COURT OF APPEALS
DECISION
DATED AND FILED

September 27, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP920 **Cir. Ct. No. 2010ME200**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF PAUL S.:

OUTAGAMIE COUNTY,

PETITIONER-RESPONDENT,

V.

PAUL S.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] Paul S. appeals an order placing him on a WIS. STAT. ch. 51 mental health commitment and an order for involuntary medication. Paul asserts the court lost competency to proceed because his probable cause hearing was not held within seventy-two hours of his detention. We agree and reverse.

BACKGROUND

¶2 On Saturday, October 16, 2010, police responded to a report of an individual standing in an intersection attempting to stop traffic. When officers made contact with Paul, he was rambling, irrational, and delirious. Officer Christopher Dearth transported Paul to St. Elizabeth Hospital "for a possible 72-hour mental hold." Dearth was met at the hospital by Outagamie County crisis worker, Mike Kochanek. At the hospital, Paul became agitated and tried to get away from hospital staff. He was handcuffed to the hospital bed and his legs were strapped down with soft restraints. The emergency room doctor determined Paul's behavior was a medical, rather than psychiatric, issue. Kochanek agreed. A statement of emergency detention was not filed. Paul was medicated and admitted into the intensive care unit at St. Elizabeth Hospital.

¶3 On Sunday, October 17, at approximately 9:00 a.m., staff at St. Elizabeth Hospital advised police that Paul wanted to check himself out of the hospital and, without an emergency detention, he would be able to leave. Officer Michael Bartlein "located Officer Dearth's original notice of detainer" and responded to St. Elizabeth Hospital. There, he met Outagamie County crisis

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

worker, Merrie Hasknif. Bartlein's report, which was attached to the subsequently filed statement of emergency detention, indicates "it was determined that a 72-hour hold would be appropriate." However, Bartlein did not complete the statement of emergency detention because he was advised Paul was "not medically cleared." Bartlein left the statement of emergency detention and Dearth's original police report at the hospital pending Paul's medical clearance.

¶4 The probable cause hearing was held on Thursday, October 20, at 11:24 a.m. Paul moved to dismiss on the ground that the court lacked jurisdiction because he had been detained for more than seventy-two hours without a probable cause hearing.

¶5 The County argued Paul's detention did not begin until October 19, which was the date entered on the statement of emergency detention. According to the County, October 19 was the date Paul received medical clearance to move to the fifth floor psychiatric unit. The County contended that, although St. Elizabeth Hospital is a treatment facility as defined by WIS. STAT. ch. 51, "the treatment facility really is the psychiatric unit of St. Elizabeth Hospital, the fifth floor" and, therefore, "the detention actually occurred when [Paul] was moved to the psychiatric part of the hospital on October 19."

¶6 Paul asserted that "once [he] requested to check himself out of the hospital [on Sunday, October 17] and was told that he could not leave and that a 72 hour hold was determined appropriate … he was being held against his will." Acknowledging weekends are excluded from the seventy-two-hour time calculation, *see* WIS. STAT. § 51.20(7)(a), Paul argued the time period to hold the probable cause hearing expired at 12:00 a.m. on Thursday morning. Paul also argued St. Elizabeth Hospital in its entirety constituted the treatment facility.

¶7 The court commissioner, following the date written on the statement of emergency detention, determined the seventy-two-hour time limitation did not begin to run until October 19, and, consequently, retained jurisdiction. Paul renewed his objection to the court's competency before the circuit court. Paul was subsequently committed.

DISCUSSION

¶8 Paul argues the court lost jurisdiction because it failed to hold a probable cause hearing within seventy-two hours of the time he "arrive[d] at the facility." *See* WIS. STAT. § 50.20(7)(a). Paul contends that because he arrived at St. Elizabeth Hospital on October 16, the seventy-two-hour time limitation started running at 12:00 a.m. on Monday, October 18, and expired before his Thursday hearing.

¶9 WISCONSIN STAT. § 51.15(5) provides an individual may "not be detained by the law enforcement officer or other person and the facility for more than a total of 72 hours, exclusive of Saturdays, Sundays, and legal holidays" without a hearing. WISCONSIN STAT. § 51.20(7)(a) requires a probable cause hearing to be held "within 72 hours after the individual *arrives* at the facility, excluding Saturdays, Sundays and legal holidays." (Emphasis added.) Compliance with the seventy-two-hour rule is mandatory, and a court loses competency to proceed when there is noncompliance. ***Dodge Cnty. v. Ryan E.M.***, 2002 WI App 71, ¶5, 252 Wis. 2d 490, 642 N.W.2d 592.

¶10 Here, regardless of the date listed on the emergency detention, it is undisputed Paul arrived at St. Elizabeth Hospital[2] on Saturday, October 16, and he remained at St. Elizabeth Hospital until his probable cause hearing on Thursday, October 21. Because the seventy-two-hour time limitation begins running "after the individual arrives at the facility" and not when the statement of emergency detention is dated, *see* WIS. STAT. § 51.20(7)(a), we conclude Paul's probable cause hearing fell outside the seventy-two-hour time limitation and the court lost competency to proceed.[3]

¶11 The County, nevertheless, maintains it complied with the seventy-two-hour time limitation. First, relying on language from WIS. STAT. § 51.15(2), which requires a law enforcement officer to seek approval from the County prior to transporting an individual to a facility for an emergency detention, the County asserts, for the first time on appeal, it did not approve of Paul's detention until he was medically cleared on October 19. We need not address arguments raised for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.

¶12 However, even on the merits, the record tends to undercut the County's argument that it did not approve Paul's detention until his October 19 transfer to the psychiatric unit. Bartlein's report from Sunday, October 17, which

[2] On appeal, the County has abandoned its argument that only the fifth floor psychiatric unit of St. Elizabeth Hospital constitutes a "treatment facility" as defined by WIS. STAT. § 51.15(2).

[3] In his brief, Paul asserts the statement of emergency detention was altered. We observe white correction fluid was used on the document, most notably in the space reserved for the date of detention. However, this was not raised before the trial court, and, consequently, it is unclear whether the white correction fluid was used to improperly alter the document or merely correct innocuous errors. In any event, resolution of this issue is irrelevant to our determination.

was attached to the statement of emergency detention, provides that when he and Outagamie County crisis worker, Hasknif, responded to St. Elizabeth Hospital, "it was determined that a seventy-two hour hold would be appropriate." Additionally, at the probable cause hearing, the County represented to the court that the statement of emergency detention had been completed earlier and had just been lacking a date, which was finally added after Paul was medically cleared on October 19.[4]

¶13 Moreover, the County's focus on the WIS. STAT. § 51.15(2) county approval requirement ignores the other statutory mandates that describe the seventy-two-hour time limitation and when it begins running. *See* WIS. STAT. §§ 51.15(5), 51.20(7)(a). The making of or correction of an error in filing a WIS. STAT. chapter 51 case cannot restart the seventy-two-hour clock. *See* ***Dane Cnty. v. Stevenson L.J.***, 2009 WI App 84, ¶15, 320 Wis. 2d 194, 768 N.W.2d 223.

¶14 Finally, the County contends, also for the first time on appeal, that, pursuant to WIS. STAT. § 51.15(1)(a) "before someone can be held under an emergency detention, he or she must be taken 'into custody' by a law enforcement officer" and Paul was not "in custody" as required by WIS. STAT. § 51.15 until October 19. Specifically, the County asserts Paul was not in custody "because a reasonable person in his position would have believed he was free to leave the hospital." Again, we need not address arguments raised for the first time on appeal. ***Huebner***, 235 Wis. 2d 486, ¶¶10-12. In any event, the County's argument ignores the WIS. STAT. § 51.15(3) definition of "custody," which

[4] WISCONSIN STAT. § 51.15(5) provides: "The statement of emergency detention shall be filed by the officer … *at the time of admission*, and with the court immediately thereafter." (Emphasis added.)

provides, "Upon arrival at the facility, the individual is deemed to be in custody of the facility." It is undisputed Paul arrived at and was admitted to St. Elizabeth Hospital on October 16. He was in custody.

By the Court.—Orders reversed.

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