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DISTRICT IV

October 20, 2022

To:

Hon. Peter Anderson
Circuit Court Judge
Electronic Notice

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
Electronic Notice

Cricket R. Beeson
Electronic Notice

David R. Gault
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Leonard D. Kachinsky
Electronic Notice

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

2019AP722 In the matter of the mental commitment of N.W.: Dane County v. N.W.(L.C. # 2017ME201)

Before Kloppenburg, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

N.W. appeals the circuit court's orders extending his involuntary commitment under WIS. STAT. § 51.20 and for involuntary medication and treatment under WIS. STAT. § 51.61(1)(g). The court found that N.W. is mentally ill, a proper subject for treatment, and a danger to himself or others. N.W. argues that the evidence is insufficient to support the court's finding of

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

dangerousness.[2] Based upon review of the briefs and record, I conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. As explained below, I agree that the evidence is insufficient to support the court's finding of dangerousness and, therefore, reverse.[3]

On November 2, 2018, Dane County filed a petition for an order extending N.W.'s involuntary commitment. The circuit court appointed Dr. Leslie Taylor and Dr. Amelia Fystrom to examine N.W. and prepare written reports. The court held a hearing on November 30, 2018, at which both doctors testified and their reports were admitted into evidence. At the conclusion of the hearing, the court granted the County's petition and entered orders extending N.W.'s commitment and for involuntary medication.

[2] N.W. also argues that the circuit court failed to make factual findings with reference to the specific standard under which it found N.W. to be dangerous, as required by our supreme court in ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277. However, as the County explains, the supreme court states in ***D.J.W.*** that its holding is prospective and does not apply to recommitment proceedings that occurred prior to issuance of the opinion in 2020. ***Id.*** at ¶3; ***Sauk Cnty. v. S.A.M.***, 2022 WI 46, ¶29, 402 Wis. 2d 379, 398, 975 N.W.2d 162. Accordingly, the ***D.J.W.*** requirement does not apply to the order appealed in this case, which was entered after a hearing on November 30, 2018.

[3] The notice of appeal in this case was filed on April 15, 2019, and a no-merit report and supplemental no-merit report were filed in May and July 2019. The appeal was subsequently stayed pending decisions in our supreme court concerning the issue of whether an appeal from an expired recommitment order is moot. On June 23, 2022, the supreme court issued a decision in ***Sauk Cnty. v. S.A.M.***, holding that an appeal from a recommitment order does not become moot when the recommitment order expires. ***S.A.M.***, 402 Wis. 2d 379, ¶27. On July 28, 2022, this court rejected the no-merit report and ordered further briefing. The parties completed briefing on October 12, 2022.

An order extending one's commitment is also called a recommitment order, *see* ***S.A.M.***, 402 Wis. 2d 379, ¶2, and in this opinion both terms will be used interchangeably.

Our supreme court has recently summarized the legal framework governing involuntary mental health commitments as follows:

> Before initially committing a person to the state or county's care, the government must prove by clear and convincing evidence that the person is: (1) mentally ill; (2) a proper subject for treatment; and (3) currently dangerous under at least one of five standards. WIS. STAT. § 51.20(1)(a), 13(e) …. Upon sufficient evidence of both a treatable mental illness and at least one of [the statutory] forms of dangerousness, the circuit court must order the person initially committed for no more than six months. § 51.20(130(a), (g)1 ….
>
> The government may thereafter seek to extend the initial commitment. Recommitment again requires clear and convincing evidence of the same three elements required for the initial commitment: mental illness, treatability, and current dangerousness under at least one of the five [statutory] standards …. Recommitment proceedings can differ from initial commitment proceedings in one significant way. In an initial commitment proceeding, the government may prove dangerousness only with evidence of recent acts, omissions, or behavior. In a recommitment proceeding, though, the government may alternatively prove dangerousness by "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 [under one of the five dangerousness standards] if treatment were withdrawn," § 51.20(1)(am). If the government presents clear and convincing evidence that the committed person remains mentally ill, treatable, and dangerous under one of the five standards (whether by recent conduct or via the § 51.20(1)(am) alternative showing), then the court must order that person committed for a period not to exceed one year ....

Sauk County v. S.A.M., 2022 WI 46, ¶¶4-5, 402 Wis. 2d 379, 975 N.W.2d 162 (footnotes omitted).

WISCONSIN STAT. § 51.20(1)(am) necessarily recognizes that, because of treatment, an individual's dangerous behavior may have subsided and there may be no recent acts evincing dangerousness reported in the individual's health record. ***Portage Cnty. v. J.W.K.***, 2019 WI 54, ¶19, 386 Wis. 2d 672, 927 N.W.2d 509. Accordingly, § 51.20(1)(am) presents an alternative

evidentiary path to establish current dangerousness because it allows the court to recognize that previous dangerous behavior could recur when treatment is withdrawn. ***Id.*** "Dangerousness in an extension proceeding can and often must be based on the individual's precommitment behavior, coupled with an expert's informed opinions and predictions." ***Winnebago Cnty. v. S.H.***, 2020 WI App 46, ¶13, 393 Wis. 2d 511, 947 N.W.2d 761. However, "[i]t is not enough that the individual was at one point a proper subject for commitment." ***J.W.K.***, 386 Wis. 2d 672, ¶24.

The County must prove by clear and convincing evidence a "substantial probability" of dangerousness, which courts have defined as "much more likely than not." ***Marathon Cnty. v. D.K.***, 2020 WI 8, ¶35, 390 Wis. 2d 50, 937 N.W.2d 901; ***J.W.K.***, 386 Wis. 2d 672, ¶24. Whether the County has met its burden of proof is a mixed question of fact and law. ***Langlade Cnty. v. D.J.W.***, 2020 WI 41, ¶24, 391 Wis. 2d 231, 942 N.W.2d 277. This Court reviews the circuit court's finding of facts for clear error, but independently determines whether the facts satisfy the legal standard required by Wisconsin law. ***Waukesha Cnty. v. J.W.J.***, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. The circuit court's finding of facts will not be disturbed unless they are clearly erroneous, meaning against the great weight and clear preponderance of the evidence. ***J.W.J.***, 375 Wis. 2d 542, ¶15.

Here, N.W. does not dispute that he is mentally ill and a proper subject of treatment. His challenge is solely to the legal sufficiency of the evidence presented by the County to show that he would be dangerous if he were not committed. The County presented evidence pertinent to two of the statutory dangerousness standards stated in WIS. STAT. § 51.20(1)(a)2.b. and c.:

> a substantial probability of physical harm to others evidenced by recent homicidal or other violent behavior, or a recent overt act,

> attempt or threat to do serious physical harm that placed others in reasonable fear of serious physical harm;
>
> a substantial probability of physical impairment or injury to one's self or others evidenced by a pattern of recent acts or omissions manifesting impaired judgment, and there is either no reasonable provision for one's protection in the community or a reasonable probability that one will not avail himself or herself of those services[.]

S.A.M., 402 Wis. 2d 379, ¶4.

As to these two standards of dangerousness, the County presented evidence in testimony and reports by the two examining doctors, which the circuit court credited. The circuit court determined that, if N.W. were not recommitted, he would not take medication, would experience psychosis and paranoia, and "would engage in behaviors that would be dangerous to himself and others." The circuit court based the dangerousness determination on the following: an incident before he was committed when he was "aggressive towards his mother and pushed her;" notes in his treatment record that he has been "known to make racial statements about terrorism and has referred to himself as an extremist;" and notes in his treatment record that he "made threats to kill group home staff and has been physically aggressive toward another resident in the group home."

There is no evidence in the record refuting the doctors' testimony that N.W. stated that he does not believe that he is mentally ill and he will not take his medication if he is not committed, and that he will decompensate without medication and his active symptoms of schizophrenia, including his delusions, paranoia, and psychosis, will reappear. However, the record lacks sufficient evidence that N.W. will be a danger to himself or others. Neither of the doctors testified as to any knowledge of the details of the incident when N.W. pushed his mother, his statements about terrorism and his being an extremist, or his interactions with group home

residents and staff. Moreover, both doctors testified that N.W. has been doing well in the group home.

As to the likely consequences of not extending N.W.'s commitment, Dr. Taylor testified that, if N.W. were not recommitted, he "would likely have delusions, would have to go back into the hospital." Similarly, Dr. Fystrom agreed that, if N.W. were not recommitted, "he would stop the medication and then decompensate and become delusional again." Neither doctor provided any details, beyond these conclusory statements, as to how or why N.W. would be dangerous to himself or others.

The evidence as to what would follow from N.W.'s not taking his medication, in terms of dangerousness to others or himself, is sparse and conclusory. There is the one time he pushed his mother, and unspecified times when he was verbally aggressive and hostile and made statements about terrorism and extremism. However, the references to the pre-commitment pushing of his mother are vague and lack specifics sufficient to establish "a substantial probability of physical harm to other individuals … or … that others are placed in reasonable fear of violent behavior and serious physical harm to them." WIS. STAT. § 51.20(1)(a)2.b. And, there is no evidence as to what N.W. actually said when he made his hostile statements; nor was there evidence that physical danger to N.W. or others followed his hostile statements or that, as required by the statute, he would have "such impaired judgment … that there is a substantial probability of physical impairment or injury to himself or herself." Sec. 51.20(1)(a)2.c. It is pure speculation that, if N.W. were not committed and stopped taking his medication, he would decompensate so as to "be a proper subject for commitment" under either of these dangerous

standards. Sec. 51.20(1)(am). In sum, on this record, I conclude that the evidence is insufficient to support the court's finding of dangerousness.[4]

Therefore,

IT IS ORDERED that the orders are summarily reversed pursuant to WIS. STAT. RULE 809.21.[5]

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[4] My conclusion follows from the sparseness of the testimony and reports regarding dangerousness. This order does not address a situation where a person who is diagnosed with a serious mental illness like schizophrenia has both stated that he or she will not take medication if not committed and engaged in pre-commitment conduct that testimony shows, for non-conclusory reasons based on details specific to the person and the conduct, that without recommitment the person will be dangerous to himself or herself or others.

[5] An order for involuntary medication and treatment requires the existence of a valid commitment order. *See* WIS. STAT. § 51.61(1)(g)3. Accordingly, the reversal of the commitment order mandates the reversal of the order for involuntary medication and treatment.