

EMERGENCY MOTION

STATE OF WISCONSIN

SUPREME COURT

In re the Condition of Fransway,

COUNTY OF CHIPPEWA,

Petitioner,

v.

Chippewa County Case No.

19ME154

COREY R. FRANSWAY,

Respondent.

FRANSWAY'S EMERGENCY MOTION

FOR PROMPT CHAPTER 51 RECOMMITMENT JURY TRIAL

(RELIEF REQUESTED BY MAY 10, 2020)

Corey R. Fransway, appearing specially by the undersigned attorney and reserving the right to challenge the court's jurisdiction, moves this Court for An Order under the 6th Amendment to the United States Constitution and Art. I § 5 of the Wisconsin Constitution and Wis. Stat § 51.20(11)(a) excepting Corey Fransway's

pending case from the Supreme Court's Order 20-02, filed March 30, 2020, suspending jury trials and tolling time limits for civil jury trials in this state, and an Order requiring that he receive a jury trial on his Chapter 51 recommitment hearing in Chippewa County Case No. 19ME-154.

This Court has the authority to use its inherent supervisory powers to grant an exception to its own Order. As to Chapter 51 involuntary civil commitment cases, the United States and Wisconsin Constitutions require that a person whose personal liberty interest is at stake not be held without due process.

Corey Fransway seeks an Order requiring that his jury trial be held on or before May 14, 2020. If the requested relief is not granted, Fransway will be harmed by being held in custody, involuntarily, without due process, and thus suffer an injury to his liberty interest.

PROCEDURAL BACKGROUND

On November 21, 2019, the Hon. James Isaacson, Circuit Court Judge for Chippewa County, committed the above-named Corey R. Fransway to the care of the Chippewa County Human Services Board for a period of six months, with the least restrictive placement found to be a locked inpatient unit. The Court ordered that Fransway may be forced to ingest psychotropic drugs. Subsequently, Fransway was released from a locked inpatient unit to outpatient treatment. On January 16, 2020, pursuant to a new emergency detention petition, Fransway was

detained at Sacred Heart Hospital in Eau Claire. Pursuant to an attachment signed by the circuit court on January 19, 2020, Fransway was transported from Sacred Heart Hospital to Gilman Phoenix House, a "Transitional Recovery Placement" in Taylor County. Fransway was later taken from Gilman Phoenix House to Gunderson Lutheran Hospital in La Crosse. From Gunderson Lutheran, Fransway was transported pursuant to an attachment signed by the circuit court on April 9, 2020 to the Trempealeau County Mental Health Center in Whitehall, WI, where he remains presently. It is anticipated that he will be held at TCMHC indefinitely pending a jury trial, where he will continue to be involuntarily medicated.

On April 15, 2020, Chippewa County, by its Corporation Counsel, filed an Application for Recommitment, as to which Fransway, by counsel on April 21, 2020 demanded a trial by jury.

As of April 29, 2020, Fransway has been in custody for 104 days. At this stage, unless the requested relief is granted, Fransway could either be held indefinitely pending a jury trial, or compelled to involuntarily waive his right to a jury trial.

RELIEF REQUESTED

Corey R. Fransway requests that this Court exempt the instant case from its Order suspending civil jury trials and order that the Chippewa County Circuit Court shall conduct a jury trial of this case within normal time limits as set by Wis. Stat. § 51.20(11)(a), or in any event no later than May 15, 2020.

BASIS FOR THE COURT'S AUTHORITY

This Court has superintending and administrative authority over all courts of the State of Wisconsin. Wis. Const. art. VII, § 3. This Court's Order 20-02, filed March 30, 2020, provides the basis for the suspension of jury trials which is the subject of the instant motion. This Court necessarily has the power to review its own orders. This motion asks the court to construe Wis. Stat. § 51.20; the Court has the power to construe statutes. *See Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 2018 WI 75, ¶ 50, 382 Wis. 2d 496, 541, 914 N.W.2d 21, 43.

ANALYSIS OF PROBLEM

Fransway is asking this Court to exempt the instant case from its Order suspending civil jury trials in this state on two independent but related grounds: First, because the Wisconsin Legislature, in Wis. Stat. § 51.20(11) set strict statutory time limits for the conduct of a jury trial in involuntary mental commitment cases, which this Court does not have the power to rewrite; and second, because Fransway's Constitutionally-protected interest in his liberty will be violated if the requested relief is not granted.

The Circuit Court found Fransway to be mentally ill at his final hearing, although this case originated as a three-party petition in which Fransway's siblings alleged that he was an alcoholic. Court-ordered evaluations noted his alcohol and drug dependency issues and emphasized his need for "structure." Court-appointed

examiners determined, and the Circuit Court found that Fransway was dangerous to himself based on attempts at self-harm and on the so-called “fifth standard,” that he his condition may deteriorate if treatment were withdrawn. There was no finding or allegation that he is dangerous to others.

1. In Wis. Stat. § 51.20(11), the legislature set facially clear mandatory time limits which this Court cannot revise.

Wis. Stat. § 51.20(11) provides in relevant part that “If before involuntary commitment a jury is demanded by the individual against whom a petition has been filed under sub. (1) ... the court shall direct that a jury of 6 people be selected to determine if the allegations specified in sub. (1) (a) or (ar) are true. ... If a jury trial demand is filed later than 5 days after detention, the final hearing shall be held within 14 days of the date of demand.”

The question whether a time limit is mandatory or directory is a question of law. *State v. Olson*, 2019 WI App 61, ¶ 10, 389 Wis. 2d 257, 263, 936 N.W.2d 178, 181. The time limit set forth in the statute is mandatory rather than directory. In construing Wis. Stat. § 51.20(7)(c), a closely related statute to the one at issue here, and finding its time limit mandatory, the Court of Appeals, in *State ex rel., Lockman v. Gerhardstein*, 107 Wis. 2d 325, 329, 320 N.W.2d 27, 29 (Ct. App. 1982) relied on this Court’s holding in *Karow v. Milwaukee Cty. Civil Serv. Comm’n*, 82 Wis. 2d 565, 571, 263 N.W.2d 214, 217 (1978) that “a statute

prescribing the time within which public officers are required to perform an official act is merely directory, unless it denies the exercise of power after such time, or the nature of the act, or the statutory language, shows that the time was intended to be a limitation” (internal citation omitted).

Karow set forth a series of factors to be considered in determining whether the timeline set by the Legislature in a statute is directory or mandatory, including: “[t]he omission or prohibition of a penalty, the consequences resulting from one construction or the other, the nature of the statute, the evil to be remedied, and the general object sought to be accomplished by the legislature.” *Karow*, 82 Wis. 2d at 572 (citing cases; internal citations and quotation marks omitted).

The use of the word “shall” rather than “may” in a statute will cause the statute to be construed as mandatory if necessary to carry out the intent of the legislature. *State v. R.R.E.*, 162 Wis. 2d 698, 707, 470 N.W.2d 283, 286 (1991) (internal citations omitted).

The paramount factor in cases relating to Wis. Stat. § 51.20 is the consequence resulting from the construction of the time limit as merely directory: Fransway will remain in custody without a jury trial. Article 1 of the Fourteenth Amendment to the U.S. Constitution forbids any State from depriving any person of liberty without due process of law. A person’s liberty interest includes, centrally, freedom from bodily restraint. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 529, 124 S. Ct.

2633, 2646, 159 L. Ed. 2d 578 (2004). In determining the amount of process due to a person whose liberty interest is at stake, the citizen's liberty interest "that will be affected by the official action" is to be weighed "against the Government's asserted interest, including the function involved and the burdens the Government would face in providing greater process." *Hamdi*, 542 U.S. at 528, citing *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotations omitted). "In our society liberty is the norm, and detention without trial is the carefully limited exception." *Hamdi*, 542 U.S. at 529, citing *United States v. Salerno*, 481 U.S. 739, 755, 107 S. Ct. 2095, 2105, 95 L. Ed. 2d 697 (1987).

In this instance the nature of the statute, the evils against which it is directed, and the general object it seeks to achieve are difficult to prise apart in a meaningful analytical way. Wis. Stat. § 51.20, dealing with involuntary civil commitments, is directed against the danger that people with untreated acute mental health, developmental disability, or addiction issues might pose, principally to themselves, due to those issues. It seeks to achieve the treatment of the person to the point that such a risk subsides. It is a civil statute—not a criminal statute implying moral censure. It creates a statutory right in an executive agency of this State to effectively sue a private citizen in order to temporarily deprive that person of certain liberties only insofar as that is necessary to bring that individual back into health.

In analyzing a statute to determine whether it is directory, the State interest at issue should be limited to the interest expressed in the statute, not the interest implicated in the State's expressed purpose for the delay. The Legislature expressed the following policy as to Chapter 51 of the Wisconsin Statutes:

(1) It is the policy of the state to assure the provision of a full range of treatment and rehabilitation services in the state for all mental disorders and developmental disabilities and for mental illness, alcoholism and other drug abuse. There shall be a unified system of prevention of such conditions and provision of services which will assure all people in need of care access to the least restrictive treatment alternative appropriate to their needs, and movement through all treatment components to assure continuity of care, within the limits of available state and federal funds and of county funds required to be appropriated to match state funds.

(2) To protect personal liberties, no person who can be treated adequately outside of a hospital, institution or other inpatient facility may be involuntarily treated in such a facility.

Wis. Stat. § 51.001

This is an explicit statement by the Legislature that the purpose of, inter alia, Wis. Stat. § 51.20 is to provide treatment for an allegedly mentally ill person in a

manner consistent with that person's personal liberty. Wis. Stat. § 51.20 supports this policy implicitly as well: It requires: a "substantial probability" of a range of serious negative outcomes (death, physical impairment, serious physical injury) proven to various degrees before the State may act, Wis. Stat. § 51.20(1)(a), (7), and (13); the appointment of an attorney for the person regardless of indigency, Wis. Stat. § 51.20(3); a jury trial if requested, Wis. Stat. § 51.20(5) and (11); and that the person be advised of his or her right to remain silent as to the court-ordered examination, Wis. Stat. § 51.20(9)(a)4.

The range of possible harms that might be caused by a person's alleged mental illness as identified by the statute are primarily harms to the person themselves. To the extent that a person may be detained under Wis. Stat. § 51.20 based on dangerousness to another member of the public, the statute requires evidence of "recent *homicidal* or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior *and serious physical harm* to them, as evidenced by a recent *overt* act, attempt or threat to do *serious* physical harm." Wis. Stat. § 51.20(1)(a)2.b. (emphasis added).

The Legislature did not intend that individuals be involuntarily detained for longer than necessary: "In recognition of the significant liberty interest an individual has in living where and under what conditions he or she chooses, the legislature has imposed tight time limits in connection with involuntary detention

proceedings." *In re Commitment of Stevenson L.J.*, 2009 WI App 84, ¶11, 320 Wis. 2d 194, 768 N.W.2d 223 citing *Kindcare, Inc. v. Judith G.*, 2002 WI App 36, ¶12, 250 Wis. 2d 817, 640 N.W.2d 839).

Each of the *Karow* factors leans in favor of finding that the statute sets forth a mandatory, not directory, time limit: The statute uses the word "shall." The statute deals with the infringement of a person's fundamental right to liberty. The expressed and implied legislative purpose of the statute is to protect that same person whose fundamental rights it proposes to infringe.¹

¹ The foregoing analysis is consistent with what the United States Supreme Court found to be the balance of interests in involuntary mental commitments:

[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. Whether we label this phenomena "stigma" or choose to call it something else is less important than that we recognize that it can occur and that it can have a very significant impact on the individual.

The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

This Court cannot rewrite or construe Wis. Stat. § 51.20 in a manner inconsistent with its plain meaning and expressed purpose. It has historically refused to rewrite statutes that are clear on their face in a manner inconsistent with their plain meaning and so to “usurp the role of the Legislature.” *State v. Weidner*, 2000 WI 52, ¶ 39, 235 Wis. 2d 306, 323, 611 N.W.2d 684, 692. Nor should it do so here.

2. Fransway has a Constitutionally-protected liberty interest that will be violated by Order 20-02 if he is deprived of his right to a jury trial within those mandatory time limits.

As noted above, Fransway has a historically-recognized, textually clear interest in being free from restraints on his liberty without due process. *Hamdi*, 542 U.S. at 529. As a threshold matter, a person who is subject to involuntary mental health commitment is entitled to due process in order to ensure that the nature and duration of that commitment is reasonably related to its purpose. *McNeil v. Dir., Patuxent Inst.*, 407 U.S. 245, 92 S. Ct. 2083, 32 L. Ed. 2d 719 (1972).

In Wisconsin, the Legislature has determined that a person subject to such a commitment may vindicate their right to such due process through a six-person jury trial. Wis. Stat. § 51.20(11).

Addington v. Texas, 441 U.S. 418, 425–26, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323 (1979) (internal citations omitted).

The undersigned cannot point to well-developed jurisprudence regarding the nature of an involuntarily civilly, as opposed to criminally, detained person's right to speedy disposition of their case. Nevertheless, principles from Sixth Amendment speedy-trial jurisprudence, which apply to the States through the Fourteenth Amendment to the United States Constitution, and which inform general due-process principles under the Fourteenth Amendment, offer some guidance. Because Fransway is presently detained and his liberty interest is being violated, the comparison is apt.

Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) sets forth a test of the factors which must be balanced when a court attempts to determine whether a person's right to a speedy trial has been violated. These factors include the length of the delay, the reasons for the delay, a person's assertion of the right, and the prejudice to the person. *Id.* at 530.

At this stage, the length of the delay is effectively indeterminate. *See* Order 20-02, Appendix A, filed March 30, 2020 (suspending Chapter 51 jury trials until further order of the Court). The reason for the delay is set forth in the relevant Order, *viz.*:

On March 24, 2020, the Wisconsin Department of Health Services, at the direction of Governor Evers, issued a "Safer at Home" order requiring Wisconsin residents to stay at home unless they must perform certain exempted activities. *See* Emergency Order #12,

"Safer at Home." All non-essential businesses and operations "are required to cease all activities located within Wisconsin." The Safer at Home Order excepts the performance of "essential activities" by all residents of the state, the operation of "essential businesses and operations," and the operation of "essential governmental functions," which includes the operation of the Wisconsin court system. Even while performing those exempt activities, however, the Safer at Home Order requires people "as reasonably possible [to] maintain social distancing of at least six (6) feet from any other person."

[***]

In the exercise of its administrative and superintending authority, the Supreme Court has determined that, in light of the existing public health emergency declared in connection with the COVID19 pandemic, and to protect the health of the public and the individuals who work for the courts of this state, it is necessary to limit temporarily the number of individuals who are physically present within the courts of this state and to temporarily modify certain procedures to ensure that the essential operations of the courts continue in an appropriate manner during the present public

health emergency.

Id. at *1–3.

In this Motion, Fransway asserts his right to a speedy trial. He had no earlier procedural opportunity in which to do so.

The prejudice to Fransway if he is detained is extreme: He will be subjected to involuntary confinement, involuntary medication, and the social stigma attached to those living in mental hospitals. *See Addington*, 441 U.S. at 425–26.

These factors weigh in favor of granting Fransway the requested jury trial. The length of the delay otherwise is indefinite. The prejudice to Fransway is great. He has asserted his right. Meanwhile, the reasons for the delay are general. They do not relate to specific issues involved in maintaining social distancing in the Chippewa County Courthouse. They do not identify how the conduct of an essential function of government is necessarily rendered impossible. They do not explain how they are the least-restrictive or most narrowly-tailored means to achieve a compelling government outcome without infringing upon Fransway's rights.

NATURE OF PROBLEM

This is an existing issue, which has been raised at the trial court. A hearing is scheduled in this case for May 14, 2020 at 10:30 AM in the trial court.

PRAYER FOR RELIEF AND PROPOSED ORDER

Wherefore, Corey Fransway, through the undersigned counsel, respectfully moves this Court for an Order as follows:

“This Court, upon motion of Corey Fransway and being fully advised in the premises, hereby ORDERS that the Chippewa County Circuit Court shall conduct a six-person jury trial of the recommitment petition in the Matter of Corey Fransway, 19ME-154 by no later than May 14, 2020.”

Dated 29 April 2020.

OFFICE OF THE PUBLIC DEFENDER

Electronically signed by

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