COURT OF APPEALS
DECISION
DATED AND RELEASED

February 20, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2819

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

IN THE MATTER OF ANTHONY C.,
AN ALLEGED INCOMPETENT:

MILWAUKEE COUNTY,

Petitioner-Respondent,

v.

ANTHONY C.,

Respondent-Appellant.

APPEAL from an order of the circuit court for Milwaukee County: RAYMOND E. GIERINGER, Reserve Judge. *Reversed and cause remanded with directions.*

FINE, J. Anthony C. appeals from the trial court's denial of his motion for "postdetermination relief." He claims that he was denied effective

assistance of counsel. We reverse the order denying "postdetermination relief" and remand for a hearing on the ineffective-assistance-of-counsel claim.[1]

A person may be committed civilly under chapter 51.20, STATS., if he or she is "mentally ill" and "dangerous." Section 51.20(1)(a)1 & 2, STATS. A person is "dangerous" under the statute if he or she "[e]vidences 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." Section 51.20(1)(a)2.b, STATS. At the commitment hearing in this case, a Milwaukee police officer testified that he was called to a home in the city by Anthony C.'s aunt who complained that Anthony C. "was out of control." When confronted in the home, Anthony C. was acting bizarre and, according to the officer's testimony, in a way so that he was concerned for the safety of the elderly woman in the home as well as the officer's own safety.

A psychiatrist testified at the hearing that he examined Anthony C. and found that he was "mentally ill"—suffering from "a bipolar disorder," that Anthony C. was on psychotropic medications, and that, if he were released, Anthony C. would be a danger to himself and others. The psychiatrist also told the trial court that Anthony C., whom he had known "at least for five or ten years," was "a proper subject for treatment." The trial court also heard testimony from a clinical psychologist, who opined that she believed that Anthony C. was mentally ill, that "he presents a danger to others," and that he was "an appropriate subject for treatment."

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[1] We reject Milwaukee County's assertion that Anthony C.'s appeal is untimely. *See* RULE 809.30, STATS. Moreover, although not raised by the County, this appeal is not moot even though Anthony C.'s original commitment order expired; it was extended by the trial court's order of October 27, 1995.

Anthony C. appealed from both the order of civil commitment under chapter 51 of the Wisconsin statutes, and the order denying "postdetermination relief." Our decision reverses only the order denying "postdetermination relief" and remands the case for further postconviction proceedings. After the trial court has acted on remand, Anthony C. may, by a subsequent appeal, renew the issues applicable to the civil commitment order.

The trial court found that Milwaukee County had proven "by clear and convincing evidence that [Anthony C.] is mentally ill at this time, is treatable, and is dangerous to himself and others." *See* § 51.20(13)(e), STATS. (petitioner's burden is "by clear and convincing evidence"). On this record we cannot say that these findings are "clearly erroneous." *See* RULE 805.17(2), STATS.

Anthony C. claims that his trial counsel gave him deficient representation. Although proceedings under § 51.20, STATS., are not criminal, persons whose commitment is sought are entitled to counsel. Section 51.20(3), STATS. *See also* ***State ex rel. Memmel v. Mundy***, 75 Wis.2d 276, 249 N.W.2d 573 (1977). As we have noted recently, "`there is a substantial liberty interest in avoiding confinement in a mental hospital.'" ***Milwaukee County v. Louise M.***, 196 Wis.2d 200, 207, 538 N.W.2d 550, 553 (Ct. App. 1995) (citation omitted). If the "adversary counsel" representation that § 51.20(3) requires is not to be an empty command, counsel must not be deficient. Although the requirement that a person subject to an involuntary-commitment petition have effective assistance of counsel is not founded upon the Sixth Amendment to the United States Constitution, as it is in criminal cases, we believe that the standard of performance should be the same, namely whether counsel's alleged "deficient performance render[ed] the result of the trial unreliable or the proceeding fundamentally unfair." *See* ***Lockhart v. Fretwell***, 113 S. Ct. 838, 844, 122 L.Ed.2d 180, 191 (1993).

The trial court did not hold a hearing on Anthony C.'s claim that he was prejudiced by his trial counsel's performance. Ordinarily, such a hearing is required. *See* ***State v. Washington***, 176 Wis.2d 205, 214–216, 500 N.W.2d 331, 335–336 (Ct. App. 1993); ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). We cannot assess Anthony C.'s ineffective-assistance-of-counsel claim without the type of hearing envisioned by ***Machner***. Accordingly, the case is remanded for such a hearing.

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

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