COURT OF APPEALS
DECISION
DATED AND FILED

June 10, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-0197 **Cir. Ct. No. 01-ME-000023**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF NOREEN O.:

BROWN COUNTY,

PETITIONER-RESPONDENT,

V.

NOREEN O.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Brown County: JOHN D. KOEHN, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Noreen O. appeals an order recommitting her in a mental health placement as well as an order denying her motion to dismiss the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

WIS. STAT. ch. 51 recommitment proceeding. Noreen contends that the trial court should have dismissed the County's petition for recommitment because the timing of the trial notice hampered her ability to put on a defense and because one of the court-appointed psychiatrist's evaluations did not conform to statutory requirements. We reject Noreen's arguments and affirm the orders.

Background

¶2 While the parties devote considerable space to recounting the entire recommitment procedure, such recitation is unnecessary. The relevant factors are as follows: On June 13, 2002, Brown County petitioned for Noreen's recommitment based on a request from her caseworker, Joan Groessl. Noreen's prior commitment was scheduled to expire July 26.

¶3 Noreen filed a jury demand on July 12. Pursuant to WIS. STAT. § 51.20(11)(a), her trial had to be held by July 26. The parties were notified on July 22 that the trial was scheduled for July 24. Noreen served one of her potential witnesses, Laura Thoma, with a subpoena but was unable to locate a second witness. At the beginning of the trial, Noreen moved to dismiss claiming she had insufficient time to serve Thoma. The trial court denied the motion and adjourned to see if Thoma could be located and offered to allow Thoma to appear by phone. Later that afternoon, Noreen renewed her motion to dismiss because Thoma was still unavailable. The trial court inquired as to the nature of Thoma's testimony but concluding it would be hearsay, denied Noreen's motion.

¶4 The trial proceeded and the jury found Noreen mentally ill, a danger to herself or others, and a proper subject for treatment. The court ordered Noreen recommitted, and Noreen appeals.

I. Appearance of Witnesses

¶5 The primary responsibility for ensuring witnesses' presence in court rests with the parties, not the court. ***Elam v. State***, 50 Wis. 2d 383, 389, 184 N.W.2d 176 (1971). Whether to continue a case to secure a witness's appearance is committed to the trial court's discretion. ***Id.*** We conclude that the same discretionary standard applies to determine whether to dismiss a case because a witness for a defendant or a respondent has not appeared. *See* ***id.***

¶6 Factors a trial court should consider include whether the moving party is guilty of neglect in endeavoring to procure the witness's attendance, whether the absent witness's testimony is material, and whether there is a reasonable expectation that the absent witness can be located. ***Id.*** at 390. Here, the parties knew where Thoma was, so the third factor is satisfied. Examining the remaining factors, we conclude that the trial court did not err when it declined to dismiss the case.

A. Neglecting to Secure a Witness's Appearance

¶7 Noreen argues first that she had inadequate time to serve her witnesses subpoenas.[2] The record belies this. She was able to personally serve Thoma on July 23. Noreen's real complaint is that Thoma did not honor the subpoena by appearing for the trial.

[2] Noreen does not further complain about her inability to locate the second witness.

¶8 Thoma refused to appear because she did not receive her witness fee in advance.[3] Pursuant to WIS. STAT. § 885.06, "no person is required to attend as a witness in any civil … proceeding unless witness fees are paid or tendered … to the person for one day's attendance and for travel." Noreen contends the failure to prepay Thoma's witness fee is the County's fault. She believes the County should pay the fee and, accordingly, requests payment from the register in probate. The County disavows responsibility for the fee.

¶9 Noreen cites to no authority that the County should be responsible for the witness fee at all, much less its prepayment. *See* WIS. STAT. RULE 809.19(1)(e). The County concedes that under ***State ex rel. Chiarkas v. Snow***, 160 Wis. 2d 123, 141, 465 N.W.2d 625 (1991), it is responsible for Noreen's attorney fees, but suggests it is not responsible for other costs. We conclude that the County is ultimately responsible for the witness fee, but that it is not responsible for prepaying the fee.

¶10 Both parties overlook WIS. STAT. § 51.20(18), entitled "FEES OF EXAMINERS, WITNESSES; EXPENSES OF PROCEEDINGS." Section 51.20(18)(b) establishes that witnesses are entitled to the same fee as witnesses in other cases. Section 51.20(18)(c), however, states:

> Expenses of the proceedings from the presentation of the … petition for commitment to the conclusion of the proceeding *shall be allowed by the court and paid by the county* from which the subject individual is detained, committed or released, in the manner that the expenses of a

[3] Noreen clouds the issue by suggesting Thoma did not comply because there was no time for Thoma to notify her employer that she needed to leave work. This is unsupported by anything in the record. Noreen then informs us that when she called Thoma's place of employment, a co-worker informed her that Thoma was not coming because she did not have twenty-four hours' notice. This hearsay is also unsupported by the record.

> criminal prosecution are paid, as provided in s. 59.64 (1). (Emphasis added.)

The rule is that a more specific statute controls over a broad statute. ***Fabyan v. Achtenhagen,*** 2002 WI App 214, ¶10, 257 Wis. 2d 310, 652 N.W.2d 649. Regardless of WIS. STAT. § 885.06's general requirement for prepayment, then it is WIS. STAT. § 59.64(1) that details the County's obligation for prepaying Thoma's witness fee. Interpretation of the statute is a question of law. ***Morris v. Juneau County***, 219 Wis. 2d 543, 550, 579 N.W.2d 690 (1998).

¶11 We conclude that a witness fee is an "expense of the proceeding" because its payment is directed under WIS. STAT. § 59.64(1)(g); the statute would not include instructions for payment of something that does not count as an expense. Section 59.64(1)(g) provides a procedure for paying the fee directly to the witness. As applicable in this case, the register in probate is to issue to the witness an order directing the county treasurer to pay the fee. WIS. STAT. § 59.64(1)(g)1. The order, however, must contain the witness's name, the time served, the number of miles the person traveled, the amount of compensation to which the person is entitled, the title of the action, the capacity in which the person served, and the date of service. ***Id.*** It will normally be impossible for the register in probate to accurately complete the order to the treasurer until *after* the witness has appeared.[4] Otherwise, the register in probate would be speculating as to the amount of time served, actual mileage traveled, the full amount due and possibly even the date of service.

[4] We do not intend to hold that the County can never prepay fees. Indeed, there may be some circumstances where the County knows for certain the mileage and dates, perhaps because the witness has appeared before and because a trial must proceed on the scheduled date. Because of the requirements of the statute, however, we cannot conclude that the County *must* prepay.

¶12 The accuracy of the order should not be taken lightly because under WIS. STAT. § 59.64(1)(g)4, any witness endorsing an order, untrue in respect to anything material, is subject to penalties under WIS. STAT. § 946.12 for misconduct in public office, a Class I felony punishable by a $10,000 fine, three and one-half years in prison, or both. WIS. STAT. § 939.50(3)(i). Witnesses are specifically to be reimbursed for every mile they travel, WIS. STAT. § 814.67(1)(c), and every day they appear, WIS. STAT. § 814.67(1)(a)1, so these are material elements to the order for payment. Therefore. the order cannot be completed until after the witness appears and verifies the mileage and length of service.[5]

¶13 Here, the County suggested Noreen's attorney should have prepaid the fee. The court suspected and the attorney answered that an attorney may not advance money for a client under the rules of professional conduct.[6] The court and the attorney were in error. While SCR 20:1.8(e) prohibits an attorney from providing "financial assistance to a client in connection with pending or contemplated litigation," the rule specifically allows attorneys to advance court costs and expenses of litigation.[7] Moreover, it is the custom and practice of the

[5] Because WIS. STAT. § 51.20(18) directs the County to pay for the costs of the proceeding, we decline to discuss the County's argument regarding WIS. STAT. § 885.10.

[6] We note that this argument was only to the trial court. Noreen offers no argument on appeal as to why her trial attorney failed to advance Thoma's fee.

[7] SUPREME COURT RULE 20:1.8 provides:

> (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter ….

profession to advance these costs and seek reimbursement later. Such custom becomes particularly salient when time is of the essence as Noreen claims it was here.

¶14 When the court rejected the idea of the attorney advancing the fee, the County answered that Noreen should have prepaid it. Noreen objected, claiming impossibility because the "county" controlled her money. In reality, Noreen has a representative payee who controls her finances, wholly independent of the register in probate to whom Noreen applied for the funds, and Noreen knew who and where the payee was. Noreen offered no explanation as to why she did not attempt to procure the funds from the payee.

¶15 In sum, WIS. STAT. § 51.20(18)(c) obligates the County to pay witness fees. However, actual payment is controlled by WIS. STAT. § 59.64(1)(g), which directs how an order for payment should be completed. Because a materially false order may be punishable as a felony, the order cannot be completed by the county official until after a witness has appeared. The County cannot be required to prepay witness fees. Thus, it was incumbent upon Noreen or her attorney to advance the fee to secure Thoma's appearance and seek reimbursement later.[8]

[8] WISCONSIN STAT. § 59.64(1)(g) also directs how attorneys are to be reimbursed when the County owes them compensation; amounts for miscellaneous expenses, such as prepaid witness fees, would be included in the "amount of compensation" category.

B. Admissibility of the Absent Witness's Testimony[9]

¶16 Noreen claimed that Thoma would testify that she had never heard of Noreen having violent episodes, nor had she ever been advised to protect herself from Noreen. Although the trial court erred by applying the incorrect exclusionary rule, we nonetheless conclude that the record reveals a rational basis for the court's decision and Noreen suffered no prejudice. *See* WIS. STAT. § 901.03(1).[10]

¶17 The court concluded that Thoma's testimony would be hearsay and excluded it accordingly. The decision to admit or exclude testimony is a trial court's discretionary decision. ***Johnson v. Kokemoor***, 199 Wis. 2d 615, 635-36, 545 N.W.2d 495 (1996). We disagree with the trial court's conclusion that

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[9] The County argues that Noreen was not prejudiced because she was offered the chance to temporarily extend her commitment to effectuate service of witnesses. We reiterate that her witness was, in fact, served. The County relies on ***In re G.O.T.***, 151 Wis. 2d 629, 445 N.W.2d 697 (Ct. App. 1989), to suggest Noreen could have extended her commitment. In ***G.O.T.***, the subject filed a jury demand. However, the subject's commitment was scheduled to expire before the end of the fourteen-day period in which the court must hold a trial. We concluded that the trial court could temporarily extend commitment to coincide with the fourteen-day period. Once that window expired, commitment could not be extended any further to accommodate the trial. We did not lift the requirement that a jury trial, once demanded, must be held within fourteen days.

Noreen's commitment would not have been extended; the expiration of the jury window and her actual commitment coincided. At most, Noreen's trial could have been postponed forty-eight hours until July 26, the end of the fourteen-day window.

We acknowledge that Noreen's counsel's failure to advance the witness fee potentially implicates an ineffective assistance of counsel claim. However, we conclude that any error in Thoma's failure to appear did not result in prejudice to Noreen. *See* ***State v. Parrish***, 2002 WI App 263, ¶38, 258 Wis. 2d 521, 654 N.W.2d 273 (A defendant must establish both that counsel was deficient and that the deficiency resulted in prejudice.).

[10] WISCONSIN STAT. § 901.03(1) states: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected…." Without prejudice, no substantial rights are implicated.

Thoma's anticipated testimony was hearsay. Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." WIS. STAT. § 908.01(3). Thoma was not being called to testify regarding any statements made to her, but rather that there were no statements. Thoma's testimony simply would not have been hearsay.

¶18 A trial court's discretionary decision to admit or exclude evidence will not be upset on appeal if it has a "reasonable basis" and was made in accordance with accepted legal standards based on facts of record. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). If the rationale is in error, but the decision is nonetheless supported by the record, we may still affirm the trial court's decision. *See* ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985). We conclude that Thoma's testimony would have been cumulative and could have been excluded on that basis. *See* WIS. STAT. § 904.03.

¶19 Noreen wanted to offer Thoma's testimony to show "another side" to her personality, ostensibly that she was not violent and therefore not a danger to anyone. However, two other witnesses testified to this effect. Joan Groessl, Noreen's caseworker, testified on cross-examination that Noreen was not aggressive toward others. Chandra Bommankanti, a psychiatrist for Brown County Mental Health Center and Noreen's supervising psychiatrist,[11] testified that Noreen was doing well and was not overtly dangerous. Because Thoma's testimony would simply reiterate opinions already offered and no prejudice

[11] Bommankanti was the treating psychiatrist, as opposed to the two doctors who conducted independent, court-ordered evaluations for the recommitment proceedings.

resulted from Thoma's failure to appear, we conclude that the timing of the trial notice was sufficient to allow Noreen to present her defense.

II. Independent Medical Examinations

¶20 Noreen claims that Dr. George Soncrant's examination did not fulfill statutory requirements and the petition for recommitment should therefore have been dismissed.[12] This requires us to interpret WIS. STAT. § 51.20(9)(a)5 so as to determine what its requirements are. Interpretation of a statute is a question of law we review de novo. ***Jungbluth v. Hometown, Inc.***, 201 Wis. 2d 320, 327, 548 N.W.2d 519 (1996).

¶21 Upon a finding that there is probable cause to believe the allegations in a WIS. STAT. ch. 51 petition, the court must appoint two doctors to examine the subject. *See* WIS. STAT. § 51.20(9)(a)1. Section 51.20(9)(a)5 states that the doctors "shall personally observe and examine the subject individual … and satisfy themselves, if reasonably possible, as to the individual's mental condition, and shall make independent reports to the court." Noreen contends that because Soncrant did not "personally observe" her, his examination is invalid and that without two valid exams, the petition for commitment cannot be sustained.

¶22 While it is undisputed that Soncrant was unable to personally observe Noreen, it is also undisputed that Noreen created this situation.[13] Under

[12] Interestingly, Noreen never contends the ultimate conclusion that she is mentally ill is somehow contrary to the evidence.

[13] Soncrant writes, "[Noreen] refused to come out of her room to talk to me. She said, 'I have the right not to talk.' … There was no examination because of the patient's refusal to be interviewed."

WIS. STAT. § 51.20(9)(a)4, the subject has the right to remain silent and not speak to the examining physician. While we would not fault Noreen for declining to answer any questions he posed to her, she refused to even see him.

¶23 Noreen's interpretations of WIS. STAT. §§ 51.20(9)(a)4 and 5 are too literal and would allow any subject to defeat a petition for commitment simply by refusing to cooperate with the examining physician. We avoid reading statutes in a manner that creates absurd results. ***In re G.O.T.***, 151 Wis. 2d 629, 634, 445 N.W.2d 697 (Ct. App. 1989).

¶24 Our conclusion does not give examiners carte blanche to make determinations only on treatment records. The examiners must be able to render their opinions to a reasonable degree of medical certainty. WIS. STAT. § 51.20(9)(a)5. There may be situations where examiners cannot meet a patient face-to-face, and that degree of certainty may be impossible to obtain.

¶25 However, we conclude that WIS. STAT. § 51.20(9)(a)5 does not compel mental health professionals to physically force an uncooperative patient into an examining room to meet with an examiner, particularly when, as here, the patient has a known history of refusing to cooperate with examiners. We are equally satisfied that § 51.20(1)(a)5 does not require these professionals to entrap a patient in his or her own room to accommodate an examiner.

¶26 Finally, if Noreen believed the report of an examiner with whom she refused to cooperate would damage her case, she had the right to request a third, independent exam. WIS. STAT. § 51.20(9)(a)3. She could have opted to secure the opinion of a physician with whom she would have cooperated. We will not, however, allow her willful behavior to defeat an otherwise conforming report.

By the Court.—Orders affirmed.

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