Appeal No. 2022AP140-FT **Cir. Ct. No. 2021ME9**

WISCONSIN COURT OF APPEALS
DISTRICT II

IN THE MATTER OF THE MENTAL COMMITMENT OF M.R.M.:

WALWORTH COUNTY,

PETITIONER-RESPONDENT,

V.

M.R.M.,

RESPONDENT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2019-20),[1] this appeal is certified to the Wisconsin Supreme Court for its review and determination.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

ISSUES

1. Does the Wisconsin Supreme Court's decision in ***Waukesha County v. E.J.W.***, 2021 WI 85, ¶38, 399 Wis. 2d 471, 966 N.W.2d 590, have retroactive application or only prospective application?

2. In a WIS. STAT. ch. 51 case involving a petition to extend a commitment order, is circuit court competency determined from the expiration of the earlier commitment order or from the expiration of the extension order, even where the extension order is determined on appeal to be invalid?

M.R.M. appeals[2] from an order of the circuit court for involuntary commitment pursuant to WIS. STAT. ch. 51, and he also challenges an order for involuntary medication and treatment.[3] He contends the court erred in "denying [him] a jury trial when he demanded one 48 hours before his adjourned recommitment hearing." Related to this issue, M.R.M. and Walworth County spar over whether the holding of a key state supreme court decision, ***Waukesha County v. E.J.W.***, 2021 WI 85, ¶38, 399 Wis. 2d 471, 966 N.W.2d 590, applies retroactively—and thus applies to M.R.M.'s recommitment petition and aids him—or only prospectively. M.R.M. and the County also dispute the appropriate remedy if ***E.J.W.*** does apply retroactively—vacatur of the order and outright reversal or vacatur of the order with a remand for the requested jury trial. This latter dispute turns upon whether a circuit court loses competency to act on a

[2] This appeal was converted from a one-judge appeal to a three-judge appeal under WIS. STAT. RULE 809.41(3).

[3] Although M.R.M. challenges the circuit court order for involuntary medication and treatment, he does not address that order separately and, therefore, neither do we.

remanded recommitment petition at the time the recommitment order *at issue on appeal* expires, even if that order is determined on appeal to be invalid, or at the time the *earlier* commitment order expired—in which case a circuit court essentially would never have competency to address a recommitment petition upon remand.

BACKGROUND

In January 2021, after the police officer who took M.R.M. into custody filed a statement of emergency detention—which "has the same effect as a petition for commitment under [WIS. STAT. §] 51.20," *see* WIS. STAT. § 51.15(5)—M.R.M. was placed in emergency detention in Winnebago Mental Health Institution. The circuit court held a final hearing on January 29, 2021, and entered an order committing M.R.M. for six months pursuant to WIS. STAT. ch. 51. On July 9, 2021, the County filed the recommitment petition at issue in this case. M.R.M. was appointed counsel, and a final hearing on the petition was scheduled for July 28, 2021.

On that date, M.R.M.'s counsel requested and received an adjournment of the final hearing to August 12, 2021, so that M.R.M could secure new counsel. M.R.M. secured new counsel and filed a jury demand on August 10, 2021. At the August 12, 2021 final hearing, the circuit court denied the jury demand on the basis that M.R.M. waived it because he did not make the demand at least forty-eight hours before the originally scheduled July 28, 2021 final hearing date.

The recommitment petition proceeded before the circuit court without a jury. The court found recommitment appropriate and issued an order extending M.R.M.'s commitment for one year. M.R.M. appeals.

DISCUSSION

E.J.W. *and Jury Waiver*

M.R.M. contends the circuit court erred in "denying [him] a jury trial when he demanded one 48 hours before his adjourned recommitment hearing" took place. This issue centers on WIS. STAT. § 51.20(11)(a), which states that an individual subject to involuntary commitment is entitled to a jury determination of the allegations of the petition if the individual demands one; however, "[a] jury trial is deemed waived" if the demand is not made at least forty-eight hours before "the time set for final hearing."

At the time of the August 12, 2021 final hearing, the controlling interpretation of this statutory provision came from our decision one year earlier in ***Marathon County v. R.J.O.***, 2020 WI App 20, 392 Wis. 2d 157, 943 N.W.2d 898, *overruled in part by* ***E.J.W.***, 399 Wis. 2d 471, ¶38. In ***R.J.O.***, we held that pursuant to WIS. STAT. § 51.20(11)(a), a committee waives the right to a jury trial by failing to demand one at least forty-eight hours before the originally scheduled final hearing date, even if that hearing is adjourned and such a jury demand is made at least forty-eight hours before the final hearing actually takes place. ***R.J.O.***, 392 Wis. 2d 157, ¶¶38-41. The circuit court's jury-waiver determination in the present case was consistent with ***R.J.O.***

Three months after M.R.M.'s final hearing took place, our supreme court overruled ***R.J.O.*** on this jury-waiver issue. The ***E.J.W.*** court held that as long as the jury demand is made at least forty-eight hours before the recommitment final hearing actually takes place, it is valid and the committee is entitled to a jury for the final hearing. ***E.J.W.***, 399 Wis. 2d 471, ¶¶3, 36. Based

upon the interpretation of WIS. STAT. § 51.20(11)(a) by the ***E.J.W.*** court, M.R.M. was wrongly denied a jury for his final hearing.

Retroactive vs. Prospective-only application of ***E.J.W.***

Both parties recognize that generally "a new rule of law," such as that announced in ***E.J.W.***, "applies retroactively." *See* ***Heritage Farms, Inc. v. Markel Ins. Co.***, 2012 WI 26, ¶44, 339 Wis. 2d 125, 810 N.W.2d 465 ("This court, like all courts, generally adheres to the doctrine that a new rule of law applies retroactively."). This general rule of retroactive application is referred to as the "Blackstonian doctrine." ***Id.*** "The Blackstonian doctrine is based on the jurisprudential theory that 'courts declare but do not make law. In consequence, when a decision is overruled, it does not merely become bad law,—it never was the law, and the later pronouncement is regarded as the law from the beginning.'" ***Id.*** (citation omitted). According to the Blackstonian doctrine, our holding in ***R.J.O.*** related to the jury-waiver issue, though binding until it was overruled, "never was the law," *see* ***Heritage Farms***, 339 Wis. 2d 125, ¶44, and, based upon ***E.J.W.***, M.R.M. was, as stated, wrongly denied a jury trial.

The County asks us to deviate from the general rule of retroactive application and apply ***E.J.W.*** only prospectively and thus not apply it to M.R.M.'s recommitment petition. If we did this, we would affirm the circuit court's order extending M.R.M.'s commitment because according to the holding of ***R.J.O.***, the court did not err in denying M.R.M. his jury demand. The County focuses on the three factors from ***Heritage Farms***, 339 Wis. 2d 125, that a court considers when deciding whether to deviate from the general rule of retroactive application and instead apply a decision only prospectively. In that case, our supreme court stated:

> [O]n occasion, *this court has* departed from the general rule of retroactivity and *chosen* instead *to apply a new rule of law only prospectively*. The decision to apply a new rule of law only prospectively … is driven by *our attempt* to alleviate the unsettling effects of *a party* justifiably relying on a contrary view of the law. Accordingly, in determining whether to apply a new rule of law prospectively instead of retrospectively, *we consider* three factors: (1) whether our holding establishes a new rule of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression, the resolution of which was not clearly foreshadowed; (2) whether retroactive application would further or impede the operation of the new rule; and (3) whether retroactive application could produce substantial inequitable results.

Id., ¶45 (emphasis added; citations omitted).

The County requests that *we*—the court of appeals—declare that ***E.J.W.*** should have only prospective application. We could of course do that; however, since our supreme court expressly overruled the jury-waiver holding of ***R.J.O.***, it would seem more appropriate for the supreme court, not the court of appeals, to clarify whether ***E.J.W.*** was intended to apply retroactively or only prospectively. Since the ***E.J.W.*** court made no mention of the retroactive-versus-prospective-only issue, we assume the question was not raised by the parties in that case. ***R.J.O.***, however, was decided one and one-half years before ***E.J.W.*** "overrul[ed] clear past precedent" by explicitly overruling ***R.J.O.*** on the jury-waiver issue. *See* ***Heritage Farms***, 339 Wis. 2d 125, ¶45; ***E.J.W.***, 399 Wis. 2d 471, ¶38. Thus, the ***E.J.W.*** court would have known at the time it released its decision that litigants and courts addressing WIS. STAT. ch. 51 petitions had been operating under the jury-waiver holding of ***R.J.O.*** for one and one-half years. It would be valuable now for the supreme court to make clear to the bench and bar

whether the ***E.J.W.*** jury-waiver holding was intended to have prospective-only application or was intended to follow the general rule of retroactive application.[4]

Circuit court competence

M.R.M. asserts that we could only reverse and cannot remand for a jury trial because the circuit court lost competency to act on the petition for recommitment once the earlier commitment order expired in August 2021. This position is consistent with numerous decisions we have released in just the last year.

In the unpublished, three-judge opinion of ***Rusk County v. A.A.***, Nos. 2019AP839 and 2020AP1580, unpublished slip op. ¶43 (WI App July 20, 2021), we concluded that due to the introduction of inadmissible hearsay evidence at the recommitment hearing, the circuit court "failed to enter a valid order extending [the committee's] commitment before his prior commitment order expired." We noted that the appropriate remedy in such a case is "typically to reverse and remand for a new trial—or, in this case, a new recommitment hearing." ***Id.***, ¶42. We concluded, however, that only reversal, without remand, was the appropriate remedy because the prior recommitment order—not the recommitment order at issue in the appeal—had expired. ***Id.***, ¶43. We explained:

[4] We note of course that in ***Waukesha County v. E.J.W.***, 2021 WI 85, ¶¶36, 40 n.10, 399 Wis. 2d 471, 966 N.W.2d 590, the court applied its holding to the order extending E.J.W.'s commitment and vacated that order; however, this alone does not clearly inform us that the ***E.J.W.*** court intended its jury-waiver holding to apply retroactively to all cases. *See* ***State ex rel. Buswell v. Tomah Area Sch. Dist.***, 2007 WI 71, ¶46 n.12, 301 Wis. 2d 178, 732 N.W.2d 804 ("Courts may apply a new rule of law 'prospectively' in different ways[, including that a] court may … apply the rule to the case in which the rule is announced, and to future events, but not to cases arising from conduct that has already occurred.").

> A circuit court "must hold a hearing on [a] petition for extension [of a WIS. STAT. ch. 51 commitment] before the previous order expires or it loses competency to extend the commitment." [***Portage County v. J.W.K.***, 2019 WI 54, ¶20, 386 Wis. 2d 672, 927 N.W.2d 509.] The commitment order that preceded the extension order at issue in this appeal expired on February 2, 2020. Although the circuit court held a hearing on the County's petition to extend [the committee's] commitment before that date, the court failed to enter a valid order extending [the committee's] commitment before his prior commitment order expired. As such, when the prior commitment order expired, the court lost competency to conduct further proceedings on the County's petition to extend [the committee's] commitment. Thus, if we were to remand for the court to conduct a new hearing on the County's petition … absent the inadmissible hearsay testimony, the court would lack the competency to do so.

Id. (first and second alterations in original). We held similarly in ***Eau Claire County v. J.M.P.***, No. 2020AP2014-FT, unpublished slip op. ¶21 (WI App June 22, 2021), ***Outagamie County v. X.Z.B.***, No. 2020AP2058, unpublished slip op. ¶44 (June 22, 2021), and ***Shawano County v. S.L.V.***, 2021AP223 unpublished slip op. ¶20 (Aug. 17, 2021).

Our supreme court, however, appears to be taking a different position as of late, but has yet to expressly so state. In ***E.J.W.***, the court concluded E.J.W. was erroneously denied a jury trial for the final hearing on the recommitment petition. ***E.J.W.***, 399 Wis. 2d 471, ¶¶3, 36. As to the appropriate remedy, the court stated: "We simply reverse the decision of the court of appeals rather than remanding for a jury trial because the specific recommitment *at issue in this case* has expired and *accordingly* the circuit court has lost competency to act." ***Id.***, ¶40 n.10 (emphasis added). Without directly stating, the court appeared to imply that it would have remanded for a jury trial if "the specific recommitment at issue" in that case had not expired *even though* the prior recommitment had

expired before a valid final hearing (i.e., with a jury) was held and a valid recommitment order was issued. *See* ***id***.

Furthermore, very recently our supreme court decided ***Sheboygan County v. M.W.***, 2022 WI 40, ¶¶2, 5 n.2, ___ Wis. 2d ___, 974 N.W.2d 733, in which the court addressed solely the question of remedy where the circuit court had failed to enter a valid recommitment order because it had failed to provide the clarity and specificity in its recommitment determination mandated by our supreme court in ***Langlade County v. D.J.W.***, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277. As to the remedy, the court reversed but did not remand to the circuit court to provide the missing clarity and specificity because the circuit court no longer had competency to act on the recommitment petition. ***Id.***, ¶38. Similarly to its remedy statement in ***E.J.W.***, the ***M.W.*** court did not state that competency for the circuit court to conduct further proceedings had been lost because the preceding recommitment order had expired but that competency had been lost because "the recommitment order *at issue here*" had expired. ***M.W.***, ___ Wis. 2d ___, ¶4, 974 N.W.2d 733 (emphasis added). The recommitment order "at issue" in ***M.W.*** was the recommitment order in which the circuit court had failed to provide the necessary clarity and specificity, not the prior recommitment order that was set to expire shortly after the final hearing on the recommitment petition at issue on appeal. ***Id.***, ¶¶8-12.

The ***M.W.*** court further cited its ***E.J.W.*** statement that "[w]e simply reverse the decision of the court of appeals rather than remanding for a jury trial *because the specific recommitment at issue in this case* has expired and *accordingly* the circuit court has lost competency to act." ***M.W.***, ___ Wis. 2d ___, ¶37, 974 N.W.2d 733 (emphasis added) (quoting ***E.J.W.***, 399 Wis. 2d 471, ¶40 n.10). "[T]he specific recommitment at issue" in ***E.J.W.*** was the invalid

recommitment order that was erroneously entered by the circuit court because E.J.W. was deprived of the jury he requested forty-eight hours before the adjourned final hearing. *See* ***E.J.W.***, 399 Wis. 2d 471, ¶40 n.10. Then, in closing, the ***M.W.*** court stated:

> Likewise here, the recommitment order *from which M.W. appealed* has expired…. Indeed, the recommitment order from which M.W. appealed *expired in October of 2021*. We therefore conclude that *the recommitment order at issue here* has expired and *as a consequence* the circuit court lacks competency to conduct any proceedings on remand.

M.W., ___ Wis. 2d ___, ¶38, 974 N.W.2d 733 (emphasis added; citation omitted). Again, the recommitment order "from which M.W. appealed," which expired in October 2021, i.e., the recommitment order at issue in ***M.W.***—which lacked specificity and clarity—was the order which *followed* the earlier recommitment order, which earlier order had expired in October 20*20*. ***Id.***, ¶¶6-8; *see also* ***Sheboygan County v. M.W.***, No. 2021AP6, unpublished slip op. ¶¶3-4 (WI App May 12, 2021).

Thus, both the ***M.W.*** and ***E.J.W.*** courts indicated that the circuit court would have lacked competency to take any further action in either case if the cases were remanded not because the *earlier* commitment order had expired, as we have held in the cases cited above, but because the one-year recommitment order that was at issue on appeal—and had been determined on appeal to be invalid—had expired. And, of course in both of those cases, not only had the prior commitment order expired, but the recommitment order being challenged on appeal had also expired. In neither ***M.W.*** nor ***E.J.W.*** did the court expressly state that a circuit court retains competency to act on a remanded WIS. STAT. ch. 51 petition if the prior commitment order has expired but the invalid recommitment

order on appeal has not. Although the court seemed to suggest this, it did so without an explanation as to how the circuit court would retain competency after the earlier commitment order expired without the entry of a valid order prior to that expiration.

Furthermore, a significant additional issue arises if the circuit court retains competency to act on a recommitment petition determined on appeal to be invalid. If the court of appeals determines that an order extending a recommitment is invalid and reverses and remands for further action by the circuit court seven months into a now invalid one-year recommitment, for example, is the individual subject to commitment or involuntary treatment or medication during the time period after remand and before the circuit court is able to conclude its further proceedings related to the petition? The earlier commitment order has long since expired (approximately seven months earlier), so that would not be in effect, yet, there is no valid order in place extending the commitment. During this time period after remand and before the circuit court is able to proceed further on the petition, does the individual remain committed and must he/she continue treatment and/or continue taking the medication that had been required by the now invalid extension orders? It would be very valuable for the supreme court to provide a clear answer to this question.

The question of competency upon remand is a murky area that arises in many WIS. STAT. ch. 51 cases that come before the court of appeals. Clear guidance from the supreme court on the above issues would be of great benefit to the court of appeals in determining the remedy when a reversal occurs within this window of time.

As of the writing of this certification, the order extending M.R.M.'s commitment (the order on appeal) has not yet expired. We recognize that by the time the supreme court would accept this certification and release a decision, the order extending the commitment will have expired. We ask that the supreme court nonetheless accept this certification and provide clear guidance on the issues raised in this certification.