COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 01-1174-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

IN THE MATTER OF THE MENTAL COMMITMENT OF LAURA J.M.:

COUNTY OF WAUKESHA,

PETITIONER-RESPONDENT,

V.

LAURA J.M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Reversed and cause remanded with directions*.

¶1 ANDERSON, J.[1] Laura J.M. appeals from orders for involuntary medication and treatment. Laura contends that the trial court erred in concluding

[1] This is a one-judge appeal pursuant to WIS. STAT. § 752.31(2)(d) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that she was incompetent to refuse medication. She claims that because the trial court found that she expressed knowledge of the disadvantages of medication, Waukesha County failed to prove by clear and convincing evidence that she was incapable of expressing an understanding of the advantages *and* disadvantages of accepting medication or treatment and the alternatives. We reverse and remand because the trial court failed to make the findings required by ***Virgil D. v. Rock County***, 189 Wis. 2d 1, 524 N.W.2d 894 (1994).

¶2 As part of a Petition for Recommitment, the Waukesha County § 51.42 Department of Community Programs (County) sought an order for the involuntary medication of Laura. In support of its request, the County presented the testimony of Dr. Kevin Kallas at the recommitment hearing. Kallas examined Laura and reviewed her records in his role as the court-appointed psychiatrist. Kallas testified that over the past ten years, Laura has been diagnosed with schizoaffective disorder. He testified that Laura gains the greatest benefit from taking two medications, Zyprexa and Prolixin, but that she did not have appreciation of how these medications help her remain stable and did not want to take any medication. Laura also testified that she did not want to take any medication because of the side effects and that she attempted suicide in the past because she could not handle the side effects of the medication.

¶3 In addition to ordering her commitment for one year, the trial court also ordered that she be involuntarily medicated. In support of this order, the court found:

> Furthermore, based on the information I've received, I'll find that she is incapable of expressing an understanding of the advantages, perhaps not the disadvantages of accepting medication or treatment and its alternatives, but certainly she is incapable of expressing an understanding of the

> advantages and disadvantages together, and that meets the (4)(a) standard.

¶4 Laura now appeals from the order for involuntary medication; she is not contesting the findings of mental illness, dangerousness or treatability. She insists that she is competent to refuse medication because the trial court found that she was aware of the disadvantages of medication. Her argument is that it is only when a patient is incapable of expressing an understanding of the advantages *and* disadvantages *and* alternatives that the patient is incompetent to refuse medication.

¶5 The issue Laura raises in this appeal was raised in ***Virgil D.***, a decision of the Wisconsin Supreme Court that neither party discussed in the briefs before this court. In ***Virgil D.***, the County was seeking an order to involuntarily medicate Virgil; the trial court denied the County's first request but granted the second request. ***Virgil D.***, 189 Wis. 2d at 6-8. Prior to granting the order, the court took testimony from Virgil's examining psychiatrist and Virgil.

> The psychiatrist concluded that even though Virgil was capable of expressing an understanding of the advantages and disadvantages of, and the alternatives to, the medication, he was not competent to exercise informed consent because he had no insight into his own mental illness. By contrast, Virgil testified that he had taken Prolixin for four years and that the medication "hindered" him, slowed down his thoughts and chemically "tortured" him. He also stated that he had been committed even while medicated with Prolixin.

Id. at 7-8. The trial court concluded that Virgil was not competent to refuse medication. ***Id.*** at 8. The court of appeals affirmed, concluding that the standard articulated in WIS. STAT. § 51.61(1)(g)4[2] was only one way a court could

[2] WISCONSIN STAT. § 51.61(1)(g)4 provides, in part:

(continued)

determine that a patient was incompetent to refuse medication. ***Virgil D.***, 189 Wis. 2d at 8. We held that Virgil was not competent to refuse medication "because he did not have an appreciation of his mental illness." ***Id.*** at 9.

¶6 The supreme court reversed.

> We conclude that [WIS. STAT. § 51.61(1)(g)] clearly establishes only one standard to evaluate a patient's competency to refuse medication, that is, whether the patient is able to express an understanding of the advantages and disadvantages of, and the alternatives to, accepting medication or treatment. *The sole focus of the statutory language is upon the patient's understanding of the effects of a particular medication*, not upon that patient's acceptance of the diagnosis of a mental illness.

Virgil D., 189 Wis. 2d at 11 (emphasis added).

¶7 Laura's focus on whether she must express an understanding of the advantages and disadvantages and alternatives ignores the supreme court's conclusion that the question is whether under all of the circumstances the patient has an understanding of the effects of a particular medication. ***Virgil D.*** does not require the trial court to discretely consider whether a patient (1) expresses an understanding of the advantages of the medication; (2) expresses an understanding of the disadvantages of the medication; and, (3) expresses an understanding of the

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> [A]n individual is not competent to refuse medication or treatment if, because of mental illness … and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness … in order to make an informed choice as to whether to accept or refuse medication or treatment.

alternatives to medication. ***Virgil D.*** does require the trial court to consider the entire picture in determining if a patient's refusal to take medication is reasonable.

¶8 In discussing "informed consent" in the field of mental health and involuntarily committed patients, the Wisconsin Supreme Court has held:

> The choice is based on reasonableness under all the circumstances; if a person is incompetent to make such reasoned choices, the courts must decide the reasonableness issue for the incompetent.

State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 710, 740, 416 N.W.2d 883 (1987) (*superseded by statute on other grounds*). Our obligation is to determine whether under all of the circumstances the trial court was correct in holding that Laura was incompetent to refuse medication.

¶9 In ***Virgil D.***, the supreme court explained what the task of the trial court is when there is a request to authorize the involuntary medication of a patient committed under WIS. STAT. ch. 51.

> When a circuit court is asked to determine a patient's competency to refuse medication or treatment pursuant to § 51.61(1)(g)4, Stats., it must presume that the patient is competent to make that decision. *See* § 51.20(13)(e), Stats. The petitioner has the burden of overcoming that presumption by showing incompetence by evidence that is clear and convincing. ***Id.*** The petitioner must establish that the patient is unable to express an understanding of the advantages and disadvantages of the medication or treatment, and the alternatives to accepting the particular medication or treatment offered, after the advantages, disadvantages and alternatives have been explained to him or her. *See* § 51.61(1)(g)4, Stats. Ultimately, if the petitioner is unable to meet that burden, the patient retains the right to exercise informed consent with regard to all medication and treatment. *See* § 51.61(1)(g)3, Stats.
>
> In making its decision, the circuit court must first be satisfied that the advantages and disadvantages of, and the alternatives to, medication have been adequately explained to the patient. Second, the court must consider the

> evidence of the patient's understanding, or the lack thereof, regarding the advantages, disadvantages, and alternatives. The evidence may include the actual testimony of the patient and the examining psychiatrist. Factors which the court should take into account in reaching its decision include:
>
> (a) Whether the patient is able to identify the type of recommended medication or treatment;
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> (b) whether the patient has previously received the type of medication or treatment at issue;
>
> (c) if the patient has received similar treatment in the past, whether he or she can describe what happened as a result and how the effects were beneficial or harmful;
>
> (d) if the patient has not been similarly treated in the past, whether he or she can identify the risks and benefits associated with the recommended medication or treatment; and
>
> (e) whether the patient holds any patently false beliefs about the recommended medication or treatment which would prevent an understanding of legitimate risks and benefits.

Virgil D., 189 Wis. 2d at 14-15.

¶10 The record lacks any evidence that the trial court completed the tasks ***Virgil D.*** requires before an order for involuntary medication is issued, which is not surprising because other than a vague, passing reference to the decision, neither counsel directed the court's attention to its tasks, as described by the supreme court. We cannot decide if Laura was an appropriate candidate for involuntary medication without the benefit of factual findings from the trial court.[3]

[3] We owe deference to the trial court's findings of fact, but once those facts are established, the application of facts to the statute is a question of law that we decide without deference to the trial court. ***Secor v. LIRC***, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175.

¶11 Without factual findings following the road map of ***Virgil D.***, we must hold that the trial court erred in ordering the involuntary medication of Laura. We remand to the trial court with directions to make the proper findings of fact and then issue the appropriate order. The testimony of Kallas, Laura and her case manager contains sufficient evidence to permit a court to make the findings required by ***Virgil D.***; therefore, it is not necessary for the court to waste limited judicial resources by conducting another evidentiary hearing.[4] The previous order of the trial court for the involuntary medication of Laura will continue to be in effect for fifteen days following remittitur of the record to give the trial court sufficient time to make the findings required by ***Virgil D.*** and to issue an order based upon those findings.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

[4] Of course, the County is free to bring a fresh petition for an order for involuntary medication.