

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 31, 2012

Diane M. Fremgen
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. 2011AP2603

Cir. Ct. No. 2000ME68

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE MATTER OF THE MENTAL COMMITMENT OF JANEEN J. C.:

GREEN COUNTY,

PETITIONER-RESPONDENT,

V.

JANEEN J. C.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Reversed and cause remanded with directions.*

¶1 HIGGINBOTHAM, J.¹ Janeen J.C. appeals an order of the circuit court for involuntary medication. Janeen contends that the involuntary medication order is improper under WIS. STAT. § 51.61(1)(g)4. because the County has failed to prove by clear and convincing evidence that the advantages, disadvantages, and alternatives of taking the medication were sufficiently explained to her. Janeen further contends that she is capable of applying and expressing an understanding of the advantages, disadvantages, and alternatives to make an informed choice, regarding accepting medication. Janeen claims she is therefore competent to regulate her doses of medication. We reverse and remand because the trial court failed to make the requisite findings under *Virgil D. v. Rock County*, 189 Wis. 2d 1, 524 N.W.2d 894 (1994).

BACKGROUND

¶2 Janeen was first committed under a petition filed under WIS. STAT. ch. 51 and ordered to receive involuntary treatment on January 5, 2001. As part of that order of commitment, Janeen was ordered to take psychotropic medications under an involuntary order. The instant petition for recommitment is filed by Green County under § 51.42, which sought an order for the involuntary medication of Janeen along with her continuing involuntary commitment. Janeen stipulated to the involuntary commitment, but challenged the petition for involuntary medication.

¶3 At the hearing on the petition, the County presented the testimony of Dr. Patricia Jens. Dr. Jens sent a letter report to the County just prior to filing its

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

petition for recommitment expressing her opinion that Janeen continued to be a proper subject for commitment and that Janeen did not understand the advantages, disadvantages, or alternatives of her medication and therefore the court should order involuntary medication. At the hearing, Dr. Jens testified that Janeen required psychotropic medication, specifically Clozapine, to help control her mental illness. Dr. Jens further testified that she had experimented with providing Janeen with lower doses in the past, however, that resulted in Janeen “becom[ing] more paranoid.”

¶4 Janeen testified that she wanted to take the lower dosage because at the higher dosage she is substantially sedated to the degree that it renders it very difficult for her to get up in the morning. The court considered oral arguments by both parties, at the conclusion of which the court ordered that Janeen be involuntarily medicated. In support of its order, the court said the following:

Now, was she substantially incapable of applying an understanding of the advantages and disadvantages and the alternates to her mental illness? I don't think so. I don't think it was clearly shown on the Statutes that she was able to do that. In fact, I think by clear and convincing evidence that was shown that she was unable to do the same. And therefore, I will order that there be the involuntary administration of the medication.

¶5 Janeen only appeals the order for involuntary medication. She is not contesting the order for recommitment. Janeen argues that Dr. Jens failed to explain the advantages, disadvantages, and alternatives to Clozapine. She further argues that she is capable of applying and understanding the advantages, disadvantages, and alternatives to her mental illness in order to make an informed choice. Finally, she argues she is capable of expressing an understanding about the advantages, disadvantages, and alternatives of Clozapine. Both in her trial court brief and her appellate brief, Janeen refers to the five factors under *Virgil D.*

that a court is to take into consideration when determining whether an individual is able to express an understanding about the advantages, disadvantages, and alternatives of her medication. However, the County does not analyze the facts under *Virgil D.* We further observe that the trial court did not analyze the facts applying the factors set forth in *Virgil D.*

¶6 We conclude the trial court erred by failing to make the requisite findings under *Virgil D.* in determining whether Janeen was competent to understand the advantages, disadvantages, and alternatives of taking Clozapine. In *Virgil D.*, Rock County filed a petition for involuntary commitment, which included a request for an order to involuntarily medicate Virgil. The trial court denied the county's first petition but granted the second petition. *Virgil D.*, 189 Wis. 2d at 6-8. 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. was just one way a court could determine that a patient was incompetent to refuse medication. *Id.* 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.

¶7 In reversing the court of appeals, the supreme court held 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 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.

¶8 In *Virgil D.*, the supreme court explained that in determining whether a patient is competent to refuse medication or treatment pursuant to § 51.61(1)(g)4., the court must presume that the patient is competent to make that decision. The court further explained that “[t]he petitioner has the burden of overcoming that presumption by showing incompetence by evidence that is clear and convincing.” *Id.* at 14. To overcome the presumption that the patient is competent to refuse medication or treatment, “[t]he 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.” *Id.*; *see also* § 51.61(1)(g)4. If the petitioner is unable to meet its burden, the patient retains the right to exercise informed consent with regard to medication and treatment. *See* § 51.61(1)(g)3; *Virgil D.*, 189 Wis. 2d at 14.

¶9 The *Virgil D.* court explained the circuit court’s obligations in determining whether a patient is competent to refuse medication. The supreme court explained the following:

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;

(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 risk and benefits.

Id. at 14-15.

¶10 We find nothing in the record indicating that the trial court here complied with its obligations under *Virgil D.* This is so in spite of the fact that Janeen had analyzed this case applying *Virgil D.* in her brief to the trial court. We do observe, however, that neither counsel directed the court’s attention to *Virgil D.* during oral arguments, which perhaps explains the court’s failure to apply *Virgil D.* to the facts of this case.

¶11 We conclude that we cannot decide based on the current state of the factual record whether Janeen should be involuntarily ordered to receive medication. We therefore conclude that the trial court erred in ordering the involuntary medication of Janeen.

¶12 Because this matter will be remanded to the trial court for factual findings, we also observe that the trial court made no findings with respect to whether Dr. Jens had explained the advantages, disadvantages, and alternatives of taking the medication to Janeen. Based on our reading of the hearing transcript, it appears that at best the evidence regarding whether Dr. Jens had explained the advantages, disadvantages and alternatives of taking the medicine with Janeen is ambiguous. Dr. Jens testified that she engaged in a “dialog” with Janeen during

medical checks regarding the same but failed to explain precisely the full extent of those dialogs. That is, it appears from Dr. Jens' testimony that what likely occurred was Janeen complained to Dr. Jens at those dialogs about the side effects she was experiencing from taking Clozapine, rather than Dr. Jens squarely addressing the advantages, disadvantages, and alternatives of taking the medication with Janeen. Thus, at this stage of the proceedings it appears that the County has failed to show by clear and convincing evidence that Dr. Jens had explained to Janeen the advantages, disadvantages, and alternatives of taking Clozapine. However, we do not decide that issue at this time because we are remanding this case to the trial court to render factual findings based on the current record. If the court believes that additional testimony is necessary to complete its factual record, that is left to the court's discretion.

¶13 In sum, we conclude the trial court has failed to fulfill its obligations under *Virgil D.* in considering the factors set out in that case in determining whether Janeen was an appropriate candidate for involuntary medication. We therefore remand to the trial court with directions to make the proper findings of fact and then to issue the appropriate order. Should the trial court find it necessary to take additional evidence to establish a more complete record, the court may do so in the exercise of its discretion. Meanwhile, the prior order of the trial court for the involuntary medication of Janeen will continue to be in effect for twenty days following remittitur of the record to allow the trial court sufficient time to make the requisite findings under *Virgil D.* and to issue an order based upon those findings.

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

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

