COURT OF APPEALS
DECISION
DATED AND FILED

January 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2098 **Cir. Ct. No. 2011ME222B**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF MARY S.:

EAU CLAIRE COUNTY,

PETITIONER-RESPONDENT,

V.

MARY S.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: JON M. THEISEN, Judge. *Reversed.*

¶1 HOOVER, P.J.[1] Mary S. appeals an order for involuntary medication. She argues Eau Claire County failed to prove by clear and convincing evidence that she was not competent to refuse medication. We agree and reverse.

BACKGROUND

¶2 In November 2011, Mary was placed under a WIS. STAT. ch. 51 mental health commitment and an involuntary medication order. Her commitment and medication order were extended by stipulation in May 2012. In May 2013, the County again petitioned to extend both the commitment and the medication order. Mary contested the petitions.

¶3 The sole witness at the extension hearing was psychiatrist Michael Murray. Murray opined Mary was diagnosed with schizoaffective disorder, bipolar type, which was a treatable mental illness. Murray also testified that, based on Mary's past history, if treatment were withdrawn, Mary would decompensate and become a danger to herself or others. Murray explained that, in addition to Mary's belief that she did not have a mental illness, Mary had a history of starting fires, had exposed her children to homicidal behavior, had engaged in suicidal behavior, and had traveled out-of-state to stalk an individual she erroneously believed was in a relationship with her.

¶4 Regarding medication, Murray testified he discussed with Mary "the reasons for and the benefits of the proposed medication and the way the medication will be administered," as well as "the alternative treatment modes and

[1] 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.

probable consequences of not receiving proposed medications." Murray then opined Mary was not competent to refuse medication, explaining:

> [S]ince Mary is severely mentally ill [and] … able to function with supervision on an outpatient basis only marginally so, she has no idea what her mental illness is and, therefore, as I previously testified, she is not likely to continue treatment on her own because she doesn't know or understand what her problem is. If that is the case, then she really is incapable of expressing an understanding of what the advantages and disadvantages are of accepting treatment for an illness that she isn't convinced that she has and, therefore, there's no way that she can be competent in this regard.

¶5 On cross-examination, Murray testified he went "through the advantages and disadvantages of proposed medications with [Mary]." The following exchange then took place:

> Q. Did you talk with her, did she give you any indication of how those medications affect her? In other words, did she complain about the medications?
>
> A. She did not explicitly complain about the medications and that's to the best of my recollection.
>
> Q. Sure. I'm not very good at pronouncing. Divalproex is a medication that she is prescribed; is that correct? Is there another name for that?
>
> A. Depakote is the brand name. Divalproex is the dictionary name.
>
> Q. And Depakote was listed as a medication she's on. Would you agree, Doctor, that some of the side effects of that are potentially, possible side effects, confusion, lack of energy, hallucinations, memory loss, new or worsening mental or mood changes, aggressiveness, agitation, anxiety, depression, impulsiveness, inability to sit still, irritability, and so forth?
>
> A. No, sir, not entirely.
>
> Q. Those aren't possible side effects?
>
> A. I didn't say that, sir.

> Q. Okay. Well, my question is, are those possible side effects?
>
> A. In some situations if one has a lengthy list of all of the possible side effects under the sun as the government would usually require them to be listed, yes, potentially they could be. Practically speaking, in terms of long clinical practice, the vast majority of those – of those side effects that you listed, in my personal experience, I have not seen due to Depakote. Therefore, sir, I cannot completely agree with that.
>
> THE COURT: Okay, [Mary's counsel], let's draw this to a conclusion.
>
> [Mary's counsel]: You did not evaluate whether or not [Mary] suffered from those side effects, did you?
>
> [Dr. Murray]: I'm sorry, could you repeat the question, please.
>
> [The County]: Again, Your Honor, I'm going to object to relevance. The standard is the advantages and disadvantages, it's not the side effects of the medication.
>
> THE COURT: Sustained. Move on, [Mary's counsel].
>
> [Mary's counsel]: For the record, Your Honor, I think one of the disadvantages is an understanding by an individual as to the possible side effects of a particular medication.
>
> THE COURT: So noted.
>
> [Mary's counsel]: Pretty clearly that is one of the disadvantages.
>
> THE COURT: You've noted it for the record. Go ahead, move on.
>
> [Mary's counsel]: I don't have any other questions.

¶6 Mary then made a statement to the circuit court. Ultimately, the court extended Mary's commitment and found she was not competent to refuse medication.

DISCUSSION

¶7 On appeal, Mary argues the County failed to prove she was not competent to refuse medication, pursuant to WIS. STAT. § 51.61(1)(g)4. The County bears the burden of proving Mary incompetent to refuse medication by clear and convincing evidence. ***Outagamie Cnty. v. Melanie L.***, 2013 WI 67, ¶37, 349 Wis. 2d 148, 833 N.W.2d 607; *see also* WIS. STAT. § 51.20(13)(e).

¶8 Whether the County met its burden of proving Mary incompetent to refuse medication is a mixed question of law and fact. ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). Factual findings by the circuit court will not be overturned unless clearly erroneous. ***Melanie L.***, 349 Wis. 2d 148, ¶38. However, applying the facts to the statutory standard in WIS. STAT. § 51.61(1)(g)4. is a question of law that we review independently. ***Id.***, ¶39.

¶9 "When a circuit court is asked to determine a patient's competency to refuse medication or treatment pursuant to [WIS. STAT.] § 51.61(1)(g)4[.] … it must presume that the patient is competent to make that decision." ***Virgil D. v. Rock Cnty.***, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). To prove an individual is not competent to refuse medication, the County must show:

> [B]ecause of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make

> an informed choice as to whether to accept or refuse medication or treatment.

WIS. STAT. § 51.61(1)(g)4.

¶10 As shown by the statutory language, WIS. STAT. § 51.61(1)(g)4. sets forth two ways that a person who is mentally ill and has received the requisite explanation of the proposed medication may be found incompetent to refuse medication. ***Melanie L.***, 349 Wis. 2d 148, ¶54. However, these standards only come into play "after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual[.]" ***Id.***; *see also* ***Virgil D.***, 189 Wis. 2d at 14 ("In making its [competency] 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." (Emphasis added)).

¶11 In ***Melanie L.***, our supreme court explained the statutory explanation requirement means:

> A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of a proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Melanie L., 349 Wis. 2d 148, ¶67.

¶12 On appeal, Mary argues the County failed to prove that she received a reasonable explanation of the advantages and disadvantages of and alternatives to her proposed medication. She emphasizes that, on direct examination, Murray never testified he discussed the disadvantages of the proposed medication with her, and his medical report filed with the court did not indicate such a discussion occurred. Mary also highlights that, when her trial counsel attempted to question Murray about the disadvantages, i.e., the side effects of the proposed medication, the County objected, arguing the questions were irrelevant, and the court sustained the objection. Although Murray did testify on cross-examination he discussed the disadvantages of the medication with her, Mary argues this "very general response was uninformative as he did not tell the court what he told Mary." Mary asserts that, based on this record, "[i]t is impossible to determine if Mary received a 'reasonable explanation of a proposed medication' as required by ***Melanie L.***" *See* ***id.***

¶13 The County responds Mary received a reasonable explanation of the proposed medication. It asserts the reasonable "standard does not require the examining doctor to state particular words at particular times but instead requires a reasonable explanation of the medications, their advantages and disadvantages." It contends Murray's testimony that he discussed the advantages and disadvantages of and alternatives to medication with Mary established he gave her a reasonable explanation. The County also suggests Murray's explanation was reasonable because Murray testified that, at the time of the evaluation, "Mary was almost non-directable in communication and discussion … and it was almost impossible for me to work with her to get her … to follow a logical train of thought or comments."

¶14 We reject the County's arguments. First, although Murray testified it was almost impossible for him to get Mary to follow a logical train of thought, he never testified that he was unable to have a discussion with her about the advantages, disadvantages, and alternatives to the medication. Rather, Murray explicitly testified he had a discussion with Mary about the proposed medication.

¶15 Second, although Murray testified he had the required discussion with Mary, his conclusory testimony does not establish by clear and convincing evidence that the explanation he gave Mary was reasonable. Stated another way, Murray's statement that he had a discussion with Mary about the medication does not prove he explained to Mary "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication." *See* ***Melanie L.***, 349 Wis. 2d 148, ¶67.

¶16 Further, in ***Melanie L.***, our supreme court admonished that: "Whatever the circumstances may be, the County bears the burden of proof on the issue of competency in a hearing on an involuntary medication order. *These hearings cannot be perfunctory under the law. Attention to detail is important.*" ***Id.***, ¶94 (emphasis added). Here, Murray never testified about what he told Mary were the disadvantages to the proposed medication and there was no evidence that Mary was advised of any "side effects [that] may be anticipated or are possible." ***Id.***, ¶67. When Mary's counsel attempted to cross-examine Murray on that subject, the circuit court sustained the County's relevancy objection. The record lacks any details about the explanation Murray gave Mary about the disadvantages of the proposed medication. Accordingly, we conclude the County failed to prove by clear and convincing evidence that Mary received a reasonable explanation of the advantages and disadvantages of and alternatives to the proposed medication.

¶17 The County, nevertheless, argues ***Melanie L.*** is factually distinguishable. It emphasizes that the circuit court in ***Melanie L.*** originally found Melanie not competent to refuse medication under the second standard, WIS. STAT. § 51.61(1)(g)4.b., but, in this case, Mary was found not competent under the first standard, § 51.61(1)(g)4.a. It also asserts the error in ***Melanie L.*** was that the examining psychiatrist applied and testified to an incorrect standard with regard to the issue of competency and, in this case, Murray offered a sufficient opinion that Mary was incompetent to refuse medication.

¶18 The County's arguments miss the mark. First, although ***Melanie L.*** involved a different competency standard, that fact does nothing to change the statutory requirement that Mary be given a reasonable explanation of the advantages and disadvantages of and alternatives to the proposed medication. *See* WIS. STAT. § 51.61(1)(g)4. Second, the appellate issue in this case is whether the County proved by clear and convincing evidence that Mary received a reasonable explanation of the proposed medication. Contrary to the County's argument, this case is not about whether Mary, once she received the requisite explanation, was incompetent to refuse the medication.

¶19 Finally, the County argues that, although individuals are presumed to be competent to refuse medication, *see* ***Virgil D.***, 189 Wis. 2d at 14, in this case, we must start with the presumption that Mary is *not* competent to refuse medication because, at the time of the hearing, Mary was under an involuntary medication order from the previous year. The County analogizes an involuntary medication order to a guardianship, which, pursuant to WIS. STAT. § 54.64, continues for the duration of the ward's life unless, generally, the ward initiates a termination proceeding and the court concludes the individual is no longer incompetent. The County states, "In reality[,] the court was deciding whether

Mary S.[,] after having received almost one year's worth of treatment[,] had regained the ability to express and or apply an understanding of the advantages and disadvantages of accepting medication."

¶20 We disagree. There is no statutory or case law support for the County's assertion that, once an individual is found not competent to refuse medication, the individual bears the burden of proving he or she has regained competency whenever the County petitions to extend the involuntary medication order.[2] *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider arguments unsupported by legal authority). In any event, and as stated previously, before the court could even consider whether Mary was able to express or apply an understanding of the proposed medication, it needed to ensure she received a reasonable explanation of the medication. *See* ***Melanie L.***, 349 Wis. 2d 148, ¶54; *see also* ***Virgil D.***, 189 Wis. 2d at 14.

¶21 In short, we conclude the County failed to prove, by clear and convincing evidence, that Mary received a reasonable explanation of the advantages and disadvantages of and alternatives to the proposed medication. Accordingly, we reverse the involuntary medication order.

By the Court.—Order reversed.

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

[2] We also observe that, similar to this case, ***Outagamie Cnty. v. Melanie L.***, 2013 WI 67, ¶1, 349 Wis. 2d 148, 833 N.W.2d 607, involved the extension of an involuntary medication order. In that case, our supreme court devoted its analysis to determining whether the County met its burden of proving Melanie was incompetent to refuse medication and ultimately concluded, in part, "[t]he County did not overcome *Melanie's presumption of competence* to make an informed choice to refuse medication." ***Id.***, ¶8 (emphasis added).