Circuit Court for Howard County
Case No. 13-C-16-108729

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1570

September Term, 2016

GARY ALLMOND

v.

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

Meredith,
Shaw Geter,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 8, 2017

Appellant, Gary Allmond, is currently committed to Clifton T. Perkins Hospital for psychiatric treatment following a diagnosis of schizophrenia. In 2014, an altercation with a staff member at the hospital led a clinical review panel to approve the involuntary administration of medication for appellant. He filed an appeal, arguing that the statute authorizing involuntary medication was unconstitutional on its face and therefore void. The Court of Appeals found that the statute was constitutional, although it held that an "overriding justification" was required to satisfy the due process guarantees in Maryland's Declaration of Rights. The involuntary medication ceased in August 2015.

Appellant developed acute urinary retention as a result of an enlarged prostate while his initial case was on appeal, which required several trips to the emergency room. Surgery was recommended to treat the condition. Appellant sought alternative treatment, but as his symptoms continued to worsen, he could not provide a consistent opinion about whether he did or did not want the procedure to be done. He also refused to take virtually any and all antipsychotic medication.

A subsequent review panel was convened on August 4, 2016. This time, the panel determined that appellant's refusal to take antipsychotic medication prevented him from making a rational decision about having prostate surgery. As a result, they approved the administration of involuntary medication for a period of no longer than ninety days. Appellant appealed the panel's decision to the Office of Administrative Hearings and then the Circuit Court for Howard County, both of which affirmed. He filed a subsequent appeal before this Court and presents three issues for review:

I. Whether the ALJ erred in interpreting HG § 10-708(g) to permit the State to forcibly medicate Mr. Allmond against his will for the purported purpose of verifying that he had given "informed consent" when he agreed to undergo a State-recommended surgery for a somatic condition which has no relevance to the statutorily required inquiry of whether Mr. Allmond was at substantial risk of continued hospitalization due to symptoms that cause him to be a danger to self or others, and which is not authorized under the statute?

II. Whether HG § 10-708(g) can be legally and/or constitutionally satisfied if the requisite "overriding justification" that Mr. Allmond is a "danger to himself" is his purported inability to competently make decisions regarding treatment for a somatic condition?

III. Whether the State can legally and/or constitutionally continue to forcibly medicate an individual under HG § 10-708(g) after the individual has undergone surgery and that alleged "overriding justification" causing him to be a danger to himself no longer exists?

For the reasons to follow, we shall affirm.

BACKGROUND

Appellant was first diagnosed with schizophrenia in 1985. He is currently committed to Clifton T. Perkins Hospital in Jessup, Maryland for psychiatric treatment after the Department of Mental Health[1] found that he was incompetent to stand trial for charges stemming from the murder of his girlfriend in 2011. His first appeal arose out of the use of involuntary medication following an altercation with a hospital staff member in 2014.[2] Appellant then filed a petition for a writ of *certiorari*, which the Court of Appeals granted. He argued that section 10-708(g) of the Health-General Article, the statute authorizing involuntary medication, was unconstitutional on its face and therefore void.

[1] The Maryland Department of Health and Mental Hygiene's name was changed to the Maryland Department of Health on July 1, 2017.

[2] Appellant has not exhibited any violent or aggressive behaviors since this incident.

The Court disagreed, although, as explained below, it held that an "overriding justification" is required to satisfy the due process guarantees in Article 24 of the Maryland Declaration of Rights. *See Allmond v. Dep't of Health and Mental Hygiene*, 448 Md. 592, 596 (2016).

While his initial case was on appeal, appellant developed acute urinary retention as a result of an enlarged prostate and was sent to the emergency department at the University of Maryland. During this time, appellant refused to take antipsychotic medication, and his symptoms continued to worsen, leading to several additional trips to the emergency room. A subsequent clinical review panel was convened on August 4, 2016. The panel recommended surgery to remove the prostate but determined that appellant's "untreated psychosis, ambivalence, and thought disorganization prevents him from being able to make a solid and rational decision about having the surgery." As a result, the panel approved the administration of involuntary antipsychotic medication to appellant for a period of no longer than ninety days.

Appellant appealed the panel's decision to the Office of Administrative Hearings, and a hearing was held on August 11, 2016. The sole witness to testify was Dr. Khalid El-Sayed, appellant's treating psychiatrist of the past four years, who was accepted as an expert in the fields of general medicine and forensic psychiatry. Dr. El-Sayed testified that after appellant's trip to the emergency room at the University of Maryland, doctors inserted a Foley catheter[3] and recommended a follow-up appointment with a urologist. Appellant

[3] Dr. El-Sayed testified that a Foley catheter is "a medical device that's inserted into the urethra, and it has a bulb that once inflated allows it to sit . . . on the floor of the bladder without coming out. When somebody has a urethral obstruction as a result of an enlarged prostate, you can put this device in there so as to allow urine to flow out."

went to the urology department in early December, and they removed the catheter. Within a few days, however, appellant developed an acute urinary retention (which results from the blockage of the passage of urine from the bladder). He was then sent to the emergency department at Howard County General, where they replaced the catheter and again referred him to see a urologist.

From that point on, appellant underwent frequent urology assessments and essentially remained with a chronic indwelling Foley catheter. This was problematic, Dr. El-Sayed testified, because the catheter "is only intended as a temporary measure, and it should really be removed as quickly as possible because it can with prolonged placement result in several serious medical conditions." These conditions include: bleeding, repeated injury to the bladder tissue, and an increased risk of developing urinary tract infections, which are uncommon in males. With a chronic indwelling catheter, moreover, the bacteria causing infections develop resistance to antibiotics. As a result, appellant "is at increased risk of potential death if he were to develop a more severe infection that requires antibiotic treatment. He's also at risk of developing urosepsis, which is a medical term to describe a severe urinary tract infection that then moves into the bloodstream."

After doctors performed a prostate biopsy to rule out malignancy or cancer, they ran a number of post-void residual tests on appellant. Under this procedure, urine is voided from the bladder, which is supposed to remain empty. Appellant's bladder showed evidence of blockage from the enlarged prostate, and it was not emptying. As a result, on April 5, 2016, he was again recommended for prostate surgery. Appellant declined the surgery, instead asking for the catheter to be removed, and for another trial of voiding. The

doctors removed the catheter and waited six to twelve hours to see if he would continue to have difficulty eliminating urine.

"The next day at 4:10 in the morning [appellant] reported excruciating pain. He was seen in the bathroom for increasing amounts of time. He was unable to clear urine, and that morning on the 6th he was sent to the emergency department where they replaced the Foley catheter." Surgery was again discussed with appellant but he "would never provide a consistent opinion about whether he did or did not want that procedure to be done." His explanations for why he did not want the procedure were inconsistent. Sometimes appellant would say he was "hoping for a miracle." At other times "he reported on his past history that the prostate reduced spontaneously in the past." And, in the weeks leading up to the hearing, he "said that a person who has problems doesn't really need to go see a doctor. They should be able to resolve those problems on their own by reading and writing."

Since August 2015, appellant has refused virtually all antipsychotic medication. Appellant explained that he did not want to take the medicine because it made him feel sedated; moreover, it was unnecessary because he does not have a mental illness, he does not have any psychiatric symptoms, and he is working on improving himself through reading, writing, and educating himself. Dr. El-Sayed testified that he tried a number of alternative treatments during the four years he has worked with appellant. For example, he referred appellant to individual therapy in hopes of understanding appellant's motivations for refusing medication; he educated appellant about the purpose of the medication and its utility; and he adjusted the dosage levels of medication that would be

administered. Dr. El-Sayed concluded that therapy would not be a successful alternative to antipsychotic medication, which is the "indicated first line treatment of schizophrenia[.]"

Appellant had another episode of severe and acute pain where he had to be sent to the emergency room on July 8, 2016. This prompted Dr. El-Sayed to call a meeting with appellant, his social worker, and the ward psychologist, which occurred on July 27. During the meeting, appellant "was ambivalent and leaned on not wanting to have the [surgery] done at all. He was denying that there were any risks. He wouldn't even acknowledge the same things that [Dr. El-Sayed] discussed as risks of potential prolonged Foley catheter placement." Dr. El-Sayed testified that at this time, appellant knew he was planning to pursue a clinical review panel for the purpose of involuntary medication.

Appellant went to the clinic the next day and said that he wanted to have surgery on his prostate, though he did not inform his treatment team until the following week. Dr. El-Sayed and another doctor then met with appellant to discuss the reasons for changing his mind. Appellant, however, "was thought disordered during that meeting. He provided various reasons for why he was now . . . agreeing to do this. [Dr. El-Sayed] tried to get him to explain why he'd suddenly changed his mind, and he was unable to give a clear reason." Dr. El-Sayed explained that based on his "familiarity and based on having seen [appellant] repeatedly accept and then refuse to do the procedure, I have very little confidence that [appellant is] going to proceed with it."

Dr. El-Sayed testified that as a result of appellant's "thought disorganization and poor reality testing, he is making inconsistent and unreliable decisions regarding his healthcare." With treatment of appellant's psychosis and schizophrenia symptoms,

however, "his ability to make appropriate medical decisions for the right reasons will improve." Since appellant was at risk of developing an untreatable bacterial infection, urosepsis, and, potentially, death, Dr. El-Sayed concluded that appellant's mental illness symptoms will cause him to remain a danger to himself or others without medication.

During closing argument, the Department noted that appellant had refused to take the antipsychotic medication prescribed by Dr. El-Sayed; the purpose of the medication is to treat appellant's mental disorder; the administration of the medication represents a reasonable exercise of professional judgment; and, without the medication, appellant would be at risk of continued hospitalization with symptoms that cause him to be a danger either in the hospital or if released from the hospital.

On the other hand, as relevant here, appellant argued that he has not been secluded or restrained since 2014, and that he has the highest privilege level that a patient can obtain in the hospital. Next, appellant has complied with requests to take medication for his enlarged prostate, as well as requests to attend appointments for the upkeep of the Foley catheter. Appellant also argued that a patient's ability to weigh the risks and benefits of a medical procedure does not support a finding of dangerousness in the hospital and that, in fact, he agreed to have the surgery at the time of the hearing. Finally, appellant maintained that if his treatment team truly believed he lacked the capacity to make medical decisions, they would have initiated a guardianship proceeding.

In her ruling, the administrative law judge (ALJ) noted that the first two factors for involuntary medication under Health-General § 10-708(g) were not in dispute: appellant was prescribed medication for treatment of his schizophrenia and refused the medication.

The core issue, the ALJ noted, was whether appellant would be at a substantial risk of continued hospitalization without the medication. Preliminarily, she noted that "there's no contest that being a danger as a result of failure to take care of a medical condition is the kind of dangerousness contemplated by the statute." Additionally, Dr. El-Sayed's testimony "was comprehensive, clear, decisive, precise based on medical records, [and] based on his medical opinion," so the ALJ "accept[ed] all of it lock, stock, and barrel."

Next, while appellant agreed to have prostate surgery at the time of the hearing, the judge did not find this election credible for a number of reasons: appellant's medical issues have been ongoing for an extended period of time; he has a history of agreeing to, then refusing to have surgery; he attempted a number of alternatives, none of which have been successful; and he waited a week to inform his treatment team about the decision. The ALJ thus concluded that appellant had not made an informed decision about having the surgery. The judge added that appellant has "already showed a renal failure, so this is not . . . just a remote possibility. This is -- this is here and now for you, and that makes you a danger to yourself." As a result, the ALJ found that without medication to treat his schizophrenia, appellant's physical condition endangered his health and safety, and she upheld the clinical review panel's decision to use forced medication.

Appellant filed a petition for judicial review in the Circuit Court for Howard County on August 31, 2016. Following a hearing, the circuit court entered an order affirming the ALJ's decision. Appellant timely appealed to this Court. Thereafter, he successfully underwent prostate surgery on September 19 and filed a motion to stay the use of forced medication for the remainder of the ninety-day period approved by the review panel. The

circuit court held an additional hearing and denied the motion. Appellant's subsequent motion to stay and petition for writ of *certiorari* before the Court of Appeals were also denied on November 7, 2016.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, such as the Office of Administrative Hearings, we "review the agency's decision directly, not the decision of the circuit court." *Comptroller v. Science Applications Int'l Corp.*, 405 Md. 185, 192 (2008). We review the decision "in the light most favorable to the agency since decisions of administrative agencies are *prima facie* correct[ ] . . . and carry with them the presumption of validity." *Wallace H. Campbell & Co. v. Maryland Comm'n on Human Relations*, 202 Md. App. 650, 662 (2011) (citation omitted). Questions of fact and mixed questions of law are reviewed with deference to the agency's decision; questions of law are reviewed *de novo*. *Md. Bd. of Physicians v. Elliott*, 170 Md. App. 369, 407–08 (2006).

DISCUSSION

I. Forcible Medication Decision

Before turning to the merits of the forcible medication decision, we first address the issue of mootness. "Generally, appellate courts do not decide academic or moot questions. A question is moot if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer any effective remedy which the court can provide." *Attorney Gen. v. Anne Arundel Cty. Sch. Bus Contractors Ass'n, Inc.*, 286 Md. 324, 327 (1979). Accordingly, "when the chronology of a case makes it apparent that nothing we could do could undo or remedy that which has already occurred, except

under the most extraordinary circumstances requiring a decision in the public interest, the case must be dismissed as moot." *In re Special Investigation No. 281*, 299 Md. 181, 189–90 (1984) (citation omitted). Nevertheless, we have constitutional authority to express our views on the merits of a moot case, which may be exercised where:

> [T]he urgency of establishing a rule of future conduct in matters of important public concern is imperative and manifest . . . . If the public interest clearly will be hurt if the question is not immediately decided, if the matter involved is likely to recur frequently, and its recurrence will involve a relationship between government and its citizens, or a duty of government, and upon any recurrence, the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision, then the Court may find justification for deciding the issues raised by a question which has become moot, particularly if all these factors concur with sufficient weight.

J.L. Matthews, Inc. v. Md.–Nat'l Capital Park & Planning Comm'n, 368 Md. 71, 96 (2002) (citation omitted).

In this case, there is no dispute that the medical issues giving rise to the review panel's involuntary medication decision were successfully treated by appellant's surgery on September 19, 2016. *See Appellee Br.* at 10 ("On September 19, 2016, Mr. Allmond underwent successful prostate surgery, and returned to Perkins Hospital."); *Appellant Br.* at 34 (explaining that the "'overriding justification' to warrant forcible medication cease[d] to exist" following appellant's September 19 surgery). Additionally, there is no evidence that appellant is dangerous to others, as indicated by his "platinum privilege level status." In order to maintain that privilege level, a patient needs to exhibit no violence in the hospital, as well as participate in treatment and group activities like interacting with other patients or attending activities off the ward. Finally, while this case was on appeal, appellant entered a plea of not criminally responsible to the charge of first-degree murder

against his girlfriend, which forms the basis of his commitment to the hospital. The verdict was entered on March 1, 2017—that case is now closed.

Given appellant's surgery, it cannot be said that the matter involved is likely to reoccur, or that "the same difficulty which prevented the appeal at hand from being heard in time is likely again to prevent a decision[.]" *J.L. Matthews, Inc.*, 368 Md. at 96. In a similar vein, the record before us does not provide a basis for a clinical review panel to find that appellant would be dangerous to others, and appellant's not criminally responsible plea precludes the Department from utilizing forcible medication to render him competent to stand trial. Finally, aside from arguing generally that this case presents issues of public concern, appellant has failed to establish that "the public interest clearly will be hurt if the question is not immediately decided[.]" *Id. But see Stidham v. R.J. Reynolds Tobacco Co.*, 224 Md. App. 459, 469–70 (2015) ("The issues in this case involve recurring matters of public concern: there are currently 700 pending cases in which plaintiffs have attempted to join claims against tobacco defendants with claims against asbestos defendants. . . These issues have evaded and continue to evade appellate review."). Accordingly, "nothing we could do could undo or remedy that which has already occurred," *In re Special Investigation No. 281*, 299 Md. at 189–90, and there is no "justification for deciding the issues raised" by appellant, *J.L. Matthews, Inc.*, 368 Md. at 96. In short, the case is moot.

However, even if the case was not moot, the outcome would be the same. Section 10-708(g) of the Health-General Article authorizes the use of involuntary medication when the following procedure is used:

> (g) The panel may approve the administration of medication or medications and may recommend and approve alternative medications if the panel determines that:
>
> (1) The medication is prescribed by a psychiatrist for the purpose of treating the individual's mental disorder;
>
> (2) The administration of medication represents a reasonable exercise of professional judgment; and
>
> (3) Without the medication, the individual is at substantial risk of continued hospitalization because of:
>
> (i) Remaining seriously mentally ill with no significant relief of the mental illness symptoms that:
> 1. Cause the individual to be a danger to the individual or others while in the hospital;
> 2. Resulted in the individual being committed to a hospital under this title or Title 3 of the Criminal Procedure Article; or
> 3. Would cause the individual to be a danger to the individual or others if released from the hospital;
>
> (ii) Remaining seriously mentally ill for a significantly longer period of time with the mental illness symptoms that:
> 1. Cause the individual to be a danger to the individual or to others while in the hospital;
> 2. Resulted in the individual being committed to a hospital under this title or Title 3 of the Criminal Procedure Article; or
> 3. Would cause the individual to be a danger to the individual or others if released from the hospital; or
>
> (iii) Relapsing into a condition in which the individual is unable to provide for the individual's essential human needs of health or safety.

Md. Code Ann., Health–Gen. § 10-708(g) (West 2009). As the Court of Appeals explained in appellant's initial appeal, more is required to satisfy the due process guarantees in Article 24 of the Maryland Declaration of Rights. *See Allmond*, 448 Md. at 619 ("[I]f the State offers nothing more than the bare minimum to satisfy the statute—that the individual has

the same symptoms as resulted in the individual's hospitalization or that the individual would be dangerous if released—then application of this statute would not be constitutional."). After reviewing relevant Supreme Court precedent, the Court instructed:

> There is a substantive due process right to refuse psychotropic drugs. For convicted prisoners, a reasonableness test applies. For pretrial detainees, the medication must be "necessary to accomplish an essential state policy." In any event, there must be "a finding of overriding justification and a determination of medical appropriateness." Overriding justifications include preventing danger to the detainee's self or others in the facility and making a detainee competent to stand trial for a serious crime.

Id. at 613 (citations omitted).

In this case, as noted by the ALJ, the first two factors in section 10-708(g) are not in dispute: Dr. El-Sayed prescribed medication for the treatment of appellant's schizophrenia, the administration of medication represents a reasonable exercise of professional judgment, and appellant refused the medication. At the time of the hearing, appellant had been sent to the emergency room at least three times as a result of his enlarged prostate. Moreover, as a result of the indwelling catheter, he was at risk of developing resistance to antibiotics, urosepsis, and "potential death if he were to develop a more severe infection that requires antibiotic treatment." While appellant indicated that he wanted to have surgery on his prostate at the time of the hearing, his "explanations for why he did not want the procedure were inconsistent," and when asked by Dr. El-Sayed about why he recently agreed to have surgery, appellant was "thought disordered" and "unable to give a clear reason." Accordingly, the ALJ's finding that without medication to treat his schizophrenia, appellant's physical condition endangered his health and safety is fully supported by the record and the statute.

We are not persuaded by the additional arguments appellant raises on appeal. First, he asserts that this case "involves a challenge to the ALJ's determination that Mr. Allmond was a 'danger to himself'" and "necessarily involves a discussion of his constitutional rights." However, the ALJ expressly found "there's no contest that being a danger as a result of failure to take care of a medical condition is the kind of dangerousness contemplated by the statute." The issue, therefore, has not been preserved for review—nor is there good cause for review, as the case is moot. *See Dep't of Health & Mental Hygiene v. Campbell*, 364 Md. 108, 123 (2001) (citations omitted) ("[T]he reviewing court, restricted to the record made before the administrative agency, may not pass upon issues presented to it for the first time on judicial review and that are not encompassed in the final decision of the administrative agency.").

Second, appellant claims that if the Department "believed that Mr. Allmond's decision to undergo the surgery it had recommended was suddenly unreliable, it was required to take the proper steps to seek appointment of a limited guardian to make the decision for him." While this argument was preserved before the ALJ, there is nothing in the statute that requires the use of guardianship proceedings, and it is not supported by applicable caselaw. *See, e.g.*, *Washington v. Harper*, 494 U.S. 210, 222 (1990) ("Respondent contends that the State, under the mandate of the Due Process Clause, may not override his choice to refuse antipsychotic drugs unless he has been found to be incompetent, and then only if the factfinder makes a substituted judgment that he, if competent, would consent to drug treatment. We disagree.").

Finally, appellant's argument that the Department further violated his right to bodily integrity when it continued to forcibly medicate him after the surgery is also without merit. The clinical review panel provided for involuntary medication for a period "not exceeding 90 days." Appellant's argument, as noted by the circuit court, would require us to make a finding of fact disputed by the parties—namely, he was no longer in need of medication—that was not made before the ALJ. Appellant's argument is also unworkable in practice, as further medication may be required in the event a complication arises during or immediately after surgery. As such, it does not form a basis for reversible error.

APPEAL DISMISSED AS MOOT. COSTS TO BE PAID BY APPELLANT.