

Ruling and Reasoning

In a unanimous decision, the Supreme Court of Idaho reversed the district court’s denial of Mr. Towner’s motion to suppress and remanded the case with instructions for the district court to enter findings of fact related to whether the state proved that Mr. Towner was “gravely disabled” or an “imminent danger” to himself or others because of his mental illness as outlined in Idaho Code Ann. § 66–326(1) (2022) before he was taken into protective custody. It ruled that the district court erred in concluding that Officer Johns’ act of taking Mr. Towner into protective custody was within his authority under the community caretaker function exception to the Fourth Amendment of the U.S. Constitution without the district court considering the requirements of Idaho Code Ann. § 66–326(1).

The state supreme court stated Mr. Towner’s initial seizure by Officer Johns, where the officer was calling out and having Mr. Towner walk back to the patrol car to talk, was permissible under the community caretaker function exception because he was concerned about Mr. Towner’s welfare and wanted to see if he needed help. But, prior to placing Mr. Towner in handcuffs and taking him into protective custody, the court ruled Officer Johns had to comply with the requirements of Idaho Code Ann. § 66–326(1), which stated that a law enforcement officer may only take a person into protective custody for mental health evaluation and treatment if the officer has reason to believe that the person is “gravely disabled” due to mental illness or the person is an “imminent danger” to himself or herself or others, as evidenced by a threat of “substantial physical harm.” The Supreme Court of Idaho ruled that the district court erred in not addressing the applicable requirements of Idaho Code Ann. § 66–326(1) and whether they were met. It reversed and remanded the case back to the lower court.

Discussion

The Fourth Amendment prohibits law enforcement from conducting unreasonable searches and seizures. A warrantless search would usually be considered unreasonable unless it falls within an exception to the warrant requirement. Exceptions to the warrant requirement include the plain view doctrine, searches incident to arrest, exigent circumstances, and consent. Once an individual has established that a warrantless search has occurred, the state then has the burden of establishing that a valid exception applied.

The community caretaker function exception, first articulated by the U.S. Supreme Court in *Cady v. Dombrowski*, 413 U.S. 433 (1973), covers warrantless seizure of evidence while officers are performing community caretaker functions, such as rendering aid to individuals in need. But, the Supreme Court of Idaho stated that the community caretaker function exception cannot be used to take an individual into protective custody absent findings consistent with Idaho Code Ann. § 66–326(1). This statute put conditions on when a law enforcement officer can take a person into protective custody for mental health evaluation and treatment without a court order, namely if the person is gravely disabled related to a mental illness, or the person is an imminent danger to himself or herself or others as evidenced by a threat of substantial physical harm; this statute further states the evidence to support either claim must be presented to an authorized court within 24 hours from the time the individual was placed in protective custody. This case highlights the limitation of law enforcement’s ability to use the community caretaker exception to take a person into protective custody for mental health evaluation and treatment and subsequently search that individual, especially when the seizure and search can lead to criminal charges.

Treatment Over Objection and the Right to Refuse Counsel

Shantanu Baghel, DO
Fellow in Forensic Psychiatry

J. Richard Ciccone, MD
Professor of Psychiatry

Director, Psychiatry and Law Program
University of Rochester Medical Center
Rochester, New York

Treatment Over Objection Requires Verification That Patients Have Waived Their Right to Counsel

DOI:10.29158/JAAPL.230034-23

Key words: treatment over objection; procedural due process; waiver of counsel; *Matthews* balancing test

In *Mercer v. Thomas B. Finan Center*, 265 A.3d 1044 (Md. 2021), the Court of Appeals of Maryland held that

Md. Code Ann. Health-Gen. § 10–708 (1982) requires verification when individuals are waiving their right to request counsel and wish to proceed unrepresented in treatment over objection hearings.

Facts of the Case

In January 2018, Jason Mercer, after being found not criminally responsible for a second-degree assault and unauthorized use of a motor vehicle, was committed to a Maryland state psychiatric hospital, the Thomas B. Finan Center. Schizoaffective disorder bipolar type was diagnosed and psychotropic medications were given for treatment. Initially, he took the prescribed medications and his condition improved. As a result, he was transferred to a less-restrictive unit of the facility. In July 2019, he began to refuse the appropriate doses of medications; he became paranoid that the food was processed, and stated he was uncertain about the contents of the water. He stopped eating and drinking. In the next few weeks, he lost 24 pounds and developed symptoms of dehydration. Mr. Mercer also stopped attending therapy sessions and instead held his own “therapeutic group” sessions where he urged other patients to reject their treatments. With Mr. Mercer’s guidance, another patient discontinued electroconvulsive therapy.

Pursuant to Md. Code Ann. Health-Gen. § 10–708, the state’s governing statute for administering psychotropic medications over the patient’s objection, the facility moved to medicate Mr. Mercer. Under this statute, in a nonemergency, individuals may be forcibly medicated when involuntarily hospitalized for treatment and the treatment over objection is approved by a clinical review panel. If the panel approves the treatment over objection, a written decision must advise patients of their right to request a hearing and their right to request representation at the hearing. Individuals must request the hearing within 48 hours of receiving the decision; there is no statutory deadline on the request for representation.

A clinical review panel convened on August 5, 2019. Mr. Mercer’s lay advisor provided him with a copy of the panel’s written decision approving treatment over objection and an appeal request form that advised him that he must request a hearing within 48 hours of receiving the panel’s decision. If he requested a hearing, it would be held within seven days of receipt of the notice. He could also request representation for the hearing by: using a designated legal assistance provider; obtaining his own private attorney; designating an

alternate advocate; or proceeding *pro se*. He initially declined a hearing. Two days later, on August 7, Mr. Mercer requested a hearing and elected to proceed *pro se*. On August 13, he was informed a hearing had been scheduled for August 16.

On August 16, at the hearing before an administrative law judge (ALJ), Mr. Mercer requested an attorney and said he did not recall filling out or signing the appeal request form. The ALJ questioned his lay advisor who reported that she reviewed the form with Mr. Mercer and that he told her he had “no need for an attorney” (*Mercer*, p 1051). Mr. Mercer objected, saying that he did not understand but would have understood it if he had legal counsel available. The ALJ interpreted Mr. Mercer’s request for an attorney as a request for postponement and proceeded with the hearing. During the hearing, Mr. Mercer argued that being forcibly medicated constituted “torture” and was a violation of his Eighth Amendment rights against cruel and unusual punishment. The ALJ found, by a preponderance of the evidence, that Mr. Mercer presented a danger to himself because he was not eating or drinking, and a danger to others as a result of his interfering in treatment of other patients. The ALJ ruled to medicate Mr. Mercer.

On August 29, Mr. Mercer, on his own behalf, filed an appeal in the Circuit Court for Allegany County. On September 4, the circuit court met. Mr. Mercer had acquired representation by this time. The appellants argued the ALJ erred by “not taking testimony” on the record on the question of waiver of counsel and that the appeal request form provided an inadequate waiver. The court affirmed the ALJ’s ruling and said Mr. Mercer had the “right to representation afforded him by statute” (*Mercer*, p 1054) and that the form was permissible as an effective waiver of representation.

Mr. Mercer then appealed to the Maryland Court of Special Appeals. In January 2021, the court affirmed the circuit court’s judgment. The court interpreted the statute to confer a right to request representation, but not an automatic right to counsel “absent a timely request.” The court found that the ALJ did not deprive Mr. Mercer of procedural due process by not postponing the hearing to allow him to obtain counsel. The court reasoned that he did not have a statutory right to counsel, and that the government had an interest in ensuring all patients were provided with the mental health care they required. In March 2021, Mr. Mercer petitioned the Court of Appeals of Maryland,

claiming that the court of special appeals erred in determining that the statute did not require an on-the-record assessment of his waiver of his statutory right to counsel. The court granted *cert.*

Ruling and Reasoning

The Maryland Court of Appeals found that the plain language of Md. Code Ann. Health-Gen. § 10–708 established that, at a hearing to appeal a clinical review panel’s decision, a patient had a right to request counsel. The court ruled that procedural due process required verification of the patient’s knowing and voluntary waiver of the right to request counsel, but an on-the-record colloquy is not required. In addition, the patient’s right to request counsel is not subject to a time limit.

The court was cognizant of the potential delays that having no time limit on requesting counsel could create. Patients, as a delaying tactic, could wait until the hearing before the ALJ before requesting counsel. Delays could place undue burden on the mental health system and potentially put the patient and others at risk of harm. On the other hand, the law clearly stated that Mr. Mercer had a right to request council.

To determine whether Mr. Mercer was erroneously deprived of procedural due process, the court turned to the balancing test provided in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The court determined that, because the appeal request form was deficient and the administrative hearing took place beyond the seven days prescribed by law, Mr. Mercer had been erroneously deprived of procedural due process. The court suggested that the appeal request form could be redrafted to advise individuals of their right to request counsel and also include information on the consequences of declining counsel. Verification of the waiver could be accomplished through this modified appeals request form or an in-person procedure.

Discussion

Mr. Mercer argued that procedural due process required an on-the-record colloquy for patients to waive their right to counsel. In *Mathews*, the U.S. Supreme Court formulated a balancing test to evaluate procedural due process questions. The *Mathews* test consists of balancing three factors: the affected private interest and potential injury; the risk that the procedures may cause an erroneous deprivation of the affected private interest and the probable value of additional procedural safeguards; and the state’s interest in

efficient adjudication, including the potential administrative burden of additional procedural requirements.

In this case, the court weighed Mr. Mercer’s interest in avoiding psychiatric medication administration over his objection against that of existing state procedures. Because the appeal request form was deficient, there was a high risk of an erroneous deprivation of due process. Mr. Mercer’s hearing was also delayed beyond the seven-day statutory requirement. These concerns were not addressed by the ALJ. Thus, the court concluded Mr. Mercer was deprived of his procedural due process rights when his request for counsel was denied at the hearing.

Due process rights are enshrined in the due process clauses of the Fifth and Fourteenth Amendments. Due process has been subdivided into procedural due process and substantive due process. Procedural due process requires that the individual be given notice, the opportunity to be heard, and a decision by a neutral decision-maker before the government may deny a citizen of life, liberty, or property. Substantive due process is inferred and holds that certain rights are fundamental and free from governmental interference. Substantive due process has been the chief consideration in a number of landmark mental health cases. *Mercer* is notable for its focus on procedural due process.

Automatic Stay of Involuntary Medication Orders and Tolling of Statutory Limitations

Lauren DeMarco, DO
Fellow in Forensic Psychiatry

Robert Weisman, DO
Professor of Psychiatry

Director, Forensic Psychiatry Fellowship
University of Rochester Medical Center
Rochester, New York

Automatic Stay of Involuntary Medication Orders and Tolling of Statutory Limitations for Competency Restoration Does Not Apply in the Pretrial Context

DOI:10.29158/JAAPL.230034L1-23

Key words: automatic stay; pretrial proceedings; statutory tolling; involuntary medication; *Sell* factors

In *State v. Green* 973 N.W.2d 770 (Wis. 2022), the Wisconsin Supreme Court held that the automatic