COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2010

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2009AP2908-FT **Cir. Ct. No. 2009ME107**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF ASHLEY O. P.:

DODGE COUNTY,

PETITIONER-RESPONDENT,

V.

ASHLEY O. P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: BRIAN A. PFITZINGER, Judge. *Affirmed*.

¶1 DYKMAN, P.J.[1] Ashley O.P. appeals from an order for mental health commitment under WIS. STAT. § 51.20 that designated the maximum level of treatment as a locked inpatient mental health facility. Ashley argues that the evidence at the final commitment hearing did not establish that she required inpatient treatment, and therefore the trial court was required to order treatment on an outpatient basis. We conclude that the evidence in the record supported the court's order allowing a locked inpatient facility as the maximum level of treatment, and therefore affirm.

Background

¶2 On June 8, 2009, the treatment director of St. Agnes Hospital's psychiatric unit in Fond du Lac filed a "Statement of Emergency Detention" with the circuit court, stating that Ashley was grossly paranoid and psychotic, and had assaulted a nurse by punching her several times in the face with a closed fist. *See* WIS. STAT. § 51.15 (authorizing emergency mental health detention). The circuit count found that the petition and supporting documents met the requirements to seek involuntary commitment for mental health treatment under WIS. STAT. § 51.20(1). It set a preliminary hearing to determine whether the petition established probable cause to involuntarily commit Ashley for mental health treatment. Following the hearing, it determined there was probable cause, and ordered two examiners to prepare reports on Ashley's mental condition. *See* WIS. STAT. § 51.20(9).

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2007-08), and expedited under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶3 The court held a final hearing on the petition for involuntary commitment on June 22, 2009. At the beginning of the hearing, counsel for the State and Dodge County (collectively "the County") stated that she anticipated that the County's only witness would be Dr. Sangita Patel, one of the doctors who had prepared a report on Ashley's mental condition.

¶4 When Dr. Patel failed to return calls by the County, the County decided to call the other doctor who had prepared a written evaluation of Ashley, Dr. Kent Berney. The County said that although Dr. Berney was on its witness list, he was not expecting to testify. Dr. Berney returned the County's call and agreed to testify, although he did not have his report or his notes with him.

¶5 On direct examination, Dr. Berney confirmed that he met with Ashley on June 17, 2009, to evaluate her for involuntary mental health commitment proceedings. He also stated that he reviewed Ashley's mental health records at Winnebago Mental Health Institute. He gave his opinion that Ashley met the requirements for an involuntary mental health commitment, as stated in his report.

¶6 On cross-examination, Dr. Berney confirmed that he stated in his report that outpatient care might be appropriate by the time of the hearing. He also stated that while he thought at the time of the examination that there was a "substantial probability" that outpatient care would be appropriate by the time of the final hearing, he had not seen Ashley again since his examination. He stated that if it were only because of "logistical issues" that Ashley had not been discharged from the hospital, that he would think that outpatient care was the most appropriate and least restrictive treatment necessary for Ashley.

¶7 After the conclusion of Dr. Berney's testimony, Ashley's counsel indicated to the court that Ashley would be willing to stipulate to an outpatient commitment. The County argued that outpatient treatment was not currently available for Ashley because there had been no discharge planning for her yet, and there was no outpatient space available.[2] Ashley's counsel argued that whether or not there was an outpatient plan available, the evidence did not support an order for inpatient treatment, and thus the court was required to order treatment on an outpatient basis. Ashley's counsel also stated that if the County did not agree to outpatient treatment, Ashley wanted to address the court.

¶8 The County then indicated it would try to reach Stephen Packee, an intake counselor for the Dodge County Human Services and Health Department who tracks the progress of patients under mental health commitments with the County.[3] Ashley's counsel stated that she believed anything Packee would say in testimony would be hearsay, because it would be based on what he heard from others at Winnebago Mental Health Institute. The County argued that because Packee's duty is to track mental health commitments, he would have firsthand knowledge as to the state of any discharge planning for Ashley. Both counsel also argued as to the level of treatment the record supported. The court then indicated that it believed inpatient treatment was necessary based on Dr. Berney's testimony.[4]

[2] As the trial court noted, the statements by counsel for the County as to discharge planning for Ashley were not evidence.

[3] The County acknowledged that Packee was not on the County's witness list.

[4] Ashley asserts in her statement of facts that the trial court made its determination as to her commitment before the conclusion of the County's case and Ashley's testimony on her own (continued)

¶9 Packee then returned the call from the County and testified as to his involvement with Ashley's case. He stated that had been working with social workers at Winnebago Mental Health Institute to address her needs. He stated that there had been some discussion about placing Ashley in a group home and that there were no current openings, but that they were hoping to place Ashley in a group home soon if she were able to stabilize. He confirmed that he regularly relies on information from mental health workers at Winnebago Mental Health Institute in his duties as an intake counselor. He stated that his understanding was that Ashley was not yet ready to be discharged. He stated that he did not know how long Ashley would need to be treated on an inpatient basis, because there were recent concerns about Ashley's level of cooperation and possible suicidality. He confirmed that there were no current discharge plans for Ashley.

¶10 On cross-examination, Packee stated that he received the information about Ashley's lack of cooperation and suicidality from staff at Winnebago Mental Health Institute. He stated that the information was not based on his own opinion. Ashley's counsel then moved to strike Packee's testimony as hearsay. The court engaged in a colloquy with Packee and established that Packee had relied on this type of information in the past and had found it to be accurate. The court denied Ashley's motion to strike, finding that the information was not offered on a factual basis, but only to support Packee's knowledge that Ashley had not stabilized.

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behalf. However, Ashley does not raise any argument as to why this would invalidate the court's order.

¶11 Ashley then testified that she was willing to undergo mental health treatment on an outpatient basis. After argument by counsel, the court found that Ashley met the requirements for a mental health commitment, and that the least restrictive treatment appropriate for Ashley was inpatient treatment. The court entered an order committing Ashley to Dodge County for six months, with the maximum level of treatment designated as a locked inpatient facility. Ashley appeals.

Standard of Review

¶12 This case requires that we interpret Wisconsin's mental health commitment statutes, which is a question of law that we review de novo. *See* ***Fond du Lac County v. Elizabeth M. P.***, 2003 WI App 232, ¶11, 267 Wis. 2d 739, 672 N.W.2d 88. However, we will uphold the trial court's factual findings in support of its decision unless those findings are clearly erroneous. ***Id.***

Discussion

¶13 Ashley argues that the County had the burden to establish by clear and convincing evidence that she required a mental health commitment on an inpatient basis. She argues that while the County established that she met the criteria for a mental health commitment under WIS. STAT. § 51.20(1)(a), that did not automatically support an order for inpatient treatment. Ashley contends that the trial court was required to find that inpatient treatment was required under § 51.20(13)(a)3., which provides that if the allegations in the commitment petition are proven, the court shall "order commitment to the care and custody of the appropriate county department … or if inpatient care is not required[,] order commitment to outpatient treatment under care of such county department." Ashley argues that here, the evidence did not establish that she required inpatient

care, and therefore the court was only authorized to order treatment on an outpatient basis. She argues that Dr. Berney's testimony supported only a finding that outpatient care was appropriate, and that Packee's testimony was inadmissible hearsay.

¶14 The County responds that the trial court properly designated the maximum level of inpatient treatment under WIS. STAT. § 51.20(13)(c)2., which states that "[t]he county department … shall arrange for treatment in the least restrictive manner consistent with the requirements of the subject individual in accordance with a court order designating the maximum level of inpatient facility, if any, that may be used for treatment." It argues that Dr. Berney's testimony supported the court's order for inpatient care as the maximum level of treatment, and that Packee's testimony was not hearsay because it was based on his own duties in planning Ashley's discharge from inpatient care.

¶15 In ***J.R.R. v. State***, 145 Wis. 2d 431, 427 N.W.2d 137 (Ct. App. 1988), we analyzed a court's obligation to determine the disposition of mental health proceedings under WIS. STAT. ch. 51. There, J.R.R. was recommitted under WIS. STAT. ch. 51 and, like Ashley, appealed from the trial court's dispositional order, arguing the trial court should have ordered a less restrictive setting. ***J.R.R.***, 145 Wis. 2d at 433. At the conclusion of J.R.R.'s commitment proceedings, the trial court had found that the least restrictive placement appropriate for J.R.R. was an inpatient facility, but also expressed its belief that J.R.R. should be placed in an unlocked unit. ***Id.*** at 433-34. When the treating facility informed the court that it could not place J.R.R. in an unlocked unit, the court ordered J.R.R. committed to an inpatient unit, and left the county to determine the least restrictive manner of treatment. ***Id.*** at 434.

¶16 J.R.R. appealed, arguing that the trial court had the authority to order him placed in an unlocked unit. ***Id.*** at 436. We concluded that "[t]he trial court's authority is to commit the individual to the care and custody of the … community board." ***Id.*** We explained that "[t]he court's obligation is to designate 'the maximum level of inpatient facility, if any, which may be used for treatment,'" and "[t]he community board's obligation is to deliver treatment in the least restrictive manner consistent with the individual's needs." ***Id.*** (quoting WIS. STAT. § 51.20(13)(c)2.).

¶17 Here, Ashley argues that her due process rights were violated when the trial court ordered inpatient commitment absent clear and convincing evidence that inpatient treatment was the least restrictive means necessary. *See generally* ***Addington v. Texa***s, 441 U.S. 418, 425 (1979) (a civil commitment "constitutes a significant deprivation of liberty that requires due process protection"). But we addressed these same concerns in ***J.R.R.***, 145 Wis. 2d at 437, and concluded that:

> Due process requires that a commitment determination consider those alternatives which would have a less drastic effect on the curtailment of the individual's freedom and civil liberties. This requirement is satisfied by sec. 51.20(13)(c)2, Stats., requiring the court to designate the maximum level of inpatient facility in which treatment can occur. Treatment decisions beyond this due process consideration are properly reserved for the medical authorities.

(Citation omitted.)

¶18 Dr. Berney testified that as of the date of his examination, Ashley required inpatient treatment, but there was a substantial probability she would be ready for outpatient treatment by the time of the final hearing, which was five days later. He testified that he had not examined her again in the five days between his initial examination and the hearing, so he did not know whether or not she was, in

fact, ready for outpatient treatment.[5] Based on this testimony, the trial court determined that a locked inpatient facility was the *maximum* level of treatment that the treating facility could utilize for Ashley.

¶19 As in ***J.R.R.***, the trial court met its obligation under WIS. STAT. § 51.20(13) by designating the maximum level of inpatient facility based on Dr. Berney's testimony, and the medical authorities are required to determine the least restrictive treatment in accord with the court's order.[6] Finally, because we have concluded that the trial court properly designated the maximum level of inpatient facility based on Dr. Berney's testimony, we decline to address whether or not the trial court erred in admitting Packee's testimony. Accordingly, we affirm the order of the trial court.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* WIS. STAT. RULE 809.23(1)(b)4.

[5] In her brief-in-chief, Ashley argues that the trial court erred in relying on Dr. Berney's testimony based on his examination five days previously. The County responds that it would be infeasible to require examinations the day or hour of a doctor's testimony at a final hearing. In reply, Ashley asserts that she does not suggest examinations must be contemporaneous with final hearings, only that a doctor's opinion that a patient will likely be ready for outpatient care as of the date of the hearing requires further evaluation to determine that inpatient care is the least restrictive treatment available. As we explain above, however, it is the medical authority's obligation to determine the least restrictive treatment. The court's obligation is to determine the *maximum* level of treatment that the treating facility may use.

[6] If the medical authorities do not provide Ashley treatment in the least restrictive manner to meet her needs, WIS. STAT. ch. 51 provides Ashley with avenues of relief, including judicial review. *See* WISCONSIN STAT. §§ 51.61(5), (7)(a), (b) and (c) (requiring grievance procedures and allowing judicial review for patients whose rights under WIS. STAT. ch. 51 are violated).