

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP1595

Cir. Ct. No. 2006GN45

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF CHRISTOPHER G:

WISCONSIN DEPARTMENT OF CORRECTIONS,

PETITIONER-RESPONDENT,

v.

CHRISTOPHER G.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORK, Judge. *Reversed and cause remanded with directions.*

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Christopher G. appeals from an order that denied his request for reconsideration of a previously issued ex parte order allowing the

Department of Corrections (DOC) medical staff to force feed and hydrate him whenever they deem it medically necessary, so long as Christopher G. remains in DOC custody. We reverse based on the recently issued decision in *DOC v. Saenz*, 2007 WI App 25, No. 2005AP2750.

BACKGROUND

¶2 The Department of Corrections filed a petition on June 8, 2006 seeking authorization to force feed and hydrate Christopher G. in order to protect both his health and the safety of the correctional institution. The petition alleged that Christopher was an inmate at the Waupun Correctional Institution in DOC custody; that he had undertaken a hunger strike to protest his medical care; that he was suffering from moderate to severe dehydration and malnutrition; that he was at great risk of suffering serious harm or death if he did not receive immediate medical treatment including forced hydration and nutrition in the near future; and that the death of an inmate in such circumstances would jeopardize the security and order of the correctional institution. The petition was supported by affidavits from a DOC physician and the warden of the Waupun Correctional Institution.

¶3 The trial court issued an ex parte order granting the requested relief the same day. The order provided that:

... any licensed physician, or a person acting under his or her direction and control, may evaluate and medically treat, including providing to Christopher [G.] any feeding or hydration or both, by force or otherwise, which in his or her medical judgment is necessary to protect and maintain the health of Christopher [G.] while he remains in the legal custody of the Department of Corrections.

Christopher filed an objection to the ex parte order on June 13, 2006. He acknowledged that he had been on a hunger strike, but requested an evidentiary

hearing at which he could challenge, among other things, the necessary scope and the indefinite duration of the court's force-feeding order. The trial court refused to give Christopher an evidentiary hearing or to modify the ex parte order, and Christopher appeals.

DISCUSSION

¶4 Christopher raised the following claims in his appellate brief: (1) inmates have a constitutional right to go on a hunger strike as a means of protest without being force fed; (2) even if prison officials may force feed a hunger-striking inmate in some instances, the order here should have been more narrowly tailored to avoid excessive force; (3) the court did not adequately consider or explain why any applicable government interest outweighed his own liberty interest in refusing medical treatment under the circumstances present here; and (4) he was entitled to have a hearing on the question of his competency, once that issue had been raised.

¶5 After the briefs in this matter had been filed, this court issued a decision in another case with nearly identical facts. *See Saenz*, 2007 WI App 25. Because it is clear that the decision in *Saenz* would control the outcome here if the due process issues raised by counsel in *Saenz* had also been raised by the pro se inmate in this case, we have decided to sua sponte exercise our own discretionary reversal power under WIS. STAT. § 752.35 (2005-06).¹

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶6 The *Saenz* case was initiated in Dodge County by a petition from DOC seeking an order allowing department medical staff to force feed an inmate who was refusing food and hydration, just as in this case. *Id.*, ¶¶2, 3. The same trial court issued a nearly identical ex parte order granting DOC the right to have any licensed physician administer any feeding or hydration which would be necessary in the physician's medical judgment to protect and maintain the inmate's health, for so long as the inmate remains in DOC's custody. *Id.*, ¶5. The inmate challenged the order, but the trial court refused to hold an evidentiary hearing to consider the inmate's objections. *Id.*, ¶9. On appeal, this court concluded in relevant part that: (1) although it was proper for the court to issue an ex parte order based on the initial petition, the trial court erred in refusing to grant the inmate an evidentiary hearing as soon as reasonably possible, once the inmate disputed material factual allegations in DOC's petition, *id.*, ¶¶23-24, 26; and (2) assuming the State met the burden of proof at the hearing, any final order for forced nutrition and hydration could not be permanent or indefinite in duration unless it also included a mechanism for periodic review. *Id.*, ¶25.

¶7 We conclude that the same due process violations found in *Saenz* are present here. That is, although the trial court could properly issue a temporary ex parte order for forced nutrition and hydration based on the exigent circumstances alleged in the affidavits filed by DOC, once the inmate challenged the basis for the temporary order he was entitled to a prompt evidentiary hearing at which DOC would bear the burden of proving its allegations by the greater weight of the credible evidence. *See id.*, ¶29. In particular, the trial court must decide whether Christopher is still refusing to consume sufficient nutrition and hydration to maintain his health in light of his assertion that he has agreed to consume some food and water when given to him by medical staff. The Department of

Corrections must also show that Christopher is still suffering from severe malnutrition or dehydration and is in imminent danger of suffering serious harm or death. *See id.*, ¶28. Furthermore, any final order issued after the hearing cannot be permanent or indefinite in nature unless it also includes some mechanism for periodic review. *Id.*, ¶33.

¶8 Accordingly, we reverse the appealed order and remand for further proceedings consistent with this opinion and the more detailed discussion set forth in *Saenz*.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

