FILED
2018 JUL 31 PM 12:50
BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY OH

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	*	**CASE NO. 2017 CR 00461**
PLAINTIFF	*	
VS.	*	**AMENDED DECISION/ENTRY FINDING DEFENDANT TO BE INCOMPETENT TO STAND TRIAL AND DENYING MOTION FOR ORDER OF FORCED MEDICATIONS (REV. 7/31/18)**
ROSEMARY REINHART	*	
DEFENDANT	*	

This decision is being revised solely to correct certain incorrect references to the Court Clinic and to Summit Behavioral Healthcare.

This cause came before the court for hearing on the 26th day of June 2018, with the defendant present and represented by attorney W. Stephen Haynes and with the state represented by assistant prosecuting attorney Robert A. Herking, with respect to the following matters- 1) the defendant's competency with respect to a community control violation charge that has been filed by the Probation Department, 2) if the defendant is incompetent, whether there is a substantial probability that she will become competent within one year if she is provided with a course of treatment, 3) if the defendant is incompetent, but there is a substantial probability that she will become competent within one year if she is provided with a course of treatment, the least restrictive alternative place of commitment that is consistent with public safety and treatment goals, and 4) the request of Summit Behavioral Healthcare for an order authorizing the involuntary administration of medications.

The court rendered findings as to the first three issues set forth above, and the full findings are set forth below. The court continued the fourth issue in order to give counsel for the parties an opportunity to brief the issue.

On June 29, 2018, the state filed a memorandum in support of the request of Summit Behavioral Healthcare for an order authorizing the involuntary administration of medications. On July 3, 2018, the defendant filed a memorandum in opposition to the request.

Upon receipt of the memoranda of counsel, the court took Summit Behavioral Healthcare's request under advisement. On both June 26, 2018 and July 17, 2018, the court indicated that the court would probably overrule the request in accordance with the caselaw that had been submitted by defense counsel, but the court also indicated that it would review the matter in more depth and would issue a written decision on the request.

Upon consideration of the request of Summit Behavioral Healthcare, the record of the proceedings, the written and oral arguments of counsel, and the applicable caselaw, the court now renders this written decision.

PROCEDURAL BACKGROUND

On August 3, 2017, the defendant was indicted in this case on two counts of felonious assault. It was alleged in the indictment that the defendant, on or about July 27, 2017, knowingly caused or attempted to cause physical harm to two peace officers by means of a deadly weapon.

On August 18, 2017, the state filed a bill of particulars alleging that on July 27, 2017, two law enforcement officers responded to the defendant's residence for a welfare check. While in the residence, the defendant began yelling at the officers and then grabbed a large kitchen knife. As officers were backing away from the defendant, she lunged toward the officers, slashing with the knife several times. She then dropped the knife, attempted to push past officers, and was restrained, placed in handcuffs, and arrested.

On September 25, 2017, the defendant was found to be incompetent to stand trial and was ordered to undergo treatment and inpatient psychiatric hospitalization at Summit Behavioral Healthcare as the least restrictive alternative that was consistent with public safety and treatment goals.

On December 15, 2017, a report was received from Summit Behavioral Healthcare opining that the defendant had been restored to competency.

On December 28, 2017, the defendant was found by the court to have been restored to competency, and the defendant was released from the Jail on a recognizance bond conditioned on the defendant complying with instructions from the Probation Department which included mental health treatment through the Veterans Administration.

On February 8, 2018, the state dismissed one of the counts of felonious assault and amended the other count to misdemeanor assault, punishable by a maximum term of incarceration of 180 days. The defendant entered a plea of guilty to the misdemeanor assault charge, and assistant prosecuting attorney Robert Herking, as part of his statement of facts, stated that the defendant attempted to cause physical

harm to one of the officers. The defendant agreed to this statement of facts and was found guilty of the lesser offense of misdemeanor assault.

During the presentence investigation that was conducted prior to sentencing, the defendant told the Probation Department that she had grabbed a knife from the dishwasher when she saw a man (one of the law enforcement officers in the house) and that she dropped the knife when he drew his firearm on her. She stated that she was not on any bipolar medications at the time, and that even after her arrest and confinement she continued to experience mental health symptoms until she was placed on the correct medications at Summit Behavioral Healthcare.

On March 19, 2018, the defendant was sentenced to three years of community control and was ordered to undergo mental health treatment through the Veterans Administration and Greater Cincinnati Behavioral Health Services. Among other things, she was ordered to take all mental health medications as they were prescribed to her, whether by injection or in pill form. She stated to the court that she would comply with these requirements.

On May 15, 2018, the Probation Department filed an affidavit alleging that the defendant had violated her community control sanctions as a result of incurring new criminal charges involving possession and use of marijuana and making a false alarm, and that she was using marijuana and was not taking her mental health medications as prescribed.

The court scheduled a community control violation hearing on May 17, 2018. On that date, defense counsel W. Stephen Haynes suggested that the defendant was incompetent to stand trial on the community control violation charge. He moved the

court to appoint an examiner to perform an evaluation of the defendant's present mental condition and indicated that the defense was agreeable to the examination being performed by the Community Diagnostic and Treatment Center.

At the time, as was reflected in the entry that was filed on May 18, 2018, the Probation Department had concerns as to whether the defendant was taking her mental health medications as prescribed and as to whether she was using illegal drugs. There were concerns on the part of the Probation Department that the defendant needed to be stabilized on her mental health medications. Defense counsel requested that the defendant be removed from the Jail and be transferred to Summit Behavioral Healthcare so that this stabilization on medications could occur.

As a result, the court ordered that the defendant be transported to Summit Behavioral Healthcare and that she remain there until she was returned for the competency hearing in this case in order that she could be stabilized on her medications and returned to competency. The court further requested that the Community Diagnostic and Treatment Center ("Court Clinic") perform an evaluation of the defendant's present mental condition and that the evaluation be performed at Summit Behavioral Healthcare.

However, the evaluation was required to be done by Summit Behavioral Healthcare because she had been ordered there by the court. On June 15, 2018, a report was received from Summit Behavioral Healthcare opining that the defendant is incompetent to stand trial but that she may be restored to competency within the time allowed by law if provided with psychiatric treatment and competency restoration interventions.

On June 22, 2018, the court received a request from Summit Behavioral Healthcare, dated June 21, 2018, stating the following:

> "1. The defendant has refused psychotropic medications in the belief that she does not suffer from a mental illness;
>
> 2. The defendant has not attended group meetings and refuses to speak to staff members for more than a couple minutes.
>
> 3. The defendant cannot reason about the medications or discuss the risks and benefits of the medications as she believes that she does not suffer from a mental illness. As a result, she is unable to understand the nature of her condition or the nature and purpose of the proposed treatment together with the risks and benefits of the medications. She lacks the ability to give informed consent."

In that report, Summit Behavioral Healthcare requested a court order for forced medications, to include the following types of medications- mood-stabilizing medication, medication for agitation, antipsychotic medications, and medications for sleep.

ISSUES FOR THE COURT'S DETERMINATION

I. COMPETENCY

Although the court scheduled and held a competency hearing in this case, the defendant has no statutory right to such a hearing. *State v. Qualls*, 50 Ohio App.3d 56, 57, 552 N.E.2d 957, 959 (10th Dist.1988). R.C. 2945.37(A) states that, in a criminal

action, the court, prosecutor, or defendant may raise the issue of the defendant's competency to stand trial. *Id.* If the issue is raised before trial, the court shall hold a hearing on the issue. *Id.* If the issue is raised after trial, the court shall hold a hearing on the issue only for good cause shown. *Id.*

R.C. 2945.37-.39 addresses competency to stand trial. See *id.* However, the defendant is not at trial in this case, but is participating in a community control revocation hearing. *Id.* As a result, R.C. 2945.37-.39 are not applicable to the community control violation proceeding which is pending before this court.

In *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the United States Supreme Court held that a probationer is entitled to a preliminary and final revocation hearing under the conditions specified in *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), which set forth the following due process requirements for revocation of parole, at 489, 92 S.Ct. at 2604, which include, in pertinent part: "* * * (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body * * *; (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole. * * * " *Qualls* at 57-58, citing and quoting *Gagnon v. Scarpelli, supra.*

The United States Supreme Court in *Morrissey, supra,* at 480, 92 S.Ct. at 2600, stated that revocation does not deprive an individual of the absolute right of liberty to which every citizen is entitled, but only of a conditional right of liberty properly dependent

on the observance of special restrictions. *Qualls* at 58. Thus, the full panoply of due process rights is not available, but minimal due process requirements must be recognized.

In this regard, "the issue as to the need for a competency hearing (as to a probation violation charge) may, as in R.C. 2945.37(A), be raised by the court or defendant, and the decision to hold such a hearing must be made on a case-by-case basis in the exercise of the sound discretion of the trial court." *Qualls, supra.* However, the hearing occurs by virtue of the defendant's due process rights, and not under the statutes that pertain to competency.

In this case, the defendant requested a hearing, and the court determined that the proper exercise of the court's discretion required, under the circumstances of this case, to order a competency evaluation and to hold a competency hearing.

Having done so, the written report of the evaluation of the defendant by Summit Behavioral Healthcare was admitted into evidence by stipulation. Both sides declined the opportunity to submit additional evidence on the issue of the defendant's competence to stand trial.

The court finds by a preponderance of the evidence that, because of the defendant's present mental condition, the defendant is incapable of understanding the nature and objective of the proceedings against her or of assisting in her defense and is therefore incompetent to provide a defense for herself on the charge of violating her community control sanctions.

II. RESTORATION OF COMPETENCY

Based on the report received from Summit Behavioral Healthcare, the court finds that there is a substantial probability that the defendant will become competent to stand trial within one year if the defendant is provided with a course of treatment to include psychiatric treatment and competency restoration interventions. However, as will be explained below, this probability will undoubtedly change as a result of the defendant's refusal to take court-ordered medications and the limitations that exist in terms of the court's ability to order forced medications.

III. LEAST RESTRICTIVE TREATMENT ALTERNATIVE

IT IS ORDERED, based on the report and recommendation of Summit Behavioral Healthcare, that the defendant shall undergo treatment and shall be committed to the department of mental health for treatment at a hospital, facility, or agency as determined to be clinically appropriate by the department of mental health. As has already occurred, it is requested that the defendant undergo treatment at Summit Behavioral Healthcare.

IT IS FURTHER ORDERED that the defendant's freedom of movement shall be restricted as hereinafter set forth.

IT IS FURTHER ORDERED that the least restrictive commitment alternative available that is consistent with public safety and treatment goals, and the least restrictive limitation on the defendant's freedom of movement determined to be necessary to protect public safety, is inpatient psychiatric hospitalization of the defendant at Summit

Behavioral Healthcare. In making this order, the court has considered the extent to which the defendant is a danger to herself and to others, the need for security, and the type of crime involved, and has given preference in weighing these factors to protecting public safety.

IT IS FURTHER ORDERED that the Clermont County Prosecuting Attorney shall send to the chief clinical officer of the hospital, facility, or agency where the defendant is placed by the department of mental health, or to the managing officer of the institution, the director of the facility, or to the person to whom the defendant is committed, copies of relevant police reports and other background information that pertains to the defendant and is available to the Prosecuting Attorney unless the Prosecuting Attorney determines that the release of any of the information in the police reports or any of the other background information to unauthorized persons would interfere with the effective prosecution of any person or would create a substantial risk of harm to any person.

IT IS FURTHER ORDERED that the defendant may not be granted unsupervised on-grounds movement, supervised off-grounds movement, or nonsecured status without further order of this court.

IT IS FURTHER ORDERED that, although 2945.38 is not applicable in this case, the person supervising the treatment or continuing evaluation and treatment of the defendant shall file a written report with this court at the times specified in Section (H) of Section 2945.38 of the Revised Code.

IV. REQUEST FOR ORDER AUTHORIZING ADMINISTRATION OF INVOLUNTARY MEDICATIONS

In *Washington v. Harper,* 494 U.S. 210, 221–222, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990), the United States Supreme Court recognized that an individual has a "significant" constitutionally protected "liberty interest" in "avoiding the unwanted administration of antipsychotic drugs."

In *Riggins v. Nevada,* 504 U.S. 127, 134-135, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992), the Court repeated that an individual has a constitutionally protected liberty "interest in avoiding involuntary administration of antipsychotic drugs"- an interest that only an "essential" or "overriding" state interest might overcome.

In *Sell v. U.S.*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.E.2d 197 (2003), syllabus, the United States Supreme Court held that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial *on serious criminal charges* if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests."

The standard that applies with regard to the involuntary administration of antipsychotic drugs is the following: "The Constitution permits the Government involuntarily to administer antipsychotic drugs to render a mentally ill defendant competent to stand trial *on serious criminal charges* if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the trial's fairness, and, taking account of less intrusive alternatives, is necessary significantly to

further important governmental trial-related interests." *Sells* at paragraph two of the syllabus.

The United States Supreme Court in *Lewis v. United States*, 518 U.S. 322, 326, 116 S.Ct. 2163, 2166-67, 135 L.Ed.2d 590 (1996) held that whether a crime is "serious" is dependent on the statutory penalty for the crime. An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious. *Blanton v. North Las Vegas*, 489 U.S. 538, 543, 109 S.Ct. 1289, 1293, 103 L.Ed.2d 550; *Codispoti v. Pennsylvania,* 418 U.S. 506, 512, 94 S.Ct. 2687, 2691, 41 L.Ed.2d 912 (1974).

The defendant's offense in this case is misdemeanor assault, and the Ohio legislature has not authorized additional penalties for that offense beyond those that are prescribed for misdemeanors of the first degree. Additionally, Crim.R. 2(C) defines a "serious offense" as "any felony, and any misdemeanor for which the penalty prescribed by law includes confinement for more than six months."

A violation of law, even a misdemeanor offense, is a significant concern. However, because the possible sentence in this case does not exceed six months, the offense does not constitute an important enough governmental interest that would support forcibly medicating the defendant so that she can be restored to competency to answer to a community control violation filed on the underlying misdemeanor offense. See *City of Cleveland v. Tarver*, 8th Dist. Cuyahoga No. 105522, 2017-Ohio-1165, ¶ 11; see, also, *State v. Brewer*, 12th Dist. Clermont No. CA2008-04-040, 2008-Ohio-6193, ¶¶ 16-17.

As a result, the court has no alternative but to deny the request made by Summit Behavioral Healthcare for an order authorizing the involuntary administration of medications on the facts of this case.

CLOSING COMMENTS

The court understands that this matter is undoubtedly frustrating to the doctors at Summit Behavioral Healthcare who would like to help improve the defendant's mental condition. It is also concerning to the court because the defendant and her counsel agreed that the defendant should be stabilized on her medication, and then the defendant backtracked on that commitment. Beyond that, the court is concerned because of the likelihood of recidivism if nothing is done to change the status quo in terms of the defendant's presently deteriorating mental condition.

In addressing the issue of forced medications in this case, a review of the caselaw in this area has convinced the court that this matter is better handled through the filing of an affidavit for civil commitment of the defendant rather than through the continued use of the criminal justice system to address what, for the most part, is a civil matter.

Doing nothing does not seem to be a viable option. The defendant was convicted of a misdemeanor offense in this case. However, the reality is that the next time that the defendant pulls out a knife in response to the approach of a police officer the results may be catastrophic. The doctors at Summit Behavioral Healthcare point out that the defendant's mental condition is continuing to deteriorate, and that she is unlikely to get

better without taking medications that are prescribed. Meanwhile, the defendant will be discharged after she has jail credit of 180 days. Unfortunately, though, it seems apparent that the defendant will still be mentally ill, she will be without treatment, and she will be in no better condition than when this case began. She is a high risk to reoffend without treatment.

Pursuant to R.C. 2945.39, either the court or the prosecutor may file an affidavit in probate court for civil commitment of the defendant pursuant to Chapter 5122 of the Revised Code. The court has the same ability as the state to file an affidavit in Probate Court. However, the court has a different role in this case than does the state, and it would appear to be more appropriate for the matter to be initiated by the state.

Regarding civil commitment, the U.S. Supreme Court noted the following in *U.S. v. Sells*:

> "The court applying these standards is trying to determine whether forced medication is necessary to further the Government's interest in rendering the defendant competent to stand trial. If a court authorizes medication on an alternative ground, such as dangerousness, the need to consider authorization on trial competence grounds will likely disappear. There are often strong reasons for a court to consider alternative grounds first. For one thing, the inquiry into whether medication is permissible to render an individual nondangerous is usually more objective and manageable than the inquiry into whether medication is permissible to render a defendant competent. For another, courts typically address involuntary medical treatment as a civil matter. If a court decides that medication cannot be authorized on alternative grounds, its findings will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes." Pp. 2185–2186.

With a civil commitment, the ability of the Probate Court to order forced medications on the basis of dangerousness is considerably greater than this court's ability to do so on the basis of restoring competency. The Ohio Supreme Court has held that "when an involuntarily committed mentally ill patient poses an imminent threat

of harm to himself/herself or others, the state's interest in protecting its citizens outweighs the patient's interest in refusing antipsychotic medication." *Steele v. Hamilton Cty. Community Mental Health Board*, 90 Ohio St.3d 176, 736 N.E. 2d 10, 2000-Ohio-47 (2000).

In a civil commitment proceeding, the court could also appoint a guardian ad litem to help the defendant get the treatment that she needs while at the same time ensuring that her rights are protected. Defense counsel has advocated zealously on behalf of his client in this case, as he was obligated to do. On the other hand, a guardian ad litem may investigate the defendant's situation and then ask the court to do what is in the defendant's best interest. These are two very different roles, as has been recognized by the Ohio Supreme Court. *In Re Baby Girl Baxter*, 17 Ohio St. 229, 232, 479 N.E.2d 257 (1985).

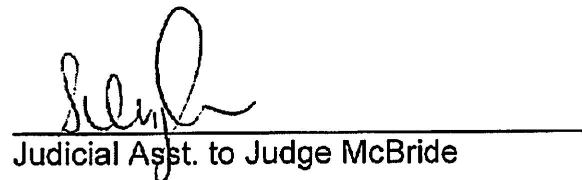
A status conference shall be scheduled in this case within 2-4 weeks. Counsel are requested to conference and call the Assignment Commissioner within five days of the date of this decision in order to schedule this status conference.

DATED: 7-31-18

Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the foregoing Entry were sent on this 31st day of July 2018 by e-mail to Robert A. Herking, Assistant Prosecuting Attorney, at rherking@clermontcountyohio.gov, and to W. Stephen Haynes, Attorney for the Defendant, at shaynes@clermontcountyohio.gov, and by regular U.S. Mail to Carla S. Dreyer, Community Diagnostic and Treatment Center, 909 Sycamore, 4th Floor, Cincinnati, Ohio 45202; Elizabeth Rose, Director of Forensic Services, Summit Behavioral Healthcare, 1101 Summit Road, Cincinnati, Ohio 45237; Renata Walsh, Summit Behavioral Healthcare, 1101 Summit Road, Cincinnati, Ohio 45237; Lee Ann Watson, Associate Director, Clermont County Mental Health and Recovery Board, 2337 Clermont Center Drive, Batavia, Ohio 45103; and the Clermont County Jail. A copy was also provided to the Probation Department.



Judicial Asst. to Judge McBride