COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2481 **Cir. Ct. No. 1996ME81D**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF JEFFREY J. T.:

PORTAGE COUNTY,

PETITIONER-RESPONDENT,

V.

JEFFREY J. T.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: THOMAS B. EAGON, Judge. *Affirmed.*

¶1 SHERMAN, J.[1] Jeffrey J.T. appeals an order extending his involuntary commitment. Jeffrey argues the circuit court lacked competency to

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

extend his commitment and that the evidence was insufficient to support the court's involuntary medication order. I affirm.

BACKGROUND

¶2 Jeffrey is a diagnosed schizophrenic and has been on a court-ordered commitment since at least June 2009. On June 12, 2009, the circuit court entered an order recommitting Jeffrey for a period of twelve months, ending on June 18, 2010. The circuit court extended Jeffrey's commitment again on June 14, 2010, June 17, 2011, and June 4, 2012. Each of those recommitments was ordered to end on June 18th of the following year.

¶3 On May 30, 2013, Portage County filed a petition with the circuit court to extend Jeffrey's commitment for an additional period of up to one year. A hearing on the petition was held on June 17, 2013, and on that date, the court entered an order recommitting Jeffrey for a period of twelve months, ending on June 18, 2014, and ordering involuntary medication for Jeffrey. Jeffrey appeals the 2013 extension of his commitment and the involuntary order of medication.[2]

ANALYSIS

¶4 Under WIS. STAT. § 51.20, involuntary commitment for treatment is authorized if the circuit court determines that an individual is: (1) mentally ill; (2) a proper subject for treatment; and (3) dangerous. Each of these prongs must be shown by clear and convincing evidence. *See* § 51.20(13)(e). Jeffrey does not dispute that each of these prongs was satisfied. Instead, he challenges the circuit

[2] Although the order appealed has now expired, we address its validity because issues arising from that order may affect subsequent orders.

court's competency[3] to extend his commitment in 2013. Jeffrey contends that the circuit court lost competency to extend his commitment because, according to Jeffrey, the court failed to issue the 2013 judgment of recommitment prior to the expiration of the prior recommitment judgment, which he claims was June 4, 2013.

¶5 In ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 82, 681 N.W.2d 190, the supreme court held that a challenge to a circuit court's competency is forfeited if not raised before the circuit court. Jeffrey does not cite this court to any place in the record where the issue of competency was raised below, and my own search of the record has not shown that it was. Jeffrey has thus forfeited his right to challenge the circuit court's competency. This being said, I have the authority to disregard Jeffrey's forfeiture and address the merits of Jeffrey's unpreserved argument. ***Id.*** at 83. I exercise that authority now in order to clarify Jeffrey's apparent misunderstanding.

¶6 Jeffrey takes the position that the 2012 recommitment order expired on June 4, 2013, because the 2012 order recommitting him was filed on that date. Jeffrey argues that because the commitment order expired on June 4, the circuit court lacked competency on June 17, 2013, to extend his commitment. However, as argued by the County, Jeffrey is incorrect as to when the 2012 recommitment order expired.

[3] A circuit court loses competency to proceed when it has jurisdiction over the persons and subject matter of the proceeding, but for other reasons does not have the power to render a valid judgment. *See* ***Mueller v. Brunn***, 105 Wis. 2d 171, 176-78, 313 N.W.2d 790 (1982), *abrogated on other grounds by* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.

¶7 It is undisputed that the 2012 recommitment order was entered on June 4, 2012, and extended Jeffrey's commitment for a period of twelve months to expire on June 18, 2013. The June 2012 recommitment order extended a prior recommitment order, which specified that Jeffrey was recommitted until June 18, 2012. The 2012 recommitment order expired on June 18, 2013, not June 4 as Jeffrey maintains. This is consistent with WIS. STAT. § 51.20(13)(g)1. and 3., which provide that those commitment orders subsequent to and consecutive to an individual's first commitment order shall be for a period not to exceed one year and shall continue the prior commitment.

¶8 Accordingly, I conclude that the 2013 order recommitting Jeffrey was timely filed and that the circuit court had competency to enter the order.

¶9 Jeffrey also challenges the sufficiency of the evidence supporting the circuit court's order for involuntary medication. Jeffrey argues that the County failed to prove that he was not competent to refuse medication, pursuant to WIS. STAT. § 51.61(1)(g)4.

¶10 The County bore the burden of proving by clear and convincing evidence that Jeffrey was incompetent to refuse medication. ***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). Whether the County met its burden of proving that Jeffrey was incompetent to refuse medication presents a mixed question of fact and law. ***K.N.K. v. Buhler***, 139 Wis. 2d 190, 198, 407 N.W.2d 281 (Ct. App. 1987). Factual findings by the court will not be overturned unless clearly erroneous; however, the application of those facts to the statutory standard presents a question of law that this court reviews de novo. ***Melanie L.***, 349 Wis. 2d 148, ¶¶38-39.

¶11 When determining whether an individual is competent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)4., the circuit court must presume that the individual is competent to make that decision. ***Virgil D. v. Rock Cnty.***, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). To prove that Jeffrey was not competent to refuse medication, the County must have shown:

> [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. These standards for determining whether an individual may be found to be incompetent to refuse medication 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." ***Melanie L.***, 349 Wis. 2d 148, ¶53 (quoting § 51.61(1)(g)4.). *See also* ***Virgil D.***, 189 Wis. 2d at 14 (a court must "first be satisfied that the advantages and disadvantages of, and the alternatives to, medication have been adequately explained to the patient.").

¶12 Jeffrey argues that the County failed to prove that he received an adequate explanation of the advantages and disadvantages of and alternatives to

his proposed medication.[4] Jeffrey argues that at the hearing on his recommitment, Dr. Ashok Seshadri, the County's sole witness, testified that he did not explain to Jeffrey the alternative treatments available to him. Jeffrey argues that alternative treatments must have been discussed with him before the court could find that he was incompetent to refuse medication. Jeffrey also argues that the County failed to prove that he received an adequate explanation of the advantages and disadvantages of his medication. Jeffrey asserts that Dr. Seshadri did not testify that he explained the advantages and disadvantages of Jeffrey's medication to him, but instead testified that he explained to Jeffrey how Dr. Seshadri believed the medication was helping him and/or was not needed. Jeffrey claims that Dr. Seshadri's testimony was insufficient evidence to support a finding that the advantages and disadvantages of his medication were explained to him.

¶13 This court will affirm factual findings by the circuit court unless those findings are clearly erroneous. ***State v. Kimbrough***, 2001 WI App 138, ¶27, 246 Wis. 2d 648, 630 N.W.2d 752. A circuit court's factual findings are not clearly erroneous if they are supported by any credible evidence in the record, or any reasonable inferences from that evidence. *See* ***Insurance Co. of N. Am. v. DEC Int'l, Inc.***, 220 Wis. 2d 840, 845, 586 N.W.2d 691 (Ct. App. 1998). The

[4] Jeffrey points out in his reply brief that the County does not dispute his argument that he did not receive an adequate explanation of the advantages, disadvantages and alternatives to his medication and treatment, and he argues that the County's failure to do so should be construed as a concession. Whether to construe a party's failure to dispute an argument as a concession lies within this court's discretion, and, in order to clarify the situation for the future, I choose not to do so here, just as I have chosen not to treat Jeffrey's competency arguments as having been forfeited. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (a respondent's failure to dispute a proposition in the appellant's brief *may* be taken as a concession on that point).

record before this court contains a "Report of Physician" dated June 13, 2013, and signed by Dr. Seshadri. Dr. Seshadri states in the report:

> I have explained to [Jeffrey] the advantages and disadvantages and alternatives to accepting medication or treatment. Due to [Jeffrey's] condition, [Jeffrey] is incapable of expressing an understanding of the advantages and disadvantages and alternatives to accepting this particular medication or treatment, or is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his [] condition in order to make an informed choice as to whether to accept or refuse medication or treatment, with the result being that [Jeffrey] is not competent to refuse medication or treatment due to his [] condition.

¶14 Because there is credible evidence in the record that Dr. Seshadri *did* in fact inform Jeffrey of the advantages, disadvantages and alternatives to his medication and treatment, I cannot say that the record was insufficient to support such a finding.

CONCLUSION

¶15 For the reasons discussed above, I affirm.

By the Court.—Order affirmed.

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