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**DISTRICT III**

May 22, 2013

To:

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

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2012AP2746-NM

In the matter of the mental commitment of Robert P.: Taylor  
County Human Services Department v. Robert P.  
(L.C. # 2012ME15)

Before Mangerson, J.<sup>1</sup>

Counsel for Robert P. has filed a no-merit report concluding there is no arguable basis for challenging an order committing Robert for mental health treatment pursuant to WIS. STAT. CH. 51.<sup>2</sup> Robert was advised of his right to respond to the report and has not responded.

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>2</sup> Although the commitment order that is the subject of this appeal has now expired, we address its validity in case it might affect subsequent orders.

The no-merit report recounts that Robert appeared by videoconference at the final hearing, and his attorney appeared from a separate location by telephone. WISCONSIN STAT. § 885.60 governs the use of videoconferencing in criminal cases and proceedings under chapters 48, 51, 55, 938 and 980. WISCONSIN STAT. § 885.60(2)(a) provides: “Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) is entitled to be physically present in the courtroom at all trials and sentence or dispositional hearings.”

In *State v. Soto*, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, our supreme court addressed the interplay between the videoconferencing statute and WIS. STAT. § 971.04(1)(g), which governs a criminal defendant’s right to be present at the pronouncement of judgment and the imposition of sentence. The *Soto* court concluded that the defendant had a statutory right to be in the physical presence of the judge when the court pronounced judgment after accepting the defendant’s guilty plea. The court further held that the right to be present could be waived, but not forfeited by inaction. *Soto*, 343 Wis. 2d 43, ¶ 44.

Here, the record does not establish that Robert waived his right to be physically present at the final hearing on his commitment. The no-merit report addresses the issue under the rubric of ineffective assistance of counsel based on counsel’s failure to object to Robert’s appearance via videoconference. Pursuant to WIS. STAT. § 885.60(2)(a) and *Soto*, however, the statutory right to be physically present is a plain right that cannot be forfeited by inaction. Therefore, this court is not convinced that the ineffective assistance analysis applies. Because Robert had a statutory right to be physically present at the final hearing and did not waive that right, we cannot say there is no arguable merit to challenge his appearance by videoconference. We will therefore

reject the no-merit report, dismiss the appeal and extend the time for counsel to file a post-commitment motion for a new hearing.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed.

IT IS FURTHER ORDERED that the time for counsel to file a post-commitment motion is extended to thirty days from the date of this order.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*