

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 29, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 97-0980

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF V.L.B., ALLEGED
MENTALLY ILL:**

MARATHON COUNTY,

PETITIONER-RESPONDENT,

v.

VICKI L.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County:
MICHAEL W. HOOVER, Judge. *Affirmed.*

LaROCQUE, J. Vicki L.B. appeals an order granting the Marathon County's application for an extension of her involuntary commitment pursuant to § 51.20(1)(am), STATS., dated June 6, 1996. Although the County advises that the court has issued a new order on June 3, 1997, it concurs with Vicki that the issues

should not be considered moot because they may arise again in this case. The appeal therefore will not be dismissed as moot.

Vicki first contends that she had ineffective counsel because there was an untimely filing of a request for a jury trial. The record does not reflect that Vicki instructed counsel that she wanted a jury. More importantly, Vicki has failed to comply with *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979), requiring the preservation of the testimony of trial counsel as a prerequisite to a claim of ineffective counsel made on appeal.

Next, Vicki contends that the County failed to meet its burden of proof that she posed a substantial probability of physical harm to herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm. A trial court's findings of fact will not be upset on appeal unless they are clearly erroneous and against the great weight and clear preponderance of the evidence; the evidence supporting the trial court's findings need not constitute the great weight or clear preponderance of the evidence and reversal is not dictated even if there is evidence to support a contrary finding. *Klein-Dickert Oshkosh, Inc. v. Frontier Mtg. Corp.*, 93 Wis.2d 660, 663, 287 N.W.2d 742, 743 (1980). The report of Dr. John Coates, a licensed physician, was placed in evidence at the commitment hearing. His report indicated that Vicki “believes that she is sometimes mentally ill and admits to often hearing ‘good voices.’” It also reports “mood labile”[readily open to change] and at times angry. History of auditory hallucinations. Impaired judgment.” He diagnosed “schizophrenia, paranoid type” and indicated that she presents a significant risk of dangerousness to herself as a result, adding “without proper medical care, the subject would be unable to care for herself or properly socialize. There would also be an increased risk of suicide.” A licensed psychologist expresses similar opinions.

Vicki challenges the sufficiency of the evidence on grounds that neither expert expressed to a sufficient degree of certainty that she would stop taking her medication if not committed. If counsel means to challenge the failure to establish that the experts' opinions were to a reasonable certainty, the failure to object at the time of hearing constitutes a waiver. If Vicki is challenging the sufficiency of the evidence in general, this court rejects her challenge. The examiners testified that Vicki would be a proper subject for commitment if treatment were withdrawn. Coates' testimony was that Vicki did not believe she really needed the medication and that if given the opportunity to discontinue medication, she would. The trial court was entitled to rely on this evidence to find that Vicki would stop taking medication if not committed.

Vicki also contends that the record is insufficient to support a finding that Vicki be treated with psychotropic medication. She refers to the law that requires that a patient may refuse the involuntary administration of such medication if, after a psychiatrist has adequately explained the advantages and disadvantages of the alternatives, she is able to express an understanding of the advantages, disadvantages and alternatives. *In re Mental Condition of Virgil D.*, 189 Wis.2d 1, 524 N.W.2d 894 (1995). The court must distinguish between the patient's mental illness and her ability to exercise informed consent. *Id.* Vicki contends that the record does not demonstrate precisely what types of treatment alternatives were discussed, what impacts those treatments would have upon the patient, and the potential risks and side effects of the medication.

The law of course permits the admission of expert testimony in the form of an ultimate or conclusory opinion. *See* § 907.04, STATS. The underlying facts or data upon which the expert's opinion is based may be disclosed by cross-examination. *See* § 907.05, STATS. Of course, the fact that the opinion is

admissible does not always mean that the opinion is adequate to prove the conclusion for which the opinion is offered. In this case, the reports in evidence demonstrate that the experts explained the advantages and disadvantages of accepting treatment by psychotropic medication, as well as the alternatives to such treatment by medication. The reports also show that the examiners explained the advantages and disadvantages even if the examiners felt that she obviously would not understand the explanation. The reports show that each of the examiners was of the opinion that Vicki was not competent to make an informed consent and that the medication was necessary to prevent a danger to herself. This is sufficient to allow the court to find that medication was appropriate. Vicki had the right to introduce evidence that would negate this proof but did not do so. The trial court weighs the evidence and decides the credibility of witnesses. The court did not commit an error of law by accepting the opinions of the experts to conclude that the County had met its burden of proof.

By the Court.—Order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

