COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP704 **Cir. Ct. No. 2009ME4950**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF EARL Z.:

MILWAUKEE COUNTY,

PETITIONER-APPELLANT,

V.

EARL Z.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JOHN F. FOLEY, Judge. *Dismissed.*

¶1 BLANCHARD, J.[1] Milwaukee County appeals from an order of the circuit court dismissing an emergency detention proceeding for Earl Z. at the determination of probable cause stage. *See* WIS. STAT. § 51.20(7)(a). The parties agree that this case would ordinarily be considered moot because Mr. Z. is no longer subject to emergency detention based on the facts at issue when this case was addressed by the circuit court. Milwaukee County asserts that we should nevertheless address issues raised before the circuit court because they are issues of public importance that are likely to be repeated and evade appellate review, namely: what constitutes both (1) police custody and (2) an applicable detention facility under WIS. STAT. § 51.15(2)[2] in order to trigger the commencement of the seventy-two-hour time limit for emergency detention pursuant to § 51.15(4)(b).

¶2 We conclude that, to the extent that the County preserved a potential topic for review by this court, the County has not identified an unsettled issue of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] WISCONSIN STAT. § 51.15(2) provides:

> FACILITIES FOR DETENTION. The law enforcement officer … shall transport the individual [taken into custody pursuant to § 51.15(1), Stats.], or cause him or her to be transported, for detention and for evaluation, diagnosis and treatment … to any of the following facilities:
>
> (a) A hospital which is approved by the department as a detention facility or under contract with a county department under s. 51.42 or 51.437, or an approved public treatment facility;
>
> (b) A center for the developmentally disabled;
>
> (c) A state treatment facility; or
>
> (d) An approved private treatment facility, if the facility agrees to detain the individual.

law that has evaded review raised by the facts as developed in the record. Therefore, we dismiss this appeal as moot without reaching the merits of any argument raised.

BACKGROUND

A. Statutory Background

¶3 Individuals who appear to be mentally ill, drug dependent, or developmentally disabled may be involuntarily detained on an emergency basis when there appears to be a substantial probability that the individual will harm him or herself or others. WIS. STAT. § 51.15(1). Law enforcement officers may take the individual into custody and transport the individual to a detention facility for detention, evaluation, diagnosis, and treatment. § 51.15(2).

¶4 To fall within the specific requirements of Chapter 51, the individual must be within the confines of certain types of facilities listed in the statute. ***Id.*** The individual is deemed to be in the custody of the detention facility upon his or her arrival at the facility. *See* § 51.15(3).

¶5 An individual brought to a detention facility under WIS. STAT. § 51.15 may be detained no longer than seventy-two hours without a probable cause hearing, at which a court determines whether there is probable cause to believe the allegations contained in the statement of emergency detention. WIS. STAT. §§ 51.15(4)(b), 51.20(7)(a).

B. Factual Background

¶6 On November 29, 2009, law enforcement officers were dispatched on an emergency call regarding an alleged suicide attempt by Mr. Z. When the

police arrived, first responders from the Milwaukee Fire Department were already treating Mr. Z. for an apparent overdose of pills. Representatives of the Milwaukee Fire Department took Mr. Z. to the intensive care unit at Aurora Sinai Hospital for further medical treatment. A police officer completed a "statement of emergency detention," as the "detaining officer," for Mr. Z. under WIS. STAT. § 51.15, using the state form developed for this purpose. This contained a detailed factual narrative supporting the officer's "cause to believe" that Mr. Z. qualified for emergency detention. This form was filed with the clerk of circuit court, along with a "Treatment Director's Supplement To Law Enforcement Officer's Statement of Detention," certifying a diagnosis of a mental illness.

¶7 A probable cause hearing was held before a court commissioner on December 2, 2009. Through counsel, Mr. Z. argued that the court commissioner lacked competence to hear the case, pursuant to WIS. STAT. §§ 51.15(4)(b) and 51.20(7)(a), because Aurora Sinai Hospital qualified as a detention facility under § 51.15(2) and he had been detained there for over seventy-two hours. The County asserted that the time limits for detention under § 51.15(4)(b) were not triggered because Mr. Z. was never in police custody and also because Aurora Sinai Hospital does not qualify as one of the facilities defined in § 51.15(2). Additionally, the County asked the court commissioner to adjourn the probable cause hearing on a day-to-day basis until Mr. Z. could be taken to a § 51.15(2) detention facility. The court commissioner found that Mr. Z. had been taken to a § 51.15(2) facility in police custody on November, 29, 2009. Consistent with those findings, the court commissioner dismissed the case without prejudice on the grounds that the statutory time limit of seventy-two hours for detention had lapsed pursuant to §§ 51.15(4)(b) and 51.20(7)(a).

¶8 At the County's request, on December 4, 2009, the circuit court held a de novo review of the court commissioner's decision. The circuit court agreed with the court commissioner that Mr. Z. had been detained. The circuit court differed, however, in finding that the seventy-two-hour time limit had not been triggered because Mr. Z. was not taken to a WIS. STAT. § 51.15(2) facility. Nevertheless, the circuit court dismissed the County's petition because allowing the County to detain Mr. Z. indefinitely under the auspices of an emergency detention until he was taken to a § 51.15(2) facility would violate Mr. Z.'s due process rights. The County appeals from the circuit court's dismissal of this mental commitment case.

¶9 Significantly for our purposes, an extensive record was not developed before the circuit court regarding the details of police interactions with Mr. Z., the status of Aurora Sinai Hospital, or the identities of the employers of persons who interacted with Mr. Z. during periods of his alleged custody. No witnesses were called and the County points only to what it asserts are reasonable inferences from the emergency detention paperwork. The County before the circuit court created only fragmentary evidence bearing on each of these topics, and so the record before this court is skeletal regarding the issues that the County now purports to raise.

DISCUSSION

¶10 The circuit court ruled that Mr. Z.'s right to due process of law prevented open-ended involuntary confinement, and therefore the proceedings could not be adjourned on a "day to day" basis. *See* ***Dane County v. Stevenson L.J.***, 2009 WI App 84, ¶11, 320 Wis. 2d 194, 768 N.W.2d 223 ("The authority to confine an individual involuntarily to a mental health facility implicates a liberty

interest protected by due process."); *see also* ***Milwaukee County v. Delores M.***, 217 Wis. 2d 69, 77, 577 N.W.2d 371 (Ct. App. 1998) (open-ended involuntary confinement tramples on significant liberty interests).

¶11 The County did not clearly object to this ruling of the circuit court at the time of its ruling. Moreover, the County does not now develop an argument that this was an erroneous ruling.

¶12 Instead, relying on the fragmentary record of this case, the County seeks an opinion of this court clarifying the legal standards to trigger the seventy-two-hour clock. Specifically, the County requests that we "reverse the trial court and hold that the time limits in WIS. STAT. § 51.15 were not triggered in Earl Z.'s case due to the absence of police custody and police transport to and detention by a § 51.15(2) treatment facility." In other words, the County appears to suggest that the due process limitations on open-ended involuntary confinement were not triggered here because the record establishes that Mr. Z. was neither in police custody nor taken to a § 51.15(2) detention facility, and that the circuit court erred in failing to recognize that fact.

¶13 In response to the mootness objection, the County effectively makes two arguments. First, the County asserts that the record, as developed, does not support the finding of the circuit court that Mr. Z. was in police custody and that clarification on the legal standards by this court would be beneficial. Second, the County suggests that, even though the circuit court found that Mr. Z. was not held in one of the designated facilities, clarification of the types of facilities that qualify is needed.

¶14 These issues are of great public importance, the County argues, because of the danger that some individuals may dangerously slip through the

cracks of the emergency detention system due to confusion about when the seventy-two-hour clock starts to run.

¶15 Appellate courts will generally not consider cases where the resolution of an issue will not "affect real parties to an existing controversy." ***State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County***, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983). We will, however, "consider a moot point if 'the issue has great public importance, a statute's constitutionality is involved, or a decision is needed to guide the trial courts.'" ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425 (citation omitted) (inmate's petition for writ of habeas corpus not moot based on inmate's subsequent release, because issue could reappear, usually evaded review, and dealt with constitutional question). We have also retained matters "where a question was capable and likely of repetition and yet evades review" because the situation involved is one that usually is resolved before the completion of the appellate process. ***State ex rel. La Crosse Tribune***, 115 Wis. 2d at 229.

¶16 We do not question the County's premise that legal issues generally implicated by facts referenced in this case are likely to arise with regularity when police, medical personnel, and others are summoned to assist persons who appear to be in some combination of physical and mental crisis. Nor is it unreasonable to assume that critical decisions surrounding the triggering of the seventy-two-hour clock in emergency detention cases are frequently going to require resolution before the ordinary completion of an appeal. Yet we cannot retain this matter because the County has not identified an unsettled area of law that has evaded review raised by the facts developed in the record of this case.

¶17 Facts triggering the seventy-two-hour clock are well established as a matter of law. In ***Milwaukee County v. Delores M.***, this court held that the seventy-two-hour time limit for emergency detention under WIS. STAT. § 51.15(4)(b) is triggered only when a person is both (1) taken into custody under that provision and (2) transported to any of the facilities designated by § 51.15(2). ***Milwaukee County v. Delores M.***, 217 Wis. 2d 69, 78, 577 N.W.2d 371 (Ct. App. 1998).

¶18 The County also does not point to ambiguities in the definitions of custody or applicable detention facilities specific to facts developed in the record of this case. The definition of "custody" is the subject of extensive case law. *See, e.g.*, ***State v. Koput***, 142 Wis. 2d 370, 379-80, 418 N.W.2d 804 (1988) (whether a reasonable person in the same circumstances would have felt free to leave). Additionally, the types of facilities to which detained individuals have been brought must fit one of the statutory definitions pursuant to WIS. STAT. § 51.15(2) to trigger the time limits; it does not have to be a facility specifically chosen by the County for the receipt of such persons. *See* ***Delores M.***, 217 Wis. 2d at 71.

¶19 In sum, the County has not identified an unsettled issue of law that has evaded review and that is raised by the record developed in this case. We therefore conclude that the County does not present an issue that warrants our application of an exception to the mootness doctrine to sustain this appeal. Accordingly, we dismiss the appeal as moot.

By the Court.—Appeal dismissed.

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