COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2603-FT **Cir. Ct. No. 2015ME18**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF T. F. W.:

MARQUETTE COUNTY,

PETITIONER-RESPONDENT,

V.

T. F. W.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: MICHAEL N. NOWAKOWSKI, Judge.[1] *Affirmed.*

[1] Judge Michael N. Nowakowski entered the order on appeal while this case was in Dane County Circuit Court, case no. 2001ME263. However, before the notice of appeal was filed, the case was transferred to the Marquette County Circuit Court and assigned to Judge Bernard Ben Bult, case no. 2015ME18.

¶1 LUNDSTEN, J.[2] T.F.W. appeals an order for involuntary medication and treatment. He argues that the order must be reversed because the petitioner, Marquette County, failed to carry its burden to prove that he received the statutorily required explanation of the advantages, disadvantages, and alternatives to his medication. I reject this argument and affirm.

Background

¶2 There is no dispute that T.F.W. has been under a mental health commitment since 2001. The circuit court ordered the most recent extension of the commitment on June 8, 2015, after a jury trial. At the conclusion of the trial, the circuit court also entered an order providing that T.F.W. was not competent to refuse medication or treatment under WIS. STAT. § 51.61(1)(g)4. T.F.W.'s challenge on appeal is limited to this order.

Discussion

¶3 "When a circuit court is asked to determine a patient's competency to refuse medication or treatment pursuant to § 51.61(1)(g)4., Stats., it must presume that the patient is competent to make that decision." ***Virgil D. v. Rock Cty.***, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994). "The petitioner has the burden of overcoming that presumption by showing incompetence by evidence that is clear and convincing." ***Id.***

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d). In a January 13, 2016 order, the court placed this case on the expedited appeals calendar, and the parties have submitted memo briefs. *See* WIS. STAT. RULE 809.17. Briefing was complete on March 8, 2016. All references to the Wisconsin Statutes are to the 2013-14 version.

¶4 Evaluating whether a petitioner met the burden of proof requires application of the facts to the statutory standard, a question of law for de novo review. ***Winnebago Cty. v. Christopher S.***, 2016 WI 1, ¶50, 366 Wis. 2d 1, __ N.W.2d __.

¶5 To prove that an individual is not competent to refuse medication, the County must show that:

> [B]ecause 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 individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual 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.

WIS. STAT. § 51.61(1)(g)4.

¶6 Here, T.F.W.'s challenge is limited to whether the County failed to meet its burden of proof on the first element of this statutory standard, that is, on whether "the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual." *See* ***id.*** I will sometimes refer to this element as the "explanation element."

¶7 There is no dispute that, at trial, at least one psychiatrist provided admissible testimony that T.F.W. received an explanation of the advantages,

disadvantages, and alternatives to his medication. Specifically, Dr. Leslie Taylor testified as follows:

> Q Okay. And have the advantages, disadvantages and alternatives to [T.F.W.'s] medication been explained to [him]?
>
> A Yes, they have.

¶8 Admittedly this testimony is cursory, but, as far as the statutory language is concerned, the testimony appears to satisfy the explanation element. T.F.W. argues, however, that, under ***Outagamie County v. Melanie L.***, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607, this testimony was too conclusory. For the following reasons, I disagree that more detailed testimony was required here.[3]

¶9 The pertinent problem in ***Melanie L.*** was that a medical expert testified using terms that differed from those in the statutory language, thus leaving unclear whether the expert applied the statutory standard. *See* ***id.***, ¶¶8-9, 27, 30, 91, 94, 96-97. Based on this discrepancy and other error, the supreme court in ***Melanie L.*** overturned an involuntary medication order. *See* ***id.***, ¶8, 88, 96.[4]

¶10 In describing each part of WIS. STAT. § 51.61(1)(g)4., the court in ***Melanie L.*** made the following statement regarding the explanation element:

> This [statutory] language is largely self-explanatory. A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive

[3] Because I rely on Dr. Taylor's testimony, I need not address T.F.W.'s objections to the admissibility of other testimony the County used to support the explanation element at trial.

[4] The other error in ***Outagamie County v. Melanie L.***, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607, was that the circuit court misstated the burden of proof. *See* ***id.***, ¶¶8, 86-88 & n.25, 96.

> from one or more medical professionals a reasonable explanation of proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Melanie L., 349 Wis. 2d 148, ¶67.

¶11 T.F.W. asserts that, contrary to this language in ***Melanie L.***, the testimony here did not establish that T.F.W. was told "why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication." Similarly, T.F.W. asserts that the testimony here did not establish exactly what T.F.W. was told when and by whom.

¶12 I reject T.F.W.'s apparent view that ***Melanie L.*** requires detailed testimony about what the patient was told. Rather, ***Melanie L.*** is more reasonably read as addressing what a medical provider's *explanation to the patient* "should" ordinarily contain, and how that explanation "should" be documented, *see* ***id.***, not what is normally required in terms of in-court testimony about what the patient was told. The ***Melanie L.*** court explained that attention to detail when informing the patient not only serves the patient's best interests under the law but also ensures that relevant evidence is available *if* the patient challenges the petitioner's proof on the explanation element at trial. *See* ***id.*** ("Medical professionals and other professionals should document the timing and frequency of their explanations so that, *if necessary*, they have documentary evidence to help establish this element in court." (emphasis added)).

¶13 Here, significantly, T.F.W. did not at trial challenge Dr. Taylor's testimony on the explanation element. And even now, on appeal, T.F.W. points to no competing evidence that might have called into question the adequacy of the explanation T.F.W. received.

¶14 T.F.W. additionally relies on the following language in ***Melanie L.***: "These [involuntary medication order] hearings cannot be perfunctory under the law. Attention to detail is important." *See* ***id.***, ¶94. As with the other language in ***Melanie L.***, I do not read this language as support for requiring, in every case, detailed testimony on the explanation a patient receives. If the court in ***Melanie L.*** had meant to impose such a requirement, it could have easily and clearly said so.

¶15 I find support for my reading of ***Melanie L.*** in the more recent supreme court case of ***Christopher S.***, 366 Wis. 2d 1. In ***Christopher S.***, the supreme court upheld an involuntary medication and treatment order based on explanation element testimony that was similar to what T.F.W. argues was insufficient here. *See* ***id.***, ¶¶54-56. The court in ***Christopher S.*** distinguished ***Melanie L.*** because, as noted above, the pertinent problem in ***Melanie L.*** was that expert testimony failed to track the statutory language. *See* ***Christopher S.***, 366 Wis. 2d 1, ¶¶52-54. Here, as in ***Christopher S.***, the testimony "closely tracked" the statutory language. *See* ***id.***, ¶54.

¶16 T.F.W. points to two unpublished cases that could be read as supporting his view of ***Melanie L.*** *See* ***Waukesha Cty. v. Kathleen H.***, No. 2014AP90, unpublished slip op. ¶¶8-10 & n.2 (WI App June 25, 2014); ***Eau Claire Cty. v. Mary S.***, No. 2013AP2098, unpublished slip op. ¶¶15-16, 18,

20-21 (WI App Jan. 28, 2014). I decline to rely on these non-binding cases because, among other reasons, they pre-date ***Christopher S.***[5]

¶17 Other than the case law already discussed, T.F.W. provides no authority suggesting that the County needed to provide additional proof here to carry its burden on the explanation element. Thus, I see no reason why, in order to satisfy that burden, the County had to provide evidence in addition to Dr. Taylor's testimony that the advantages, disadvantages, and alternatives to medication were explained to T.F.W.

Conclusion

¶18 For the reasons stated above, I affirm the order for involuntary medication and treatment.

By the Court.—Order affirmed.

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

[5] The parties do not address ***Winnebago County v. Christopher S.***, 2016 WI 1, 366 Wis. 2d 1, __ N.W.2d __, which was released approximately one month before T.F.W.'s brief-in-chief and two months before briefing was completed. Perhaps the parties believe that ***Christopher S.*** sheds no light on ***Melanie L.*** For reasons explained in the text, I disagree and find it difficult to square T.F.W.'s broad view of ***Melanie L.*** with ***Christopher S.***