

[Cite as *State v. Doran*, 2010-Ohio-4530.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23750
v.	:	T.C. NO. 2003CR0933
SUSAN R. DORAN	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	

**OPINION**

Rendered on the 24<sup>th</sup> day of September, 2010.

JOHNNA M. SHIA, Atty. Reg. No. 0067685, Assistant Prosecuting Attorney, 301 W. Third Street, 5<sup>th</sup> Floor, Dayton, Ohio 45422  
Attorney for Plaintiff-Appellee

MARK J. BABB, Atty. Reg. No. 0078670 and PATRICIA N. CAMPBELL, Atty. Reg. No. 0068662, 2190 Gateway Drive, Fairborn, Ohio 45324  
Attorneys for Defendant-Appellant

DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Susan R. Doran, filed November 19, 2009. Doran was committed for treatment, in 2003, to Twin Valley Behavioral Healthcare (“TVBH”), after the trial court found her not guilty by reason of insanity of aggravated arson, a felony of the second degree. Doran was transferred to

Summit Behavioral Healthcare (“SBH”) after TVBH closed. On January 9, 2009, the trial court issued an “Order Granting Limited Level 5 Privileges,” which allowed Doran to leave the grounds of SBH unsupervised. While on these privileges, Doran sought independent psychiatric care.

{¶ 2} Doran appeals from a subsequent Order of October 29, 2009, issued after a hearing, which determined that Doran is a mentally ill person subject to hospitalization, but not in need of in-patient hospitalization, and which placed her on conditional release from SBH. The Order provides in part that Doran shall reside in a supervised group home setting and shall “receive intensive monitoring including daily face-to-face meetings with her case manager to monitor medication intake.”

{¶ 3} At the hearing, Doran opposed, inter alia, her conditional release to a group home and the daily monitoring requirements. John Goris, the director of adult services for Eastway Behavioral Healthcare (“EBH”), testified that he acts as the liaison between SBH and EBH. Goris stated he has not met Doran and has had no direct involvement in her care. Goris testified that Doran refused to sign the current conditional release plan, and that she refused to apply for social security benefits.

{¶ 4} Karen Marciani, a psychologist for the Forensic Psychiatry Center for Western Ohio, a division of EBH, testified that she acts as the forensic monitor for Montgomery County and the 13 surrounding counties. In that role, she oversees the treatment of patients found not guilty by reason of insanity, and she apprises the court of the their treatment status. Marciani has been involved with Doran’s treatment since 2003, although she has never met Doran. According to Marciani, she “became aware of some

behaviors that Ms. Doran was engaging in while hospitalized \* \* \* that suggested that she may not be compliant if allowed to leave the hospital.

{¶ 5} “Specifically, one of the issues that came to my attention was her use of level 5 privileges that were granted by this court. Primary concern being that I was made aware that she had seen a psychiatrist at another facility while away from the hospital grounds. And that was of concern because that suggested that she may be looking [for] other options. \* \* \* .” Although Marciani did not discuss the issues with Doran, she stated, “My concern specific to her case was that she didn’t tell anybody that she was going to seek another opinion, which suggested an attempt to either manipulate the system or to engage in activities that may be adverse to the treatment she was getting at Summit.”

{¶ 6} Dr. Lorena Wallhauser, a staff psychiatrist at SBH, testified that she has “weekly sessions with [Doran] as well as treatment team visits.” Wallhauser also stated that when Doran “was out on Level 5 privileges we found out that she was seeing a psychiatrist. And she didn’t tell us about it.”

{¶ 7} Finally, Daniel Anderson, a staff social worker at SBH, testified that Doran’s conservator told him that Doran was seeing an outside psychiatrist, and that after he relayed that information to Wallhauser, Doran’s Level 5 privileges were revoked.

{¶ 8} Doran asserts three assignments of error. Her first two assignments of error are as follows:

{¶ 9} “THE TRIAL COURT ERRED AS A MATTER OF LAW, BY FAILING TO PROVIDE MS. DORAN THE ADVICE REQUIRED BY R.C. 2945.40(C).” And,

{¶ 10} “THE TRIAL COURT VIOLATED MS. DORAN’S RIGHT TO EQUAL

PROTECTION AND DUE PROCESS OF LAW BY REVOKING HER LEVEL 5 PRIVILEGES WHEN SHE SOUGHT TO EXERCISE HER STATUTORY RIGHT TO AN INDEPENDENT PSYCHIATRIC EVALUATION.”

{¶ 11} The transcript of the hearing reveals, and the State in its brief admits, that it “is undisputed” that the trial court did not advise Doran of her rights pursuant to R.C. 2945.40(C) at her conditional release hearing. The State further asserts that the error does not affect a substantial right. We disagree. R.C. 2945.40(C) provides:

{¶ 12} “(C) If a person is found not guilty by reason of insanity, the person has the right to attend all hearings conducted pursuant to sections 2945.37 to 2945.402 of the Revised Code. At any hearing conducted pursuant to one of those sections, the court shall inform the person that the person has all of the following rights:

{¶ 13} “(1) The right to be represented by counsel and to have that counsel provided at public expense if the person is indigent,\* \* \* :

{¶ 14} “(2) The right to have independent expert evaluation and to have that independent expert evaluation provided at public expense if the person is indigent;

{¶ 15} “(3) The right to subpoena witnesses and documents, to present evidence on the person’s behalf, and to cross-examine witnesses against the person;

{¶ 16} “(4) The right to testify in the person’s own behalf and to not be compelled to testify;

{¶ 17} “(5) The right to have copies of any relevant medical or mental health document in the custody of the state or of any place of commitment other than a document for which the court finds that the release to the person of information contained in the

document would create a substantial risk of harm to any person.”

{¶ 18} Both parties rely upon *State v. Wachtel* (Aug. 29, 2000), Athens App. No. 98CA47, which reversed the trial court and remanded the matter due to the trial court’s failure to advise Wachtel of his rights, pursuant to R.C. 2945.40(C), in the course of a hearing to determine if Wachtel’s commitment to a psychiatric facility should be continued. The Fourth District noted that the “General Assembly amended R.C. 2945.40(C) effective March 13, 1997 to require trial courts to inform individuals subject to involuntary commitment of certain rights. See Am.Sub.S.B.No. 285, 146 Ohio Laws, Part VI, 11168, 111204.

{¶ 19} “ \* \* \*

{¶ 20} “As evidenced by the enactment of Am.Sub.S.B.No 285, the General Assembly has determined that it is important for individuals facing the loss of their liberty or the continued deprivation of their liberty through involuntary or continued commitment to be informed of their rights during the hearing determining their commitment.” The court further noted that “the General Assembly’s use of the word ‘shall’ in 2945.40(C) places a duty upon the trial court to inform persons facing involuntary commitment or continued commitment of the rights listed in that section.” Finally, the court concluded that the trial court’s error in failing to advise Wachtel was not harmless. The court determined, due to “Wachtel’s strained relationship with his appointed counsel and his heavy involvement in the proceedings, there is a reasonable probability that Wachtel, had the trial court informed him of his rights, would have exercised his rights, which would have affected the outcome of the proceedings.”

{¶ 21} R.C. 2945.40(C) imposes a mandatory duty upon the trial court to advise Doran of her rights. As in *Wachtel*, Doran’s liberty interest is at issue and she is entitled to be informed of her rights, including her right to seek an independent expert evaluation on the subject of conditional release. The fact that Doran sought independent psychiatric care resulted in the loss of her Level 5 privileges. It is clear that Doran opposed the revised 2009 conditional release plan which was more restrictive than her previous plan at SBH. Her opposition to the new plan raised a substantial objection that warranted an independent evaluation. Significantly, her loss of Level 5 privileges was a result of seeking independent psychiatric care, and no evidence was adduced that this effort on Doran’s part in fact impaired her on-going supervision and treatment. Accordingly, we sustain Doran’s first two assigned errors, reverse the judgment of the trial court, and remand the matter for proceedings consistent with R.C. 2945.40(C).

{¶ 22} Doran’s remaining assigned error is as follows:

{¶ 23} “MS. DORAN’S SIXTH AMENDMENT RIGHT TO REPRESENTATION WAS VIOLATED BY HER TRIAL COUNSEL’S INEFFECTIVE ASSISTANCE.”

{¶ 24} Our resolution of the first two assigned errors renders analysis of the remaining assigned error moot. See App.R.12(A)(1)(c).

Judgment reversed and remanded.

.....

BROGAN, J. and GRADY, J., concur.

Copies mailed to:

Johnna M. Shia  
Mark J. Babb

Patricia N. Campbell  
Hon. Mary L. Wiseman