Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-238

DECEMBER TERM, 2002

State of Vermont v. Richard S. Powers	} } } } } } } } } }	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET NO. 1312-2-02 CnCr Trial Judge: Brian Burgess

In the above-entitled cause, the Clerk will enter:

Defendant appeals an involuntary commitment order, arguing that the district court violated his due process rights and exceeded its jurisdiction by appointing a guardian ad litem for him and holding a commitment hearing before finding him to be incompetent to stand trial or change his plea. We affirm.

Defendant was charged with unlawful trespass and eventually transported to the Vermont State Hospital for an inpatient psychiatric examination. The examining psychiatrist initially concluded that defendant was competent to stand trial, but upon defense counsel' s motion and the district court' s order, the psychiatrist examined defendant again and found him to be incompetent. At the competency hearing on April 29, 2002, after hearing conflicting statements concerning defendant' s competency, the district court indicated its reluctance to go forward without appointing a guardian ad litem for defendant. The court asked counsel to express any positions they might have on appointing a guardian ad litem at that juncture in the case. Defense counsel responded, in part, by stating that the court could take the competency decision under advisement, appoint a guardian ad litem, and then reschedule the matter for a later combination competency/commitment hearing. After engaging defendant in a colloquy, the court did precisely what defense counsel suggested. A guardian litem was appointed, and a competency/commitment hearing was scheduled for May 6. At the hearing, the guardian ad litem declined to take a position on whether defendant was competent to stand trial. The court took the testimony of two psychiatrists, and heard from the attorneys, the guardian ad litem, and defendant before concluding that defendant was not competent to stand trial or change his plea. The court also determined that hospitalization was necessary because defendant posed a threat to himself and others. The criminal charge was dismissed.

On appeal, defendant first argues that the district court violated his due process rights by appointing a guardian ad litem for him before finding him to be incompetent. In making this argument, defendant relies exclusively on State v. Ladd, 139 Vt. 642 (1981). In that case, the district court appointed a guardian ad litem for the defendant before hearing any evidence on the issue of incompetency, and then failed to discharge the guardian even after finding the defendant to be competent based on the testimony of the examining psychiatrist. We held that the continued retention of the guardian ad litem after the defendant was found to be competent impinged upon the defendant' s due process rights. Id. at 644. The present case is inapposite. Here, at the first competency hearing, the district court was aware that the examining psychiatrist had found defendant to be incompetent, and that defense counsel had expressed substantial misgivings concerning defendant' s competency. To protect defendant' s rights, the court considered appointing a guardian ad litem for defendant pending further proceedings on the issue of competency. The court concurred with defense counsel' s suggestion that it appoint a guardian ad litem for defendant and take the matter under advisement until a combination

competency/commitment hearing could be held. At the follow-up hearing, the court found defendant to be incompetent, and thus, unlike the situation in Ladd, the guardianship did not continue after a finding of competence. We fail to see how defendant' s due process rights were violated.

Defendant also argues that the district court lacked jurisdiction to hold a commitment hearing without first finding him to be incompetent. In making this argument, defendant relies upon 13 V.S.A. § 4820(2), which provides that a court shall hold a commitment hearing if a person charged with a criminal offense is found to be incompetent to stand trial. Defendant made no objection to the procedure the court employed, and waived this argument. See, e.g., State v. Hayes, 172 Vt. 613, 614 (2001) (mem.). In any event, we can discern no prejudice from the court combining evidence presentation to determine the separate issues of whether defendant was incompetent to stand trial and whether he should be committed. Here, the court made the predicate determination of incompetency to stand trial before committing defendant to the custody of the Commissioner of Developmental and Mental Health Services.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice