COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2276-FT **Cir. Ct. No. 01-ME-30**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF JEFFREY T.M.:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

JEFFREY T.M.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: PETER J. NAZE, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Jeffrey M. appeals a judgment finding him mentally ill and an order extending his commitment from August 23, 2001, for a

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

(continued)

period of one year.[2] Jeffrey specifically argues that the County did not present adequate evidence of his potential dangerousness. However, Jeffrey argues an incorrect standard and because the County met its burden, we affirm the judgment and order.

Background

¶2 Jeffrey was previously committed in Brown County and, as the expiration of his commitment term on August 23, 2001, approached, the County filed a petition to extend the commitment. While recommitment was ordered, Jeffrey was eventually granted a new trial because he had not been adequately apprised of his right to a jury. Following the new trial on April 11, 2002, in which Jeffrey waived his right to a jury trial, the court found him to be mentally ill and ordered recommitment for a one-year period retroactive to August 23, 2001. Jeffrey appeals.

Analysis

¶3 Jeffrey contends that the County failed to meet statutory standards of proof: Application of a statute to a set of facts is a question of law we review de novo. *See* ***VanCleve v. City of Marinette,*** 2002 WI App 10, ¶7, 250 Wis. 2d 121, 639 N.W.2d 792.

This is an expedited appeal under WIS. STAT. RULE 809.17.

[2] Although the order for commitment has expired, this court may review an issue if it is likely to be repeated yet is evasive of review because it is typically resolved before completion of the appellate process. *See* ***State ex rel. Olson v. Litscher,*** 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425.

¶4 When a county petitions for an extension of an individual's commitment, WIS. STAT. § 51.20(13)(g)3 directs the court to proceed under subsections (10) to (13). Evaluation of whether the individual is a proper subject for commitment is subject to standards set forth in § 51.20(1).[3]

¶5 In order for commitment to be proper in a case such as this, the County must make two showings. First, it must show that an individual is mentally ill. WIS. STAT. § 51.20(1)(a)1.[4] Second, it must show that an individual is dangerous. WIS. STAT. § 51.20(1)(a)2. There are several subparagraphs that describe how the dangerousness requirement may be met: Relevant here are § 51.20(1)(a)2a and 51.20(1)(a)2b, which state dangerousness can be shown if the individual evidences a substantial probability of causing physical harm to himself or to other individuals respectively.[5] This dangerousness can be demonstrated by overt acts, such as suicidal or homicidal behavior.

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[3] WISCONSIN STAT. § 51.20(1) states in relevant part:

> (a) Except as provided in pars. (ab), (am), (ar) and (av), every written petition for examination shall allege that all of the following apply to the subject individual to be examined:
>
> 1. The individual is mentally ill ….
>
> 2. The individual is dangerous ….

[4] Jeffrey has not argued the trial court's finding of mental illness to be in error.

[5] WISCONSIN STAT. § 51.20(1)(a)2 contains the following relevant subparagraphs, which provide in part:

> a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats of or attempts at suicide or serious bodily harm.

(continued)

¶6 However, when the individual has been the subject of inpatient treatment for mental illness immediately prior to commencement of recommitment proceedings, the showing of dangerousness may be made by showing "that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn" rather than by showing recent overt acts. WIS. STAT. § 51.20(1)(am).[6]

¶7 Jeffrey argues that the County has failed to provide sufficient evidence of any specific acts that would show he poses a danger to others. He also argues that the County has failed to show he is substantially likely to be dangerous to himself or others because the testifying psychiatrist states only that Jeffrey posed a "mild to moderate risk" of dangerousness. These arguments go to

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> b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

[6] WISCONSIN STAT. § 51.20(1)(am) provides:

> If the individual has been the subject of inpatient treatment for mental illness … immediately prior to commencement of the proceedings as a result of … placement ordered by a court under this section … the requirements of a recent overt act, attempt or threat to act under par. (a) 2. a. or b. … may be satisfied by a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

the level of proof required of the County under WIS. STAT. § 51.20(1)(a)2. Jeffrey fails to address the applicable standard of § 51.20(1)(am).[7]

¶8 The only question this court need answer is whether there was sufficient evidence that Jeffrey was dangerous because he would be "a proper subject for commitment if treatment were withdrawn." Contrary to Jeffrey's argument, dangerousness under WIS. STAT. § 51.20(1)(am) does not require any showing of overt acts or fear others may have. Dangerousness under § 51.20(1)(am) only requires a showing that an individual would be substantially likely to require treatment if current treatment ceased.

¶9 At Jeffrey's recommitment hearing, two people testified for the County: Dr. George Soncrant, a psychiatrist appointed by the court, and Joyce Dirschl, a psychiatric social worker who was managing Jeffrey's case. While the question whether facts fulfill a legal standard is a question of law, ***DOR v. Exxon Corp.***, 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), it is still the trial court's function to weigh evidence and credibility of witnesses and make factual determinations. WIS. STAT. § 805.17(2).

¶10 Soncrant had the opportunity to interview Jeffrey as well as review Jeffrey's treatment records. Based on this information, Soncrant concluded that Jeffrey has schizoaffective disorder, that he posed a mild to moderate risk to others, and that his behavior deteriorated and his judgment was impaired when he

[7] On review of the record, we note that there was some debate in the trial court over whether WIS. STAT. § 51.20(1)(am) applied, since at the time of the recommitment hearing, Jeffrey was not in treatment but had absconded. On appeal, Jeffrey concedes that § 51.20(1)(am) applies. As the trial court astutely noted, however, Jeffrey's argument that § 51.20(1)(am) was not applicable "would reward somebody for eloping …. I can't imagine that the legislature's … intent was to encourage that kind of behavior."

stopped taking his medications. Soncrant testified on direct examination by the County that Jeffrey would be an appropriate subject for treatment. Later, the trial court specifically asked Soncrant whether there was substantial likelihood Jeffrey would be a proper subject for commitment if treatment were withdrawn. Soncrant answered yes; he thought Jeffrey would meet that standard.

¶11 Although Jeffrey contends that some of the information available to Soncrant, like reports of his past behavior, was "hearsay," WIS. STAT. § 51.20(1)(am) states that a determination may be made based on the review of an individual's treatment record. The statute does not require an examining psychiatrist to conduct interviews with people who might be harmed by the individual. Indeed, most of the record would be hearsay, but the legislature permits experts to rely on it nonetheless.

¶12 Dirschl testified that Jeffrey failed to comply with the rules of the group home to which he was assigned and that he failed to comply with his treatment regimen. She noted that he absconded from the group home multiple times. She further testified that he seemed to have difficulty keeping a job because he refused to comply with rules at work. While Dirschl thought Jeffrey posed no danger to himself when off medication, she thought he would pose a danger to others. She testified that he had a history of becoming combative and his record contained a series of reports that he was intimidating and frightening his grandparents, although she knew no specifics of the encounters.

¶13 Jeffrey also testified on his own behalf. When asked whether he was mentally ill, he replied, "I can't tell. There's so many lies said about [me] … that I just can't tell."

¶14 While the testimony fails to establish that Jeffrey evidenced a substantial probability of physical harm to himself or others as manifested by recent overt acts under WIS. STAT. § 51.20(1)(a)2, the testimony sufficiently established there was a substantial likelihood Jeffrey would be a proper subject for commitment if treatment were withdrawn under the appropriate standard of WIS. STAT. § 51.20(1)(am). Jeffrey's mental illness, combativeness, failure to comply with directions, failure to self-medicate, flight from treatment, potential harm to others even if only a mild risk, and denial of his condition, along with Soncrant's direct answer to the court, clearly indicate that likelihood.

By the Court.—Judgment and order affirmed.

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