brought this proceeding on all of petitioners' behalf, arguing that

petitioners' retention was unlawful because it should have been made, if at all, pursuant to the procedures of the Correction Law which, in contrast to ****499** MHL § 9.27, provides for a pre-commitment hearing. Petitioners also argued that MHL article 9 procedures as applied to them were unconstitutional. Respondent argued that MHL article 9 was properly applied to petitioners because at the time they were committed, they were no longer serving sentences of imprisonment.

The IAS court granted the petition, finding that since the petitioners were never out of custody at the time of their commitment, they could only have been committed pursuant to the procedures of Correction Law § 402. It then directed respondent to allow for the examination of each petitioner by two independent examining physicians to be appointed by the court and ordered the immediate release of any petitioner who was not certified by both physicians as mentally ill, in need of care and treatment at a psychiatric hospital, and posing a substantial threat of physical harm to themselves or others.

Statutory Framework

"Unless otherwise specifically provided for by statute," MHL article 9 governs all admissions of mentally ill patients to in-patient psychiatric facilities which the Director oversees (MHL § 9.03). The MHL in general, and § 9.27 in particular, places primary ***224** authority over admissions in the hands of doctors and ensures that commitment occurs only after several preconditions have been met. First, at least two physicians must certify that an individual is "mentally ill"[1] according to the statutory scheme, that involuntary care and treatment is necessary or essential to his welfare and that his "judgment is so impaired that he is unable to understand the need for such care and treatment" (MHL § 9.01, § 9.05[b], § 9.27[a]; *see Matter of Gilliard v. Sanchez,* 219 A.D.2d 500, 631 N.Y.S.2d 330 [1995]). Second, the two physician certifications must be accompanied by an application for admission executed within 10 days prior to admission by one of several statutorily designated persons (MHL § 9.27[b]). Third, the prospective patient must be brought to the inpatient psychiatric facility and examined there forthwith by a third physician who must concur with the conclusion of the two original certifying physicians (MHL § 9.27[e]).

[1] Under the Mental Hygiene Law, a "mental illness" is "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation" (MHL § 1.03[20]).

A patient may demand a hearing before Supreme Court within 60 days of his involuntary admission (MHL § 9.13); if no such demand is made, he can be held for only 60 days, unless an application is made authorizing continued retention for up to six months (MHL § 9.33[a], [b]). Upon receipt of such application, the patient may demand, or the court on its own motion may calendar, a hearing on the need for involuntary retention (MHL § 9.33[c]). Finally, within 30 days after an adverse decision following an MHL § 9.31 or § 9.33 hearing, a patient may demand a rehearing and review of the prior proceeding before a jury (MHL § 9.35).

Similarly, the procedures set forth in the Correction Law ensure that only inmates who are both mentally ill and in need of inpatient care and treatment are committed involuntarily (Correction Law § 400[4]). If a dangerously mentally ill person undergoing a sentence of imprisonment cannot be safely held in the prison, application is made by the prison superintendent to the court to cause an examination to be made of such person by two examining physicians (Correction Law § 402[1]). In New York City, the petition ****500** seeking commitment must include two physician certificates ***225** stating that the prisoner is mentally ill and in need of care and treatment, and must be served personally upon the alleged mentally ill prisoner (Correction Law § 402[2–3]). The court may, upon request or its own motion, hold a hearing and, if deemed advisable, examine the alleged mentally ill person either in or out of court (Correction Law § 402[4–5]).

The inmate upon his commitment becomes an "inmate-patient" (MHL § 29.27 [a]) and is in the custody of OMH for the period stated in the order of commitment. If hospitalization is no longer necessary, custody of the inmate reverts back to DOCS and OMH's responsibility for him terminates (MHL § 29.27[e], [f]). If, on the other hand, continued hospitalization beyond the authorized period or expiration of sentence is necessary, retention must be made in accordance with MHL article 9 (MHL § 29.27[c]; Correction Law § 404[1]).

Discussion

[1] It is a cardinal rule of statutory construction that all parts of an act should be harmonized, to be read and construed together in a manner most consistent with the overall legislative intent (*Matter of Pilgrim Psychiatric Ctr.,* 197 A.D.2d 204, 207, 610 N.Y.S.2d 962 [1994]; McKinney's Cons. Laws of N.Y., Book 1, Statutes, §§ 97, 98). Completely overhauled by the Legislature in 1976, Correction Law article 9 along with the inmate-patient provision of MHL § 29.27, was enacted to ensure that, in concert with DOCS, OMH provide mentally ill inmates appropriate psychiatric care in both prison and psychiatric hospitals when necessary, and upgrade the quality of care while at the same time providing adequate assurances of

security for the duration of the inmate's sentence (Governor's Mem approving L. 1976, ch. 766, § 1, reprinted in 1976 McKinney's Session Laws of N.Y., at 2445; Mem of State Executive Dept, reprinted in 1976 McKinney's Session Laws of N.Y., at 2397–2398). Because the Correction Law applies only to persons undergoing a sentence of imprisonment, it contemplates return to a DOCS facility. Indeed, Correction Law § 404(1) states that the MHL commitment procedures control where a hospitalized inmate no longer serving a sentence becomes a free individual.

[2] Based upon the facts presented here, we believe that the Supreme Court's holding that Correction Law § 402 governs petitioners' commitments is inconsistent with its plain meaning and legislative intent. The Correction Law clearly does not apply ***226** to the two petitioners whose applications were submitted on the date of their release. As to the remaining 10 petitioners, whose applications were submitted from one to four days prior to their conditional release, release to parole supervision or expiration of their terms, there was no possibility that they would be returned back to DOCS' custody as the Correction Law contemplates. Moreover, a few hours or days remaining in the sentence of these individuals as of the time of the application did not, as Supreme Court postulated, render them "persons serving a sentence of imprisonment." Such a reading finding the Correction Law applicable to these petitioners is hypertechnical and without support in the legislative intent.

Conversely, by its plain text, MHL applies to petitioners (MHL § 9.03). Under the MHL scheme, a petitioner's status is fixed not on the date of the application seeking commitment but rather on the date of "commitment," i.e., the date of the certification of the third physician confirming the necessity of commitment. Here, each petitioner was committed on the date of his release from prison. Thus, at the ****501** time of commitment, each petitioner was a free citizen no longer "undergoing a sentence of imprisonment." As such, under both the MHL and the Correction Law, respondent properly sought retention in accordance with MHL article 9 (MHL § 29.27[c]; Correction Law § 404 [1]).

[3] We nonetheless agree with Supreme Court that DOCS had standing to make the applications pursuant to MHL.[2] Pursuant to MHL § 9.27(b)(4), "an officer of any public or well recognized charitable institution or agency or home in whose institution the person alleged to be mentally ill resides" may execute an application for involuntary commitment. By reading this section so that "public" and "well recognized" apply to "charitable," and "charitable" modifies "institution," "agency" and "home," petitioners read the section as applying to: an officer of a public charitable institution, charitable agency or charitable home, or a well-recognized ***227** charitable institution, charitable agency or charitable home. Conversely, respondent's reading of the provision is that it applies to: a public institution, public agency or public home, or a well-recognized charitable institution, charitable agency or charitable home. Respondent's interpretation of the statute is correct.

[2] In a related matter entitled *State of New York ex rel. Harkavy v. Consilvio,* 11 Misc.3d 1053(A), 2006 N.Y. Slip Op. 50191(U), *5, 2006 WL 346534, *1–*2, 2006 N.Y. Misc. LEXIS 258, *13, N.Y.L.J., Feb. 15 2006, at 22, col. 1, Justice Silbermann reversed herself, stating that she misread MHL § 9.27(b). She ruled that "[c]learly, a prison superintendent is not an officer of a charitable institution or agency, and, as such, is not an appropriate applicant for the involuntary admission of a person pursuant to § 9.27 of the Mental Hygiene Law."

As a matter of grammar, the repeated use of the disjunctive "or" in the sentence indicates that both "public" and "well recognized charitable" entities are authorized to make the application. As a matter of word choice, the term "agency" commonly refers to governmental entities, which suggests that the term "public" modifies institution, agency and home. Moreover, the second use of the term "institution" suggests that the section is to apply not just to charitable institutions. Finally, as supported by the legislative history, the 1976 amendments adding the words "public" to the statute, where there had before been only "charitable," further suggest that "public" was to have independent meaning. Thus, as a public agency in whose institution the individual resided at the time of the application, DOCS had standing to make the application.

[4] Petitioners' alternative argument, that the procedures under MHL article 9 deprived them of their due process rights under the Fourteenth Amendment, is also baseless (*Project Release v. Prevost,* 722 F.2d 960 [1983]; *Matter of K.L.,* 1 N.Y.3d 362, 371, 774 N.Y.S.2d 472, 806 N.E.2d 480 [2004]). Distinguishable on its facts is *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 [1980], where the United States Supreme Court struck down a Nebraska statute which allowed transfers of prisoners to a psychiatric hospital without a pre-deprivation judicial hearing. Since petitioners were no longer prisoners at the time of their commitment, any *Vitek* concerns are not present.

Vehicle for Relief

[5] Petitioners commenced the instant habeas corpus proceeding pursuant to CPLR article 70. This was error. By its express terms, CPLR article 70 applies to all cases in which habeas relief is sought "[e]xcept as otherwise prescribed by statute" (CPLR 7001; *see also* CPLR 101). Under the MHL, habeas relief is specifically ****502**

available to both inmate-patients committed to civil psychiatric facilities pursuant to Correction Law § 402 (MHL § 29.27[c]) and those retained in psychiatric facilities (MHL § 33.15). Accordingly, ***228** MHL § 33.15, which is directed exclusively to those retained in psychiatric facilities, is the more specific habeas provision and thus controlling in these mental hygiene cases (*Matter of Lupoli,* 275 A.D.2d 44, 50, 714 N.Y.S.2d 497 [2000]; *cf. People ex rel. Ledwith v. Board of Trustees of Bellevue & Allied Hosps.,* 238 N.Y. 403, 408, 144 N.E. 657 [1924]).

[6] While the Supreme Court correctly concluded that the petition should have been brought pursuant to MHL § 33.15, by ordering the conditional release of petitioners upon one examining physician's certification that they are not "mentally ill, in need of care and treatment at a psychiatric hospital, and pose a substantial threat of physical harm to themselves or others," it did not follow the provisions of that section. MHL § 33.15(b) states:

> Upon the return of such a writ of habeas corpus, the court shall examine the facts concerning the person's alleged mental disability and detention. The evidence shall include the clinical record of the patient and medical or other testimony as required by the court. The court may review the admission and retention of the person pursuant to the provisions of this chapter. The court shall discharge the person so retained *if it finds that he is not mentally disabled or that he is not in need of further retention for in-patient care and treatment* (emphasis added).

Given this language, MHL § 33.15 requires a judicial determination of sanity in each case (*see also Matter of Stone,* 294 A.D.2d 59, 740 N.Y.S.2d 335 [2002]; *People ex rel. Thorpe v. Von Holden,* 63 N.Y.2d 546, 483 N.Y.S.2d 662, 473 N.E.2d 14 [1984]). The court's order conditionally releasing petitioners without conducting its own review as to the state of each individual's mental disability was improper.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about November 15, 2005, which granted the habeas corpus petition insofar as to order the conditional release of petitioners, should be reversed, on the law, without costs, the order for the conditional release vacated and the petition dismissed.

***229** Order and judgment (one paper), Supreme Court, New York County (Jacqueline W. Silbermann, J.), entered on or about November 15, 2005, reversed, on the law, without costs, the order for the conditional release of petitioners vacated and the petition dismissed. Motion seeking leave to enlarge record and file an extended sur-reply denied.

All concur.

Parallel Citations

29 A.D.3d 221, 812 N.Y.S.2d 496, 2006 N.Y. Slip Op. 02451