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February 5, 2016

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J. W. J.

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

2015AP1410-NM In the matter of the mental commitment of J.W.J.: Waukesha County v. J.W.J. (L.C. #2009ME1158)

Before Brennan, J.[1]

J.W.J. appeals orders, entered after a jury trial, that extended his mental health commitment for twelve months and authorized involuntary administration of medication and treatment on an outpatient basis. *See* WIS. STAT. § 51.20. The state public defender appointed Attorney John R. Breffeilh to represent J.W.J. on appeal. Appellate counsel filed and served a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

(1967). J.W.J. did not file a response. This court has independently reviewed the record and the no-merit report. We conclude that no potential issue is arguably meritorious, and we summarily affirm.

In 2009, while J.W.J. was a prison inmate, the State of Wisconsin petitioned the Winnebago County circuit court to commit him. According to the petition and accompanying documents, J.W.J. was diagnosed with schizophrenia, refused medical treatment, induced a seizure and hyponatremia by overconsumption of water, wrote a threatening letter to his mother, and wrote a sexually explicit letter to a female warden. In December 2009, the circuit court ordered him committed for six months. Soon thereafter, J.W.J. was released from prison and his commitment was transferred to Waukesha County. The Waukesha County circuit court subsequently extended his commitment four times, and, with each extension, the circuit court authorized involuntary medication and treatment. A few weeks before expiration of the nine-month extension entered on October 23, 2013, the County petitioned for a fifth recommitment order.

On July 23, 2014, the circuit court entered the orders underlying this appeal. The circuit court extended J.W.J.'s commitment for twelve months, established the maximum level of treatment as "outpatient with conditions," and authorized involuntary medication and treatment. The orders expired on July 23, 2015, approximately two weeks after J.W.J. filed the notice of

appeal. Meanwhile, the Waukesha County circuit court recommitted J.W.J. for a twelve-month period and authorized involuntary medication and treatment by orders entered on July 9, 2015.[2]

Mental health commitments are authorized by WIS. STAT. § 51.20(13). A person is a proper subject for commitment upon proof by clear and convincing evidence that the person is, *inter alia*, mentally ill and a proper subject for treatment, and that the person meets any one of the statutory criteria for dangerousness described in § 51.20(1)(a). *See* §§ 51.20(13)(a)3., 51.20(13)(e). Mental illness is defined as "a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life." WIS. STAT. § 51.01(13)(b). A proper candidate for treatment is a person who is amenable to rehabilitation or treatment techniques that could control, improve or cure the person's underlying disorder. *See* §§ 51.20(1)(a)1.; 51.01(17); ***C.J. v. State***, 120 Wis. 2d 355, 360-62, 354 N.W.2d 219 (Ct. App. 1984); WIS JI—CIVIL 7050. As relevant to our review, a person is dangerous within the meaning of § 51.20(1)(a)2. if the person, by recent threat, act, or omission: (1) evidences a substantial probability of physical harm to himself or herself or to other individuals, *see* § 51.20(1)(a)2.a.-b.; or (2) evidences such impaired judgment that there is a substantial probability of physical impairment or injury to himself or herself, *see* § 51.20(1)(a)2.c.

[2] The July 9, 2015 orders are in the record but nonetheless are not before the court in the instant proceeding. *See* WIS. STAT. RULE 809.10(4) (appeal from final order brings before the court prior adverse nonfinal judgments, orders and rulings).

When the County seeks to recommit a person such as J.W.J. who is already under a commitment order, the proceeding is governed by WIS. STAT. § 51.20(13)(g)3. In such circumstances, the County may prove dangerousness without offering evidence of a recent overt threat, act, or omission. *See* § 51.20(1)(am). Instead, the County may show "a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." ***Id.*** Section 51.20(1)(am) is intended to avoid the "vicious circle of treatment, release, overt act, recommitment." *See* ***State v. W.R.B.***, 140 Wis. 2d 347, 351, 411 N.W.2d 142 (Ct. App. 1987). With these principles in mind, we turn to appellate counsel's no-merit report.

In the no-merit report, appellate counsel discusses only counsel's conclusion that this appeal is moot because J.W.J. challenges an expired recommitment order. We do not agree that this appeal is moot. "[A] moot question is one which circumstances have rendered purely academic." ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. Our supreme court determined that an appeal from an order of commitment may be moot when the order lapsed and was not extended. ***G.S. v. State***, 118 Wis. 2d 803, 805-06, 348 N.W.2d 181 (1984). Here, however, the circuit court ordered J.W.J. recommitted after expiration of the order underlying this appeal. Consequently, a decision in this case could have direct and material consequences for the parties: if the 2014 recommitment order underlying this appeal is ruled invalid, then commitment proceedings—not recommitment proceedings—might be necessary to sustain a later order. Because the validity of the 2014 proceedings underlying this appeal could affect the validity of the later recommitment proceedings, we are satisfied that this appeal has the potential to present questions that are not moot. Accordingly, we consider

whether the record shows a basis for J.W.J. to challenge the recommitment order entered in July 2014.[3]

There is no arguable merit to a claim that the circuit court failed to comply with applicable deadlines. WISCONSIN STAT. § 51.20(11) provides that a subject of a petition must be afforded a jury trial within fourteen days after a jury demand when the demand is made later than five days after detention. Further, unless an existing commitment is extended by not more than fourteen days to accommodate a jury demand, the circuit court must hear a recommitment petition before expiration of the prior commitment. *See* ***G.O.T. v. Rock Cty.***, 151 Wis. 2d 629, 633-34, 445 N.W.2d 697 (Ct. App. 1989). Here, J.W.J. was an outpatient on July 3, 2014, when he demanded a jury trial. The circuit court held the jury trial fourteen days later, on July 17, 2014. When computing deadlines, we exclude the first day from which the designated period begins to run and we include the last day of the period. *See* WIS. STAT. § 801.15(1). The jury trial therefore was timely. Similarly, the circuit court conducted the trial and ordered J.W.J. recommitted before expiration of the nine-month extension ordered on October 23, 2013. Further pursuit of this issue would be frivolous.

There is no arguable merit to a claim that J.W.J. was denied the right to testify on his own behalf. *See* WIS. STAT. § 51.20(5). The circuit court conducted a colloquy with J.W.J. and established that he and his attorney had discussed J.W.J.'s right to testify, J.W.J. understood the right, and he chose not to exercise it. The subject of a recommitment proceeding is

[3] By order of October 6, 2015, we directed appellate counsel to address mootness as the first issue in the no-merit report. Unfortunately, appellate counsel elected to address only mootness. We have, as required, independently reviewed the record to determine whether it presents arguably meritorious issues. *See* ***State v. Tillman***, 2005 WI App 71, ¶17, 281 Wis. 2d 157, 696 N.W.2d 574.

presumptively competent, *see* ***S.Y. v. Eau Claire Cty.***, 162 Wis. 2d 320, 334, 469 N.W.2d 836 (1991), and when he or she gives up a right in the course of that proceeding, "the real inquiry is whether there was a sufficient showing of a genuine waiver," ***id.*** at 335. The colloquy that the circuit court conducted here satisfies the standard for waiver of the right to testify that governs in criminal proceedings. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. Further pursuit of this issue would be frivolous.

There is also no arguable merit to a claim that the evidence was insufficient to extend J.W.J.'s mental health commitment. The County presented testimony from two of J.W.J.'s case managers, mental health counselor Brent Brockway and social worker Robert Walker. Both Brockway and Walker described J.W.J.'s outpatient care and explained that J.W.J. receives psychotropic medication by intramuscular injection every four weeks. Brockway, who worked with J.W.J. from 2011 through May 2014, described J.W.J.'s compliance with medication as "poor," explaining that the sheriff was required to bring J.W.J. to receive his medication six times between September 2012 and February 2014. Walker, who took over as J.W.J.'s case manager two months before trial, testified that J.W.J. continues to receive monthly injections of psychotropic medication and that J.W.J.'s medical history reflects that he requires inpatient hospitalization when he discontinues his medication.

Dr. Joseph Koch, a psychologist, and Dr. Charles Cahill, a psychiatrist, each testified that he was court appointed to examine J.W.J. for purposes of the hearing. Each doctor testified that he had examined J.W.J. multiple times in the past and that J.W.J. has a substantial history of persistent mental illness. The doctors testified that J.W.J. carries a diagnosis of schizophrenia, paranoid type, and that the disorder grossly impairs his judgment and behavior. The doctors further testified that J.W.J. is a proper subject for treatment and, without treatment, would be a

proper subject for commitment. Dr. Koch described a pattern of stable behavior, followed by termination of treatment which in turn leads to incidents of "[J.W.J.] verbally threatening suicide or other times threatening to kill his wife.... [T]hat leads to culmination where the police are contacted and he is detained by the sheriff[']s department and brought into the hospital." The doctor summarized the pattern as "a cycle of treatment, going off of treatment, getting worse again and then having to come back into the hospital for treatment." In light of the foregoing, a challenge to the sufficiency of the evidence supporting involuntary commitment would lack arguable merit.

There is also no arguable merit to a claim that the evidence was insufficient to support the order for medication and treatment on an outpatient basis. *See* WIS. STAT. § 50.20(13)(dm). Under WIS. STAT. § 51.61(1)(g)4., a court may order involuntary medication and treatment for a person subject to commitment if the person is not competent to refuse medication or treatment because the person is "incapable of expressing an understanding of the advantages and disadvantages" of treatment or is substantially incapable of applying an understanding of the advantages and disadvantages of treatment to the person's own mental illness in order to make an informed decision regarding treatment. *See* ***id.*** Here, Dr. Koch testified that J.W.J. meets the statutory standard, and explained that J.W.J. believes the medication "causes all of his problems." Similarly, Dr. Cahill testified that medication and treatment improve J.W.J.'s thought processes and mood but, due to mental illness, J.W.J. is unable to understand the advantages and disadvantages of treatment and instead views his medication with "typical paranoid intent." Brockway testified that J.W.J. claims he is not mentally ill and that the psychotropic medication causes his symptoms. Walker described a conversation in which J.W.J. said his medications were poisonous and that he was allergic to them. A challenge to the

evidence supporting the order for involuntary medication and treatment would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the orders entered on July 23, 2014, are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved of any further representation of J.W.J. on appeal from the orders entered on July 23, 2014. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals