KERR COUNTY ATTORNEY

REX EMERSON

COUNTY COURTHOUSE, SUITE BA-103 • 700 MAIN STREET • KERRVILLE, TEXAS 78028

RECEIVED
JUN 22 2009
OPINION COMMITTEE

June 19, 2009

FILE # ML-46096-09
I.D. # 46096

RQ-0809-GA

The Honorable Gregg Abbott
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Re: Request for Opinion

Dear General Abbott:

Pursuant to Section 402.043 of the TEXAS GOVERNMENT CODE, I am requesting an opinion from your office regarding the following: whether a peace officer who has taken a proposed patient into custody pursuant to TEXAS HEALTH & SAFETY CODE §573.001 (peace officer's emergency detention) or §573.011 (judge's or magistrate's order for emergency apprehension and detention) may be required to transport the proposed patient to a medical facility for evaluation prior to acceptance by either a state hospital or the Hill Country MHMR's Crisis Stabilization Unit (CSU).

The Kerr County Sheriff has asked this office to seek an opinion from you on this issue, as local law enforcement is experiencing a recurring problem, first with the Kerrville State Hospital (KSH), and now the CSU. These inpatient mental health facilities require that proposed patients be "medically cleared" before they will accept the person for mental health treatment, even when presented with a court order directing the patient to be brought to the CSU for such treatment.

In the past, if law enforcement was called to a scene where an individual appeared to be having mental problems requiring immediate treatment, by agreement between law enforcement and the local MHMR office, MHMR was notified, and a trained mental health screener was sent to the scene to evaluate the person to see if they were indeed in need of treatment for mental illness. If the MHMR screener determined that the individual did need help, the law enforcement officers were requested to take the individual to the Peterson Regional Medical Center (PRMC) for lab work and a medical evaluation before MHMR would make application for a Judge's or Magistrate's Order for Emergency Apprehension and Detention pursuant to §573.011. Only after a clear medical evaluation, would the MHMR screener make such application. This application

was presented to a judge or magistrate, who only then issued the order for emergency apprehension and detention. This was the practice when civil commitments were being made to the Kerrville State Hospital,[1] and the same policy has been adopted by the CSU.

While we appreciate the CSU's need to ensure that its patients do not have medical issues that require attention at the time of admission for mental health treatment, this concern does not, in our opinion, serve to modify the constitutional or statutory requirements that govern law enforcement's role in the treatment of mental health patients. It is the position of the Kerr County Sheriff and of this office, that absent specific statutory authority, a peace officer has no authority to seize a person or to transport him against his will, or to force medical treatment on him.

It is our opinion that the statutes permitting the involuntary seizure and presentation to an inpatient mental health facility for treatment do not permit a peace officer to make a side trip with the patient to a medical facility and to forcibly subject him to medical evaluation and possible invasive treatment without the patient's consent.

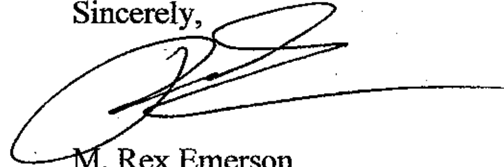
This issue raises important constitutional issues under the Fourth Amendment of the United States Constitution as well as the Article 1, §9 of the Texas Constitution. It is our understanding that this same practice has been adopted by some or all of the other state hospital facilities around the state, making resolution of this matter of critical and immediate importance. If our understanding of the law is correct, this policy puts all peace officers at risk of incurring liability for violation patients' rights if they comply with the medical pre-screening requirements of the CSU or other in-patient mental health facilities.

---

[1] Once the Kerrville State Hospital was converted into an entirely forensic hospital, no longer accepting civil commitments, the legislature created the CSU as a pilot project, to "provide short-term treatment for acutely mentally ill patients, including medical and nursing services, designed to reduce a patient's acute symptoms of mental illness and prevent [the] patient's admission to an inpatient mental health facility." Texas Health & Safety Code §551.009.

Please see the enclosed brief, which sets out the applicable law and our analysis more fully. Thank you for your assistance.

Sincerely,



M. Rex Emerson
Kerr County Attorney

Enclosure

cc: State Rep. Harvey Hilderbran
Rusty Hierholzer, Kerr County Sheriff
Mike Hayes, Kerrville City Attorney
Sheree Hess, Hill Country MHMR

BRIEF

ISSUE:

Whether a peace officer who has taken a proposed patient into custody pursuant to TEXAS HEALTH & SAFETY CODE §573.001 (peace officer's emergency detention) or §573.011 (judge's or magistrate's order for emergency apprehension and detention) may be required to transport the proposed patient to a medical facility for evaluation prior to acceptance by either a state hospital or the Hill Country MHMR's Crisis Stabilization Unit (CSU).

DISCUSSION:

Statutory Framework:

The TEXAS HEALTH & SAFETY CODE ("Code") provides the mechanism for apprehension, detention, and treatment of mentally ill individuals who are in need of mental health treatment, but who are suffering from the effects of such illness to the extent that they are unwilling or unable to voluntarily seek out and accept the treatment available through our state hospital system.

The two methods provided for in the Code for involuntary treatment are (1) peace officer's emergency detention (§573.001); and (2) judge's or magistrate's order for emergency apprehension and detention (§573.011). Both statutory provisions contemplate that the proposed patient is acutely mentally ill, in need of immediate treatment, but is unable or unwilling to agree voluntarily to seek treatment due to the effects of the mental illness.

Section 573.001 of the Code permits any peace officer to take a person into custody without a warrant if he has reason to believe and does believe that the person is mentally ill, and also believes that (1) because of that mental illness there is a substantial risk of serious harm to the person or to others unless the person is immediately restrained; and (2) there is not sufficient time to obtain a warrant before taking the person into custody.

A peace officer who takes an individual into custody pursuant to §573.001 (apprehension without warrant), must immediately take that individual to the nearest appropriate inpatient mental health facility or a facility deemed suitable by the county's mental health authority, if an appropriate inpatient mental health facility is not available[1]. The officer must then immediately file an application for detention, stating the officer's belief that the proposed patient meets the statutory criteria for commitment (§573.002).

---

[1] Note that the statute specifically provides that a jail or similar detention facility may not be deemed a suitable mental health facility except in extreme emergency. See THSC §573.001(e).

After this has been done, the officer's duties with respect to the detention and transportation are complete[2].

Section 573.011 of the Code permits any adult person to file a written application for the emergency detention of another person. This application must be presented to a judge or magistrate in person, who will then interview the applicant and review the application. The judge or magistrate must deny the application unless he finds that (1) the proposed patient evidences mental illness; (2) the proposed patient evidences a substantial risk of serious harm to himself or others; (3) the risk of harm is imminent unless the person is immediately restrained; and (4) the necessary restraint cannot be accomplished without emergency detention. *Id.*

If the magistrate finds that each criterion has been met, he will then issue to an on-duty peace officer a warrant for the person's immediate apprehension. The statute then requires that a person apprehended under this section must be transported for a preliminary examination "in accordance with §573.021 to the nearest appropriate inpatient mental health facility; or a mental health facility deemed suitable by the local mental health authority, if an appropriate inpatient mental health facility is not available." §573.011(d).

Section 573.021 mandates that a facility *shall* temporarily accept a person for a preliminary examination when they are brought to the facility pursuant to an application for emergency apprehension and detention[3]. Such person "may be detained in custody for not longer than 48 hours after the time the person is presented to the facility unless a written order for protective custody is obtained, but it is the facility's duty to have the proposed patient examined by a physician within the first 12 hours. *See* §573.012[4]. The 48-hour period allowed by this section includes any time the patient spends waiting in *the facility* for medical care before the person receives the preliminary examination." §573.021, emphasis added.

If the facility's physician determines that the proposed patient is appropriate for admission, he must be admitted for treatment (§573.022). If the physician finds the proposed patient to be inappropriate for treatment, he must be released (§573.023). The hospital or the local mental health authority (Hill Country MHMR, in this case) must then make arrangements to transport the proposed patient either to the location from which he was apprehended, or to his residence, or to another suitable location (§573.024), unless

[2] *See, e.g.* 24-415 Dorsaneo, Texas Litigation Guide, §415.05; *see also* AG Op. No. JC-0364 (after a peace officer transports the apprehended person to the inpatient mental health facility, that facility temporarily accepts the person for detention. Following a preliminary examination by a physician, the apprehended person is admitted or is released).

[3] *See* 25 TAC §412.176: "a SMHF **shall** accept for preliminary examination ... a person who has been apprehended and transported to the SMHF by a peace officer in accordance with THSC §573.001 or §573.012" (emphasis added).; *See also* 25 TAC §412.171: a person screened and referred to a SMHF by a LMHA shall be medically screened by the SMHF physician, and the SMHF is responsible for arranging for transfer of the patient to a hospital that can treat any emergency medical condition, if such is needed.

[4] *See* AG Op. No. JC-0387 (the admitting hospital is the proper entity to transport a patient)

the patient refuses to consent to the transport (§573.024[b]). The county in which the person was apprehended must pay the costs of this transportation (THSC §573.024[d]).

Background:

Kerrville has been the location of one of the seven state hospitals in Texas for a number of years. This hospital has historically been the location for voluntary and involuntary civil mental health commitments from a multi-county area surrounding Kerr County. This hospital has been slowly converted to an entirely forensic hospital, accepting only criminal court commitments, leaving Kerr County and the surrounding area without the ability to provide immediate care for acutely mentally ill citizens who require inpatient mental health services.

In recognition of this problem, the Texas Legislature created the CSU in 2007, which was to be a pilot project of the Department of State Health Services, contracting with Hill Country MHMR. The CSU was designed to serve the 19-county Hill Country area, and was designed to provide short term residential treatment, including medical and nursing services, to reduce a patient's acute symptoms of mental illness, which would then ideally prevent the necessity for that patient's admission to a more long-term inpatient mental health facility. *See* §551.009.

The CSU began operations in late April or early May, 2009, and has taken over services that were previously provided by the Kerrville State Hospital for acutely mentally ill individuals. Peace officer emergency detentions and judge's orders for emergency apprehension and detention are now directed to the CSU, rather than to the Kerrville State Hospital.

Current Practice:

The CSU, like the Kerrville State Hospital before it, requires that proposed patients brought to it pursuant to peace officer emergency detentions or judge's orders for emergency apprehension and detention, be taken to the local hospital by the presenting peace officer prior to their acceptance into the CSU. The CSU's insistence on this "medical clearance" appears to be based on the requirement in §573.021 that patients who are brought to the CSU must be medically evaluated by a physician within 48 hours of admission unless an order of protective custody[5] is obtained. The CSU has also directed our attention to certain policies adopted by the Department of State Health

---

[5] Orders of protective custody (OPC) are provided for in Chapter 574 of the Texas Health & Safety Code, and are the process by which a patient is involuntarily committed to an inpatient mental health facility in the absence of a peace officer's emergency detention or judge's/magistrate's order of emergency apprehension and detention. These orders are granted only upon application accompanied by a recent certificate of examination by a physician certifying the need for mental health treatment. A court on its own motion, or a county attorney or district attorney may file an application for OPC without the accompanying physician's certificate. Detention pursuant to this chapter is followed by appointment of counsel for the detained patient and required hearings within strict time limits.

Services regarding a patient's ineligibility for admission to its service if the patient has a physical medical condition that is unstable and could reasonably be expected to require inpatient treatment for that condition. *See* 25 TAC §411.608[6].

We believe that the CSU's reliance on these provisions to require law enforcement to take proposed patients to the hospital for medical clearance prior to bringing them to the CSU is misplaced. We acknowledge that a proposed patient must be medically evaluated either prior to admission into the unit or within 48 hours after admission, but under the established statutory scheme, all such evaluations should take place after the patient has been delivered to the facility and accepted for evaluation by the CSU. The law does not place this responsibility for medical evaluation and clearance on the law enforcement officer who presents the patient to the CSU for treatment.

Analysis:

It is a fundamental principle of American jurisprudence that all individuals have the right to be free from unreasonable searches and seizures. U.S. Constitution, 4th Amendment; Texas Constitution, Art. 1 §9. A seizure by a peace officer is by definition unreasonable if not authorized by law, and therefore any seizure by a peace officer for purposes of delivering a proposed patient to mental health treatment facility can only be reasonable if specific statutory authority exists allowing such seizure and transportation.

The Texas Health & Safety Code provisions cited above provide ample authority for a peace officer to apprehend and transport a patient either directly to a mental health facility based on his own observation and opinion that such is warranted, or to transport such patient to the facility pursuant to court order. The statutes do not authorize a detour to a medical facility, nor do they authorize the peace officer to compel an unwilling proposed patient to submit to medical evaluation, testing, or treatment. The referenced sections require the officer to "***immediately*** transport the apprehended person to the nearest appropriate inpatient mental health facility" (§573.001, emphasis added), or if the seizure is to be made pursuant to a judge or magistrate's order, that warrant must order the person's ***immediate*** apprehension and transportation to the nearest appropriate inpatient facility. (§573.012[d]).

While there are no cases on point regarding these statutes, we believe that the legislative intent is clear. When analyzing the meaning of a statute, a court must give effect to the plain meaning of the statute's language unless that plain meaning would lead to absurd consequences that the legislature could not possibly have intended. TEX. GOVT. CODE §311.021 (Texas Code Construction Act); *see also, Yeager v. State*, 23

---

[6] Note that the CSU has failed to note that the following guideline established by the Texas Department of State Health Services for admission to inpatient mental health facilities directly contradicts the CSU's position on patient transportation: "Policy on Medical Exclusion Criteria Guidelines for State Hospital Admissions -- ... Prospective state hospital patients may be seen in at least three categories for referral: I. Court-ordered patients – all patients under court order for state hospital treatment will be admitted, medically screened, and treated. Patients assessed to be medically unstable at the time of admission will be referred to a community hospital for medical stabilization per current state hospital policy."

S.W.3d 566 (Tex. App. – Waco 2000), rev'd on other grounds, 104 S.W.3d 103 (Tex. Crim. App. 2003). The statutes in question require that the proposed patient to be delivered *immediately* to the mental health facility. The plain meaning of this statute would prohibit any detour such as that required by the CSU, particularly one which also includes medical evaluation and possibly non-consensual invasive testing or treatment. The policy suggested by the CSU would convert a legal seizure into an unauthorized act that could open the officer to charges of unlawful restraint, false imprisonment or even assault, if medical procedures are undertaken without the patient's consent and against his will.

42 U.S.C. 1983 provides a cause of action against individual officers and their employer where constitutional violations results from the execution of a government's policy or custom. If the sheriff adopts the policy urged by the CSU, this would, in our opinion, open Kerr County up to potential liability for these alleged violations.

We believe that the correct interpretation of the referenced statutes require the medical evaluation to take place after the proposed patient has been delivered to the CSU. CSU personnel are then responsible for providing any necessary medical testing and/or treatment, either at that facility or at the local hospital, if they find such to be necessary. *See* §551.009(b). As detention and treatment by the CSU is authorized by statute, this process has none of the pitfalls that are present in the current policy followed by the CSU.

Respectfully submitted,

Rex Emerson, Kerr County Attorney