COURT OF APPEALS
DECISION
DATED AND FILED

JULY 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0754-FT

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

IN THE MATTER OF THE MENTAL COMMITMENT OF SPENCER C.N.:

WAUKESHA COUNTY,

PETITIONER-RESPONDENT,

V.

SPENCER C.N.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Waukesha County: KATHRYN W. FOSTER and J. MAC DAVIS, Judges. *Reversed.*

ANDERSON, J. Spencer C.N. appeals from an order for recommitment under ch. 51, STATS., and an order denying his motion for postcommitment relief.[1] Spencer contends that in accepting a petition for

[1] The order for recommitment was signed on July 2, 1997, by Judge Kathryn W. Foster and the order denying Spencer's motion for reconsideration was signed on February 24, 1998, by Judge J. Mac Davis.

recommitment not prepared by the Waukesha county corporation counsel, the trial court disregarded the supreme court's directive that circuit judges are to refuse to accept commitment petitions drafted by persons not authorized to do so. Because this directive has been extended to recommitment proceedings and we lack the power to overrule, modify or withdraw language from published opinions, we reverse the orders.

It is undisputed that Spencer was under a § 51.20(13)(g)3, STATS., recommitment order issued July 31, 1995, when a petition for recommitment, prepared by an employee of the Waukesha County § 51.42 Board, was filed on May 21, 1997. It is also undisputed that the recommitment petition was not prepared and filed by the Waukesha county corporation counsel's office as required by § 51.20(4).[2]

Spencer did not file a prehearing motion to dismiss on the grounds that the petition was not prepared by the corporation counsel as required by § 51.20(4), STATS. The trial court ordered him recommitted for one year. Several months later, Spencer did file a motion for reconsideration seeking dismissal because of the failure of the corporation counsel to prepare the recommitment petition. The trial court denied his motion. The court concluded that the Waukesha County § 51.42 Board would be prejudiced by a dismissal and that by not filing a prehearing motion, Spencer had waived his right to challenge the failure of the corporation counsel to prepare the petition.

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[2] Section 51.20(4), STATS., provides,

> Except as provided in ss. 51.42(3)(ar)1. and 51.437(4m)(f), the corporation counsel shall represent the interests of the public in the conduct of all proceedings under this chapter, including the drafting of all necessary papers related to the action.

We first consider whether Spencer waived his right to challenge the failure of the corporation counsel to prepare the recommitment petition by failing to raise the issue prior to the hearing. At the hearing on Spencer's motion to reconsider, the trial court applied the doctrine of laches and held that Spencer's failure to timely raise the issue prejudiced the county.

The timeliness of Spencer's actions seeking postcommitment relief forestalls a finding that he waived his right to challenge the preparation of the recommitment petition. The order for recommitment was signed on July 2, 1997; Spencer filed his notice of intent to pursue postcommitment relief on July 8, 1997. The state public defender promptly appointed appellate counsel for Spencer and sought preparation of the record. On November 5, 1997, appointed counsel filed a motion with this court seeking an extension of the time to file a motion for reconsideration on the grounds that a conflict of interest required the appointment of new counsel. The motion was granted on November 7, 1997, and an additional thirty days was allowed for the filing of the motion. Substitute counsel was appointed on November 7, 1997, and filed a motion for reconsideration on December 3, 1997. We conclude that Spencer promptly began to challenge his recommitment and preserved the issue presented in this appeal.

Waiver is not a jurisdictional defect, but one of administration. *See* ***Terpstra v. Soiltest, Inc.***, 63 Wis.2d 585, 593, 218 N.W.2d 129, 133 (1974). This is not an instance where Spencer waited in the weeds only to spring the issue for the first time on appeal. Further, it was manifest error for the trial court to accept the petition for recommitment not drafted by the corporation counsel in light of the directive in ***D.S. v. Racine County***, 142 Wis.2d 129, 416 N.W.2d 292 (1987). The issue was necessarily raised in the motion for reconsideration and is not waived.

See ***Schinner v. Schinner***, 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988).

The principal dispute between the parties is the application of ***D.S.*** and ***State v. S.P.B.***, 159 Wis.2d 393, 464 N.W.2d 102 (Ct. App. 1990), to the undisputed facts. In ***D.S.***, the supreme court considered whether the petition for commitment drafted by a probate coordinator assigned to the Racine county probate court was contrary to the drafting requirements of § 51.20(4), STATS., which requires the corporation counsel to prepare involuntary commitment papers. *See* ***D.S.***, 142 Wis.2d at 131-32, 416 N.W.2d at 293. The court concluded that the provision in § 51.20(4) that the corporation counsel shall draft all papers related to commitment proceedings was unambiguous and prevented those not employed by the corporation counsel from preparing and filing commitment papers. *See* ***D.S.***, 142 Wis.2d at 134-35, 416 N.W.2d at 294-95. The court went on to state:

> Under the exercise of this court's superintending and administrative authority pursuant to sec. 3, art. VII, Wis. Const., we direct circuit judges henceforth to refuse to accept petitions drafted by persons not authorized to do so under sec. 51.20(4), Stats.

Id. at 136-37, 416 N.W.2d at 295.

In ***S.P.B.***, we were confronted with a fact pattern almost identical to that presented by this appeal. Prior to the expiration of ***S.P.B***.'s commitment order, a mental health counselor and representative of the Waukesha County § 51.42 Board wrote a letter to the trial court requesting the initiation of recommitment proceedings. *See* ***S.P.B.,*** 159 Wis.2d at 395, 464 N.W.2d at 103. Although the trial court denied the prehearing motion to dismiss because a petition was not prepared in accordance with § 51.20(4), STATS., it eventually reversed itself and vacated the order of recommitment. *See* ***S.P.B.***, 159 Wis.2d at 395, 464 N.W.2d at 103. Waukesha County appealed arguing that the directive of ***D.S.***

does not warrant dismissal of the recommitment petition if prejudice is not present. *See* ***S.P.B.***, 159 Wis.2d at 395, 464 N.W.2d at 103. In affirming the trial court's dismissal of the recommitment petition, we wrote:

> We read the statement of the supreme court to be a prophylactic action designed to pronounce a bright line that cannot be crossed. We further read the statement to mean that since the supervisory directive was newly announced, it was not to be applied to the ***D.S.*** case; therefore, the issue was limited to whether the error was jurisdictional. However, as for the future, circuit judges were *henceforth* directed to *refuse* to accept petitions drafted by "*persons not authorized to do so* under sec. 51.20(4), Stats."
>
> The clear, unambiguous intent is to create a rule that must be followed after ***D.S.*** If we were to allow the courts to reach the prejudice component even if the directive were not followed, then the supreme court's statement would be rendered meaningless.

S.P.B.. 159 Wis.2d at 396-97, 464 N.W.2d at 104 (citation omitted).

On appeal, Spencer urges us to apply ***D.S.*** and ***S.P.B.*** and reverse his recommitment order. On the other hand, the County urges us to overrule ***S.P.B.*** The County argues that in ***S.P.B.***, § 51.20(13)(g)3, STATS., was neither argued nor considered and that we overextended the supreme court's directive in ***D.S.***[3]

[3] Section 51.20(13)(g)3, STATS., provides in part:

> The county department under s. 51.42 or 51.437 to whom the individual is committed under par. (a) 3 may discharge the individual at any time, and shall place a committed individual in accordance with par. (f). Upon application for extension of a commitment by the department or the county department having custody of the subject, the court shall proceed under subs. (10) to (13).

The County argues that the only logical way to interpret this statute is that the county department charged with care of the committed individual is authorized to file the recommitment petition. The County bases this argument on the premise that it is this department, and not the corporation counsel, that is knowledgeable in the patient's treatment; therefore, it is better equipped to prepare and file the petition.

We are not at liberty to depart from the precedent established by this court. "The constitutional and statutory provisions clearly set forth the mandate that the Court of Appeals function as a single court under a chief judge and not function as four separate courts." ***Cook v. Cook***, 208 Wis.2d 166, 186, 560 N.W.2d 246, 254 (1997) (quoted source omitted). Consequently,

> If the court of appeals is to be a unitary court, it must speak with a unified voice. If the constitution and statutes were interpreted to allow it to overrule, modify or withdraw language from its prior published decisions, its unified voice would become fractured, threatening the principles of predictability, certainty and finality relied upon by litigants, counsel and the circuit courts.

Id. at 189, 560 N.W.2d at 256. Therefore, a published decision by this court is binding and must be followed as precedent, even if erroneously decided. *See* ***id.*** at 189-90, 560 N.W.2d at 256. Accordingly, this court is bound to apply the principles of law enunciated in ***S.P.B.***, which require that we reverse the order

denying Spencer's motion for reconsideration and order the recommitment petition filed in 1997 to be dismissed.[4]

By the Court.—Orders reversed

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

[4] Generally, we have two alternatives available where a trial court fails to carry out a mandate laid down by the supreme court exercising its superintending and administrative authority. The first alternative is outright reversal and a remand to the trial court. The second alternative would be to conclude that where the trial court has failed to follow ***D.S. v. Racine County,*** 142 Wis.2d 129, 416 N.W.2d 292 (1987), we will review the issue on appeal de novo. *See* ***State v. Dadas***, 190 Wis.2d 339, 344-45, 526 N.W.2d 818, 820 (Ct. App. 1994). However, because ***State v. S.P.B.,*** 159 Wis.2d 393, 464 N.W.2d 102 (Ct. App. 1990), extends the ***D.S.*** directive to the preparation of recommitment petitions, we are left with no choice but to reverse the decision of the trial court. *See* ***Cook v. Cook,*** 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997) (restricting appellate court's options when dealing with precedent).