COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2790 **Cir. Ct. No. 2013ME9**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF SONDRA F.:

PRICE COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES,

PETITIONER-RESPONDENT,

V.

SONDRA F.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed*.

¶1 STARK, J.[1] Sondra F. appeals a WIS. STAT. ch. 51 mental health commitment order and an order denying her motion for postdisposition relief.

[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.

Sondra appeared at the final hearing from the Winnebago Mental Health Institute via videoconferencing technology. On appeal, she argues that she had a statutory and constitutional right to be physically present at the final hearing, that this right could only be affirmatively waived, and that the court violated this right by failing to engage her in a colloquy to confirm she affirmatively waived her right to be physically present. She also argues the error is not harmless. We affirm.

BACKGROUND

¶2 On May 15, 2013, the Price County Department of Health and Human Services placed Sondra under a WIS. STAT. ch. 51 emergency detention. Sondra appeared at the final hearing from the Winnebago Mental Health Institute via videoconferencing technology. Her attorney, the County's attorney, and the Honorable Douglas Fox were present at the Price County Courthouse. The two doctors who examined Sondra, Sangita Patel and Indu Dave, appeared by telephone.

¶3 At the beginning of the final hearing, the court acknowledged that Sondra was appearing from Winnebago Mental Health via videoconferencing technology. Sondra then engaged the court in a brief discussion and made a comment to the County's social worker, who was present in the courtroom. The court did not conduct a colloquy with Sondra regarding the use of videoconferencing technology. Neither Sondra nor her attorney objected to Sondra's appearance by videoconferencing.

¶4 During Patel's testimony, Sondra consistently interjected, disagreeing with Patel. Each time Sondra interrupted, the court told Sondra she would get a chance to testify and be able to tell the court whatever she wanted. At one point, her counsel informed the court that he could no longer see Sondra on

the videoconferencing screen and was not sure where in the videoconferencing room she was located. The attendant from Winnebago Mental Health responded that Sondra said she "couldn't take any more of this" and walked out.

¶5 The court had the attendant invite Sondra back to the proceeding and make it clear to Sondra that she was welcome to participate. The attendant then informed the court that Sondra stated she did not wish to return. The court continued the hearing and maintained the videoconference connection with Winnebago Mental Health in case Sondra "decide[d] to rejoin the hearing." Sondra never rejoined the hearing.

¶6 Ultimately, the circuit court found that Sondra had a mental illness, specifically bipolar affective disorder, that she was a proper subject for treatment, and that she presented a substantial risk of dangerousness to herself or others as evidenced by the suicide attempt prompting the detention and by her assaultive statements and actions while at Winnebago Mental Health. It ordered a mental health commitment.

¶7 Sondra brought a postdisposition motion, arguing she was denied her right to be physically present in the courtroom for the final hearing because the court did not obtain her affirmative waiver regarding the use of videoconferencing technology. Sondra appeared to argue that, because WIS. STAT. § 885.60(2) stated she was "entitled to be physically present in the courtroom," that statute required her physical presence unless she affirmatively waived this requirement. At the postdisposition hearing, the circuit court determined it erred by failing to engage Sondra in a colloquy regarding the use of videoconferencing technology. However, the court concluded the error was harmless, and it denied Sondra's motion.

DISCUSSION

¶8 On appeal, Sondra renews her argument that she had a statutory and constitutional right to be physically present at the final hearing, that this right could only be affirmatively waived, and that the court violated this right by failing to engage her in a colloquy to confirm her waiver. In support of these assertions, Sondra does not renew her reliance on WIS. STAT. § 885.60; instead, she relies primarily on criminal law. She also argues the harmless error analysis cannot be applied to this error, and, in any event, the error is not harmless.

¶9 The County does not address Sondra's reliance on criminal law to support her assertions regarding her physical presence at the final hearing. Instead, the County simply states in passing that "pursuant to WIS. STAT. § 885.60(2), Sondra was entitled to be physically present in the courtroom for her final hearing." The County then argues the harmless error analysis is applicable to the court's error and the error is harmless.

¶10 Therefore, the parties appear to agree, albeit for different reasons, that Sondra was required to be physically present at the final hearing, that Sondra was required to affirmatively waive her physical presence, and that the court's failure to obtain her waiver before proceeding via videoconferencing constituted error. These conclusions, however, present questions of law, and we are not bound by the parties' conclusions on questions of law. *See* ***Bergmann v. McCaughtry***, 211 Wis. 2d 1, 7, 564 N.W.2d 712 (1997). As explained below, we reject the parties' assertions that Sondra's physical presence was mandated at her final hearing and that she therefore was required to affirmatively waive her physical presence before appearing via videoconferencing technology.

¶11 Sondra relies on WIS. STAT. § 971.04(1) and ***State v. Soto***, 2012 WI 93, 343 Wis. 2d 43, 817 N.W.2d 848, to support her assertion that she has statutory and due process rights to be physically present at the final hearing that could only be affirmatively waived. Section 971.04(1) applies to criminal defendants[2] and it provides, in relevant part: "[T]he defendant *shall be present* … (b) At trial; … (d) At any evidentiary hearing; … [and] (g) At the pronouncement of judgment and the imposition of sentence …." (Emphasis added.)

¶12 In ***Soto***, the circuit court conducted a plea hearing via videoconferencing. ***Soto***, 343 Wis. 2d 43, ¶¶6-7. On appeal, Soto argued the proceeding violated his statutory right to be present under WIS. STAT. § 971.04(1)(g). ***Soto***, 343 Wis. 2d 43, ¶15. Our supreme court concluded § 971.04(1)(g) gave Soto a statutory right to be present in the same courtroom as the presiding judge when the judge accepted his plea and pronounced judgment. ***Soto***, 343 Wis. 2d 43, ¶34. The court then determined

> a defendant's right to be present in the same courtroom as the presiding judge at the proceedings listed in WIS. STAT. § 971.04(1)(g) is particularly important to the actual or perceived fairness of the criminal proceedings. Therefore, if the right is to be relinquished, it must be done by waiver, the "intentional relinquishment of a known right."

Soto, 343 Wis. 2d 43, ¶40. Ultimately, the court found Soto affirmatively waived his § 971.04(1)(g) right to be present in the same courtroom as the judge when judgment was pronounced. ***Soto***, 343 Wis. 2d 43, ¶48.

[2] WISCONSIN STAT. § 967.01 provides, in relevant part: "Chapters 967 to 979 may be referred to as the criminal procedure code and shall be interpreted as a unit. Chapters 967 to 979 shall govern all criminal proceedings[.]"

¶13 Sondra's reliance on WIS. STAT. § 971.04(1) and ***Soto*** is misplaced. Section 971.04(1) mandates that criminal defendants "shall be present" at certain hearings. Sondra is a respondent in a WIS. STAT. ch. 51 mental health proceeding and not a criminal defendant. WISCONSIN STAT. § 51.20(10) provides that, "except as otherwise provided in this chapter, the rules of evidence in civil actions and [WIS. STAT. §] 801.01(2) [referring to civil procedure and practice] apply to any judicial proceeding or hearing under this chapter." As a result, § 971.04(1) does not apply to Sondra, and it does not require her physical presence or the affirmative waiver of her physical presence. There is no statute similar to § 971.04(1) that mandates civil litigants be physically present at certain hearings, and Sondra does not cite any other statutory authority mandating her physical presence at a final hearing.

¶14 On appeal, the County states that "pursuant to WIS. STAT. § 885.60(2), Sondra was entitled to be physically present in the courtroom for her final hearing." Section 885.60(2) governs the use of video conferencing technology in specific cases. It provides:

> (a) Except as may otherwise be provided by law, a defendant in a criminal case and a respondent in a matter listed in sub. (1) [including a chapter 51 respondent] is entitled to be physically present in the courtroom at all trials and sentencing or dispositional hearings.
>
> ….
>
> (d) If an objection is made by the defendant or respondent in a matter listed in sub. (1) [including a chapter 51 respondent], regarding any proceeding where he or she is entitled to be physically present in the courtroom, the court shall sustain the objection. For all other proceedings in a matter listed in sub. (1), the court shall determine the objection in the exercise of its discretion under the criteria set forth in s. 885.56.

¶15 WISCONSIN STAT. § 885.60(2)(a) does provide that Sondra is "entitled to be physically present" at her final hearing. Section 885.60(2)(d) requires Sondra to specifically object to the use of videoconferencing in the context of a WIS. STAT. ch. 51 civil proceeding to avail herself to her entitlement to physically appear. However, unlike WIS. STAT. § 971.04(1), § 885.60(2) does not mandate her physical presence at the final hearing. This distinction is important because in ***Soto***, the court concluded Soto needed to affirmatively waive his right to be physically present under § 971.04(1) as that statute mandated his presence at specified hearings. *See* ***Soto***, 343 Wis. 2d 43, ¶¶34, 41; *see also* WIS. STAT. § 971.04(1) ("[T]he defendant shall be present ...."). Accordingly, we reject the County's concession that § 885.60(2) requires Sondra's physical presence at the final hearing, such that Sondra needed to affirmatively waive that requirement before appearing by videoconferencing.

¶16 Further, even if WIS. STAT. § 885.60(2)(a) could somehow be read to require Sondra's physical presence at the final hearing, we observe that in ***Soto***, our supreme court explained:

> [Section] 885.60 was fully derived from a Supreme Court rule through a legislative delegation under WIS. STAT. § 751.12. S. Ct. Order No. 07-12, 2008 WI 37, 305 Wis. 2d xli (issued May 1, 2008, eff. July 1, 2008). Section 751.12 prohibits the supreme court from abridging, enlarging or modifying the substantive rights of any litigant when creating a Supreme Court rule under § 751.12(1). Accordingly, § 885.60(2)(a) cannot enlarge or diminish a defendant's statutory right established by § 971.04(1)(g).

Soto, 343 Wis. 2d 43, ¶32. We also note the comment to § 885.60(2)(a) provides, in part: "This section is not intended to create new rights in litigants to be physically present which they do not otherwise possess; it is intended merely to preserve such rights, and to avoid abrogating by virtue of the adoption of this

subchapter any such rights." Sondra points to no legal authority mandating her physical presence at the final hearing. Section 885.60(2)(a) cannot be used to give her that statutory right.[3]

¶17 In a final attempt to argue there is a requirement that she be physically present at the final hearing, Sondra emphasizes that "criminal defendants" have the right to be present at trial under the Wisconsin and United States Constitutions, and that WIS. STAT. § 51.20(5) provides all WIS. STAT. ch. 51 hearings "shall conform to the essentials of due process and fair treatment[.]"[4] She argues that, although case law has established the due process rights afforded to criminal defendants are not necessarily the same as those afforded to respondents in chapter 51 proceedings, "the right to be present is an essential element of due process" and must "appl[y] equally to criminal defendants and respondents in mental health commitments."

¶18 We reject Sondra's assertion that she has the same rights as a criminal defendant. The rights explicitly afforded to "criminal defendants" under

[3] This perhaps explains why Sondra, who relied on WIS. STAT. § 885.60(2)(a) in her postdisposition motion, does not even cite the statute in her appellate brief.

[4] WISCONSIN STAT. § 51.20(5) is titled "Hearing requirements" and provides:

> The hearings which are required to be held under this chapter shall conform to the essentials of due process and fair treatment including the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, the right to remain silent and the right to a jury trial if requested under sub. (11) …. The court may determine to hold a hearing under this section at the institution at which the individual is detained, whether or not located in the same county as the court with which the petition was filed, unless the individual or his or her attorney objects.

the Wisconsin and United States Constitutions do not apply to respondents in a WIS. STAT. ch. 51 proceeding. *See, e.g.*, ***W.J.C. v. County of Vilas***, 124 Wis. 2d 238, 240, 369 N.W.2d 162 (Ct. App. 1985) (Respondent "argue[d] that in a [WIS. STAT. §] 51.20 hearing, he has the right to confront the witnesses against him"; however, "[b]ecause this is a civil proceeding, … no independent right to confront witnesses exists under the Wisconsin and United States Constitutions.").

¶19 That being said, we certainly recognize that the procedures used in a WIS. STAT. ch. 51 hearing must conform to the essentials of due process. *See* ***id.***; *see also* WIS. STAT. § 51.20(5). Therefore, had Sondra expressed a desire to be physically present at the final hearing or objected to the use of videoconferencing, and had the court nevertheless continued the hearing, it seems apparent that her right to due process as well as her rights under WIS. STAT. §§ 51.20(5) and 885.60(2) may have been implicated. At that time, we would be tasked with determining the validity of the mental commitment procedure under a procedural due process challenge. *See, e.g.*, ***W.J.C.***, 124 Wis. 2d at 239-40 (over respondent's objection, the state's witnesses testified by telephone; on appeal, court determined telephonic testimony by state's experts did not violate respondent's right to procedural due process).

¶20 However, in this case, Sondra never objected to videoconferencing or made a request to be physically present. Sondra has not provided any legal authority requiring her physical presence at the final hearing. Without such authority the rules of civil procedure apply. Pursuant to those rules, when Sondra appeared at the final hearing via videoconferencing and did not object, she forfeited her right to later object to the court's use of videoconferencing technology. We therefore conclude the court did not err by failing to obtain Sondra's affirmative waiver, and we affirm the commitment order and the order

denying postdisposition relief. *See* ***Mercado v. GE Money Bank***, 2009 WI App 73, ¶2, 318 Wis. 2d 216, 768 N.W.2d 53 (appellate court may affirm on different grounds). Additionally, because we conclude the court did not err, we need not consider the parties' arguments regarding harmless error. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

By the Court.—Orders affirmed.

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