COURT OF APPEALS
DECISION
DATED AND FILED

June 26, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1497 **Cir. Ct. No. 2012ME252A**

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

IN RE THE MATTER OF THE CONDITION OF P. X.:

MARATHON COUNTY,

PETITIONER-RESPONDENT,

V.

P.X.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY J. STRASSER, Judge. *Affirmed.*

¶1 STARK, P.J.[1] P.X. appeals an order extending his involuntary commitment pursuant to WIS. STAT. ch. 51. We reject his argument that he was

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

incapable of "rehabilitation" and thus not a proper subject for treatment. Accordingly, we affirm the commitment order.

BACKGROUND

¶2 P.X. is an autistic, non-verbal, and intellectually and developmentally disabled individual who has been diagnosed with obsessive compulsive disorder and pica. He was first placed under WIS. STAT. ch. 51 involuntary commitment and involuntary medication orders in 2012. Those orders have been extended four times. P.X. has also been subject to WIS. STAT. ch. 54 guardianship and WIS. STAT. ch. 55 protective placement orders during that timeframe, and he continues to be subject to those orders. A recommitment hearing on the County's petition for the fifth extension of P.X.'s ch. 51 order was held on March 10, 2017.[2]

¶3 The only disputed issue at P.X.'s recommitment hearing was whether he was capable of rehabilitation and, accordingly, was a proper subject for treatment. Two court-appointed physicians were the only witnesses to testify. Doctor John Coates, a psychiatrist, reviewed P.X.'s records and testified that P.X. needed constant supervision and had a "tendency to engage in property destruction and kind of self[-]mutilating behavior." Coates observed that P.X. "display[ed]

[2] The County cites the opinion in P.X.'s prior appeal, *see* ***Marathon Cty. v. P.X.***, No. 2016AP1490, unpublished slip op. (WI App Apr. 18, 2017), and includes the opinion in its appendix of its response brief, *see* WIS. STAT. RULES 809.23(3)(b)-(c); 809.19(3)(b). The County refers to our prior opinion as "law of the case." P.X. argues in his reply brief that the "law of the case" doctrine is inapplicable because the recommitment order now before this court is based upon entirely new evidence. P.X. is correct. However, given the context in which the County discusses the opinion, it appears the County intended to cite the opinion only for the fact that the prior appeal occurred, not that the prior appeal requires us to reject P.X.'s argument in this appeal or that our review is limited to the facts produced at the prior recommitment hearing.

mood swings and very disruptive behavior" and that "this type of behavior has been ongoing for several years" without "any significant change." In particular, Coates noted that P.X. often chewed on the walls of his room and had removed "all the wallpaper within reach …."

¶4 Coates opined that P.X. was capable of rehabilitation because P.X. could "be chemically restrained" and "medication, antipsychotics c[ould] control his behavior." Coates specified that while P.X.'s developmental disability could not be cured, his obsessive compulsive disorder, autism and "behavioral problems" could "be treated and controlled" or "modified through the use of medication." Coates further stated, however, "whether or not that [behavior] is going to change in the long run, it's pretty unlikely." When asked whether this treatment was rehabilitative or would improve P.X.'s condition, Coates answered,

> Well, I haven't really seen any improvement over the last three or four years that I have evaluated him. … [I]f he does have a condition that is treatable, then it's only treatable in terms of protecting himself from his actions by having staff available to intervene and also at times the use of medication to kind of chemically restrain him when necessary.

¶5 On cross-examination, Coates described P.X.'s prognosis for the future as "[g]rim." Coates testified that P.X. was not "going to see any long-term improvements" and that "[t]he best we can hope is stabilization to some degree." Coates explained that P.X.'s intellectual disability, obsessive compulsive disorder, and autism "all combine to make treatment very difficult." When asked if P.X.'s treatment was rehabilitative, Coates replied that P.X.'s medications of "antipsychotics and antianxiolytics … can definitely help his mood" and "can control some aggressive behavior," but Coates stated that the medications, while beneficial, "are not going to be curative."

¶6 Doctor Nicholas Starr, a psychologist, has evaluated P.X. annually since March 2013. Starr testified that P.X.'s "intellectual disability w[ould] remain unchanged" but that his other conditions could be "controlled" with medication, extensive support, and staff involvement.[3] Starr observed that P.X.'s records demonstrated he did "really well with … assistance" in his current environment, but Starr also noted that P.X. had a "difficult time with changes" and that P.X. could be "very impulsive and dangerous" due to P.X.'s inability to understand or perceive danger. When asked whether P.X.'s treatment achieved "rehabilitation" under WIS. STAT. ch. 51, Starr replied, "Yes. As a matter of fact, his most recent records indicate this is the most improved he has been. He has slowly improved at this institution over time." Starr explained P.X. displayed improvement because P.X. "had less aggressive outbursts," was in need of fewer medications and restraints, and "ha[d] been more compliant" and less destructive.

¶7 When asked on cross-examination how P.X.'s behaviors had changed since 2013, Starr answered, "[P.X.] has adjusted to his environment. I think he has calmed down. That's the biggest part. He has made it how he likes by chewing things, by eating the paint, by getting used to the staff there over the years." Starr described P.X.'s treatment as "habilitative" because it kept P.X. "safe in a stable environment." However, Starr clarified P.X. "is not able to be rehabilitated because these functions did never exist. You cannot create intellectual capacity for someone that biologically does not have it." Starr

[3] Starr testified P.X.'s diagnoses of pica and obsessive compulsive disorder met the definition of mental illnesses, while P.X.'s autism and intellectual disability met the definition of developmental disabilities. *See* WIS. STAT. § 51.01(5), (13).

reaffirmed his opinion P.X.'s "condition" had improved due to "the highly-specialized treatment that he receives in that highly-specialized environment."

¶8 The circuit court concluded P.X. was a proper subject for treatment. The court first determined that P.X. "is not in this for rehabilitation … because Dr. Starr told us you have to have something to start with to go back to …." The court observed P.X. was not an individual who "was competent at one point [but] who became incompetent," and it instead focused on "evidence of improvement" from P.X.:

> [Doctor] Starr is the one who impressed upon me the conclusion that [P.X.] has gotten better. Now, is he ever going to be good enough to get back out in society? No. But they are trying "extraordinary measures" … to get him to the point where he can at least have more functionality, more independence; but he never will have those things.
>
> … I think that Dr. Starr is telling me he has seen this man for three years at least; that he notices a difference in him.

The court further relied on Starr's testimony in finding that P.X.'s conditions could be improved with treatment but also that P.X. could "be habiltiated but not rehabilitated, because you are not taking him back to a place he was before."

¶9 The circuit court entered orders extending P.X.'s commitment and authorizing involuntary medication for twelve months. P.X. appeals the order extending his commitment.

DISCUSSION

¶10 Review of a commitment order presents a mixed question of fact and law. The circuit court's findings of fact will not be set aside unless they are clearly erroneous. ***Outagamie Cty. v. Melanie L.***, 2013 WI 67, ¶38, 349 Wis. 2d

148, 833 N.W.2d 607. Application of those findings to the relevant statutory standard and interpretation of the statute are questions of law that we review independent of the circuit court's conclusions. ***Id.***, ¶39.

¶11 For an individual to be involuntarily committed, a petitioner must prove by clear and convincing evidence that he or she is mentally ill or developmentally disabled, a proper subject for treatment and dangerous. WIS. STAT. § 51.20(1)(a)1., (13)(e). The same standard applies when a petitioner seeks to extend an individual's involuntary commitment. *See* § 51.20(13)(g)3., (16)(d). Here, P.X. challenges only the circuit court's conclusion that he was "a proper subject for treatment" under § 51.20(1)(a)1.

¶12 Our supreme court first considered this issue in ***Fond du Lac County v. Helen E.F.***, 2012 WI 50, 340 Wis. 2d 500, 814 N.W.2d 179. There, the supreme court concluded that a subject individual who suffered from Alzheimer's disease was not a proper subject for treatment because she was medically incapable of "rehabilitation," as defined under WIS. STAT. § 51.01(17). ***Helen E.F.***, 340 Wis. 2d 500, ¶30. The court explained the circumstances under which "rehabilitation" was possible:

> If treatment will maximize the individual functioning and maintenance of the subject, but not help in controlling or improving their disorder, then the subject individual does not have rehabilitative potential, and is not a proper subject for treatment. However, if treatment will go beyond controlling activity and will go to controlling the disorder and its symptoms, then the subject individual has rehabilitative potential, and is a proper subject for treatment.

Id., ¶36 (internal alterations and citations omitted).

¶13 Applying this standard, the ***Helen E.F.*** court concluded that the evidence showed the subject individual's Alzheimer's disease was "incurable and untreatable" and that, at best, "her activity may be managed, [but] her disorder cannot be controlled" with medication. ***Id.***, ¶¶37-38. As the court explained, a protective placement under WIS. STAT. ch. 55 was more appropriate under such circumstances because WIS. STAT. ch. 51 "is designed to accommodate short-term commitment and treatment of mentally ill individuals, while ch. 55 provides for long-term care for individuals with disabilities that are permanent or likely to be permanent." ***Helen E.F.***, 340 Wis. 2d 500, ¶¶21, 39.

¶14 Our supreme court recently revisited ***Helen E.F.*** in ***Waukesha County v. J.W.J.***, 2017 WI 57, 375 Wis. 2d 542, 895 N.W.2d 783. J.W.J. argued the ***Helen E.F.*** holding on "rehabilitation" was flawed because, among other reasons, there was no apparent difference between treatments affecting "activities" or treatments affecting "behaviors" or "symptoms." ***J.W.J.***, 375 Wis. 2d 542, ¶¶27-28.

¶15 The supreme court declined to modify ***Helen E.F.*** per J.W.J.'s contention that "rehabilitation" only exists when treatment may improve a subject individual's disorder to the point an individual would experience "either a cure or a plateau beyond which no further improvement is possible." ***J.W.J.***, 375 Wis. 2d 542, ¶30. Rather, the court concluded J.W.J. was a proper subject for treatment because the evidence clearly and convincingly showed his treatment controlled the symptoms of his paranoid schizophrenia. ***Id.***, ¶¶47-48. In doing so, the supreme court also clarified the ***Helen E.F.*** definition of "rehabilitative potential":

> [T]he distinction we draw between rehabilitation and habilitation depends on whether the focus of the treatment is endogenous to the patient (symptoms) or exogenous (activities). A symptom is an expression of the disorder at

> work within the patient. It is the symptom itself that is harmful, and because it manifests from within, it is endogenous. On the other hand, an inability to engage in a specific activity, such as feeding oneself, grooming, dressing, etc., focuses on the manipulation of something exogenous to the patient—food, clothes, washing implements, and so on. The patient suffers harm because he cannot turn those external things to his benefit.
>
> Habilitation, therefore, refers to interventions that help a patient put exogenous things to his benefit (that is, activities). Rehabilitation, to the contrary, refers to improving the patient's condition through ameliorating endogenous factors such as symptoms and behaviors.

J.W.J., 375 Wis. 2d 542, ¶¶35-36.

¶16 In this appeal, P.X. concedes the permanent or incurable nature of his condition does not mean he is incapable of rehabilitation. *See* ***id.***, ¶32 (citing ***C.J. v. State***, 120 Wis. 2d 355, 360, 354 N.W.2d 219 (Ct. App. 1984)). Rather, P.X. contends that his treatment only maximized his "functioning and maintenance," as it did for the individual in ***Helen E.F.***, 340 Wis. 2d 500, ¶36, or provided "therapeutic value" instead of reaching his underlying conditions or disorders. In support, P.X. cites Coates' testimony that the medication only "chemically restrain[ed]" him and Starr's statement that P.X.'s treatment was primarily meant to "keep him safe." P.X. also emphasizes the circuit court's finding that P.X. would not be "good enough to get back out in society" as evidence that his treatment is fundamentally inconsistent with the objectives of a WIS. STAT. ch. 51 commitment.

¶17 We conclude the County presented clear and convincing evidence that P.X. was capable of "rehabilitation" and accordingly was a proper subject for treatment. Starr and the circuit court both used the term "habilitation" with respect to P.X.'s developmental disability, but the substance of Starr's testimony and the

court's findings was that P.X.'s treatment reached and improved "endogenous factors" caused by his other disorders. *See* ***J.W.J.***, 375 Wis. 2d 542, ¶36. In particular, Starr testified that while P.X.'s intellectual and developmental disabilities could not be cured, the symptoms of his pica and obsessive compulsive disorders were "controlled with medication." P.X. had fewer aggressive outbursts, and he had "been more compliant" and less destructive. Starr observed that P.X.'s condition and his resulting behavior had improved through treatment to the point that P.X. required fewer restraints and medications.

¶18 Although Coates expressed doubt about the effectiveness of P.X.'s treatment, Coates nevertheless opined that P.X. was capable of rehabilitation because his "behavioral problems" and altered moods stemming from his autism and obsessive compulsive disorder could be treated with medication. Similar to J.W.J., the evidence here showed that P.X.'s treatment "lessen[ed] the disordering" of P.X.'s thoughts and mood and, consequently, limited him from acting on his symptoms. *See* ***id.***, ¶40.

¶19 P.X. relies on ***Helen E.F.*** for the proposition that his treatment cannot provide him with rehabilitation because it purportedly affects only "anxiety and aggression." In ***Helen E.F.***, the supreme court noted that the secondary symptoms ("anxiety and aggression") associated with the individual's Alzheimer's disease could have only been "ameliorated with psychotropic medication" and could not be treated. ***Helen E.F.***, 340 Wis. 2d 500, ¶38. However, the evidence here showed the "aggressive" behaviors stemming from P.X.'s disorders, other than from his intellectual/developmental disabilities, could be treated with medication. Unlike the individual's treatment in ***Helen E.F.***, P.X.'s treatment did not merely "palliate some of the minor aspects" of these other conditions or "reach only habilitative matters"; it affected and reduced the symptoms caused by P.X.'s

other disorders rather than merely restraining or enabling his activities. *See* ***J.W.J.***, 375 Wis. 2d 542, ¶38.

¶20 P.X. further contends the circuit court's finding that he may not be able to independently function and live in society means he can only be subject to a WIS. STAT. ch. 55 protective placement instead of a WIS. STAT. ch. 51 commitment. P.X. observes the ***J.W.J.*** court cited evidence showing J.W.J.'s treatment was "so effective at controlling his symptoms that he can live in society … as an outpatient" in support of its conclusion that J.W.J was a proper subject for treatment. ***J.W.J.***, 375 Wis. 2d 542, ¶40. However, the fact that P.X. may not be able to independently function and live in society does not control the outcome of our decision. As noted above, P.X. concedes the permanent or incurable nature of his condition does not mean he is incapable of rehabilitation. The circuit court relied upon Starr's testimony that P.X. was a proper subject for treatment because the treatment improved the behavior caused by P.X.'s disorders, and it properly concluded P.X. was a proper subject for treatment under a ch. 51 commitment. There may be several aspects of P.X.'s disorders that require a ch. 55 placement, and he is indeed currently subject to one. However, nothing in ***Helen E.F.*** or ***J.W.J.*** forecloses the possibility that an individual may be simultaneously placed under both ch. 51 and ch. 55 orders. *See* ***J.W.J.***, 375 Wis. 2d 542, ¶¶51, 53 (Abrahamson, J., concurring) (explaining "there is substantial overlap and similarity between some aspects of the two chapters," but despite that the chapters "ostensibly serve different purposes").

¶21 Finally, P.X. raises an argument that involuntary medication may be administered pursuant to his WIS. STAT. ch. 55 protective placement without the need for a WIS. STAT. ch. 51 involuntary commitment. This issue appears to be intertwined with his above argument that he is more properly subject to only a

ch. 55 placement order. However, we need not address this issue. Regardless of whether P.X. could be administered medication involuntarily under a ch. 55 placement order, we conclude he is a proper subject for treatment under ch. 51. Accordingly, we affirm the commitment order on that basis.

By the Court.—Order affirmed.

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