COURT OF APPEALS DECISION DATED AND FILED

February 1, 2005

Cornelia G. Clark
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. 04-2795-FT | **Cir. Ct. No. 04-ME-19**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF MICHAEL R.L.:

DOUGLAS COUNTY,

PETITIONER-RESPONDENT,

V.

MICHAEL R.L.,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Reversed.*

¶1 CANE, C.J.[1] Michael R.L. appeals from a judgment concluding the court commissioner had competency to proceed with a May 14, 2004, probable cause commitment hearing. He also appeals the order of commitment that followed. Michael argues that, under WIS. STAT. § 51.15 and the due process clauses of the Wisconsin and United States Constitutions, a court loses competence[2] when a probable cause hearing is not held in the first seventy-two hours of emergency detention. Michael further argues that once the court in his case lost competence, Douglas County could not "reset the 72-hour clock" simply by filing another petition which was virtually identical, in content if not in form, to the statement on which Michael's original detention was based. We agree. The judgment and commitment order are therefore reversed.

Background

¶2 On May 5, 2004, Michael R.L. was arrested for possession of drug paraphernalia and taken to the Douglas County Jail. There, on May 6, 2004, Sergeant Russ Milroy allegedly observed Michael "cutting into his wrists and neck with a sharp piece of plastic." Michael was also alleged to have attempted to attack and resist officers. On May 7, 2004, based on his belief that Michael was mentally ill and dangerous to himself or others, Milroy transported Michael to the Northwest Regional Healthcare Facility in Cumberland. According to the

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). This is also an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] A court loses the competence to proceed when it has jurisdiction over the persons involved and the subject matter of the proceeding, but for other reasons does not have the power to render a valid judgment. *See* ***Mueller v. Brunn***, 105 Wis. 2d 171, 176-78, 313 N.W.2d 790 (1982).

Statement of Emergency Detention completed by Milroy at the time, Michael was "detained" at the facility at 8:20 p.m on May 7.[3]

¶3 On Wednesday, May 12, Dr. Louis Noltimier, Northwest's treatment director, filed another Statement of Emergency Detention. According to that statement, which was faxed to the court at 3:36 p.m., Michael was taken into custody at 3:15 p.m. because he was a danger to himself and others. That judgment was based on "specific threats of harm to staff, i.e. 'snap your neck,' inappropriate behavior towards female peer, poor disorganization, and poor boundaries." Noltimier's statement also noted that "[t]he emergency detention time frame has expired."

¶4 The same day, Milroy, Jan Lippitt, a mental health and AODA counselor, and Mary Grantstrom, an LTS supervisor, signed a three-person petition for examination, alleging that Michael was mentally ill and dangerous to himself or others, based on Michael's behavior in jail. The petition was filed on Thursday, May 13. A probable cause hearing was held before the court commissioner on May 14 at 2:45 p.m. Michael moved to dismiss on the grounds that the time for holding the hearing had expired. The commissioner denied his motion, finding that the petition was filed within twenty-four hours of the director's hold, and concluded there was probable cause to believe the allegations in the petition were true. Michael then filed a written motion to dismiss.

¶5 The parties argued that motion before the circuit court during the final commitment hearing on May 26, 2004.[4] The County admitted that Michael's

[3] That was on a Friday evening. Milroy filed his Statement of Emergency Detention with the court, as required by the statute, the following Monday, May 10.

original detention had expired on Wednesday, May 12, because for "whatever reason" it had not been "able to secure a court date." The County also argued that it had no control over director's holds and that Michael would have been released if the hospital had not placed the hold. In response, Michael contended that his detention began when he arrived at Northwest at 8:20 p.m. on May 7, and that the proceeding should be dismissed because a probable cause hearing was not held within seventy-two hours of that time. The court went ahead with the hearing, finding that Michael was mentally ill, dangerous, and a proper subject for treatment. On May 28, two days later, the court denied Michael's motion to dismiss in writing. The court concluded that:

> The circumstances herein support the proposition that 72 hour time period began to run from the filing of the three person petition on May 12, 2004 and was essentially a second proceeding since the first proceeding or first detention starting on May 7 had actually expired. Therefore, the detention in this case started on May 12, 2004 instead of May 7, 2004.
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> … [N]othing in Chapter 51 … precludes the initiation of a second commitment proceeding on the heels of one which either expires or is dismissed, under the circumstances in this case the court does not believe that the court lacks jurisdiction based on any violation of the 72 hour time limit[.]

Michael now appeals.

Discussion

¶6 Both the construction of statutes and their application to undisputed facts are questions of law, which we review independently. *See* ***State ex rel.***

[4] If Michael was detained on May 7, the final hearing should have taken place within fourteen calendar days, on or before May 21.

Sandra D. v. Getto**,* 175 Wis. 2d 490, 493-94, 498 N.W.2d 892 (Ct. App. 1993). When we interpret a statute, we attempt to ascertain what the legislature intended. *See* ***State v. Moore, 167 Wis. 2d 491, 496, 481 N.W.2d 663 (1992). If the language of the statute is unambiguous, we give its words their ordinary meaning. *See* ***Wisconsin Bankers Ass'n v. Mutual S&L Ass'n**,* 96 Wis. 2d 438, 450, 291 N.W.2d 869 (1980). When that language is ambiguous, we may infer legislative intent from the statute's context, subject matter, history, and objectives. *See* ***Moore***, 167 Wis. 2d at 496. In all cases, we interpret statutes to avoid absurd or unreasonable results. *See* ***id.***

¶7 WISCONSIN STAT. § 51.15 (1)(a)1. authorizes police officers to take an individual into custody if they have cause to believe that individual is mentally ill and if that individual has demonstrated "a substantial probability of physical harm to himself or herself"; § 51.15(1)(a)2. provides the same authority when the threat is of physical harm to "other persons." Under that authority, officers may transport an individual subject to an emergency detention action to an appropriate mental health facility. *See* WIS. STAT. § 51.15(2). Custody or detention begins when the individual arrives at the facility. *See* WIS. STAT. § 51.15(3). Officers are required to file a Statement of Emergency Detention, which has the same effect as a petition for involuntary commitment. *See* WIS. STAT. § 51.15(5).

¶8 This authority to confine an individual involuntarily to a mental health facility clearly implicates a liberty interest protected by due process. *See, e.g.,* ***Humphrey v. Cady***, 405 U.S. 504, 509 (1972) (commitment to a mental hospital produces "a massive curtailment of liberty"); ***State ex rel. B.S.L. v. Lee***, 115 Wis. 2d 615, 621, 340 N.W.2d 568 (Ct. App. 1983). The authority granted under WIS. STAT. § 51.15 is thus carefully constrained. Individuals detained in this way must be given notice of their rights "upon detention." WIS. STAT.

§ 51.15(9). They must receive a probable cause hearing no more than seventy-two hours, exclusive of Saturdays, Sundays, and legal holidays, after being taken into custody.[5] WIS. STAT. § 51.15(6). This court has concluded that expressing the time requirement for a probable cause hearing in hours, rather than days, reflects the legislature's intent that the length of detention be calculated from the moment of the individual's arrival at the facility. ***Dodge County v. Ryan E.M.***, 2002 WI App 71, ¶11, 252 Wis. 2d 490, 642 N.W.2d 592. A strictly calculated limit prevents people from being detained any longer than necessary before holding a hearing to determine probable cause. "Although protecting people from harm is important, so is due process, which the time limit is intended to provide." ***Id.***, ¶10.

¶9 The issue before us on appeal is not whether the County's failure to hold a probable cause hearing for Michael on the first emergency detention violated WIS. STAT. § 51.15; the County admits that it did. The issue is rather whether the second emergency detention procedure initiated on March 12 or the three-person petition for examination, filed on March 13 can, in some fashion, cure or restore the court's lost competence.

¶10 The County contends that no authority prohibits the use of three detention methods[6] in "close proximity" and that Wisconsin law does not require a patient be formally discharged from one commitment proceeding before a second

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[5] If cause is found, a final hearing must occur within fourteen calendar days of the initial detention. *See* WIS. STAT. § 51.20(8)(bm). The critical factor in statutory and constitutional time requirements is thus when the individual subject to emergency detention enters the facility.

[6] What the County describes as three detention methods are more properly a single procedure, which the legislature has determined can be initiated either through an emergency detention, which involves actual deprivation of liberty, or by a three-person petition, authorized by WIS. STAT. § 51.20.

action may be instituted. The circuit court agreed, holding that a new seventy-two hour period began "to run from the filing of the three person petition on May 12, 2004 and was essentially a second proceeding …. Therefore the detention in this case started on May 12, 2004 instead of May 7, 2004." We are not persuaded.

¶11 It is true that WIS. STAT. § 51.15 does not explicitly say that if a probable cause hearing is not held within seventy-two hours, the detainee must be released. However, that silence cannot mean that someone detained under § 51.15 can be held without authorization for days or weeks after the first seventy-two-hour period has expired and then, when the state or facility feels ready, be subjected to a proceeding that starts a new seventy-two hour clock. Given its unambiguous intent to protect the liberty interests of individuals like Michael during emergency detention, § 51.15 cannot be construed to allow practices that would defeat that end.

¶12 Nor can we agree that the three-person petition filed on May 13 could, by itself, begin a new detention. WISCONSIN STAT. § 51.15 uses the terms "custody" and "detain" interchangeably in the context of a police officer transferring an individual in his or her custody to the custody of a mental health facility; the transfer of custody and the beginning of detention thus occur upon arrival at the facility. *See* WIS. STAT. § 51.15(3). Under WIS. STAT. ch. 51, detention is defined by control over the detainee's person, the actual deprivation of liberty. Three-party petitions also trigger involuntary commitment proceedings; but they neither create nor require detention. Under WIS. STAT. § 51.20(2), however, a court must first review the petition to determine whether to issue a detention order. If an order is issued, an officer must present the subject of the order with a notice of hearing and other information specified by statute. *See* WIS.

STAT. § 51.20(2)(b). The three-party petition alone cannot therefore authorize detention.

¶13 The County suggests that our decision in ***B.S.L.*** supports the proposition that one emergency detention procedure can follow immediately on the heels of another to obviate the need to release a detained individual after seventy-two hours have passed. *See* ***B.S.L.***, 115 Wis. 2d at 620-21. However, ***B.S.L.*** is distinguishable from the case before us in critical ways, the most important of which is that "[c]ompliance with all of the statutory time limits for probable cause and final hearing was met." ***Id.*** at 621.

¶14 Michael argues that his case is more properly governed by our holdings in ***Sandra D.*** and ***Kindcare, Inc. v. Judith G.***, 2002 WI App 36, 250 Wis. 2d 817, 640 N.W.2d 839. We agree. In ***Sandra D.***, we concluded that WIS. STAT. § 55.06(11), which governs protective placement custody, does not "allow continued, multiple periods of detention upon repeated assurances that probable cause exists for the subject's temporary, emergency detention." ***Sandra D.***, 175 Wis. 2d at 501. We later clarified this holding by determining that "the mere filing of a new petition," after the circuit court lost competence to adjudicate a person's need for protective placement because of a violation of the seventy-two hour limit, does not "start the clock anew." ***Kindcare***, 250 Wis. 2d 817, ¶3. Saving competency by timing the running of the seventy-two hour clock from the filing of a second petition, virtually indistinguishable from the first, would "dilute or destroy" the protections embodied in the protective placement statute. ***Id.***, ¶19.

¶15 WISCONSIN STAT. chs. 51 and 55 both involve potential involuntary deprivations of liberty and both establish procedures designed to balance the state's interests against individual due process rights. Because we conclude the

requirement that a probable cause hearing be held within seventy-two hours of the initial deprivation of liberty serves the same purpose in both statutes, our reasoning in ***Kindcare*** applies not only to emergency detention prior to a protective placement hearing, but also to emergency detention prior to an involuntary commitment hearing.

¶16 The County argues that even if ***Kindcare*** is applicable, it is factually distinguishable because here the Emergency Detention Statement filed by the Northwest treatment director meant the County was not responsible, as Kindcare was, for Michael being detained beyond the seventy-two hour period. The circuit court found, however, that Michael's probable cause hearing was based on the three-person petition brought by the County, through Sergeant Milroy and two County human services employees.[7] The specific evidence offered of dangerousness to self or others was the same as in the first Emergency Detention Statement, which is not surprising because the petitioner with "personal knowledge of the conduct of the subject" was Milroy, the officer who took Michael to Northwest. Thus, whether the County was responsible for the second detention is beside the point. As in ***Kindcare***, the County sought to bring a second emergency detention proceeding substantively identical to the first to regain legal control over an individual who had been held for more than seventy-two hours without a probable cause hearing.

[7] The County argues the validity of Noltimier's Emergency Detention Statement. *See* ***Milwaukee County Combined Comm. Servs. Bd. v. Haskins***, 101 Wis. 2d 176, 187-88, 304 N.W.2d 125 (Ct. App. 1980). We need not address the contention that WIS. STAT. § 51.15(10)'s reference to voluntary patients and those "otherwise admitted" means a treatment director can initiate detention proceedings against all involuntary admitted individuals, however, because the circuit court determined it was the three-person petition, not the director's hold, that started the new seventy-two hour clock.

¶17 Michael was detained at 8:20 p.m. on May 7, 2004, pursuant to a valid Emergency Detention Statement based on allegations about his behavior in jail. The authority to hold Michael lapsed after seventy-two hours, and the court lost competence to proceed on May 12. Based on our reasoning in ***Kindcare,*** we conclude that the County can neither paper over its failure to hold a timely hearing nor make the court competent again simply by filing another petition, alleging essentially the same facts as the first.

By the Court.—Judgment and order reversed.

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