COURT OF APPEALS
DECISION
DATED AND FILED

December 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP591 **Cir. Ct. No. 1998CI000017**

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

IN RE THE COMMITMENT OF THOMAS TREADWAY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

THOMAS TREADWAY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK, Judge. *Affirmed*.

Before Kessler and Brennan, JJ., and Daniel L. LaRocque, Reserve Judge.

¶1 BRENNAN, J. Thomas Treadway appeals from the circuit court order finding him not competent to refuse medication and granting the State the authority to involuntarily medicate him. Treadway asserts that the State failed to establish that he was incompetent because it did not show that "the advantages and disadvantages of and alternatives to" medication were explained to him or that he was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his mental illness … to make an informed choice," as required by WIS. STAT. § 51.61(1)(g)4. (2013-14).[1] Because the record belies Treadway's assertions, we affirm.

BACKGROUND

¶2 In November 1999, Treadway was committed as a sexually violent person under WIS. STAT. ch. 980 (1999-2000). We affirmed the original commitment and order, and Treadway has remained in a secure treatment facility since that time. Since his commitment, the circuit court has issued five involuntary medication orders pursuant to WIS. STAT. § 51.61(1)(g). Treadway did not appeal any of those orders.

¶3 On October 27, 2014, Dr. Stephen Weiler, Treadway's treating psychiatrist at Sand Ridge Secure Treatment Center, petitioned the court for an order, pursuant to WIS. STAT. § 51.61(1)(g)3., finding that Treadway was not competent to refuse medication for his schizophrenia. Attached to the petition was the Physician's Report for Medication or Treatment, in which Dr. Weiler reported, as relevant here, that Treadway "is mentally ill," and that Dr. Weiler had

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

"explained to [Treadway] the advantages and disadvantages and alternatives to accepting medication or treatment."

¶4 Also attached to the petition was a report from Sand Ridge, signed by both Dr. Weiler and Rachel Bocek, Treadway's social worker. The report detailed Treadway's deteriorating mental state beginning on September 3, 2014, and continuing until October 22, 2014, a day after Treadway began refusing his medication. The report detailed six incidents when Treadway acted out or threatened staff, and described him becoming increasingly paranoid. Dr. Weiler and Bocek concluded that when Treadway "refuses medication[] he becomes actively psychotic and easily agitated" and they opined that he "will continue to be psychologically unstable if not treated with appropriate psychotropic medications."

¶5 The circuit court held a hearing on the petition on November 6, 2014. Treadway declined the opportunity to attend the hearing by video, and therefore, did not appear. Dr. Weiler was the only witness.

¶6 Dr. Weiler testified that, as a psychiatrist at Sand Ridge, he had been treating Treadway for schizophrenia for five-and-a-half years, and that Treadway had recently begun to refuse to take his medication, leaving Treadway irritable and aggressive. Dr. Weiler stated that Treadway had refused his psychiatric medication since October 21, 2014, but that prior to October 21, Treadway had refused a dosage change that had been recommended based upon Treadway's increasingly symptomatic behavior.

¶7 Dr. Weiler testified that he and Treadway "had discussed the advantages of [psychotropic medication] on multiple occasions … nearly every visit." Dr. Weiler told the court that throughout the time he had been treating

Treadway, Treadway had "contested and protested" that he suffers from schizophrenia, and that Treadway only "accepted medication [when] understanding that it would calm him."

¶8 Dr. Weiler also testified that Treadway complained about the side effects of his medication in 2013. In response, medical staff attempted an alternative medicine "which probably was not as effective over time but was somewhat effective." However, Treadway's current refusal to take his psychotropic medication was not based on the side effects he had objected to in the past. When recently refusing medication, Treadway told the nursing staff that "I'm not crazy, I don't need that medication."

¶9 According to Dr. Weiler, Treadway's condition had deteriorated over the two to three months leading up to the hearing, and Treadway had "lost the ability to understand the benefits and effects of taking his needed psychotropic medication." Dr. Weiler opined that Treadway's schizophrenia was currently impairing Treadway's "understanding and judgment regarding the mental illness itself and the treatment needed for it." Dr. Weiler testified that, in his opinion, Treadway was not competent to refuse medication or treatment and that he posed a safety risk to himself and others when unmedicated.

¶10 The circuit court entered the involuntary medication order, finding that Treadway was "substantially incapable of applying and understanding the advantages and disadvantages and any other alternatives to his mental illness or make an informed choice as to whether he should accept or refuse his medication." The circuit court added that Treadway posed a risk to himself and others when he was not medicated. Treadway appeals.

DISCUSSION

¶11 Treadway argues that the circuit court erred when it entered the order for the involuntary administration of psychotropic medication because he contends that the record is insufficient to support the circuit court's conclusion that Treadway is incompetent pursuant to WIS. STAT. § 51.61(1)(g)4. His argument and the State's response raise two issues that must be addressed by this court: (1) what standard of review we must apply when reviewing the circuit court's order for the involuntary administration of psychotropic medication; and (2) whether the circuit court's order in this case was supported by the record. We address each question in turn.

I. *Standard of Review.*

¶12 To begin, we address our standard of review. Both Treadway and the State agree that we must uphold the circuit court's findings of fact in this case unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2). However, Treadway contends that our review of the circuit court's application of those facts to the relevant law is *de novo,* citing ***Secor v. LIRC***, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175, while the State argues that an incompetency determination is reviewed under the clearly erroneous standard, citing ***Outagamie County v. Melanie L.***, 2013 WI 67, ¶¶38, 81, 349 Wis. 2d 148, 833 N.W.2d 607. We need not resolve this debate because we conclude under either standard that

the record in this case plainly demonstrates that the State met its burden of demonstrating that Treadway was incompetent.[2]

¶13 As such, we turn to whether the record in this case is sufficient to support the circuit court's ruling that Treadway was incompetent to refuse medication.

II. *The circuit court's incompetency finding is supported by the record.*

¶14 Pursuant to "WIS. STAT. § 51.61, a person has the right to refuse medication unless a court determines that the person is incompetent to make such a decision." ***Melanie L.***, 349 Wis. 2d 148, ¶53. As relevant here, § 51.61(1)(g)4. states:

> For purposes of a determination under subd. 2. or 3., an individual is not competent to refuse medication or treatment if, because of mental illness … and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, …:
>
> ….

[2] The State's assertion that we should review the circuit court's decision under the clearly erroneous standard rests, in substantial part, on our supreme court's decision in ***State v. Byrge***, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477. In ***Byrge***, the court held that "[t]he findings of a circuit court in a competency *to stand trial* determination will not be upset unless they are clearly erroneous." ***Id.***, ¶4 (emphasis added). However, here, the circuit court was not considering a defendant's competency to stand trial, but rather was considering the competency of a sex offender committed pursuant to WIS. STAT. ch. 980 to consent to medication. That difference may be significant because the supreme court held that a circuit court's competency-to-stand-trial decision was to be reviewed for clear error because of the "[circuit] court's superior ability to observe the defendant and the other evidence presented." ***Byrge***, 237 Wis. 2d 197, ¶33 (citation omitted). In a competency hearing to determine whether to issue an order for involuntary medication under WIS. STAT. § 51.61(1)(g), the subject of the order may not be present in court, as was the case here. However, as we set forth above, we need not resolve the issue in this case.

> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness … in order to make an informed choice as to whether to accept or refuse medication or treatment.

Id.

¶15 When the circuit court is considering whether an individual is competent to refuse medication pursuant to WIS. STAT. § 51.61(1)(g)4., the court "must presume that the patient is competent." ***Virgil D. v. Rock Cty.***, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). The burden of overcoming that presumption is on the petitioner by showing incompetence that is clear and convincing. *See* ***id.***

¶16 In sum, to prove that Treadway is not competent to refuse medication, the State was required to show by clear and convincing evidence that "the advantages and disadvantages of, and the alternatives to, medication have been adequately explained to [Treadway]." *See* ***id.*** Second, the State was required to show, as relevant here, that Treadway is substantially incapable of applying an understanding of his medication to his mental illness in order to make an informed choice as to whether to accept or refuse medication. *See* WIS. STAT. § 51.61(1)(g)4.b.

¶17 Here, in support of its petition, the State submitted both the Physician's Report for Medication and the Sand Ridge report, as well as Dr. Weiler's testimony. Based upon that evidence, the circuit court concluded that Treadway had been informed of the advantages and disadvantages of the medication, and had been told of any alternatives to medication, but that Treadway was substantially incapable of applying that information to his mental illness in order to make an informed choice. Treadway challenges both findings.

A. The record shows Treadway was informed of the advantages and disadvantages of his medication and had been told of alternatives.

¶18 First, Treadway argues that the record does not demonstrate that "the advantages and disadvantages of and alternatives to" medication were discussed with him. *See* WIS. STAT. § 51.61(1)(g)4. Treadway complains that Dr. Weiler's testimony was vague and conclusory, and that Dr. Weiler only testified "that others at Sand Ridge attempted to persuade Treadway to take psychotropic medications but [Dr.] Weiler provided no specificity as to whom and when." We disagree.

¶19 Whether WIS. STAT. § 51.61(1)(g)4.'s requirement that "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained" is "largely self-explanatory." ***Melanie L.***, 349 Wis. 2d 148, ¶67.

> 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 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.

Id.

¶20 There is direct evidence in the record demonstrating that Dr. Weiler personally explained to Treadway "the advantages and disadvantages of and alternatives to" medication. To begin, Dr. Weiler signed the Physician's Report

for Medication, explicitly acknowledging that he "explained to [Treadway] the advantages and disadvantages and alternatives to accepting medication or treatment." In addition, Dr. Weiler testified to as much during the hearing, telling the court that he had been Treadway's treating psychiatrist for five-and-a-half years and that he "had discussed the advantages of [psychotropic medication] on multiple occasions … nearly every visit."

¶21 There is also circumstantial evidence in the record showing that Dr. Weiler had explained "the advantages and disadvantages of and alternatives to" medication. Dr. Weiler testified that in 2013 Treadway had complained about the side effects of his medication and that he was offered an alternative medicine that was not as effective. As such, Treadway was certainly aware of the advantages and disadvantages of different medications, and knew that alternatives may be available upon his request.

¶22 It is clear from its order that the circuit court found Dr. Weiler's testimony credible, and that testimony is sufficient to support the circuit court's conclusion that Dr. Weiler told Treadway of "the advantages and disadvantages of and alternatives to medication." That evidence was uncontested. As such, we must conclude that the record supports the circuit court's conclusion that Treadway was informed of "the advantages and disadvantages of and the alternatives to" medication.

B. The record shows Treadway was substantially incapable of applying an understanding of his psychotropic medication such that he could make an informed decision as to whether to accept it.

¶23 Treadway also challenges, in a less developed argument, the circuit court's finding that Treadway was "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his … mental

illness … in order to make an informed choice as to whether to accept or refuse medication." *See* WIS. STAT. § 51.61(1)(g)4. Treadway claims that "[t]he record … did not clearly establish that Treadway was unable to make a connection between the advantages and disadvantages of medication and [his] mental illness." Again, we disagree.

¶24 The phrase "substantially incapable of applying an understanding" means that "to a considerable degree, a person lacks the ability or capacity" "to make a connection between an expressed understanding of the benefits and risks of medication and the person's own mental illness." *See* ***Melanie L.***, 349 Wis. 2d 148, ¶¶70-71 (emphasis omitted). Here, the State submitted the report from Sand Ridge in which Dr. Weiler and Bocek, Treadway's social worker, set forth six incidents describing Treadway's deteriorating mental state in the days leading up to his refusal. And Dr. Weiler testified that, from the beginning of his treatment, Treadway had refused to acknowledge that he suffered from schizophrenia and only takes his medication when he is able to understand that it calms him. Dr. Weiler, as Treadway's treating psychiatrist, told the court that as Treadway's "condition has deteriorated over the past two to three months, he has lost the ability to understand the benefits and effects of taking his needed psychotropic medication."

¶25 Again, the State's evidence was uncontested. And we conclude that the evidence is sufficient to support the circuit court's conclusion that Treadway is "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his … mental illness … in order to make an informed choice as to whether to accept or refuse medication." *See* WIS. STAT. § 51.61(1)(g)4.

¶26 For the foregoing reasons, we affirm.[3]

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[3] The State argues that, in the alternative, we can uphold the circuit court's order on the grounds that the medication was necessary to prevent Treadway from harming himself or others. *See* WIS. STAT. § 51.61(1)(g)3. We do not address that question because we decide the case on the other grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (Cases should be decided on the narrowest possible grounds.).