Appeal No. 2007AP2767-CR **Cir. Ct. No. 1998CF59**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN A. WOOD,

DEFENDANT-APPELLANT.

FILED

Aug. 21, 2008

David R. Schanker
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Vergeront, Lundsten and Bridge, JJ.

This case challenges the constitutionality of WIS. STAT. § 971.17(3)(c) (2005-06),[1] which authorizes the involuntary medication of persons who have been committed to the custody of the Department of Health and Family Services after being found not guilty of a crime by reason of mental disease or defect, and who are further determined to be incompetent to refuse medication or treatment. The appellant, a criminally committed person who has been found incompetent to refuse medication, contends that the statute violates due process in two respects: (1) by allowing involuntary medication without a finding of dangerousness; and (2) by failing to provide a mechanism for periodic review of

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

the medication order. As we will discuss below, both these issues appear to be questions of first impression with broad statewide implications. Accordingly, pursuant to WIS. STAT. RULE 809.61, we hereby certify the present appeal to the Wisconsin Supreme Court for its review and determination.

BACKGROUND

The facts relevant to the determination of the certified questions are undisputed. Wood was committed to the custody of the Department of Health and Family Services in April of 1999 pursuant to WIS. STAT. § 971.17, after he was found not guilty of a charged crime by reason of mental disease or defect for the second time. He has resided at the Mendota Mental Health Institute ever since.

In September of 2006, Mendota moved for an order authorizing the involuntary administration of psychotropic drugs to Wood on the grounds that Wood was incompetent to refuse medications.[2] The trial court issued the requested order following a hearing, without making any determination that Wood presented a danger to himself or others and without making any provision for periodic review of the medication order.

Wood filed a postconviction motion challenging the constitutionality of the involuntary medication statute for criminally committed persons, and also raising several claims of ineffective assistance of counsel. The motion was

[2] We recognize that the balancing test may be different depending upon the type of medication sought to be administered, since psychotropic drugs are widely acknowledged to carry significantly serious side effects and thus present a greater burden on an individual's liberty interest. For convenience, we will simply refer to medication in this certification.

deemed denied after the trial court did not act on it within the statutory time period, and Wood appeals.

DISCUSSION

We do not discuss the ineffective assistance claims in this certification, because we believe they may be resolved based upon current precedent. Rather, our focus is on the constitutionality of the challenged statute.

WISCONSIN STAT. § 971.17(3)(c) provides in relevant part:

> If [a criminally committed person] is not subject to a court order determining the person to be not competent to refuse medication or treatment for the person's mental condition and if the institution in which the person is placed determines that the person should be subject to such a court order, the institution may file with the court … a motion for a hearing, under the standard specified in s. 971.16(3), on whether the person is not competent to refuse medication or treatment. A report on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the person needs medication or treatment and that the person is not competent to refuse medication or treatment, based on an examination of the person by a licensed physician. …. If the district attorney, the person and his or her counsel waive their respective opportunities to present other evidence on the issue, the court shall determine the person's competency to refuse medication or treatment on the basis of the report accompanying the motion. In the absence of these waivers, the court shall hold an evidentiary hearing on the issue. If the state proves by evidence that is clear and convincing that the person is not competent to refuse medication or treatment, under the standard specified in s. 971.16(3), the court shall order that the person is not competent to refuse medication or treatment for the person's mental condition and that whoever administers the medication or treatment to the person shall observe appropriate medical standards.

Under WIS. STAT. § 971.16(3):

> … The defendant is not competent to refuse medication or treatment if, because 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 defendant, one of the following is true:
>
> (a) The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> (b) The defendant 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.

Thus, under these statutes, involuntary medication may be ordered for criminally committed persons who are not competent to make medication decisions, without specific findings regarding whether they present any danger to themselves or others. The statutes also do not contain any provision for automatic review of such medication orders, although the person subject to the order may periodically petition for release from the commitment itself. *See* § 971.17(4).

Wood relies heavily on ***Enis v. DHSS***, 962 F. Supp. 1192 (W.D. Wis. 1996), to support his claims that this statutory scheme violates his due process rights. In ***Enis***, a federal district court concluded that WIS. STAT. § 971.17 was unconstitutional "to the extent it does not require a court to determine before authorizing medication that an incompetent inmate is dangerous and that treatment with psychotropic drugs is in his medical interest, given the legitimate needs of his institutional confinement." ***Id.*** at 1194. The district court further concluded that "[the] plaintiff's procedural rights require periodic review of the medication decision…." ***Id.***

We may consider the decisions of federal district courts for their persuasive value. However, in ***Enis*** the court noted that the State was not arguing

against the necessity of showing dangerousness. ***Id.*** at 1198. Consequently, the court accepted dangerousness as a prerequisite for medicating criminally committed defendants without an extended discussion of this issue. *See* ***id.*** Therefore, while the ***Enis*** decision suggests that there are substantial questions about the constitutionality of the current statutory scheme for ordering involuntary medication of criminally committed incompetent persons under WIS. STAT. §§ 971.16(3) and 971.17(3)(c), it is of limited help in answering them.

There are two United States Supreme Court cases cited in ***Enis*** that deal with involuntary medication in other contexts: ***Washington v. Harper***, 494 U.S. 210 (1990), and ***Riggins v. Nevada***, 504 U.S. 127 (1992). We are not persuaded, however, that ***Harper*** and ***Riggins*** compel the conclusion that a showing of dangerousness is required before ordering medication for a criminally committed person who has been found incompetent to make medication decisions.

In ***Harper***, the Court upheld a statutory scheme that allowed a psychiatrist to order the administration of medication to a prison inmate against his will upon a showing that the inmate suffered from a "mental disorder," and was also either "gravely disabled" (which was defined in terms of being unable to provide for his own health or safety needs) or posed a "likelihood of serious harm" to himself, others, or their property. ***Harper***, 494 U.S. at 215, 236. The Court reasoned that an inmate's significant liberty interest in avoiding involuntary medication was outweighed by the legitimate State interest in reducing the danger that an inmate might pose to himself or others in an institutional setting. ***Id.*** at 222, 225-26. It concluded that due process allowed administration of drugs against an inmate's will "if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest." ***Id.*** at 227.

In ***Riggins***, the Court held that the involuntary administration of antipsychotic drugs to a criminal defendant in order to render him competent to stand trial violated his due process rights "absent a finding of overriding justification and a determination of medical appropriateness." ***Riggins***, 504 U.S. at 135. The Court offered two examples which might have provided the necessary justification: (1) if "considering less intrusive alternatives," medication was "essential for the sake of Riggins' own safety or the safety of others," or (2) if the State could show "it could not obtain an adjudication of Riggins' guilt or innocence by using less intrusive means." ***Id.***

While both ***Harper*** and ***Riggins*** may support the proposition that dangerousness can provide a sufficient reason to overcome an individual's liberty interest in refusing unwanted medication in certain situations, it does not necessarily follow that dangerousness is the only possible justification. That notion is further supported by subsequent case law.

In ***Sell v. United States***, 539 U.S. 166 (2003), the United States Supreme Court expanded on its discussion in ***Riggins***, explaining:

> the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.

Sell, 539 U.S. at 179. The Court went on to note that every state provides some avenue through which a guardian may be appointed to authorize medication in the best interests of a patient who lacks the mental competence to make such a decision. ***Id.*** at 182. It then pointed out, "If a court authorizes medication on

these alternative grounds, the need to consider authorization on trial competence grounds will likely disappear." ***Id.*** at 183.

It is clear from the Court's discussion in ***Sell*** that there are at least some situations in which medication can be administered against a person's will without a finding of dangerousness. What is not clear is whether the statutory scheme at issue here falls within that category. Unlike ***Harper***, where the Court treated a finding of dangerousness as integral to the constitutionality of a statutory scheme for involuntarily medicating competent prisoners, a criminally committed person being involuntarily medicated under WIS. STAT. § 971.17(3)(c) must have been found incompetent to make medication decisions. Therefore, there might be an alternate analysis or different state interest at stake. However, unlike ***Riggins*** and ***Sell***, where the Court suggested that the State's compelling interest in bringing a defendant to trial could provide just such an alternate ground, here the State has not fully articulated what compelling interest it has in medicating criminally committed persons who have already been found not guilty by reason of mental disease.

In other words, if, given the security controls in place at Mendota, Wood does not actually present a danger to himself or others in his current unmedicated state, exactly what interest does the State have in compelling him to take medication? The State contends that it is simply a matter of substituted decision making, which it claims was already approved in ***Jones v. Gerhardstein***, 141 Wis. 2d 710, 739-40, 416 N.W.2d 883 (1987). In ***Jones***, however, the question presented was whether there was an equal protection violation because one statute allowed non-dangerous precommitment detainees to refuse medication if they were competent to evaluate their medication options, while another statute prevented all involuntarily committed people who were still competent to make

medication decisions to refuse medication. *See* ***id.*** at 713-14, 733-35. The ***Jones*** court simply did not consider the due process implications of involuntarily medicating incompetent persons in either of the classes it was comparing.

The State contends that, even if some showing of dangerousness is required, it either may be presumed from the very fact of Wood's commitment, or was already proven by the evidence presented at the hearing. With respect to the first contention, we note that presenting a danger to the community while at large may not be synonymous with presenting a danger to oneself or others within an institutional setting specifically designed to deal with people with mental illness. With regard to the second contention, we note that the trial court made no explicit findings on the topic, and if additional requirements are to be read into the statute, it cannot be done by this court. *See generally* ***State v. Hall***, 207 Wis. 2d 54, 82, 557 N.W.2d 778 (1997) ("While a statute should be held valid whenever by any fair interpretation it may be construed to serve a constitutional purpose, courts cannot go beyond the province of legitimate construction to save it, and where the meaning is plain, words cannot be read into it or out of it for the purpose of saving one or other possible alternative.").

Turning to the second constitutional challenge, the State concedes that due process requires some mechanism for periodic review of an involuntary medication order. It contends, however, that such review may be performed during a criminally committed person's petition for conditional release under WIS. STAT. § 971.17(4). The State analogizes the situation to that presented in ***State v. Anthony D.B.***, 2000 WI 94, 237 Wis. 2d 1, 614 N.W.2d 435. There, the Wisconsin Supreme Court determined that a person committed under WIS. STAT. ch. 980 could obtain review of an involuntary medication order as part of the annual review process specified under WIS. STAT. § 980.07 for the commitment

itself. ***Anthony D.B.***, 237 Wis. 2d 1, ¶31. However, unlike ch. 980, there is no automatic periodic review of commitments under WIS. STAT. ch. 971. Rather, a criminally committed person may petition for release six months after the commitment or the last order denying release, while the director of the facility where the person has been placed may make such a petition at any time. Section 971.17(4)(a). If periodic review of a medication order is constitutionally required, it is not apparent whether the current statutory scheme satisfies that requirement for criminally committed persons.

Given the likelihood that a significant proportion of people who have been found not guilty by reason of mental defect would also be in need of medication and not competent to make medication decisions for themselves, the outcome of this case will potentially affect the rights of many people who wish to refuse medication. The decision will also clarify the responsibilities of those caring for them and provide guidance for the courts who must resolve medication disputes. Because this appeal presents issues of first impression with broad statewide implications, we believe that the supreme court is the proper forum for it. *See* ***Wisconsin Public Serv. Corp. v. Public Serv. Comm'n of Wis.***, 176 Wis. 2d 955, 958 n.1, 501 N.W.2d 36 (1993) (Abrahamson, J., *concurring*) (It is appropriate to certify to the supreme court appeals raising issues which that body might otherwise ultimately consider on a petition for review, in order to reduce the burden and expense of the appellate process on both the parties and the judicial system.).