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DISTRICT III

October 12, 2016

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You are hereby notified that the Court has entered the following opinion and order:

2015AP1619-NM

Barron County v. K. L. (L. C. No. 2013ME26)

Before Seidl, J.¹

Appointed attorneys for K. L. have filed a no-merit report concluding there is no arguable basis for challenging a judgment extending K. L.'s WIS. STAT. ch. 51 mental health commitment. K. L. was advised of the right to respond to the report and has not responded. Upon an independent review of the record as mandated by WIS. STAT. RULE 809.32, this court concludes

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

there is no arguable merit to any issue that could be raised on appeal. Therefore, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

In 2013, K. L. was the subject of an emergency detention based on her escalating paranoia and psychosis. Barron County petitioned for K. L.'s involuntary commitment, and the parties stipulated to a six-month commitment at a community-based residential facility. When the County later petitioned for an extension of K. L.'s commitment, the parties stipulated to another six-month commitment, which included K. L.'s transition to independent living and required K. L. to comply with outpatient treatment conditions. K. L.'s commitment was subsequently extended for one year to ensure she would continue her existing outpatient treatment conditions. The present appeal involves the County's second petition for a twelve-month extension of K. L.'s commitment. K. L. was served with notice of the extension hearing and requested a jury trial. The circuit court denied K. L.'s pretrial motion to substitute counsel or to act as co-counsel. The jury returned a unanimous verdict, finding that K. L. met the criteria for an extension of her commitment. The court extended K. L.'s outpatient commitment for one year, but did not issue an involuntary medication order.

Any challenge to the denial of K. L.'s requests to substitute her appointed counsel or to act as co-counsel would lack arguable merit. At a hearing six days before the scheduled recommitment hearing, K. L. indicated she wanted a new attorney appointed because her counsel would not call a specific psychologist at trial. The question whether appointed counsel should be relieved and another attorney substituted is reviewed under an erroneous exercise of discretion standard. *State v. Scarbrough*, 55 Wis. 2d 181, 186, 197 N.W.2d 790 (1972). Here, the circuit court stated that trial tactics are left to counsel. The court also acknowledged that an indigent person's right to counsel does not include the right to the particular counsel of the person's

choosing. *See id.* The circuit court ultimately denied the request, concluding that the dispute over the “choice of a psychologist” was not a sufficient reason to have counsel substituted. Here, appointed counsel opted to call psychologist John Lapcewich to testify on K. L.’s behalf. The choice between two experts is part of an attorney’s tactical decision-making.

With respect to K. L.’s request to act as “co-counsel,” it is likewise within the circuit court’s discretion to permit hybrid representation. *See State v. Campbell*, 2006 WI 99, ¶66, 294 Wis. 2d 100, 718 N.W.2d 649. However, one has no constitutional right to be actively represented in the courtroom both by counsel and by herself/himself. *See Moore v. State*, 83 Wis. 2d 285, 300, 265 N.W.2d 540 (1978). Here, the circuit court denied K. L.’s request to act as co-counsel, emphasizing that lawyers have specialized training and skills to present a case to a jury. The record supports the circuit court’s discretionary decisions.

There is no basis for arguing the evidence was insufficient to extend K. L.’s commitment. In determining whether sufficient evidence exists to support a jury verdict, a reviewing court views evidence most favorably to sustaining a verdict. *Outagamie Cty. v. Michael H.*, 2014 WI 127, ¶21, 359 Wis. 2d 272, 856 N.W.2d 603. WISCONSIN STAT. § 51.20(13)(g)3. requires continued commitment if it is determined that the individual: (1) is a proper subject for commitment; and (2) meets certain statutory conditions of dangerousness. A person is a proper subject for commitment if he or she is mentally ill and a proper subject for treatment. WIS. STAT. § 51.20(1)(a)1. At an extension hearing, the dangerousness element 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.” WIS. STAT. § 51.20(1)(am). “The burden of proof is upon the county department or other person seeking commitment to establish evidence that the subject individual is in need of continued

commitment.” WIS. STAT. § 51.20(13)(g)3. Further, the County must prove all required facts by clear and convincing evidence. WIS. STAT. § 51.20(13)(e).

Here, the examining psychiatrist, Dr. Filza Hussain, testified consistent with the report she submitted prior to trial. Dr. Hussain opined to a reasonable degree of “medical and psychiatric” certainty that K. L. suffers from chronic paranoid schizophrenia and is a proper subject for treatment. Dr. Hussain explained that when K. L. is on the “right dose of medication, she actually does not exhibit much paranoia, nor does she exhibit any other delusional belief.” Dr. Hussain testified, however, that when she attempted to decrease K. L.’s dosage of medication, K. L. experienced a return of paranoia and delusional beliefs. Dr. Hussain added that K. L. lacks insight into her condition and does not take her medication “when not under commitment.” Based on K. L.’s treatment record, Dr. Hussain opined that if treatment were withdrawn, K. L. would become a proper subject for commitment again.

Jennifer Frazer, K. L.’s behavioral health social worker, testified regarding K. L.’s symptoms following the decrease in her medication dosage. Specifically, K. L. exhibited disorganized thoughts and paranoia, including a complaint that she spilled holy water in her apartment, causing her feet to “feel funny.” According to Frazer, K. L. also seemed preoccupied with guns, stating concern that hunters in her apartment building would shoot her. K. L. also expressed fear and sadness about an “old man” on the bus who she claimed was “covered in blood.”

In turn, Lapcewich testified consistent with his report that K. L. has “schizophrenic spectrum illness, probably paranoid type” and that she is a proper subject for treatment. Although Lapcewich opined, to a reasonable degree of psychological certainty, that K. L. is not a

danger to herself or others, he agreed “it would be good for her to continue on with treatment on a voluntary basis.” Lapcewich indicated that K. L. had “virtually no insight into her behavioral health illness, so she may not voluntarily continue on with psychiatric care and medication.” Lapcewich nevertheless opined that because K. L. had been doing reasonably well under commitment, she deserved the opportunity to succeed or fail independently.

After a colloquy with the circuit court regarding her decision to testify, and after having additional time to discuss her decision with counsel, K. L. elected to testify. When asked whether K. L. believed she has a mental illness, K. L. responded, “I don’t know. They say I do.” Despite not being sure whether she has a mental illness and despite indicating she does not want to be on medication because of its negative side effects, K. L. testified she would continue to take her medications even if she were not under commitment.

To the extent the experts disagreed on whether K. L.’s commitment should be extended, it is the jury’s function “to evaluate the foundation for the expert’s opinion and to accord to that opinion such weight as the jury deems appropriate.” *Herro v. DNR*, 67 Wis. 2d 407, 422, 227 N.W.2d 456 (1975). The evidence was sufficient to establish that K. L. is mentally ill, that she is a proper subject for treatment, and that there is a substantial likelihood, based on her treatment record, that she would be a proper subject for commitment if treatment were withdrawn.

The court’s independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorneys Catherine R. Malchow and Katie R. York are relieved of further representing K. L. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals