COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2031 **Cir. Ct. No. 2013GN000011**

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

IN THE MATTER OF THE GUARDIANSHIP OF C. L.-K,

MILWAUKEE COUNTY,

PETITIONER-RESPONDENT,

V.

C. L.-K.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: DAVID L. BOROWSKI and JANE V. CARROLL, Judges. *Affirmed*.

¶1 Brennan, J.[1] C. L.-K. appeals the trial court's order extending her protective placement under Chapter 55,[2, 3] claiming that her trial counsel was ineffective in his representation of her at the annual judicial review of the protective placement. She contends counsel was deficient because he failed to object to the review on the grounds that C. L.-K.'s constitutional rights to equal protection were violated when her annual ***Watts***[4] review was not completed within one year.

¶2 Milwaukee County argues in response that nothing in the ***Watts*** decision, or in the subsequently enacted WIS. STAT. § 55.18, requires that the review be *completed* within one year. Additionally, as this review fully complied with all of the time requirements of ***Watts*** and WIS. STAT. § 55.18, the County argues that C. L.-K.'s constitutional equal protection rights were not violated and that counsel was not deficient.

¶3 We agree with the County and affirm. Nowhere in the ***Watts*** decision does it require the Chapter 55 annual judicial review to be *completed* within one year of the initial placement order. Additionally, in the court's equal protection analysis, while it did conclude there was no rational basis for the absence of an annual *judicial* review in the then-existing version of Chapter 55

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-2014). All references to the Wisconsin Statutes are to the 2103-14 version unless otherwise noted.

[2] *See* WIS. STAT. § 55.18.

[3] Chapter 55 refers to WIS. STAT. §§ 55.001 through 55.23.

[4] ***State ex rel. Watts v. Combined Community Services Bd. of Milwaukee County***, 122 Wis. 2d 65, 362 N.W.2d 104 (1985)

annual reviews, as compared to Chapter 51,[5] which did so require, it *expressly rejected* an argument that Chapter 55's review procedures must be identical to those of Chapter 51. More particularly, it rejected the suggestion from the petitioners that Chapter 55 extension orders be limited to one year, and it found "cumbersome and unnecessary" the argument that Chapter 55 reviews must employ all of the procedures for annual reviews that Chapter 51 requires. *See* ***State ex rel. Watts v. Combined Community Services Bd. of Milwaukee County,*** 122 Wis. 2d 65, 84, 362 N.W.2d 104 (1985).

¶4 Here because the County strictly complied with the express requirements of ***Watts*** and WIS. STAT. § 55.18, we conclude that C. L.-K.'s equal protection rights were not violated, and trial counsel was not deficient. Accordingly, we affirm.

BACKGROUND

¶5 C. L.-K. first became subject to a Chapter 55 protective placement order on March 1, 2013.[6] C. L.-K. appealed that decision, which is not before us. In the meantime, she was placed in a community based residential facility (CBRF), which was the least restrictive placement consistent with her needs, as ordered by the court. Then Milwaukee County conducted its annual internal review, as required by Chapter 55, and recommended continued protective placement on November 20, 2013. The County filed the petition for annual review on December 13, 2013. On December 31, 2013 the trial court appointed a

[5] Chapter 51 refers to WIS. STAT. §§ 51.001 through 51.95.

[6] The Honorable Jane Carroll entered this order and presided until judicial rotation in August 2014.

guardian ad litem (GAL), Attorney Jonathan Richards, to review the County's petition and report. The GAL filed his report on February 19, 2014, recommending that the protective placement be continued. But he requested that legal counsel be appointed for C. L.-K. and for a full due process hearing to be set because "[C. L.-K.] clearly stated, repeatedly, that she objects to her protective placement, that she wants a trial and that she wants an independent evaluation." The GAL filed a formal objection to continued protective placement and made a request for adversary counsel for C. L.-K. on February 26, 2014. The court held a hearing on the GAL's objection and requests on February 26, 2014 and appointed legal counsel for C. L.-K.

¶6 At a pretrial conference on April 28, 2014, C. L.-K.'s attorney requested time to get an independent evaluation. The court ordered that Dr. Kristine Mooney be appointed to do the evaluation and set a status hearing for June 2, 2014. At the status date, Dr. Mooney's May 23, 2014, report was filed, in which she recommended continued protective placement. A July 16, 2014, date was set for a contested ***Watts*** hearing on the continued protective placement. At the full hearing on July 16, 2014, the trial court ordered continued protective placement.

¶7 On May 21, 2015, C. L.-K., through post disposition counsel,[7] filed a motion to vacate the protective placement order of July 16, 2014, alleging as grounds ineffective assistance of counsel due to counsel's failure to move to dismiss or object to the ***Watts*** annual review on the grounds that it was not completed within one year of the initial protective placement order of March 1,

[7] Post disposition and appellate counsel are the same.

2013, violating C. L.-K.'s constitutional equal protective rights. Counsel sought a ***Machner***[8] hearing on the motion.

¶8 On August 20, 2015, Milwaukee County filed a response to the motion, arguing that a Chapter 55 order, unlike a Chapter 51[9] order, does not require completion of the review within one year. The GAL also filed a written response asserting that C. L.-K. was not prejudiced because she "continued to meet the standard for someone requiring a protective placement order" from the time of the GAL's interview with her to the time of the ***Watts*** hearing. The trial court held a non-evidentiary hearing on the motion on September 3, 2015.[10] The trial court then issued a written decision dated September 16, 2015, denying the motion without an evidentiary hearing. C. L.-K. appeals.

LEGAL PRINCIPLES

Constitutional principles

¶9 C. L.-K. frames her constitutional challenge within an ineffective assistance of counsel argument. The standard of review for ineffective assistance is well established. First the reviewing court determines whether trial counsel's performance was deficient, then, if deficient, whether the client was prejudiced by that representation. *See* ***State v. Artic***, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, "the defendant must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690

[8] ***State v. Machner,*** 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

[9] Involuntary commitments are controlled by Chapter 51.

[10] The Honorable David L. Borowski presided after the judicial rotation in August 2015.

(1984). To show prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Smith***, 207 Wis. 2d 258, 276, 558 N.W.2d 379 (1997). We review the trial court's decision under a mixed review framework. We defer to the trial court's fact and credibility findings unless clearly erroneous. *See* ***State v. Roberson***, 2006 WI 80, ¶25, 292 Wis. 2d 280, 717 N.W.2d 111. As to whether counsel's performance was deficient, we review that and the prejudice prong independently of the trial court. *See* ***id.***

¶10 C. L.-K. seeks a ***Machner*** hearing on her ineffective assistance claim. The standard of review for entitlement to a ***Machner*** hearing is well established. Post disposition counsel is required to plead with specificity facts which, if true, would entitle the defendant to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). Whether the defendant has met that burden is a matter we review independently of the trial court. *See* ***id.***

¶11 The issue presented here, although framed as ineffective assistance of trial counsel and entitlement to a ***Machner*** hearing, rests entirely on a legal determination of constitutionality that this court makes independently of the trial court. *See* ***State v. Cole***, 2003 WI 112, ¶10, 264 Wis. 2d 520, 665 N.W.2d 328. The issue is whether C. L.-K.'s constitutional equal protection rights, as set forth in the ***Watts*** decision, require that the annual judicial review of her protective placement be *completed* within one year of the initial order. C. L.-K. objects to alleged disparate treatment between the timing and completion of her Chapter 55 annual review hearing as contrasted with those of a patient involuntarily

committed under Chapter 51 of the Wisconsin Statutes. We analyze an equal protection challenge under the *rational basis* test:

> The fundamental determination to be made when considering a challenge based upon equal protection is whether there is an arbitrary discrimination in the statute or its application, and thus whether there is a rational basis which justifies a difference in rights afforded.

Watts, 122 Wis. 2d at 77. In other words, the law permits different treatment but only if there is some "relevance to the purpose for which the classification is made." ***Baxstrom v. Herold***, 383 U.S. 107, 111 (1966). The burden is on the challenger to show, beyond a reasonable doubt, that there is no rational basis for the distinction. *See* ***State v. Post***, 197 Wis. 2d 279, 318, 541 N.W.2d 115 (1995).

The Watts decision

¶12 In 1985 the Wisconsin Supreme Court, in ***Watts***, addressed an equal protection challenge to the then-existing Chapter 55 protective placement procedures. The petitioners in ***Watts*** argued that the Chapter 55 protective placement court review procedures, which failed to provide for annual *judicial* review of extensions of protective placements, differed from the Chapter 51 involuntary commitment procedures, which mandated annual judicial reviews and limited extension orders to one year, without any rational basis, violating their constitutional equal protection rights. The court agreed and held that every person who was protectively placed under Chapter 55 was entitled to an annual *judicial* review of each protective placement: "[W]e hold [that] protectively placed individuals are entitled to the right of periodic, automatic judicial review that all other civilly committed persons in Wisconsin have." ***Watts***, 122 Wis. 2d at 83.

¶13 In reaching this decision, the court recounted the history of civil commitment laws in Wisconsin and, of significance here, noted that in 1975 when

the Wisconsin Legislature changed the civil commitment laws, it created three sets of procedures: the first one was WIS. STAT. § 51.15-51.20 (Chapter 51), commitment procedures for persons who are acutely mentally ill, developmentally disabled, or drug dependent; it established separate procedures for those who are alcoholics (not implicated here); and finally, it set up a third category for persons who have permanent mental disabilities, WIS. STAT. § 55.06 (Chapter 55). *See* ***id.*** at 72. The supreme court noted that the review procedures employed in Chapters 51 and 55 were fundamentally different. ***Id.*** at 74. Of particular concern to the court was the fact that Chapter 51 required *court* review of the commitment after the first six months and then annually thereafter, whereas reviews of Chapter 55 placements required only *agency* review of the placement on an annual basis. At the time of the ***Watts*** decision, there was no procedure for regular court reviews of Chapter 55 placements. *See* ***id.*** at 75-77.

¶14 The ***Watts*** court concluded that equal protection was violated because there was no rational basis for the absence of an annual court review of Chapter 55 placements. *See* ***id.*** at 82. The court considered various solutions but expressly rejected the argument that it should adopt the same procedures of WIS. STAT. § 51.20(13)(g)3 which it described as: "time-limited commitments—six months for the first commitment and one year for subsequent ones—which must be renewed through a full due process court proceeding initiated by the party wishing to continue the commitment." ***Id.*** at 75. Instead, it said that: "We find this cumbersome and unnecessary. Section 55.06 provides for residential care and custody of those persons with mental disabilities that are likely to be permanent. Chapter 51 provides for active treatment for those who are proper subjects for treatment." ***Id.*** at 84.

¶15 The solution chosen by the court was an annual judicial review: "We hold that there must be an annual review of each protective placement by a judicial officer." ***Id.*** at 84. The court then described, at length, the procedure and the responsibilities of each party to the protective placement review. The first step was the filing of the agency's report with the court. Next, it was the *court's* duty to appoint a GAL: "The court should appoint a guardian ad litem to meet with the placed individual and to review the annual report made by the protective services agency under sec. 55.06(10)(a)." ***Id.*** at 84.

¶16 Following that, it was the *GAL's* duty to do the following:

> The guardian ad litem should explain to the placed individual and his or her guardian the right to have an attorney appointed, to an independent evaluation, and to request a full due process hearing on the need for continued protective placement or on the appropriateness of the present placement facility. The guardian ad litem should request an additional evaluation of the individual if that appears necessary. Using all of the information gathered, the guardian ad litem should make a report to the court concerning whether the individual continues to meet the standards for protective placement whether the current placement is the least restrictive environment consistent with the individual's needs, whether the individual or guardian requests a change in status or placement, whether counsel should be appointed, and whether a full due process hearing should be held.

Id. at 84-85.

¶17 And finally the ***Watts*** court described the required further action *by the court*:

> Upon its review of the report of the guardian ad litem, the court should decide whether to order additional information, whether to appoint defense counsel, and whether to hold a full due process hearing under sec. 55.06(6), STATS., or a summary hearing.

> A full due process hearing should be required whenever the protectively placed individual, his or her guardian or the guardian ad litem requests it or when the report of the guardian ad litem indicates that the individual no longer meets the standards for protective placement, the current placement is not the least restrictive environment or the individual objects to the present placement.

Id. at 85 (citations omitted).

¶18 Other than describing the review as "annual," the only mention of a time limit requirement in the ***Watts*** decision is the following statement controlling the catch-up reviews of every protective placement affected by the ***Watts*** decision: "The initial annual review of protective placement required by this decision for those persons *already in protective placement* shall be accomplished within one year from the mandate date of this opinion." ***Id.*** at 86 (emphasis added).

The current Chapter 55 procedural requirements

¶19 Subsequent to the ***Watts*** decision, the Wisconsin Legislature modified Chapter 55. In 2005, it created WIS. STAT. § 55.18, which described the responsibilities of the county, the GAL, and the court. It first required that the *county* shall annually review the status of each individual who has been protectively placed by visiting the individual and preparing a written evaluation of the physical, mental, and social condition of the individual and the service needs of the individual. It obligates the county to inform the guardian of the individual that it was conducting the review and to invite the guardian's participation. It also states a time-sensitive requirement that the county prepare a report and a petition for annual review and file both with the court not later than the first day of the eleventh month after the initial protective placement order:

> *Not later than the first day of the 11th month after the initial order* is made for protective placement for an individual

> and, except as provided in par. (b), annually thereafter, the *county* department *shall do all of the following*:
>
> 1. File a *report* of the review with the court that ordered the protective placement. The report shall include information on all of the following:
>
> ….
>
> 2. File with the court under subd. 1. a *petition for annual review* by the court of the protective placement ordered for the individual.
>
> 3. *Provide the report under subd. 1. to the individual* and the guardian of the individual, and to the individual's agent under an activated power of attorney for health care, if any.

WIS. STAT. § 55.18(1).

¶20 After the county files its report with the court, the court is to appoint a GAL. WISCONSIN STAT. § 55.18(2) requires that the *GAL must* review the county's report, meet with the placed individual and any guardian for that person, and advise the ward and guardian of that individuals rights and alternatives. Then, within thirty days of appointment, the GAL must file the written report with the court, advise the court of the GAL's recommendation on continued placement, and request an independent evaluation and legal counsel if deemed necessary. *See* WIS. STAT. § 55.18(2).

¶21 Next the court is required to review the report of the GAL and make necessary orders for appointment of doctor, legal counsel, and setting a court date. *See* WIS. STAT. § 55.18(3). No time limits are specified.

Current Chapter 51 procedural requirements

¶22 Because C. L.-K. frames this appeal as an equal protection challenge to the differing one-year time limits for orders for extension in Chapter 55 and

Chapter 51, we next turn to describe the relevant portions of the Chapter 51 involuntary commitment procedure. Under WIS. STAT. § 51.20(13)(g)1., a Chapter 51 commitment extension "may be for a period not to exceed one year."[11] This was the law at the time the court decided ***Watts***. *See* WIS. STAT. § 51.20(13)(g)1 (1983-84), (1985-86). There is no corresponding language in Chapter 55. Nonetheless, the parties do not dispute that after the ***Watts*** decision, persons protectively placed under Chapter 55 have a constitutional right to an *annual* judicial review.

¶23 C. L.-K. uses this language to argue that Chapter 51 requires *completion* of the review within one year, however we note that C. L.-K. points to no language in Chapter 51 expressly saying that.[12]

¶24 Chapter 51 annual reviews are conducted with all of the procedural requirements of the initial petition for involuntary placement. *See* WIS. STAT. § 51.20(10-13). As noted above, the ***Watts*** court considered whether to impose those requirements on a Chapter 55 review but expressly decided not to because it found them "cumbersome and unnecessary," noting that Chapter 55 placements, by the nature of the individuals' disabilities, were "likely to be permanent," whereas Chapter 51 individuals may improve with treatment. ***Watts***, 122 Wis. 2d at 84**.**

[11] The first extension after the initial order is six months and all subsequent orders are limited to twelve months.

[12] In fact, we note that WIS. STAT. § 51.20(13)(g)2r. provides that if an agency report is not filed by twenty-one days prior to the expiration of a commitment order, the court does not lose jurisdiction over the recommitment. This seems to undercut C. L.-K.'s argument. Nonetheless, we will assume without deciding that Chapter 51 imposes a one year completion requirement.

DISCUSSION

¶25 C. L.-K. argues that trial counsel performed deficiently by failing to move to dismiss, or object to, the petition for extension of C. L.-K.'s protective placement on the grounds that it was not completed within one year of the initial order for protective placement in violation of the ***Watts*** decision and her equal protection rights. She maintains that when the Wisconsin Supreme Court in ***Watts*** held that equal protection requires that individuals protectively placed under Chapter 55 are entitled to an annual judicial review of all extension petitions, just as individuals who are involuntarily committed under Chapter 51 are, it imposed the requirement of completion of the review within one year. She argues that because Chapter 51 extension orders are limited to one year from the initial order, that means that Chapter 55 annual judicial reviews must be *completed* within one year of the initial order. For additional support of her position, she relies on the court's use of the word "annual" and one sentence of the ***Watts*** decision which says: "The initial annual review of protective placement required by this decision for those persons already in protective placement shall be accomplished within one year from the mandate date of this opinion." ***Watts***, 122 Wis. 2d at 86 (emphasis added).

¶26 The County responds that requiring an "annual" judicial review, as the court did in ***Watts***, does not require that it be *completed* within one year and that completion within the year is not practically possible given the time needed for the county agency review and report; the court appointment of a GAL, doctor for an independent evaluation, and legal counsel; as well as the time need for each of those individuals to do their investigation and reports. Additionally, it fails to take into account the practical realities of scheduling and conducting a full due process hearing.

¶27 We agree with the County that completion is not required within one year under equal protection or the ***Watts*** decision. First, the supreme court's decision never said the annual review must be *completed* within one year. Certainly, considering the careful analysis and lengthy detail in the opinion, the court could have said the words, "and the annual review must be completed in one year." It did not. And simply using the word "annual" does not impose a one-year *completion* requirement.

¶28 The time frame has to be viewed in context of the court's equal protection analysis. The context was that the supreme court was trying to correct what they saw as an inequity in the treatment of Chapter 55 protectively placed individuals *vis-a-vis* Chapter 51 involuntarily committed individuals. The court found there was no rational basis for failing to require an annual *judicial* review of Chapter 55 protectively placed individuals, whereas Chapter 51 individuals received those reviews. *See* ***Watts***, 122 Wis. 2d at 82. Thus, the court imposed a requirement for an annual judicial review: "We hold that there must be an annual review of each protective placement by a judicial officer." ***Id.*** at 84.

¶29 The court then wrote a specific, detailed description of the annual process it required prospectively for the Chapter 55 annual judicial review. It described the first step as the agency's report to the court. Next, it laid out the appointment and duties of the GAL, including filing a report in the court. It then described the responsibilities of the court to review the GAL report and make the necessary appointments of legal counsel and decision as to whether additional information was needed before setting a date for full due process hearing or summary hearing. *See* ***Watts***, 122 Wis. 2d at 84-85. Nowhere in that detailed description of the review process did the court say the process must be *completed* within one year of the initial order. Other than the word "annual," the court did

not even specify that the process be commenced by a certain date from the initial order. Obviously, the court could have done so if it felt that equal protection so required.

¶30 Secondly, C. L.-K.'s argument fails because the court in ***Watts*** specifically considered *and rejected* imposing the same one-year time limit on a Chapter 55 order as the Chapter 51 orders have. Chapter 51 specifically states that a Chapter 51 commitment extension "may be for a period not to exceed one year." *See* WIS. STAT. §51.20(13)(g)1. The petitioner in ***Watts*** had argued that Chapter 55 orders should be similarly worded. The supreme court rejected that argument, as well as one for imposing *all of the exact same procedural requirements* (including a jury trial) that were then required for Chapter 51 annual reviews. *See* WIS. STAT. § 51.20(10-13). Not only did the court reject the idea of imposing all of those requirements, but it clearly stated its reasoning:

> We find this cumbersome and unnecessary. Section 55.06 provides for residential care and custody of those persons with mental disabilities that are likely to be permanent. Chapter 51 provides for active treatment for those who are proper subjects for treatment.

Watts, 122 Wis. 2d at 84 (citation omitted).

¶31 In so saying, the ***Watts*** court made it clear that it recognized a rational basis for differing procedural requirements in Chapters 55 and 51. It noted that Chapter 55 individuals are a very different category of person. Their disabilities are typically permanent. Individuals committed under Chapter 51 on the other hand, are committed after the court makes a finding that they are treatable and then are given the treatment they need. The ***Watts*** court was recognizing a greater prospect for a change of condition in Chapter 51 individuals

and hence a greater need for more protective procedural requirements in their annual reviews. We agree.

¶32 C. L.-K.'s final argument based on the ***Watts*** decision is that one sentence at the end of the court's description of the review process establishes the one-year completion requirement:

> The initial annual review of protective placement required by this decision for those persons *already in protective placement* shall be accomplished within one year from the mandate of this opinion.

Id. at 86 (emphasis added).

¶33 But this sentence does nothing more than say that the annual reviews of all of those individuals who were already in protective placement at the time of the ***Watts*** decision ("already in protective placement") are entitled to their newly created annual judicial reviews, and the courts have one year to accomplish the catch-up on reviews ("from the mandate date of this opinion").

¶34 Finally, C. L.-K., points to the language of WIS. STAT. § 55.18, which was created after ***Watts***, as support for her argument that both Chapter 55 and ***Watts*** require completion of the annual review in one year. For this argument, she again relies on the word "annual" in each. But, as in the case of the supreme court's language in ***Watts***, other than using the word "annual," there is no mention in the statute of a one-year requirement for *completion* of the review process. We assume that the legislature used the words it intended and omitted others intentionally. *See* ***Karow v. Milwaukee Cty. Civil Serv. Comm'n***, 82 Wis. 2d 565, 571, 263 N.W.2d 214 (1978). The legislature did impose one specific time frame and that is for the *start* of the review. It required the filing of the county's review report "[n]ot later than the first day of the 11th month after the initial order is

made for protective placement." *See* WIS. STAT. § 55.18(1). Certainly, the legislature could have added specific language requiring *completion* of the process within one year of the initial order, but it did not.

¶35 It is noteworthy here that all parties to C. L.-K.'s annual review proceeded timely and in good faith. The County got the report filed in time. The court immediately appointed the GAL. The GAL timely did his report and noted C. L.-K.'s objection to extension and got her an independent doctor's evaluation and legal counsel. The court timely appointed legal counsel, and a full due process hearing was held in front of the judge. This is the annual judicial review contemplated by ***Watts***. The fact that it was completed within one year and four months from the initial placement order does not render it untimely. In fact, it moved along expeditiously. We again observe that the court in ***Watts*** specifically rejected imposing the Chapter 51 requirements on a Chapter 55 annual review. C. L.-K.'s rights were protected by the procedures observed in this case.

¶36 We also observe that the County makes a good point that the realities of the time needed to accomplish all of the required steps make it unlikely that all could be accomplished within one year of the initial order. To that, C. L. K. responds that the County and courts should start the process sooner. But in this case, the process was commenced two months short of the one-year anniversary of the initial order and went four months over. To start earlier and complete within one year, the process would have to commence six or seven months into the one-year order. That is neither practical in terms of care of the individual, nor required, in terms of ***Watts***. Regardless, we conclude that C. L.-K. has failed to meet her burden of showing any equal protection violation.

¶37 Because we conclude that neither equal protection, as shown in the ***Watts*** decision, nor Chapter 55 require that the annual ***Watts*** review be completed within one year, trial counsel was not ineffective for failing to move to dismiss or object on that basis.

By the Court.—Orders affirmed.

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