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COMMONWEALTH OF MASSACHUSETTS

NORFOLK SUPREME JUDICIAL COURT

NO. SJC-13455

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

V.

A.Z.,
Appellant.

ON DIRECT APPELLATE REVIEW FROM A DECISION AND ORDER OF THE APPELLATE DIVISION OF THE DISTRICT COURT (SOUTHERN DISTRICT)

BRIEF FOR THE COMMONWEALTH

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Issues Presented

I. Where the defendant was ordered to be hospitalized for observation and further examination under G.L. c. 123, §15(b), and subsequently found incompetent to stand trial, at which point her interest in the §15(b) hospitalization order terminated, and where there was no surviving interest or stigma in the temporary hospitalization, should this appeal of the §15(b) hospitalization order be dismissed as moot?

II. Is G.L. c. 123, §15 narrowly tailored to achieve a State's interest in a defendant's right to be tried only if competent to stand trial, while not depriving a defendant of liberty without due process?

III. What evidentiary standard should a judge apply to determine whether to order a defendant's hospitalization for observation and further examination on the issue of the defendant's competence to stand trial under G.L. c. 123, §15(b), where the statute provides permissive authority to a judge to order a defendant's hospitalization after an initial screening by a qualified clinician if "necessary in order to determine whether mental illness or mental defect had so affected the defendant such that she was not competent to stand trial?"

IV. Where a court clinician opined that the defendant did not possess an ability to consult with her attorney in a rational manner and should be further evaluated at a psychiatric hospital, and was not a good candidate for voluntary treatment, was it error for the judge to order the defendant's hospitalization for 20 days for further examination under G.L. c. 123, §15(b)?

Statement of the Case[1]

On July 9, 2018, the defendant was arraigned in Wrentham District Court for threat of a bomb/hijack, in violation of G.L. c. 269, §14(b), arising from the defendant's July 6, 2018 email to an employee of the Walpole Times threatening to shoot him.[2] The Commonwealth moved for pretrial detention of the defendant as dangerousness under G.L. c. 276, §58A. On July 17, 2018, the judge (Maureen H. McManus, J.) found the defendant dangerous and ordered that she be held without bail. On that date, the defendant was evaluated regarding her competency to stand trial under G.L. c. 123, §15(a); after hearing, the judge did not order any further examination under G.L. c. 123, §15(b). (RA/7-9; SA/3-5).

On July 17, 2018, the defendant petitioned the Superior Court to review the dangerousness. On August 3, 2018, the defendant was found dangerous, but the judge (Peter B. Krupp, J.) found the following conditions of release were appropriate: GPS monitoring; reside at Knights Inn in Hadley, Massachusetts, or another location approved by probation; curfew from 12:00 a.m. to 5:00 a.m.; stay

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[1] The defendant's brief, record appendix, and addendum are "Def. Br.," "RA," and "ADD."

[2] On August 13, 2018, the Commonwealth amended the charge to threat to commit a crime, to wit: "shoot someone," in violation of G.L. c. 275, §§2-4. (RA/7, 17; SA/3, 4).

away from the victim or any employee of the Walpole Times; stay away from Walpole, Massachusetts; continue with mental health treatment with Dr. Locke; take all prescribed medications; have no contact with the Walpole Times or any news organization; no posting on social media; and sign and do not rescind releases for probation. On August 8, 2018, the Commonwealth moved in the District Court to revoke the defendant's bail for repeatedly contacting the Attorney General's press office. The Superior Court judge (Krupp, J.) who set the defendant's conditions of release heard the bail revocation motion and denied it; but the judge amended the defendant's conditions to include: no contact with the Attorney General's Office, and to only use a phone or computer to contact friends, family, counsel, therapist, and housing authority. (RA/9-12; SA/5-8).

On December 19, 2018, the Commonwealth filed a motion to revoke the defendant's bail for sending copies of her children's book to the home of the Norfolk District Attorney and the parents' home of an assistant district attorney with a note. The motion was denied (Neil A. Hourihan, J.). On December 28, 2018, the Commonwealth filed a motion to reconsider its motion to revoke the defendant's bail because another copy of the book was delivered to the assistant district attorney at her office. The motion was not acted upon. (RA/13; SA/9).

On January 4, 2019, the Commonwealth filed a motion to revoke the

defendant's bail on the grounds that a letter sent from the defendant's friend to the Walpole Times' parent company was written by, at the direction of, or in concert with the defendant. The motion was denied (Thomas A. Finigan, J.). (RA/13-14; SA/9-10).

On January 7, 2019, the Commonwealth filed a motion to revoke the defendant's bail based on her January 3, 2019 arrest in Westfield, Massachusetts for leaving the scene of property damage. The motion was denied (Finigan, J.). On that date, the judge ordered an examination regarding the defendant's competency to stand trial under G.L. c. 123, §15(a). (RA/14; SA/10).

On January 10, 2019, the defendant was examined by a court clinician regarding her competence to stand trial under G.L. c. 123, §15(a). After hearing, the judge (Steven E. Thomas, J.) ordered the defendant's commitment to Dr. Solomon Carter Fuller Mental Health Hospital for 20 days for observation and further examination regarding competence to stand trial under G.L. c. 123, §15(b). (ADD/86; RA/14-15, 33-43; SA/10-11).

On January 15, 2019, the defendant filed a notice of appeal; and subsequently filed a petition for relief under G.L. c. 211, §3 regarding the judge's order for further examination regarding her competence to stand trial. (RA/15, 47; SA/11). On January 24, 2019, the defendant's petition was denied (Kimberly S. Budd, J.)

(ADD/85; RA/15, 48; SA/15-16).

On January 29, 2019, after hearing, the defendant was found incompetent to stand trial (John P. Stapleton, J.) The Commonwealth filed a motion for observation and examination under G.L. c. 123, §16(a), which was allowed (SA/12). On March 1, 2019, after hearing, the defendant was found competent to stand trial (Finigan, J.). (SA/13).

On February 12, 2019, the defendant filed an amended notice of appeal. (RA/49).

On July 1, 2019, the court (Michele M. Armour, J.) accepted a joint recommendation to place the defendant on pretrial probation for three months, with conditions to stay away and have no contact with the victim, including no third-party contact; continue to meet with psychiatrist and therapist; continue to take medications as prescribed; and no contact with media. (RA/8; SA/15). On October 1, 2019, the case was dismissed. (SA/14).

On August 13, 2019, the defendant filed a brief in the Appellate Division of the District Court (Southern District). (RA/5). On October 10, 2019, the Commonwealth filed a responsive brief, and the Court scheduled a hearing for November 8, 2019. (RA/5). The defendant sought leave to file a reply brief, and on

October 29, 2019, the Court allowed her to file a brief by November 29, 2019. (RA/5).

On November 15, 2019, appellate counsel withdrew. (RA/5). On November 18, 2019, successor appellate counsel filed an emergency motion to file a substitute brief. (RA/5). On December 13, 2019, the Court allowed the defendant's motion and permitted the filing of a substitute brief before January 10, 2020. (RA/5). On January 10, 2020, the defendant filed her second brief with the District Court Department Appellate Division (Southern District). (RA/5). On February 24, 2020, the Commonwealth filed a responsive brief. (RA/5-6). On December 3, 2020, oral argument was heard. (RA/6).

On May 5, 2022, the Appellate Division of the District Court (Southern District) found the issues raised by the defendant not moot, but affirmed the trial court's January 10, 2019 order and dismissed her appeal. (ADD/76-78, 84; RA/51, 58-60, 66). The Court reasoned that a temporary detention under G.L. c. 123, §15 satisfied due process because the statute is narrowly tailored to a compelling government interest of ensuring an incompetent defendant is not forced to trial. (RA/62-63; ADD/80-81). The Court rejected the defendant's argument for a less restrictive alternative to hospitalization because her expert did not testify at the G.L. c. 123, §15(a) competency hearing, nor did the defendant provide the judge with an

affidavit from her expert. (RA/64; ADD/82). The Court also declined to read into G.L. c. 123, §15(b) a requirement that a judge find the defendant poses a serious risk of harm to herself or others to order the twenty-day temporary hospitalization. (RA/65-66; ADD/83-84).

On June 30, 2022, the defendant filed a Notice of Further Appeal from the Appellate Division's dismissal. (RA/6, 67).

Statement of Facts

Hearing Under G.L. c. 123, §15(a)

On January 10, 2019, Dr. Leah Robertson testified as follows. She had evaluated the defendant in July 2018 regarding her competency to stand trial under G.L. c. 123, §15(a). The defendant had informed the doctor that she had been diagnosed with bipolar disorder and was psychiatrically hospitalized when she was 19 years-old. Since 2013, she had been seeing her current therapist. Since 2008, she had been prescribed a mood stabilizer to counterbalance an estrogen patch. At that time, Dr. Robertson did not recommend further examination under G.L. c. 123, §15(b). (RA/33).

On the date of the hearing, Dr. Robertson met with defense counsel, who said that "he has noticed some decline" with the defendant over the past six months, and "that she talks quite a bit and it can get in the way of their discussing things."

(RA/33). Dr. Robertson found it was "very, very hard" to interview the defendant. (RA/34). The defendant exhibited "pressured speech" and "flight of ideas." (RA/34). During her interview, defense counsel, who was present, tried multiple times to advise his client, but she continually interrupted him. (RA/34). Dr. Robertson testified, "this case has become quite complicated." (RA/34). Defense counsel had told Dr. Robertson that the defendant had been arrested for possible violations of conditions of release, and that she had an open charge for leaving the scene of a car accident. (RA/34).[3]

During the interview, the defendant told Dr. Robertson that she did not believe she suffered from mental illness, which Dr. Robertson inferred that the defendant not pursue further mental health treatment. (RA/34). She told the doctor that she felt anguish about her relationship with a male friend, and was stressed about court proceedings and evidence being used against her. (RA/34). Dr. Robertson opined that the defendant did not possess an ability to consult with her attorney in a rational manner. She recommended further hospitalization in a psychiatric hospital. (RA/34-35). She opined that "if she does not treat this mental illness, she will continue to

[3] On cross-examination, Dr. Robinson stated she was aware that the bomb threat charge was reduced to a threats charge. She also agreed that the defendant had expressed "anguish" about her acquaintance's involvement in the case. (RA/36).

decompensate." (RA/35). On cross-examination, Dr. Robertson agreed that the defendant was seeing a therapist and taking prescribed medications. (RA/35-36).

Defense counsel argued that the defendant's competence could be addressed on an outpatient basis, said that the defendant had retained an expert, but did not submit an affidavit from the expert. (RA 37-41). In response, the judge noted that the defendant "doesn't believe she has a mental problem that needs to be addressed and, therefore, Dr. Robertson does not believe she's a good candidate for voluntary treatment." (RA/39). He then made the following findings:

> Let me just say that I understand that you would rather not me order you to be further evaluated by the State under Chapter 15(a)[sic] and subsequent chapters under [Chapter] 123. However, I do understand Dr. Leah Robertson's presentation as her observations, her thoughts concerning the challenges that you're [sic] presented with and the way in which she observed your behavior and characteristics today and prior. I understand that she does believe you have this illness, and that you are not in a position to be able to confidently assist counsel, and therefore she is recommending further evaluation and a work-up under the General Law, Chapter 120, Section 15(a) and (b).
>
> I'm going to allow that and endorse her suggestion that you be committed to Solomon Carter and Fuller Mental Health Institution [sic] for further -– Center for further evaluation under the chapter and section.
>
> (RA/42).

Argument

I. Where the defendant was ordered to be hospitalized for observation and further examination under G.L. c. 123, §15(b), her interest in that order terminated when she was subsequently found incompetent to stand trial and where there was no surviving interest or stigma in the temporary hospitalization, this appeal of the initial §15(b) hospitalization order should be dismissed as moot.

The defendant argues that while she is no longer hospitalized at Dr. Solomon Carter and Fuller Mental Health Center ("Solomon Carter") under G.L. c. 123, §15(b), she has a "surviving interest" in challenging the judge's hospitalization order. (Def. Br. 27-28, citing Matter of F.C., 479 Mass. 1029, 1029-30 (2018)). In the Matter of F.C. case, the Supreme Judicial Court held that "[a]ppeals from expired or terminated commitment and treatment orders under G.L. c. 123, §§7, 8, and 8B, like appeals from expired harassment prevention orders (G.L. c. 258E) or expired abuse prevention orders (G.L. 209A), 'should not be dismissed as moot where the parties have a continuing interest in the case.'" Matter of F.C., 479 Mass. at 1029-30. The Court reasoned, "a person who has been wrongfully committed or treated involuntarily has 'a surviving interest in establishing that the orders were not lawfully issued, thereby, to a limited extent, removing a stigma from his name and record.'" Id. at 1029–30 (quotation omitted).

The narrow and limited purpose of an order for temporary hospitalization for observation and further examination under G.L. c. 123, §15(b) is so the defendant may only be tried as competent; thus, there is no continuing stigma after the 20-day hospitalization has concluded. See Garcia v. Commonwealth, 487 Mass. 97, 106 n. 15 (2021) (an evaluation under G.L. c. 123, §15(b) to determine the defendant's competency is designed to help ensure that a defendant is not tried while incompetent.) Here, following the defendant's 20-day examination at Solomon Carter, the defendant was returned to the trial court and found incompetent to stand trial, at which point her interest in the hospitalization order concluded. (SA/12-13). The defendant was also returned to Solomon Carter for observation and examination under G.L. c. 123, §16(a), without objection. (SA/12).[4] On March 1, 2019, the defendant returned to court with a §16(a) evaluation. After hearing, the judge found the defendant competent to stand trial. (SA/13). The defendant was later placed on pretrial probation for three months, and on October 1, 2019, the case was dismissed. (SA/14, 15). The defendant's appeal is moot. Commonwealth v. Pagan, 445 Mass.

[4] A finding that a defendant is incompetent to stand trial permits a judge to order the defendant may be hospitalized for observation and further examination under G.L. c. 123, §16(a). A hospitalization under G.L. c. 123, §15(b) is not a condition precedent.

315, 317 (2005) ("Because the charges against the defendant were resolved, the case is moot.")

Further, the requirement under G.L. c. 123, §36C(a) that after a defendant has been involuntarily committed under G.L. c. 123, §15(b), the court must provide her identifying information with the department of criminal justice ("DCJIS") does not overcome the mootness of the defendant's appeal.[5] See Matter of J.C., 2018 Mass. App. Div. 63 (Dist. Ct. 2018) (the trial court's requirement to report an order of commitment under G.L. c. 123, §§7 and 8, to DCJIS does not stigmatize respondent nor give him a legally protected interest that prevents mootness.) The defendant has not presented evidence that the trial court provided DCJIS with any information about her hospitalization under G.L. c. 123, §15(b). The defendant also has not argued that she desires to apply for a license to carry a firearm. Cf. Matter of T.C., 2018 Mass. App. Div. 35 (Dist. Ct. 2018) (appeal moot where respondent presented no evidence she ever owned a gun or expressed a present interest in doing so.)

The defendant argues that her appeal presents issues of public importance capable of repetition and evading review. (Def. Br. 28, citing Pembroke Hosp. v.

[5] Mass. Gen L. c. 123, §36C(a) requires that "commitments" are to be reported to DJCIS, but does not state whether hospitalizations in a facility are to be reported by the court. G.L. c. 123, §36C(a).

D.L., 482 Mass. 346, 351 (2019)). Notably, in Garcia, the Supreme Judicial Court did not address temporary commitments of incompetent defendants under G.L. c. 123, §16(a) because "such circumstances present different compelling interests." Garcia, 487 Mass. at 102, 106 n. 10, 15, citing Commonwealth v. Calvaire, 476 Mass. 242, 246 (2017) (confinement of incompetent defendants under G.L. c. 123, §16(f) "narrowly tailored to allow the Commonwealth some time to pursue the legitimate and proper purpose of prosecuting charged crimes, but not for a period of time longer than is reasonably necessary to ascertain the defendant's chances of regaining competency.") This Court should properly exercise its discretion to find he defendant's case moot, where the issues raised concern a 20-day hospitalization order, issued over four years ago.

II. Mass. Gen. L. c. 123, §15 is narrowly tailored to achieve a compelling State interest to protect a defendant's right to be tried only if competent to stand trial, while not depriving a defendant of liberty without due process.

It is a violation of a defendant's due process right to a fair trial under both the Federal and Massachusetts Constitutions to proceed to trial when the defendant is not competent. Pate v. Robinson, 383 U.S. 375, 378 (1966); Commonwealth v. Vailes, 360 Mass. 522, 524 (1971). The test for determining competency to stand trial is whether the defendant has a "sufficient present ability to consult with his

lawyer with a reasonable degree of rational understanding and ... a rational as well as factual understanding of the proceedings." Commonwealth v. Hung Tan Vo, 427 Mass. 464, 468–469 (1998), quoting Commonwealth v. DeMinico, 408 Mass. 230, 236 (1990) and Vailes, 360 Mass. at 524. The Commonwealth has the burden of proving that the defendant is competent by a preponderance of the evidence. Commonwealth v. Crowley, 393 Mass. 393, 400–402 (1984). The judge is "entitled to substantial deference" regarding how to ensure that a defendant is competent to stand trial. Commonwealth v. Brown, 449 Mass. 747, 759 (2007).

Under G.L. c. 123, §15(a):

> Whenever a court of competent jurisdiction doubts whether a defendant in a criminal case is competent to stand trial or is criminally responsible by reason of mental illness or mental defect, it may at any stage of the proceedings after the return of an indictment or the issuance of a criminal complaint against the defendant, order an examination of such defendant to be conducted by one or more qualified physicians or one or more qualified psychologists. Whenever practicable, examinations shall be conducted at the court house or place of detention where the person is being held. When an examination is ordered, the court shall instruct the examining physician or psychologist in the law for determining mental competence to stand trial and criminal responsibility.

Whenever there is "a substantial question of possible doubt" whether the defendant is competent, the judge must conduct a hearing, regardless of whether counsel raises the issue, and inquire into the defendant's competency.

Commonwealth v. Hill, 375 Mass. 50, 62 (1978). A hearing does not necessarily require the taking of evidence, especially where there are recent written reports of mental health evaluations. Commonwealth v. Scionti, 81 Mass. App. Ct. 266, 272–73 (2012). The judge is permitted to rely on his own observations and direct knowledge of events, testimony from court officers and court staff, and the defendant's statements and conduct, as well as the impressions of counsel. Commonwealth v. Chubbuck, 384 Mass. 746, 752 (1981). A judge's determination of competency is reviewed under an abuse of discretion standard. Scionti, 81 Mass. App. Ct. at 273.

"An examination to determine competency has a 'limited, neutral purpose.'" Seng v. Commonwealth, 445 Mass. 536, 545 (2005), quoting Estelle v. Smith, 451 U.S. 454, 465 (1981). "It differs significantly from an examination intended to assess responsibility at the time of the crime . . . or from one to assess sexual dangerousness." Id. at 545 (internal citations omitted).

After a G.L. c. 123, §15(a) evaluation, the statute specifically permits a judge to order that a defendant "be hospitalized at a facility . . . for a period not to exceed twenty days for observation and further examination," if the judge "has reason to believe that observation and further examination are necessary in order to determine

whether mental illness or mental defect have so affected a person that he not competent to stand trial." G.L. c. 123, §15(b). Garcia, 487 Mass. at 106, n. 15.

In Garcia, the Supreme Judicial Court stated that G.L. c. 123, §15(b) is narrowly tailored because hospitalizations are ordered only after a screening evaluation and a judicial determination that observation and further examination are necessary. Id. Additionally, where a criminal case is pending, as was the case here, there is a compelling government interest for a G.L. c. 123, §15 evaluation to ensure that an incompetent defendant is not tried, convicted, or sentenced. Id., citing Commonwealth v. Robidoux, 450 Mass. 144, 152 (2007) (subjecting incompetent defendant to trial would violate due process rights). G.L. c. 123, §15 also satisfies "the Commonwealth's interest in 'protecting the public from potentially dangerous persons' who may be unable to control their actions because of their mental condition." Matter of E.C., 479 Mass. 113, 119 (2018), quoting Commonwealth v. Calvaire, 476 Mass. at 246.

Mass. Gen. L. c. 123, §15 provides a framework that protects a defendant's constitutional right to be tried only if competent to stand trial, and does not deprive a defendant of liberty without due process.

III. Mass. Gen. L. c. 123, §15(b) provides permissive authority to a judge to order a defendant's hospitalization for observation and further examination after an initial screening by a qualified clinician if "necessary in order to determine whether mental illness or mental defect had so affected the defendant such that she was not competent to stand trial.

The defendant argues that this Court should adopt the evidentiary standard for civil commitments under G.L. c. 123 for determining that necessity of an inpatient examination for competency to stand trial under G.L. c. 123, §15(b). (Def. Br. 38-43). Where the express language of G.L. c. 123, §15(b) permits a judge to order a criminal defendant to be hospitalized at a facility for the purpose of determining whether that defendant is competent to stand trial, the statute is conclusive as to legislative intent.

The Legislature chose not to include a likelihood of serious harm standard for G.L. c. 123, §15, so this Court should not read it into the statute. Cf. Garcia, 487 Mass. at 106-07 ("We doubt whether our tools of statutory interpretation would allow us to [rewrite G.L. c. 123, §16(a) to include a standard from other portions of the statute], especially where legislative history suggests that the Legislature might not have intended to include a standard at all.) Reviewing courts look first to the words of a statute, which is read according to its plan and ordinary meaning when the text is clear and unambiguous. Foss v. Commonwealth, 437 Mass. 584, 586

(2002). See also Commonwealth v. Garvey, 477 Mass. 59, 62 (2017) ("Where the statutory language is clear and unambiguous, our inquiry ends.")

Mass. Gen. L. c. 123, §15 is unambiguous: "[w]hen a criminal defendant is suspected of being incompetent to stand trial, a court may order the defendant to be evaluated by a court-appointed medical professional for an initial determination of competency." Matter of E.C., 479 Mass. at 116, citing G.L. c. 123, §15(a). The government and criminal defendant have a shared and compelling interest for him or her to be tried as competent. Matter of E.C., 479 Mass. at 119. Accordingly, the Legislature gave a specific authorization under G.L. c. 123, §15 permitting a judge to order an inpatient examination to determine whether a criminal defendant is competent to stand trial. Seng, 445 Mass. at 540-42. "If the initial determination is that the defendant appears to be incompetent and further examination is necessary, a judge may order the defendant committed to a mental health facility for a period of observation not to exceed twenty days." Id., citing G.L. c. 123, §15(b).

The case of Seng v. Commonwealth, where the Supreme Judicial Court addressed whether a criminal defendant must submit to a competency examination by an expert of the Commonwealth's choosing, is on point. Seng, 445 Mass. at 536. There, the defendant argued that the judge lacked authority under G.L. c. 123, §15. Id. at 539. The Court held that "[b]y its terms [G.L. c. 123, §15] permits the judge

to order a competency examination by “one or more” experts, and that the judge acted within her statutory authority. Id. at 540-41. The Court also found that “the statutory scheme . . . grants considerable discretion to a judge to determine how many experts should examine the defendant to determine his competency.” Id. at 545. It necessarily follows that the Legislature granted the same discretion for a judge to order an inpatient examination of a defendant to determine whether she is competent to stand trial under G.L. c. 123, §15(b). Cf. Pagan, 445 Mass. at 320 (the Legislature authorized “a specific, but limited, grant of authority to District Court judges . . . to revoke a bail order that has been entered under §58 or §57” under G.L. c. 276, §58).

Contrary to the defendant’s argument, proceedings under G.L. c. 123, §§7 and 8, §12(b), §§16(b) and (c), §18, and §35 concern involuntary civil commitments, and are dissimilar from those under G.L. c. 123, §15, which occur during the pendency of a criminal matter. (Def. Br. 37-45). At a hearing under G.L. c. 123, §15, the Commonwealth bears the burden to show that the defendant is competent so that the matter may proceed in the normal course. Seng, 445 Mass. at 539-45. At a hearing under G.L. c. 123, §§7 and 8, the hospital is petitioning for a person’s involuntary hospitalization; and under G.L. c. 123, §18, the “person in charge of the place of detention” or hospital may be the petitioner. The Commonwealth is not a proponent

for hospitalization under G.L. c. 123, §15(b), but has that right under G.L. c. 123, §§16(b) and (c). Civil commitment proceedings under G.L. c. 123 are clearly distinguishable proceedings under G.L. c. 123, §15(b); and their statutory schemes are reflective of the Legislature's intent as to the degree of authority it granted judges under each section.

For these reasons, G.L. c. 123, §15(b), by its express and unambiguous terms, appropriately grants permissive authority to a judge to order a person to be hospitalized at a facility for 20 days for the purpose of determining whether that person is competent to stand trial.

IV. Where a court clinician opined that the defendant did not possess an ability to consult with her attorney in a rational manner and should be further evaluated at a psychiatric hospital, and was not a good candidate for voluntary treatment, the judge properly ordered the defendant's hospitalization for 20 days for further examination under G.L. c. 123, §15(b).

The defendant argues that the judge erred in ordering her to undergo an inpatient examination under G.L. c. 123, §15(b) to determine whether she was competent to stand trial. (Def. Br. 47-53, 60-65). The judge properly exercised his substantial discretion to issue the hospitalization order. Brown, 449 Mass. at 759.

The defendant's contention that a further examination for competence to stand trial under G.L. c. 123, §15(b) could have been completed outpatient is without

merit. (Def. Br. 62-65). On January 7, 2019, the judge (Finigan, J.) ordered an examination under G.L. c. 123, §15(a), and defense counsel proposed that the examination be conducted by a court clinician rather than the defendant's expert, specifically, Dr. Robertson; and the judge approved funds for an independent evaluation by Dr. Patricia Schmitz. (RA/14, 18-20; SA/10). At the hearing on January 10, 2019, defense counsel argued that the defendant's competence could be addressed on an outpatient basis (RA/37-41), and the judge (Thomas, J.) responded that the defendant no longer believed she had a mental illness and would be unlikely to seek treatment voluntarily. (RA/39). He had the statutory authority, and responsibility, to assuage those concerns. Cf. United States v. Huguenin, 950 F.2d 23, 26 (1991) (rejecting defendant's claim that judge could not order competency examination under federal statute without his consent, and noting that requiring defendant's consent could defeat purpose of statute because if defendant is in fact incompetent, decision to give or withhold consent to examination would not be valid).

The defendant's claim on appeal of a less restrictive alternative was not properly before the trial court because there was no credible evidence presented that further examination for competence to stand trial under G.L. c. 123, §15(b) could have been completed outpatient. Absent from the record was any testimony by Dr.

Schmitz, nor an affidavit from her. Defense counsel represented that Dr. Schmitz could do a competency evaluation on an outpatient bases, which could not be considered by the judge. (RA/39). See Mass. G. Evid. §§801, 802 (2022) (statement of a declarant offered by a party in evidence to prove the truth of the matter asserted is inadmissible.)

On January 10, 2019, Dr. Robertson, a qualified clinician under G.L. c. 123, §15(a), evaluated the defendant and opined the defendant did not possess an ability to consult with her attorney in a rational manner and recommended inpatient hospitalization at Solomon Carter. (RA/34-35). The defendant told Dr. Robertson that she did not believe she had a mental illness, and the doctor believed that the defendant would not pursue outpatient treatment. (RA/34). Dr. Robertson testified that the case had become more complicated because the defendant was arrested for potential violations of conditions of release, and those arrests arose from her acquaintance's involvement in the criminal case and being charged with a subsequent offense. (RA/34-36).

The judge (Thomas, J.) expressed his concern that the defendant no longer believed she had a mental illness, and as Dr. Robertson opined, would be unlikely to voluntarily seek treatment. (RA/39). The judge considered the "challenges" the defendant faced during the pendency of her case (RA/42), which was appropriate to

assess whether she had the present ability to consult with her lawyer with a reasonable degree of rational understanding and whether she had a rational understanding of the proceedings. Vailes, 360 Mass. at 522. The judge was also present throughout the proceedings and could have observed the defendant's "behavior in the courtroom, [her] demeanor, and [her] interaction with defense counsel." Commonwealth v. Lameire, 50 Mass. App. Ct. 271, 276 (2000).

The judge (Thomas, J.) credited the doctor's findings and properly acted within his authority under G.L. c. 123, §15(b) to order a 20 day hospitalization for observation and further examination of the defendant where he had concerns about the defendant's competency to stand trial.

Conclusion

This Court should dismiss the defendant's appeal as moot; alternatively, it should affirm the decision of the trial court and dismiss the appeal.

Respectfully submitted,
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Certification By Counsel

I, undersigned counsel, hereby certify that the brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(13); Mass. R. A. P. 16(e); Mass. R. A. P. 18; Mass. R. A. P. 20; and Mass. R. A. P. 21. I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in a proportionally-spaced font Times New Roman font, size 14, and contains less than 11,000 non-excluded words.

Michael McGee

Addendum

G.L. c. 123, §15
Effective: March 28, 2001

(a) Whenever a court of competent jurisdiction doubts whether a defendant in a criminal case is competent to stand trial or is criminally responsible by reason of mental illness or mental defect, it may at any stage of the proceedings after the return of an indictment or the issuance of a criminal complaint against the defendant, order an examination of such defendant to be conducted by one or more qualified physicians or one or more qualified psychologists. Whenever practicable, examinations shall be conducted at the court house or place of detention where the person is being held. When an examination is ordered, the court shall instruct the examining physician or psychologist in the law for determining mental competence to stand trial and criminal responsibility.

(b) After the examination described in paragraph (a), the court may order that the person be hospitalized at a facility or, if such person is a male and appears to require strict security, at the Bridgewater state hospital, for a period not to exceed twenty days for observation and further examination, if the court has reason to believe that such observation and further examination are necessary in order to determine whether mental illness or mental defect have so affected a person that he is not competent to stand trial or not criminally responsible for the crime or crimes with which he has been charged. Copies of the complaints or indictments and the physician's or psychologist's report under paragraph (a) shall be delivered to the facility or said hospital with the person. If, before the expiration of such twenty day period, an examining qualified physician or an examining qualified psychologist believes that observation for more than twenty days is necessary, he shall so notify the court and shall request in writing an extension of the twenty day period, specifying the reason or reasons for which such further observation is necessary. Upon the receipt of such request, the court may extend said observation period, but in no event shall the period exceed forty days from the date of the initial court order of hospitalization; provided, however, if the person requests continued care and treatment during the pendency of the criminal proceedings against him and the superintendent or medical director agrees to provide such care and treatment, the

court may order the further hospitalization of such person at the facility or the Bridgewater state hospital.

(c) At the conclusion of the examination or the observation period, the examining physician or psychologist shall forthwith give to the court written signed reports of their findings, including the clinical findings bearing on the issue of competence to stand trial or criminal responsibility. Such reports shall also contain an opinion, supported by clinical findings, as to whether the defendant is in need of treatment and care offered by the department.

(d) If on the basis of such reports the court is satisfied that the defendant is competent to stand trial, the case shall continue according to the usual course of criminal proceedings; otherwise the court shall hold a hearing on whether the defendant is competent to stand trial; provided that at any time before trial any party to the case may request a hearing on whether the defendant is competent to stand trial. A finding of incompetency shall require a preponderance of the evidence. If the defendant is found incompetent to stand trial, trial of the case shall be stayed until such time as the defendant becomes competent to stand trial, unless the case is dismissed.

(e) After a finding of guilty on a criminal charge, and prior to sentencing, the court may order a psychiatric or other clinical examination and, after such examination, it may also order a period of observation in a facility, or at the Bridgewater state hospital if the court determines that strict security is required and if such person is male. The purpose of such observation or examination shall be to aid the court in sentencing. Such period of observation or examination shall not exceed forty days. During such period of observation, the superintendent or medical director may petition the court for commitment of such person. The court, after imposing sentence on said person, may hear the petition as provided in section eighteen, and if the court makes necessary findings as set forth in section eight, it may in its discretion commit the person to a facility or the Bridgewater state hospital. Such order of commitment shall be valid for a period of six months. All subsequent proceedings for commitment shall take place under the provisions of said section eighteen in the district court which has jurisdiction of the facility or hospital. A person committed to a facility or Bridgewater state hospital pursuant to this section shall have said time credited against the sentence imposed as provided in paragraph (c) of said section eighteen.

(f) In like manner to the proceedings under paragraphs (a), (b), (c), and (e) of this section, a court may order a psychiatric or psychological examination or a period of observation for an alleged delinquent in a facility to aid the court in its disposition. Such period shall not exceed forty days.

Certificate of Service

I certify that on June 22, 2023, which is within the time for filing, I e-filed and served copies of the Commonwealth's brief and supplemental appendix upon the defendant, to his attorney of record, Devorah Anne Vester, Esq., Committee for Public Counsel Services, Mental Health Litigation Division, 109 Main Street, Suite 201, Northampton, MA 01060, dvester@publiccounsel.net.

Signed under the pains and penalties of perjury.

____
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