

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

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OF WISCONSIN**

In re the Commitment of THOMAS L TREADWAY:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

Case No. 2015AP0591

THOMAS L TREADWAY,

Respondent-Appellant.

ON NOTICE OF APPEAL FROM AN ORDER FOR INVOLUNTARY
MEDICATION ORDERED AND ENTERED BY MILWAUKEE COUNTY
CIRCUIT COURT BRANCH 22, THE HONORABLE TIMOTHY
WITKOWIAK PRESIDING

RESPONDENT-APPELLANT'S BRIEF AND APPENDIX

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RESPONDENT-APPELLANT'S BRIEF

ISSUE PRESENTED

WAS THE EVIDENCE TO SUPPORT THE ORDER FOR INVOLUNTARY
ADMINISTRATION OF PSYCHOTROPIC MEDICATION TO TREADWAY?

The trial court answered this question in the affirmative.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested as the respondent-appellant (Treadway) believes that the briefs of the parties will fully meet and discuss the issues on appeal. Publication is not warranted as this case involved the application of well-settled case law to a unique set of facts.

STATEMENT OF THE CASE

On November 16, 1999, Treadway was committed as a sexually violent person (SVP) under Chapter 980 (22). On July 30, 2012 this court affirmed the original commitment and order (48). Treadway has remained in a secure treatment facility ever since this matter was filed in 1998. Involuntary medication orders were entered on August 22, 2002 (60); September 12, 2003 (64); January 17, 2008 (100); February 11, 2009 (109); and February 10, 2010 (117). None of those orders were appealed.

The involuntary medication order that is the subject of this appeal was commenced on October 27, 2014 by the filing of a physician's report by Dr. Steven Weiler for medication or treatment (143). A hearing was held before Circuit Judge Timothy Witkowiak on November 6, 2014 (150) which resulted in the entry of an order for involuntary medication (146; App. 101-102).

Treadway subsequently filed a notice of intent to pursue post-commitment relief and the undersigned attorney was appointed to represent him (147-2). On

March 23, 2015, Treadway placed this matter before this court by filing a notice of appeal 147-1) directed at the involuntary medication order.

STATEMENT OF FACTS

The only report authored by a treating physician prior to the hearing on November 6, 2014 was Dr. Stephen Weiler's report dated October 24, 2014 (143). The report began by stating in conclusory and unspecific terms that TREADWAY was mentally ill and met the criteria for involuntary administration of psychotropic medications (143: 1). It also outlined Treadway's behavior history (143: 2-3). The report did not state any efforts made to discuss with Treadway the advantages, disadvantages and alternatives to medication.

At the hearing on November 6, 2014, ASPD Melissa Fitzsimmons stated that Lisa Conway told her that morning that Treadway was not going to attend the hearing by video but wanted to contest the hearing (150: 3). Dr. Weiler confirmed that Fitzsimmons's statements were accurate (150: 4-5).

Dr. Steven Weiler, a Sand Ridge Secure Treatment Facility psychiatrist, testified that he had treated Treadway for schizophrenia for five and one half years (150: 6). Treadway had refused Olanzapine, a psychotropic medication since October 21, 2014 (150: 6-7, 12, 16-17). When Treadway did not take his medications, Treadway became irritable and aggressive (150: 8). Treadway had

some incidents as listed on the petition but did not have to be placed in restraints nor had he hit anyone (150: 17-18).

Weiler discussed the advantages of psychotropic medications on nearly every visit Weiler had with Treadway (150: 9-10). Treadway had never been able to understand that he had a mental illness (150: 10, 14). Treadway accepted medication when he understood it would calm him (150: 10, 14). However, as his condition deteriorated the last two or three months, Treadway lost the ability to understand the benefits and effects of taking his needed psychotropic medications (150: 10). The medication was needed to prevent serious harm to others (150: 11, 20). Treadway was not competent to refused medications due to his mental illness (150: 11, 20). Treadway had refused to speak to Weiler for the six weeks prior to the hearing (150: 13, 18). Other physicians and nursing staff had spoken to Treadway about medications in the previous month (150: 19).

Treadway had not been on a medication order for at least two years (150: 13). He had complained about side effects which led to a medication change in 2013 (150: 14-15). Until Weiler filed the request, he had been able to work with Treadway to some extent (150: 15-16).

Judge Witkowiak found that Treadway had refused to participate in the hearing (150: 21; App. 103). Treadway was a sexually violent person who needed medication and was incompetent to refuse it (150: 23; App. 105). The existing order for medication expired on February 10, 2011 (150: 24; App. 106).

Treadway was a risk of harm to himself or others if not medicated (150: 24; App. 106). Further, Treadway was substantially incapable of applying and understanding the advantages and disadvantages and alternatives to medication and unable to make an informed choice (150: 24; App. 106).

Further facts will be stated in the argument below.

ARGUMENT

THE RECORD WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT’S ORDER FOR INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION.

A. Standard of review.

This court must uphold the trial court’s findings of fact unless clearly erroneous. Sec. 805.17(2), Wis. Stats. However, once those facts are established, the application of facts to the statute is a question of law that the Court of Appeals decides without deference to the trial court. *Secor v. LIRC*, 2000 WI App 11, ¶8, 232 Wis. 2d 519, 606 N.W.2d 175.

B. Relevant statutes

The patient's rights set forth in §51.61 apply to sexually violent persons committed under Wis. Stat. §980.06. Section 51.61(1); *State v. Anthony D.B.*, 2000 WI 94, ¶13, 237 Wis. 2d 1, 614 N.W.2d 435.

Sec. 51.61(1g)4, Wis. Stats. provides as follows with respect to orders for involuntary administration of psychotropic medication in Chapter 51 cases:

4. For purposes of a determination under subd. 2. or 3., an individual is not competent to refuse medication or treatment if, because of mental illness, developmental disability, alcoholism or drug dependence, and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual , one of the following is true:

a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.

b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

C. The record and trial court's findings were insufficient to support the trial court's order for involuntary administration of psychotropic medications.

The burden was upon the State to establish by clear and convincing evidence that the trial court should issue an order for involuntary administration of psychotropic medications. Sec. 51.20(13)(e), Wis. Stats. In this case, despite ample opportunity, the State failed to sufficiently establish that Treadway was incompetent to refuse medications.

Appellate cases regarding involuntary medication orders are instructive as to what a petitioning party is required to establish before an involuntary medication order may be entered.

In *The Matter of K.S.*, 147 Wis.2d 575, 433 N.W.2d 291, 292 (1988), the Court of Appeals held that evidence that a subject had been told of the advantages and disadvantages and alternatives to medication was sufficient when the testimony established the examining physician had discussed medications with K.S. and that there were no alternative treatments to medications available.

The Wisconsin Supreme Court provided further clarification as to the requirements for a finding of incompetency to refused psychotropic medications in 1994. *Virgil D. v. Rock County*, 189 Wis. 2d 1, 524 N.W.2d 894 (1994), required that the court's "focus must be upon whether the patient understands the implications of the recommended medication or treatment and is making an informed choice." *Id.* at 15.

The *Virgil D.* court instructed trial courts that:

In making its decision, the circuit court must first be satisfied that the advantages and disadvantages of, and the alternatives to, medication have been adequately explained to the patient. Second, the court must consider the evidence of the patient's understanding, or the lack thereof, regarding the advantages, disadvantages, and alternatives. The evidence may include the actual testimony of the patient and the examining psychiatrist. Factors which the court should take into account in reaching its decision include:

- (a) Whether the patient is able to identify the type of recommended medication or treatment;

- (b) whether the patient has previously received the type of medication or treatment at issue;
- (c) if the patient has received similar treatment in the past, whether he or she can describe what happened as a result and how the effects were beneficial or harmful;
- (d) if the patient has not been similarly treated in the past, whether he or she can identify the risks and benefits associated with the recommended medication or treatment; and
- (e) whether the patient holds any patently false beliefs about the recommended medication or treatment which would prevent an understanding of legitimate risks and benefits.

Id., 189 Wis. 2d at 14-15, 524 N.W.2d at 899-900.

After *Virgil D.* decision, the legislature amended the statute to permit a petitioner to seek an involuntary medication order if the individual was *incapable of applying* an understanding of the medication and the alternatives to the individual's mental illness to make an informed choice as to whether to accept or refuse the medication. 1995 Wis. Act 268.

Very recently, the Wisconsin Supreme Court explained the importance of the right of an individual to decline psychotropic medications:

¶ 42 An individual's right to refuse unwanted medical treatment “emanates from the common law right of self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, [S]ection 1 of the Wisconsin Constitution.” *Lenz v. L.E. Phillips Career Dev. Ctr.*, 167 Wis.2d 53, 67, 482 N.W.2d 60 (1992); *see also Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (competent individuals have a protected

Fourteenth Amendment liberty interest in refusing unwanted medical treatment).

¶ 43 Competent individuals also retain a “ ‘significant’ liberty interest in avoiding forced medication of psychotropic drugs.” *State v. Wood*, 2010 WI 17, ¶ 25, 323 Wis.2d 321, 780 N.W.2d 63 (citing *Washington v. Harper*, 494 U.S. 210, 221, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)). “The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person’s liberty.” *Harper*, 494 U.S. at 229, 110 S.Ct. 1028. However, while a patient has “an interest in remaining free from bodily intrusion,” the state has an interest in administering treatment to a patient pursuant to a commitment order. Mary C. McCarron, Comment, *The Right to Refuse Antipsychotic Drugs: Safeguarding the Mentally Incompetent Patient's Right to Procedural Due Process*, 73 Marq. L.Rev. 477, 484 (1990) (footnote omitted). Current mental health statutes reflect a balance between treating mental illness and protecting the individual and society from danger on the one hand, and personal liberty of the individual on the other.

Outagamie Cnty. v. Melanie L., 2013 WI 67, ¶¶42-43, 349 Wis.2d 148, 833 N.W.2d 607.

Evidence required to meet the requirement for clear and convincing evidence for involuntary administration of psychotropic medications includes the following:

A person subject to a possible mental commitment or a possible involuntary medication order is entitled to receive from one or more medical professionals a reasonable explanation of proposed medication. The explanation should include why a particular drug is being prescribed, what the advantages of the drug are expected to be, what side effects may be anticipated or are possible, and whether there are reasonable alternatives to the prescribed medication. The explanation should be timely, and, ideally, it should be periodically repeated and reinforced. Medical professionals and other

professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court.

Melanie L. ¶ 67.

Further,

[T]he phrase “substantially incapable” means, *to a considerable degree*, a person lacks the ability or capacity to apply an understanding of the advantages and disadvantages of medication to his or her own condition.... “applying an understanding” requires a person to *make a connection between* an expressed understanding of the benefits and risks of medication and the person's own mental illness... [I]t is the responsibility of medical experts who appear as witnesses for the county to explain how they probed the issue of whether the person can “apply” his or her understanding to his or her own mental condition. The person's history of noncompliance in taking prescribed medication is clearly relevant, but it is not determinative if the person can reasonably explain the reason for the noncompliance. For both the patient and the medical professional, facts and reasoning are nearly as important as conclusions..... The plain language of the statute gives a person the right “to refuse medication or treatment,” provided the patient is competent to make that choice. Consequently, the court's determination should not turn on the person's choice to refuse to take medication; it should turn on the person's ability to process and apply the information available to the person's own condition before making that choice.

Melanie L.,. ¶¶ 70, 71, 75, 78.

In this case, it is not clear when Dr. Weiler provided the statutorily provided explanation or if that explanation included disadvantages and alternatives as well as the advantages (150: 9-10). Weiler testified that others at Sand Ridge

attempted to persuade Treadway to take psychotropic medications but Weiler provided no specificity as to whom and when (150: 19). There was no documentation of the same as required by *Melanie L.* The record also did not clearly establish that Treadway was unable to make a connection between the advantages and disadvantages of medication and Treadway's mental illness. Treadway had been able to understand side effects of medication he was taking and the benefits of it (150: 10, 14).

The State presented no evidence as to alternatives or lack of the same to psychotropic medications. Dr. Weiler did not testify as to *why* Treadway's negative opinion of medications should be disregarded other than Treadway's mental illness and deteriorating behavior. There was no evidence of patently false beliefs regarding the medication.

No reasonable inferences could be drawn from the record that Dr. Weiler engaged Treadway in a timely discussion about recommended medications that demonstrated that he was incompetent to refuse them. The testimony and documentation (or lack of the same) in the record was insufficient. The balance of the *Virgil* factors did not demonstrate by clear and convincing evidence that an involuntary medication order could be authorized.

The State was only able to establish that Dr. Weiler recommended the involuntary medication order without following the mandate of *Virgil D.* and *Melanie L.* that there be sufficient evidence of inability to make an informed choice. The State simply put on its evidence in a "perfunctory" manner that was

insufficient to support an involuntary medication order, *Melanie L.* ¶ 94. As the Wisconsin Supreme Court stated:

Attention to detail is important. A county cannot expect that a judge concerned about a person with mental illness will automatically approve an involuntary medication order, even though the person before the court has chosen a course of action that the county disapproves.... When a county disapproves of the choices made by a person under an involuntary medication order, it should make a detailed record of the person's noncompliance in taking prescribed medication and show why the noncompliance demonstrates the person's substantial incapability of applying his or her understanding of the medication to his or her mental illness.

Melanie L. ¶¶ 94, 99.

Because the record did not demonstrate the required proof by clear and convincing evidence, the trial court did not have the authority to require involuntary administration of psychotropic medications to Treadway and its order should be reversed.

CONCLUSION

For the reasons stated above, the undersigned attorney requests that this court reverse the order authorizing the involuntary administration of psychotropic medications to Treadway and remand this matter to the trial court with instructions to vacate the same.

Dated this 15th day of April, 2015.

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CERTIFICATION AS TO BRIEF LENGTH

I hereby certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c) for a brief and appendix produced with a serif proportional spaced font. This brief has 2887 words including certifications.

Dated this 15th day of April, 2015.

LEN KACHINSKY

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies the requirements of Rule 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of April, 2015.

LEN KACHINSKY