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Equal Protection

SUPREME COURT

NEW YORK COUNTY

Matter of Tanya P.[97]
(printed February 28, 1995)

Tanya P. asserted that Bellevue Hospital's petition, made pursuant to section 9.13(b) of the Mental Hygiene Law,[98] requesting her involuntary confinement on the grounds that she posed a danger to her unborn fetus, infringed upon her federal and state constitutional rights to due process[99] and equal protection.[100] In a case of first impression, the New York

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97. N.Y. L.J., Feb. 28, 1995, at 26 (Sup. Ct. New York County 1995).

98. N.Y. MENTAL HYG. LAW § 9.13(b) (McKinney 1996). This subsection states in pertinent part:

> If such voluntary patient gives notice in writing to the director of the patient's desire to leave the hospital, the director shall promptly release the patient; provided, however, that if there are reasonable grounds for belief that the patient may be in need of involuntary care and treatment, the director may retain the patient for a period not to exceed seventy-two hours from receipt of such notice. Before the expiration of such seventy-two hour period, the director shall either release the patient or apply to the supreme court or the county court . . . for an order authorizing the involuntary retention of such patient.

Id.

99. U.S. CONST. amend. XIV, § 1. This provision states in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." *Id.* N.Y. CONST. art. I, § 6. Section 6 states in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *Id.*

100. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27. U.S. CONST. amend. XIV, § 1. This provision states in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* N.Y. CONST. art. I, § 11. This provision states in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

Additionally, Tanya P. asserted that the language of section 9.13 of Article IX of the Mental Hygiene Law contains no express provision allowing involuntary retention based on fetal endangerment. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27. The language of § 9.13 requires that the person the state seeks to commit be mentally ill and in need of involuntary treatment. *Id.* However,

Supreme Court, with an extremely well-reasoned opinion, denied the petition.[101]

The *Tanya P.* court held that the involuntary retention of Tanya P. on the grounds of fetal endangerment violated the statute "for failure to prove dangerousness by clear and convincing evidence, and because such involuntary commitment would violate [Tanya P.'s] constitutional right to liberty."[102] The court respectfully found that "[a] woman's pregnancy cannot support limitations upon her liberty on fetal endangerment grounds based on the entirely inadequate medical evidence presently available."[103] In addition, the court determined that discrimination based upon a woman's pregnancy is a violation of the woman's constitutional right to equal protection under the New York State Constitution.[104]

On April 9, 1993, a petition was brought pursuant to Mental Hygiene Law section 9.13(b)[105] by Bellevue Hospital to involuntarily retain Tanya P. on the grounds that if she were released, she would pose a threat to the safety of her unborn child.[106] Two months before the petition was filed, Tanya had become a patient at Bellevue in order to receive treatment for a

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the court stated that based on several federal and state decisions, § 9.13 requires a showing that the person is a potential threat to herself or other persons by clear and convincing evidence. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27 (citing O'Conner v. Donaldson, 422 U.S. 563, 575-76 (1975)). *See* Scopes v. Shah, 59 A.D.2d 203, 205, 398 N.Y.S.2d 911, 913 (3d Dep't 1977) (holding that due process "requires that the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others"). In addition, the court found that, "absent specific legislative inclusion of fetal protection, a fetus can have no 'rights' imputed to it and *cannot* be the object of the state's protection under Article IX of the Mental Hygiene Law." *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27. Thus, the court agreed with Tanya P. and held that section 9.13 "does not permit involuntary retention of a person for purposes of protecting the welfare of a fetus." *Id.*

101. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29.

102. *Id.*

103. *Id.*

104. *Id.*

105. N.Y. MENTAL HYG. LAW § 9.13(b).

106. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 26.

mental illness.[107] Tanya received treatment during those months, which ended her hallucinations and resolved her psychosis.[108] However, Bellevue sought to keep her retained as a patient at the hospital and filed the petition during her eighth month of pregnancy.[109]

Affidavits were submitted by two doctors in support of the petition for Tanya's retention.[110] At a hearing, one of the doctors testified, giving three reasons why Tanya should be involuntarily retained.[111] First, the doctor testified that Tanya's "impulsivity" and past addiction to crack would result in her continued use of drugs upon release from Bellevue, thus damaging her fetus.[112] Second, Tanya would be a great threat to her unborn child because of her "aggressive rule-breaking behavior" and her "inability to defer gratification stemming from her antisocial personality."[113] Third, Tanya's disposition and lifestyle before she was admitted to the hospital, particularly "living on the streets," posed a risk to her fetus because she would likely be involved in altercations with other people which would result in injury.[114] However, the doctor acknowledged on cross-examination that fetal endangerment resulting from cocaine use was speculative and unsupported by conclusive medical evidence.[115]

In evaluating Tanya P.'s claim that involuntary retention violated her substantive due process rights, the court found that retention on the grounds of fetal endangerment infringed upon her "liberty interest in freedom of movement,[116] freedom of

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107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* The doctor stated that "[w]e don't have any conviction that she wouldn't be using crack five minutes after she left the hospital." *Id.* at 27.

114. *Id.*

115. *Id.*

116. The United States Supreme Court has stated that involuntary confinement to a mental institution is a "massive curtailment of liberty." Humphrey v. Cady, 405 U.S. 504, 509 (1972). In *Humphrey*, the petitioner

reproductive choice,[117] and freedom to refuse medical treatment."[118] The court stated that since the retention infringed upon these fundamental rights of privacy and liberty, the policy had to withstand strict scrutiny to avoid violating substantive due process.[119] Thus, the hospital was required to demonstrate that

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challenged the constitutionality of a statute providing a procedure for the involuntary commitment of sex offenders. *Id.* at 506. The Court, deciding that an evidentiary hearing was necessary, remanded the case back to the district court. *Id.*

117. "'[L]iberty' also includes the fundamental right to privacy in matters such as bodily autonomy and reproductive choice." *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973), *holding modified by* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). In *Roe*, an unmarried pregnant woman residing in Texas sought an abortion. *Id.* at 120. However, she was unable to obtain a legal abortion in Texas due to state statutes that made it a crime to perform an abortion unless it was necessary to save the mother's life. *Id.* She filed suit challenging the constitutionality of the criminal abortion statutes, alleging that the statutes infringed upon her right to privacy as guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.* The Supreme Court held that the Texas criminal abortion statutes' ban on abortions unless needed to save the mother's life, without considering the stage of the woman's pregnancy, violated the Fourteenth Amendment Due Process Clause. *Id.* at 164.

118. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29. The New York Court of Appeals has stated that bodily autonomy encompasses being able to choose and "control the course of [one's] medical treatment." Rivers v. Katz, 67 N.Y.2d 485, 492, 495 N.E.2d 337, 341, 504 N.Y.S.2d 74, 78 (1986). In *Rivers*, involuntarily retained mental patients filed suit "to enjoin the nonconsensual administration of antipsychotic drugs and to obtain a declaration of their . . . constitutional right to refuse medication." *Id.* at 490-91, 495 N.E.2d at 339-40, 504 N.Y.S.2d at 76-77. The court of appeals held that "the due process clause of the New York State Constitution affords involuntarily committed mental patients a fundamental right to refuse antipsychotic medication." *Id.* at 492, 495 N.E.2d at 341, 504 N.Y.S.2d at 78. The court also declared that the right was not absolute and could be overcome by a compelling interest asserted on behalf of the State. *Id.* at 495, 495 N.E.2d at 343, 504 N.Y.S.2d at 80.

119. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 28. *See Roe*, 410 U.S. at 155 (stating that "[w]here certain 'fundamental rights' are involved . . . regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake") (citations omitted); *Rivers*, 67 N.Y.2d at

the retention "serves a compelling [state] interest, and that the policy is narrowly tailored to achieve its goals."[120]

In evaluating whether the fetal endangerment policy furthered a compelling state interest, the court established that the hospital was required to show by clear and convincing evidence that the respondent represented "a real and present threat of substantial harm to [her]self or others."[121] However, the court determined that the "others" did not include an unborn child, and that a fetus "*cannot* be the object of the state's protection under Article IX of the Mental Hygiene Law."[122] Thus, the court stated that "absent a legislative declaration that a fetus is a person, neither the state nor the federal constitution 'confer[s] or require[s] legal personality for the unborn.'"[123] The court concluded that it was not the intent of the legislature to include unborn children under

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495-97, 495 N.E.2d at 342-44, 504 N.Y.S.2d at 80-81 (stating that where a fundamental right is at issue restrictions based upon a compelling state interest must be narrowly tailored to achieve that interest).

120. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 28.

121. *Id.* (citing Scopes v. Shah, 59 A.D.2d 203, 205, 398 N.Y.S.2d 911, 913 (3d Dep't 1977)). In *Scopes*, the petitioner was involuntarily retained on the grounds that he was mentally ill, required treatment and was unable to "realize the necessity for that treatment." *Id.* at 204-05, 398 N.Y.S.2d at 912-13. The appellate division held that in order to justify involuntary retention of a patient, it must be shown that the individual poses a danger to himself or others; it is not enough that the sole grounds for "such deprivation of liberty is the provision of some treatment." *Id.* at 205, 398 N.Y.S.2d at 913.

122. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27.

123. *Id.* (alteration in original) (citing Byrn v. New York City Health & Hosp. Corp., 31 N.Y.2d 194, 203, 286 N.E.2d 887, 890, 335 N.Y.S.2d 390, 395 (1972)). In *Byrn*, the issue was "whether children in embryo are and must be recognized as legal persons or entities entitled under the State and Federal Constitutions to a right to life." *Byrn*, 31 N.Y.2d at 199, 286 N.E.2d at 888, 335 N.Y.S.2d at 392. The court of appeals stated that "unborn children have never been recognized as persons in the law in the whole sense." *Id.* at 200, 286 N.E.2d at 888, 335 N.Y.S.2d at 392. It also determined that "[t]he Constitution does not confer or require legal personality for the unborn." *Id.* at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 395. Additionally, the *Tanya P.* court noted that the United States Supreme Court has declared that "'the unborn have never been recognized in the law as persons in the whole sense.'" *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 27 (quoting Roe v. Wade, 410 U.S. 113, 162 (1973)).

this section of the Mental Hygiene Law.[124] Alternatively, the court asserted that even if a fetus was encompassed in the Mental Hygiene Law's definition of "others," the "courts do not compel one person to permit a significant intrusion upon his or her bodily integrity for the benefit of another person's health."[125] Additionally, the court stated that "[i]f the fetus likely would, or even might survive without involuntary confinement of the pregnant woman, there is no 'compelling' interest."[126] Furthermore, the court found that the medical evidence presently available relating crack or cocaine use to fetal endangerment was speculative and thus not sufficient to justify involuntary retention.[127] Therefore, the court concluded that the State did not have a compelling interest to justify retention of Tanya P. on the basis of fetal endangerment.[128]

The court next turned to the question of whether the hospital had established that involuntary retention was narrowly tailored to fulfill the state's goal of preventing fetal endangerment in mentally ill, substance abusing pregnant women.[129] In the instant case, the court found that the respondent's conduct clearly reflected her eagerness to obtain pre-natal care, the respondent's family had and would continue to provide her with affection and would continue to support her, and the medical evidence presented by petitioner was not conclusive in showing adverse effects upon a fetus by a pregnant woman's use of crack or cocaine.[130] Accordingly, the court determined that the

124. *Id.*

125. *Id.* at 28 (quoting *In re A.C.*, 573 A.2d 1235, 1243-44 (D.C. 1990)). In *A.C.*, doctors asserted that a terminally ill, pregnant woman's fetus would have a reduced survival rate unless a caesarean section was performed. *In re A.C.*, 573 A.2d at 1239. The Court of Appeals of the District of Columbia held that the right of an individual to accept or forego medical treatment requires that "in virtually all cases the question of what is to be done is to be decided by the patient-the pregnant woman-on behalf of herself and the fetus." *Id.* at 1237.

126. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 28.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

circumstances in the instant case "demonstrate that involuntary commitment is, at best, only loosely related to any state interest in preserving potential human life."[131] Further, the court noted that "since prenatal care is the single most important factor in healthy babies born to substance abusers, the fear of involuntary commitment by a woman seeking such treatment may well deter her from precisely what is most needed and which best serves the state's interest."[132] Thus, involuntary retention "is not only insufficiently tailored, it is also directly contra-indicated."[133] As a result, the court determined that involuntary commitment based on potential danger to the fetus failed strict scrutiny.[134]

In addition, the court established that the involuntary retention of mentally ill, substance abusing pregnant women who do not pose a threat to themselves or other people, and who would not be retained if they were not pregnant, implicates the equal protection clauses of both the state and federal constitutions.[135] The court found that the involuntary retention policy had not withstood strict scrutiny as applied to the deprivation of a person's liberty.[136] The court further asserted that, assuming strict scrutiny was not applicable, the involuntary retention at issue in this case discriminated on the basis of pregnancy.[137] Although noting that in *Geduldig v. Aiello*,[138] the "Supreme Court has held that discrimination based on pregnancy is not gender-based discrimination for purposes of the Fourteenth Amendment,"[139] the court found the reasoning of Justice

131. *Id.*
132. *Id.* at 29.
133. *Id.*
134. *Id.* at 28.
135. *Id.* at 29.
136. *Id.*
137. *Id.*
138. 417 U.S. 484 (1974). In *Geduldig*, the appellees challenged the constitutionality of a section of California's disability insurance program which excluded coverage of disabilities occurring as a result of pregnancy. *Id.* at 486. The Court held that the program did not violate the Equal Protection Clause. *Id.* at 497.
139. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29.

Brennan's dissent in *Geduldig* more persuasive.[140] In *Geduldig*, Justice Brennan stated that "dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[141] The court in *Tanya P.* then stated that "New York courts are not bound by [the majority opinion of *Geduldig*] in determining the extent of protection under our State Constitution Equal Protection Clause."[142]

In the absence of a state court decision directly ruling on the issue, the court referred to *Brooklyn Union Gas Co. v. New York State Human Rights Appeal Board*,[143] where the New York Court of Appeals, "in construing provisions of our state's Human Rights Law . . . held that pregnancy based discrimination *is* gender based discrimination."[144] The court stated that based on the reasoning of the court of appeals in *Brooklyn Union Gas Co.*, and the dissent in *Geduldig*, the applicable test for pregnancy based discrimination under the New York State Constitution is akin to intermediate scrutiny, and that "the state bears the burden

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140. *Id.*

141. *Geduldig*, 417 U.S. at 501 (Brennan, J., dissenting).

142. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29. *See* People v. P.J. Video, Inc., 68 N.Y.2d 296, 302, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986) (stating that "[a]lthough State courts may not circumscribe rights guaranteed by the Federal Constitution, they may interpret their own law to supplement or expand them"), *cert. denied*, 479 U.S. 1091 (1987).

143. 41 N.Y.2d 84, 359 N.E.2d 393, 390 N.Y.S.2d 884 (1976).

144. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29. The court of appeals in *Brooklyn Union Gas Co.* recognized that two years after *Geduldig*, the Supreme Court, in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), had interpreted Title VII's ban on gender based discrimination not to include pregnancy based discrimination. *Brooklyn Union Gas Co.*, 41 N.Y.2d at 86 n.1, 359 N.E.2d at 395 n.1, 390 N.Y.S.2d at 886 n.1. The court of appeals, however, found the Supreme Court's decision "instructive, [but] not binding" in reading New York Executive Law section 296 as prohibiting pregnancy based discrimination. *Id.* at 386, 391 n.1, 359 N.E.2d at 395, 398 n.1, 390 N.Y.S.2d at 886, 889-90 n.1. In addition, the *Tanya P.* court noted that this interpretation of Title VII by the Supreme Court was reversed when Congress enacted the Pregnancy Discrimination Act of 1978. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29 n.47.

of showing an important governmental interest and means closely tailored to effectuate that interest."[145]

The court noted that involuntary retention, based on fetal endangerment, had failed strict scrutiny because the fit was not tight enough to further the State objective.[146] As a result, the court concluded that the involuntary retention did not withstand intermediate scrutiny either.[147] The court stated that "[t]he means chosen [are] . . . 'actually perverse'" to that objective.[148] Thus, the court determined that involuntary confinement violated Tanya P.'s equal protection rights because it constituted impermissible gender based discrimination.[149]

The court applied the strict scrutiny test to determine if Tanya P.'s liberty interests under the Federal and New York State Constitutions had been violated,[150] and intermediate scrutiny to determine if her right to equal protection had been violated under the New York State Constitution.[151] Although the court acknowledged the majority decision of the Supreme Court in *Geduldig* with respect to equal protection, the court made it clear that New York may expand the protection afforded under the Federal Constitution.[152] In doing so, the *Tanya P.* court chose to follow Justice Brennan's dissent in *Geduldig*. Furthermore, the court noted that Congress included discrimination based on pregnancy in Title VII's ban on discrimination based on sex when it enacted the Pregnancy Discrimination Act of 1978.[153] Thus, in accordance with the reasoning of Justice Brennan's dissent, the New York Court of Appeals in *Brooklyn Union Gas Co.*, and the Pregnancy Discrimination Act of 1978, the court found that gender discrimination included pregnancy based discrimination

145. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *See supra* notes 86-88 and accompanying text.
151. *See supra* note 145 and accompanying text.
152. *Tanya P.*, N.Y. L.J., Feb. 28, 1995, at 29.
153. *Id.* at 26 n.47.

and, as such, was prohibited.[154] As a matter of constitutional law, *Tanya P.* points out that the New York Equal Protection Clause goes further than the Federal Equal Protection Clause, in that it deems discrimination based on pregnancy gender discrimination, thus subjecting it to review under intermediate scrutiny.

RENSSELAER COUNTY

Jubic v. City of Troy City Corporation[155]
(decided October 4, 1995)

Plaintiff, an applicant to become a municipal firefighter, passed an open competitive examination for the position prior to reaching the age of thirty-five, however, he was not offered the position until after turning age thirty-five.[156] Plaintiff brought an action against the municipality seeking an order stating that he had been denied his right to equal protection under the New York State[157] and Federal Constitutions[158] when the municipality refused to hire him.[159] The Supreme Court, Rensselaer County, held that defendants' requirement, that firefighter applicants be under the age of thirty-five in order to take the open competitive examination, was not violative of the Federal Constitution or the

154. *See supra* notes 80-82 and accompanying text.

155. 166 Misc. 2d 326, 633 N.Y.S.2d 720 (Sup. Ct. Rensselaer County 1995).

156. *Id.* at 328, 633 N.Y.S.2d at 721.

157. N.Y. CONST. art. I, § 11. Article I, § 11 provides in pertinent part:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Id.

158. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

159. *Jubic*, 166 Misc. 2d at 328, 633 N.Y.S.2d at 721.