COURT OF APPEALS
DECISION
DATED AND FILED

February 8, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3182 **Cir. Ct. No. 1997ME260**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF ERNEST J. P.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERNEST J. P., JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: LINDA M. VAN DE WATER, Judge. *Affirmed.*

¶1 SNYDER, P.J.[1] Ernest J.P., Jr., (Ernest) appeals from a twelve-month extension of his WIS. STAT. § 51.20(1)(am) outpatient commitment, which includes an order for involuntary medication. Ernest argues that the order is based on an improper determination that he is not competent to refuse his medication. He contends there was insufficient evidence to support the trial court's findings in regard to his mental condition and need for medication; further, he contends that he should have been allowed to testify as to the opinions of expert witnesses whom he was denied the right to call in his defense. We affirm the order of the circuit court.

¶2 Ernest was initially committed under WIS. STAT. ch. 51 in 1997 and extended annually through the date of this order, November 9, 2004.[2] His outpatient status is subject to conditions, including a condition that Ernest continue to take his psychotropic medication. The extension order specifically states that medication and treatment may be administered to Ernest regardless of his consent during the commitment period or until further order of the court. Ernest objects to the legality of the involuntary medication condition.

¶3 Ernest cites to WIS. STAT. § 51.61 and to ***Virgil D. v. Rock County***, 189 Wis. 2d 1, 5, 9, 524 N.W.2d 894 (1994), to support his rights of informed consent and refusal of psychotropic medication or treatment. ***Virgil D.*** states that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version.

[2] The order expired in November 2005. Ernest contends that this appeal is not moot because of the potential for future extensions of his involuntary commitment. We agree. A statutory prohibition against forcing an involuntarily committed mental patient to take psychotropic drugs is an important legal issue when the patient remains subject to future ingestion of the drug(s). *See* ***G.S. v. State***, 118 Wis. 2d 803, 804-05, 348 N.W.2d 181 (1984).

under § 51.61(1)(a), "[o]nce a patient has been *admitted or committed to a treatment facility*, he or she must be informed of his or her [§ 51.61] rights, both orally and in writing." ***Virgil D.***, 189 Wis. 2d at 10 (emphasis added). One of the rights provided to patients under § 51.61 is the right, under specified procedures, to refuse medication. Sec. 51.61(1)(g). It is upon this statutory right that Ernest bases his appeal. Statutory interpretation and analysis present us with questions of law, which this court reviews de novo. *See* ***Virgil D.***, 189 Wis. 2d at 9.

¶4 We begin by observing that Ernest's extended outpatient treatment is consistent with the following WIS. STAT. ch. 51 legislative policy: "To protect personal liberties, no person who can be treated adequately outside of a hospital, institution or other inpatient facility may be involuntarily treated in such a facility." *See* WIS. STAT. § 51.001(2). Here, Ernest was neither admitted nor committed to a ch. 51 treatment facility under the extension order. *Cf.* ***Virgil D.***, 189 Wis. 2d at 5-6, n.2 (concerning inpatient treatment at the county psychiatric hospital). Unlike Virgil D., Ernest was allowed to remain in the community as an outpatient, provided he complied with the conditions of the court's order. The outpatient extension order includes the condition that Ernest:

> Report to a designated facility for outpatient evaluation(s) as often as directed, if the director or his or her designee determines that the patient has failed to take the medication as prescribed … the director or designee may request that the patient be taken into custody under s. 51.39[3] and *thereafter may administer prescribed medication to the patient* under s. 51.61(1)(g) and (h), Stats. (Footnote and emphasis added.)

[3] WISCONSIN STAT. § 51.39 provides the authority for law enforcement to "take charge of and return the patient to the facility" if directed.

The Court ordered that if Ernest violated any of the conditions in the order "[h]e may be taken into custody by law enforcement and transferred to an inpatient facility."

¶5 Procedurally, every petition for involuntary commitment or recommitment must allege grounds for commitment under WIS. STAT. § 51.20(1)(a). Where the commitment standard under § 51.20(1)(a)2.e. is implicated, special statutory considerations arise. For purposes of our analysis here, the relevant consideration is found in WIS. STAT. § 51.61(1)(g)3., which states in part that an individual, "[f]ollowing a final commitment order, other than for a subject individual who is determined to meet the commitment standard under s. 51.20(1)(a)2.e., [has] the right to exercise informed consent with regard to all medication and treatment" unless there is a proper finding that "the individual is not competent to refuse medication or treatment." Accordingly, we turn to the commitment standard under § 51.20(1)(a)2.e. to determine whether Ernest's recommitment is excepted from the terms of § 51.61(1)(g)3.

¶6 WISCONSIN STAT. § 51.20(1)(a)2.e. provides grounds for alleging dangerousness in a petition for involuntary commitment or recommitment. This specific standard requires a petitioner to demonstrate two things; first, the petitioner must show that the mentally ill individual:

> [E]vidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability 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….

Sec. 51.20(1)(a)2.e. This language is substantially similar to that contained in the patients' rights provisions of WIS. STAT. ch. 51, the language which forms the

foundation for Ernest's appeal.[4] In addition to demonstrating an incapability to express, understand or apply the advantages and disadvantages of medication or treatment, a petitioner must also show that the individual:

> [E]vidences a substantial probability, as demonstrated by both the individual's treatment history and his or her *recent acts or omissions*, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, *if left untreated*, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that *will result in the loss of the individual's ability to function independently in the community* or the loss of cognitive or volitional control over his or her thoughts or actions.

Sec. 51.20(1)(a)2.e. (emphases added).

¶7 This brings us to the distinction between inpatient and outpatient commitments. Where an individual has been the subject of outpatient treatment for mental illness, WIS. STAT. § 51.20(1)(a) provides alternate standards of proof of dangerousness pursuant to § 51.20(1)(am). Section 51.20(1)(a) expressly directs that, except as provided in para. (am), every petition shall allege that the individual is a proper subject for treatment and is dangerous as demonstrated by any factor listed in subparas. a. through e. *See* § 51.20(1)(a)1. and 2. The alternate standard in § 51.20(1)(am) reads in relevant part:

> [I]f the individual has been the subject of *outpatient treatment* for mental illness … immediately prior to commencement of the proceedings as a result of a commitment ordered by a court under this section … a pattern of recent acts or omissions *under par. (a)2.c.e.* …

[4] There, a determination of competence weighs whether, because of mental illness, the individual is "incapable of expressing an understanding of the advantages and disadvantages of accepting medication" or the individual is "substantially incapable of applying an understanding of the advantages, disadvantages and alternatives … in order to make an informed choice as to whether to accept or refuse medication." WIS. STAT. § 51.61(1)(g)4.

> may be satisfied by a showing that there is 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.* (Emphases added.)

¶8 Employing this alternate standard, we are presented with the following question: Whether Ernest would be a proper subject for commitment if he did not take his medication. The trial court held he would.

¶9 We are satisfied that WIS. STAT. § 51.20(1)(a)2.e. supports Ernest's § 51.20(1)(am) outpatient commitment. This placement is consistent with the legislative policy of providing the least restrictive commitment terms available and provides for outpatient placement with treatment. Because Ernest's extended outpatient treatment order meets the commitment standard under § 51.20(1)(a)2.e., his right to WIS. STAT. § 51.61(1)(g)3. informed consent and to refuse medication and treatment is excepted. Furthermore, ***Virgil D.***, which addresses treatment upon commitment or admission to a treatment facility, does not provide Ernest with any relief from his outpatient commitment extension order or its conditions for treatment and medication.

¶10 We next address whether the record supports the standard of proof under WIS. STAT. § 51.20(am) necessary to extend Ernest's outpatient order. A trial court's findings of fact will not be upset on appeal unless they are clearly erroneous and against the great weight and clear preponderance of the evidence; the evidence supporting the trial court's findings need not constitute the great weight or clear preponderance of the evidence, and reversal is not dictated even if there is evidence to support a contrary finding. ***Klein-Dickert Oshkosh, Inc. v. Frontier Mortgage Corp.***, 93 Wis. 2d 660, 663, 287 N.W.2d 742 (1980).

¶11 The trial court made findings of fact that Ernest was mentally ill, that he was a proper subject for extended outpatient commitment and that dangerousness was "likely to be controlled with appropriate medication administered on an outpatient basis." The statutory requirement for the extension of Ernest's outpatient commitment is a "showing that there is a substantial likelihood, based upon [Ernest's] treatment record, that [Ernest] would be a proper subject for commitment if treatment were withdrawn." *See* WIS. STAT. § 51.20(1)(am).

¶12 Dr. Edmundo Centena's testimony was that Ernest is mentally ill and suffers from a schizophrenic disorder, that Ernest presents a danger to himself if he discontinues his psychotropic medications, and that he would "decompensate dramatically," "revert to his psychotic process," and become a proper subject for commitment if treatment and medication were withdrawn. Dr. Centena related that Ernest requires psychotropic medication and outpatient services in order to manage the medication. We are satisfied that the extension of Ernest's outpatient commitment with conditions is supported in law and in fact.

¶13 We now turn to Ernest's contention that he was wrongly denied the right to testify as to the opinions of professional medical experts who did not testify or present any evidence at his extension hearing. Ernest subpoened Dr. Michael J. Eis and Dr. Peter Kenny to appear and give evidence at the hearing. Drs. Eis and Kenny invoked their WIS. STAT. § 907.06 privilege not to testify, and the trial court granted the requests. Ernest, acting pro se, then attempted to testify himself as to the expert opinions and determinations of Drs. Eis and Kenny. The State objected, and the trial court sustained the objections on the basis that the evidence would be inadmissible hearsay.

¶14 Ernest argues that his testimony should be admissible under the WIS. STAT. § 908.03(4) exception to hearsay as statements made for the purpose of medical diagnosis or treatment. Ernest does not cite to any supporting legal authority. The State cites to ***State v. Nelson***, 138 Wis. 2d 418, 406 N.W.2d 385 (1987), which says that the § 908.03(4) hearsay exception relates to statements made by a patient to his or her doctor in order for the doctor to testify to a diagnosis. *See* ***id***. at 434-35.

¶15 In ***Klingman v. Kruschke***, 115 Wis. 2d 124, 126, 339 N.W.2d 603 (Ct. App. 1983), we held that WIS. STAT. § 908.03(4) permits a medical expert consulted for purposes of testimony to relate a patient's self-serving statements when those statements are used to form a medical opinion. Ernest is not a medical expert nor can he form and testify to a medical opinion. Ernest provides no other reasoning for the application of the § 908.03(4) exception to the hearsay rule. We need not address this issue further. *See* ***Roehl v. American Family Mut. Ins. Co.***, 222 Wis. 2d 136, 149, 585 N.W.2d 893 (Ct. App. 1998).

By the Court.—Order affirmed.

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