COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 2017

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. 2017AP5 **Cir. Ct. No. 2015ME18**

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

IN THE MATTER OF THE MENTAL COMMITMENT AND INVOLUNTARY MEDICATION AND TREATMENT OF T. F. W.:

MARQUETTE COUNTY,

PETITIONER-RESPONDENT,

V.

T. F. W.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Marquette County: MARK T. SLATE, Judge. *Affirmed*.

¶1 KLOPPENBURG, P.J.[1] T.F.W. appeals the circuit court's orders extending his commitment and involuntary medication entered after a jury found T.F.W. to be mentally ill, a proper subject for treatment, and dangerous to himself or others. T.F.W. argues that: (1) the jury did not have sufficient evidence to find that T.F.W. was dangerous; and (2) the circuit court erred in allowing telephonic testimony without good cause being shown and in violation of T.F.W.'s right to due process. I reject T.F.W.'s arguments and affirm.

Sufficiency of the Evidence

¶2 T.F.W. argues that the jury did not have sufficient evidence to find that he was dangerous to himself or others. As I explain, under the applicable standard of review, I conclude that the evidence was sufficient for the jury to find that T.F.W. was dangerous.

¶3 WISCONSIN STAT. § 51.20(13)(g)3. requires an extension of an individual's commitment if it is determined that the individual: (1) is mentally ill; (2) is a proper subject for commitment; and (3) is dangerous. *See also* WIS. STAT. § 51.20(1)(a). In an extended commitment proceeding, the dangerousness element may be satisfied by "a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." WIS. STAT. § 51.20(1)(am).

¶4 The County bore the burden of proving by clear and convincing evidence the facts required to show that T.F.W. needed his mental health

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

commitment to be extended. WIS. STAT. § 51.20(13)(e) and (g)3. T.F.W. does not dispute that the jury had sufficient evidence to find that he was mentally ill and a proper subject for commitment. T.F.W. argues that there was insufficient evidence to prove that he was dangerous. Specifically, T.F.W. argues that there was insufficient evidence that he would be a proper subject for commitment if treatment were withdrawn.

¶5 In determining whether sufficient evidence exists to support a jury verdict, "a reviewing court views [the] evidence most favorably to sustaining [the] verdict" and will sustain the verdict if there is any credible evidence to support it. ***Outagamie Cty. v. Michael H.***, 2014 WI 127, ¶21, 359 Wis. 2d 272, 856 N.W.2d 603.

> Appellate courts in Wisconsin will sustain a jury verdict if there is any credible evidence to support it. Moreover, *if there is any credible evidence, under any reasonable view, that leads to an inference supporting the jury's finding, [appellate courts] will not overturn that finding.*
>
> In applying this narrow standard of review, [the appellate court] considers the evidence in a light most favorable to the jury's determination.

Id. (quoted source omitted; alteration in original).

¶6 Two witnesses testified at trial: the County presented T.F.W.'s treating psychiatrist Dr. Steven Genheimer, and T.F.W. presented his guardian Mark Sleger, who also runs a group home for the rehabilitation of people with mental health issues. Dr. Genheimer testified that: T.F.W.'s mental illness prevents him from understanding the advantages and disadvantages of, and alternatives to, accepting recommended treatment or medication; T.F.W. does not believe he has a mental illness or needs in-patient treatment or psychotropic medication; T.F.W. refused his psychotropic medication when the involuntary

medication order expired days before trial; if T.F.W. ceased taking his psychotropic medication, "there's a very high likelihood that he would decompensate" and manifest "increased psychosis and irritability"; T.F.W. became more psychotic when he was on less medication; T.F.W. needs a structured in-patient environment because his mental illness affects his ability to "engage in his treatment plan"; and T.F.W. would "[d]efinitely" become a proper subject for in-patient treatment if his current treatment were discontinued. Sleger, T.F.W.'s own witness, testified that it would be dangerous for T.F.W. to stop taking his medication for a least the next two years.

¶7 Contrary to T.F.W.'s argument on appeal, this testimony shows more than that his symptoms of mental illness would increase if treatment were withdrawn. From Genheimer's and Sleger's testimony, the jury could reasonably infer that, based on T.F.W.'s treatment record, he would become a proper subject for commitment if treatment were withdrawn.

¶8 In sum, viewing the testimony discussed above in the light most favorable to the jury verdict, I conclude that the evidence was sufficient for the jury to find that T.F.W. was dangerous.

Good Cause

¶9 T.F.W. argues that the circuit court erroneously admitted Dr. Genheimer's telephonic testimony without finding good cause under WIS. STAT. § 807.13(2)(a)-(b). As I explain, I conclude that T.F.W. has forfeited this argument.

¶10 The circuit court has the discretionary power to allow or disallow testimony by telephone. ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶32, 312

Wis. 2d 435, 752 N.W.2d 359. A discretionary decision will not be overturned unless it is erroneous. *See* ***Miller v. Hanover Ins. Co.***, 2010 WI 75, ¶30, 326 Wis. 2d 640, 785 N.W.2d 493. A circuit court erroneously exercises its discretion if it applies the wrong legal standard or if the facts of the record do not support the decision. ***Werner v. Hendree***, 2011 WI 10, ¶59, 331 Wis. 2d 511, 795 N.W.2d 423.

¶11 As stated, T.F.W. argues that the circuit court erroneously exercised its discretion to admit Dr. Genheimer's telephonic testimony because the court did not first determine whether the County had shown good cause as required under WIS. STAT. § 807.13(2)(a)-(b). The County responds that T.F.W. forfeited this argument because he failed to raise it before the circuit court. *See* ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 ("Arguments raised for the first time on appeal are generally deemed forfeited ...." (quoted source omitted)). The record supports the County's position.

¶12 T.F.W. correctly relates that he objected to telephonic testimony before trial, both orally and in writing. However, as the County asserts, he based his objection only on the violation of WIS. STAT. § 885.60 (notice requirement for video conferencing) and due process. T.F.W. does not show otherwise. To the extent that T.F.W. is arguing that he preserved his argument that the circuit court erroneously failed to find good cause by arguing improper notice, I disagree. "[T]he forfeiture rule focuses on whether particular arguments have been preserved, not on whether general issues were raised before the circuit court." *See* ***Townsend v. Massey***, 2011 WI App 160, ¶25, 338 Wis. 2d 114, 808 N.W.2d 155.

¶13 Application of the forfeiture rule is particularly apt here, where the circuit court was not given the opportunity to weigh the eight considerations listed

in WIS. STAT. § 807.13(2)(c) for determining whether good cause has been shown.[2] *See* ***Townsend***, 338 Wis. 2d 114, ¶25 ("[T]he fundamental forfeiture inquiry is whether a legal argument or theory was raised before the circuit court, as opposed to being raised for the first time on appeal in a way that would 'blindside' the circuit court." (quoted source omitted)). Accordingly, I conclude that T.F.W. has forfeited his challenge to the circuit court's admission of telephonic testimony based on the court's asserted failure to determine whether good cause had been shown.

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[2] Those considerations are:

> 1. Whether any undue surprise or prejudice would result;
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> 2. Whether the proponent has been unable, after due diligence, to procure the physical presence of the witness;
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> 3. The convenience of the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
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> 4. Whether the procedure would allow full effective cross-examination, especially where availability to counsel of documents and exhibits available to the witness would affect such cross-examination;
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> 5. The importance of presenting the testimony of witnesses in open court, where the finder of fact may observe the demeanor of the witness, and where the solemnity of the surroundings will impress upon the witness the duty to testify truthfully;
>
> 6. Whether the quality of the communication is sufficient to understand the offered testimony;
>
> 7. Whether a physical liberty interest is at stake in the proceeding; and
>
> 8. Such other factors as the court may, in each individual case, determine to be relevant.

WIS. STAT. § 807.13(2)(c).

Due Process

¶14 T.F.W. argues that the admission of Dr. Genheimer's telephonic testimony violated T.F.W.'s right to procedural due process. As I explain, I conclude that T.F.W.'s argument is defeated by our decision in ***W.J.C v. County of Vilas***, 124 Wis. 2d 238, 369 N.W.2d 162 (Ct. App. 1985).

¶15 As we stated in ***W.J.C.***:

> The approach for analyzing a procedural due process claim is set out in ***Mathews v. Eldridge***, 424 U.S. 319 (1976). The test involves balancing three factors: 1) The private interest affected by the official action, 2) the risk of erroneous deprivation of the interest through the procedures used and the probable value of additional or substitute procedural safeguards, and 3) the government's interest. ***Id.*** at 335.

124 Wis. 2d at 240.

¶16 In ***W.J.C.***, we concluded that permitting the examining physician to testify by telephone in a commitment proceeding under WIS. STAT. § 51.20 did not violate the subject's due process rights. ***Id.*** at 241. In that case, we determined that the first ***Mathews*** factor, the nature of the interest at stake, weighed heavily in favor of the subject whose freedom will be lost upon an involuntary commitment, even though his interests would ultimately be "served if he is in fact a proper subject for treatment." ***W.J.C.***, 124 Wis. 2d at 240-41. We determined that the other ***Mathews*** factors weighed in favor of permitting telephone testimony, stating:

> Telephone testimony poses only a slight risk to the correctness of the jury's fact finding. The only aspect of the fact finding process lost by telephone testimony is the jury's ability to observe the doctor's demeanor. Given the doctors' neutrality, the probable value of in-court testimony

> does not justify the fiscal and administrative burdens in-court testimony would impose.

W.J.C., 124 Wis. 2d at 241-42.

¶17 The same is true here. Dr. Genheimer's testimony was solely medical in character, and T.F.W. was free to contest Dr. Genheimer's medical opinions through cross-examination or testimony of other medical experts. Dr. Genheimer testified that he would derive no personal benefit from T.F.W.'s being committed to in-patient treatment because he was a salaried employee "in a [state] institution that has a long waiting list." In sum, following our holding in ***W.J.C.***, I conclude that T.F.W. has failed to show that the admission of Dr. Genheimer's telephonic testimony violated T.F.W.'s right to due process.

¶18 For the reasons set forth above, I affirm the circuit court's orders extending T.F.W.'s commitment and involuntary medication for one year.

By the Court.—Orders affirmed.

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