COURT OF APPEALS DECISION DATED AND FILED

January 14, 2014

Diane M. Fremgen
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. 2013AP1719

Cir. Ct. No. 2011ME59

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

IN THE MATTER OF THE MENTAL COMMITMENT OF BOE H.:

POLK COUNTY HUMAN SERVICES DEPARTMENT,

PETITIONER-RESPONDENT,

V.

BOE H.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

¶1 HOOVER, P.J.[1] Boe H. appeals an order extending his WIS. STAT. ch. 51 mental health commitment. He argues neither the circuit court nor the Polk

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

County Department of Human Services has authority to require him to live in a group home. Alternatively, he argues that even if the Department has authority to place him in a group home, the Department has exceeded its authority. We affirm.

BACKGROUND

¶2 This is the second time this case is before us. Boe was diagnosed with paranoid schizophrenia and, in September 2011, a jury found Boe mentally ill, a proper subject for treatment, and dangerous under the "fifth standard." *See* WIS. STAT. § 51.20(1)(a)2.e. The circuit court committed Boe to the Department for six months and determined the maximum level of treatment would be a locked inpatient facility.

¶3 WISCONSIN STAT. § 51.20(13)(g)2d.a. provides that an individual committed pursuant to the "fifth standard" may "be treated only on an outpatient basis" after thirty days. Accordingly, after thirty days in the hospital, the Department transferred Boe to a group home.

¶4 When Boe's six-month commitment was nearing expiration, the Department petitioned to extend Boe's commitment. Boe contested the extension, and, as relevant to this case, objected to his placement in the group home. Following an evidentiary hearing on March 21, 2012, the court extended Boe's commitment for twelve months and continued Boe's placement in the group home.

¶5 Boe filed a postdisposition motion, emphasizing, in part, that WIS. STAT. § 51.20(13)(g)2d.a. provides that persons committed under the "fifth standard" can "be treated only on an outpatient basis" after thirty days. He argued his placement in the group home amounted to placement in an inpatient facility

and therefore violated WIS. STAT. § 51.20(13)(g)2d.a.'s outpatient treatment requirement.

¶6 Following a postdisposition hearing, the circuit court disagreed. It found that Boe did not receive "treatment" in the group home. The court also concluded the group home did not meet the statutory definition of an "inpatient facility" and therefore Boe's group home was not an inpatient placement. The court then signed an amended extension order, authorizing the maximum level of treatment as "outpatient with conditions." After a box marked "other," the court ordered: "Subject shall remain at a group home on an outpatient basis." Boe appealed the March 21, 2012 extension order and the order denying his postdisposition motion.

¶7 While Boe's appeal was being briefed by the parties, the Department again petitioned to extend Boe's commitment and the circuit court held a hearing on March 12, 2013.[2] At the close of evidence, Boe again objected to his placement in the group home because he wanted to return to his father's house.[3]

[2] At the March 12, 2013 extension hearing, Boe's psychiatrist, Dr. Kent Brockmann, testified that Boe's medication prevented Boe from becoming more psychotic; however, Boe's paranoid schizophrenia was not in remission. Boe had "significantly bizarre delusions and patterns of behavior" and Brockmann was "concerned about [Boe's] safety both towards himself and others." Specifically, Brockmann was concerned about Boe's significant verbal aggression toward others, his belief that he is a pregnant female, and Boe's statements that he has taught himself to be a surgeon, that he intends to practice medicine once off the commitment, and that, if not committed, he intends to consume illegal substances on a daily basis instead of his psychotropic medicine.

[3] In a letter written to the court in support of the March 2013 extension petition, Dr. Brockmann wrote he was concerned that "Boe's father helps feed into Boe's delusional belief system." Brockmann explained, "Boe's father believes that Boe's problem is primarily due to spiritual forces as he explained to me one time which are controlled by the government …." "Boe's father seems to have some concern about unusual conspiracies and has talked to me about his belief that Boe would benefit if he were not on commitment and if he were able to take Boe to California and … [place him] on medical marijuana therapy."

The circuit court, noting the court of appeals was currently being asked to determine the appropriateness of Boe's placement in the group home, concluded that, as recommended by the Department, Boe would remain in the group home and that the court would wait for a decision from the court of appeals. Boe appealed the March 12, 2013 extension order.

¶8 Briefing then concluded on Boe's appeal of the March 21, 2012 extension order and order denying his postdisposition motion. In ***Polk County DHS v. Boe H.***, No. 2012AP2612, unpublished slip op. ¶13 (WI App May 7, 2013) (***Boe I***), *review denied* (WI Sept. 17, 2013), Boe argued the circuit court lacked authority to order him to live in a residential group home because the maximum level of treatment he may receive was outpatient treatment. In support of his argument, Boe asserted the group home provided "treatment" to him and, therefore, the residential nature of the group home meant he was receiving inpatient treatment. ***Id.***, ¶15. Boe also argued that, if we agreed with the circuit court that he was not receiving "treatment" at the group home, WIS. STAT. ch. 51 did not authorize his placement in the group home because ch. 51 authorized only rehabilitation, not habilitation. ***Id.***, ¶18. Finally, Boe argued the Department could not place him in a group home because it lacked "custody" over his person and he was committed only to the "care" of the Department. ***Id.***, ¶20.

¶9 Ultimately, we concluded the Department could require Boe to live in the group home.[4] ***Id.***, ¶3. We reasoned Boe was not receiving inpatient treatment in the group home and continued to be treated on an outpatient basis. ***Id.***, ¶17. We also determined the Department was not merely providing habilitation to Boe because the purpose of Boe's placement in the group home was to stabilize him on his medication so he may be further transitioned back into the community. ***Id.***, ¶19. Finally, we concluded that, because Boe has been committed to the "care" of the Department while he receives outpatient treatment, the Department could require Boe to live in the group home as part of its plan to treat Boe and further transition him back into the community. ***Id.***, ¶21. Boe petitioned our supreme court for review, which the court denied on September 17, 2013.

¶10 Boe's appeal of the March 12, 2013 extension order is now before us.

DISCUSSION

¶11 On appeal, Boe again objects to his placement in the group home. He argues:

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[4] As a preliminary matter, before reaching Boe's appellate arguments in ***Polk County DHS v. Boe H.***, No. 2012AP2612, unpublished slip op. ¶14 (WI App May 7, 2013) (***Boe I***), *review denied* (WI Sept. 17, 2013), we concluded the circuit court lacked authority to order Boe to live in a residential group home for the pendency of his commitment. We explained that, pursuant to WIS. STAT. § 51.20(13)(c)2., the court designates "the maximum level of inpatient facility, if any, which may be used for treatment" and the Department then arranges for treatment in the least restrictive manner consistent with the subject's specific requirements and the court order. ***Boe I***, No. 2012AP2612, slip op. ¶14. We noted the court's order stated Boe "shall remain at a group home …." ***Id.*** We determined the court was without authority to order Boe to live in the group home for the pendency of the commitment because that determination was reserved for the Department. ***Id.***

> The unpublished court of appeals [decision] does not govern the decision in this case. Therefore, Boe's first argument is that the previous court of appeals decision was wrong as to the county department's authority. Neither the court nor the county department of human services can require Boe to live in a group home as part of his outpatient treatment.

¶12 The Department responds Boe is precluded from raising this issue on appeal because the issue was addressed in ***Boe I*** and our decision in ***Boe I*** established the law of the case. The issue of whether a decision establishes the law of the case raises a question of law that we review de novo. ***State v. Stuart***, 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82. "The law of the case doctrine is a 'longstanding rule that a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal.'" ***Id.***, ¶23 (citation omitted). The purpose of the law of the case doctrine is that "courts should generally follow earlier orders in the same case and should be reluctant to change decisions already made, because encouragement of change would create intolerable instability for the parties." ***Id.*** (citation omitted).

¶13 However, the rule is not absolute. ***Id.***, ¶24. "There are now certain circumstances, when 'cogent, substantial, and proper reasons exist,' under which a court may disregard the doctrine and reconsider prior rulings in a case." ***Id.*** (citation omitted). Specifically, our supreme court has stated, "[A] court should adhere to the law of the case 'unless the evidence on a subsequent trial was substantially different, [or] controlling authority has since made a contrary decision of the law applicable to such issues.'" ***Id.*** (citation omitted). More broadly, our supreme court has stated, "It is within the power of the courts to disregard the rule of 'law of the case' in the interests of justice." ***Id.*** (citation omitted).

¶14 The Department argues our decision in ***Boe I*** on the Department's ability to place Boe in a group home established the law of the case. It emphasizes that Boe offers no legal argument in support of his assertion that ***Boe I*** is *not* controlling.

¶15 In his reply brief, Boe argues we should disregard the law of the case because: ***Boe I*** was unpublished; extension orders last only one year and therefore this is a new case; the annual review in WIS. STAT. ch. 51 cases means stability between the parties is not a goal in a chapter 51 case; and, in ***Boe I***, he challenged only the court's authority to place him in a group home and never had the opportunity to address the Department's authority to place him in a group home.[5] Boe asserts these reasons establish "it is in the interest of justice for the court to disregard the law of the case doctrine and to consider Boe H.'s arguments set forth in the brief-in-chief …."

¶16 However, the issue concerning the validity of Boe's placement in the group home was already before this court and a decision was made. Our decision in ***Boe I*** regarding Boe's placement in the group home established the law of the case. Here, Boe has pointed to no change in the law or substantially different evidence that would compel us to disregard the law of the case. Further, the arguments Boe advanced in his reply brief do not persuade us it is in the interest of justice to revisit our decision in ***Boe I*** regarding the Department's ability to place

[5] In regard to Boe's last reason, we observe that in Boe's brief-in-chief in ***Boe I***, Boe nevertheless argued, in part, "Here, the county had 'custody' of Boe only for the duration of his inpatient commitment order, 30 days. Then it lost custody. Under an order of outpatient treatment, it can provide care, but it cannot involuntarily house the subject of the commitment."

Boe in a group home.[6] Accordingly, we conclude there are no cogent, substantial, or proper reasons to find an exception to the law of the case doctrine and reconsider our original decision.

¶17 Boe next argues that, "if the court of appeals was correct that a group home placement is authorized to 'transition him back into the community,' that placement must be limited in time and geography." He asserts the Department exceeded its authority by continuing his out-of-home and out-of-community placement for more than eighteen months.

¶18 The Department responds Boe never made this argument in the circuit court and, as a result, it is forfeited because it is being raised for the first time on appeal. *See* ***State v. Holland Plastics Co.***, 111 Wis. 2d 497, 504, 331 N.W.2d 320 (1983) (Generally, issues raised for the first time on appeal are not considered.); *see also* ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (A fundamental appellate precept is that we "will not … blindside trial courts with reversals based on theories which did not originate in their forum.").

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[6] Although Boe argues it is in the interest of justice to disregard the law of the case because this is a new "case," he also seems to suggest that, rather than disregard the law of the case, we should conclude the doctrine simply does not apply. He states each extension hearing is a new case because the court's commitment order expires if the Department fails to prove he continues to meet the statutory criteria for commitment at an extension hearing. To the extent Boe is also arguing that, rather than disregard the law of the case, we should conclude the doctrine does not apply, his argument is undeveloped. Although the Department bears the burden at extension hearings of proving the commitment is still proper, Boe does not explain how the extension of an order in the same circuit court case with the same case number means that the order comes from a new case such that the law of the case does not apply to legal issues previously determined. We will not consider Boe's argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (we need not consider undeveloped arguments)

¶19 In his reply brief, Boe argues "forfeiture does not apply here because the court of appeals' decision on which the argument is based did not exist at the time of the recommitment hearing." In support, he cites a single quotation from ***State v. Rodriguez***, 2007 WI App 252, ¶11, 306 Wis. 2d 129, 743 N.W.2d 460—specifically, "[a] litigant cannot fairly be held to have waived an argument that, at the time, a court of competent jurisdiction had not yet announced."

¶20 In ***Rodriguez***, we disagreed with Rodriguez's argument that the State forfeited its right to rely on the forfeiture by wrongdoing exception to the Confrontation Clause. ***Id.***, ¶¶10-11. We reasoned that, although the State "did not name the doctrine" in the circuit court because it had not yet been endorsed by a court of competent jurisdiction, the State nevertheless advised the circuit court of the defendant's efforts to intimidate a witness. ***Id.***, ¶11. We concluded the argument was not forfeited because "[t]he issue of Rodriguez's misconduct was before the trial court" and the State "initiated the process from which the trial court made pretrial findings of witness intimidation[.]" ***Id.***, ¶¶11-12.

¶21 Here, Boe develops no legal argument in support of his assertion that forfeiture should not be applied in this case. Although he cites to ***Rodriguez***, he offers no argument that this case is similar to the situation in ***Rodriguez*** or that ***Rodriguez*** is dispositive. We therefore will not consider it. *See* **State v. Pettit**, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments need not be considered). We conclude Boe has forfeited his right to assert that, if the Department properly placed Boe in the group home, it has since exceeded its authority.

By the Court.—Order affirmed.

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