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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT I

Case No. 2015AP591

In re the commitment of Thomas Treadway:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

THOMAS TREADWAY,

Respondent-Appellant.

ON APPEAL FROM A NOVEMBER 6, 2014,
ORDER FOR INVOLUNTARY MEDICATION
ENTERED BY THE MILWAUKEE COUNTY CIRCUIT
COURT, CASE NO. 98-CI-17, THE HONORABLE
TIMOTHY WITKOWIAK, PRESIDING

BRIEF OF PETITIONER-RESPONDENT

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STATEMENT OF THE ISSUE

The circuit court has the authority to issue an order for involuntary medication to a sexually violent person committed under Wis. Stat. ch. 980. Here, the court issued such an order after determining that Thomas L. Treadway—committed under Wis. Stat. ch. 980—was incompetent and dangerous. Treadway now appeals. But he only challenges the court’s incompetency determination—not the independent basis for involuntary medication under dangerousness. Should this Court affirm the court’s involuntary medication order?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication because the briefs adequately present the issue and because the case involves only the application of the law to the facts.

STATEMENT OF THE CASE

The State generally agrees with the statement of the case and facts provided by Treadway. (Resp't-Appellant Br. 2-5.)¹ But Treadway misrepresents the record when he states that a report from Dr. Stephen J. Weiler “did not state any efforts made to discuss with Treadway the advantages, disadvantages and alternatives to medication.” (*Id.* at 3.) In the report and request for a hearing, Dr. Weiler affirmed that he had “explained to the subject the advantages and disadvantages and alternatives to accepting medication or treatment.” (R. 143:2.)

ARGUMENT

This Court should affirm the circuit court’s involuntary medication order. The circuit court had the authority to issue the order because Treadway is a sexually

¹The State does not agree with Treadway describing a report from Dr. Stephen J. Weiler as “conclusory and unspecific.” (Resp't-Appellant Br. 3.) Such editorializing by Treadway is argument—not a statement of the case. *Compare* Wis. Stat. § 809.19(1)(d) (statement of case), *with id.* § 809.19(1)(e) (argument). And Treadway acknowledges that the report “outlined Treadway’s behavior history” so even he concedes that his characterization of the report is not accurate. (Resp't-Appellant Br. 3.)

violent individual committed under Wis. Stat. ch. 980. *See State v. Anthony D.B.*, 2000 WI 94, ¶ 1, 237 Wis. 2d 1, 614 N.W.2d 435. The circuit court has such authority when either (1) “the individual is not competent to refuse medication,” or (2) “a situation exists in which the medication . . . is necessary to prevent serious physical harm to the individual or others.” Wis. Stat. § 51.61(1)(g)3., *cited in Anthony D.B.*, 237 Wis. 2d 1. Here, the circuit court based its order on both grounds after making incompetency and dangerousness determinations. (R. 146:1-2; 150:22-24.) The circuit court was correct on both accounts, either of which was a sufficient basis for its order.

I. This Court should affirm the circuit court’s involuntary medication order because Treadway was not competent to refuse medication.

A. The circuit court had the authority to order involuntary medication based upon Treadway’s incompetency.

The circuit court found that Treadway “is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his mental illness in order to make an informed choice as to whether to

accept or refuse psychotropic medication or treatment.”
(R. 146:2.)

There are two ways a circuit court may find an individual incompetent. *Matter of Mental Commitment of Melanie L.*, 2013 WI 67, ¶¶ 54-55, 349 Wis. 2d 148, 833 N.W.2d 607. An individual is not competent when, “because of mental illness . . . and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual,” either (1) “[t]he individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives,” or (2) “[t]he individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness . . . in order to make an informed choice as to whether to accept or refuse medication or treatment.” Wis. Stat. § 51.61(1)(g)4.; see *Melanie L.*, 349 Wis. 2d 148, ¶¶ 53-55 (two standards).

Here, the circuit court found incompetency under the second standard (R. 146:2). Thus, the circuit court correctly understood the case to be about its authority to order involuntary medication upon a finding of incompetency. *See* Wis. Stat. § 51.61(1)(g)3. Having made such an incompetency determination, the circuit court had the authority to order involuntary medication.

B. This Court reviews a circuit court's incompetency determination under the clearly erroneous standard.

This Court reviews the circuit court's incompetency determination by applying the clearly erroneous standard of review. *Melanie L.*, 349 Wis. 2d 148, ¶¶ 38, 81; *State v. Garfoot*, 207 Wis. 2d 214, 216-17, 225, 558 N.W.2d 626 (1997); *Kainz v. Ingles*, 2007 WI App 118, ¶ 21, 300 Wis. 2d 670, 731 N.W.2d 313.

The clearly erroneous standard applies because incompetency “presents a unique category of inquiry in which the circuit court is in the best position to apply the law to the facts.” *State v. Byrge*, 2000 WI 101, ¶ 4, 237 Wis. 2d 197, 614 N.W.2d 477. An incompetency

determination is “primarily factual.” *Garfoot*, 207 Wis. 2d at 225. And “[t]he trial court is in the best position to decide whether the evidence of competence outweighs the evidence of incompetence.” *Id.* at 222. Even though the circuit court ultimately applies a legal test, its determination is functionally one of fact. *Id.* So an appellate court adheres to the clearly erroneous standard. *Byrge*, 237 Wis. 2d 197, ¶¶ 32-45.

Treadway misstates the standard of review in his brief to this Court. Treadway properly states that this Court “must uphold the trial court’s findings of fact unless clearly erroneous.” (Resp’t-Appellant Br. 5 (citing Wis. Stat. § 805.17(2)).) But Treadway then argues for de novo review—relying on a case that involved the appellate review of a commission decision on a worker’s compensation claim (*Id.* (citing *Secor v. LIRC*, 2000 WI App 11, ¶ 8, 232 Wis. 2d 519, 606 N.W.2d 175).) Treadway fails to recognize that an incompetency determination is significantly different from a worker’s compensation claim.

This Court should review the circuit court's incompetency determination under the clearly erroneous standard. Under the standard, this Court gives great deference to the circuit court and should not set aside the court's determination unless it is contrary to the great weight and clear preponderance of the evidence. *Fryer v. Conant*, 159 Wis. 2d 739, 744, 465 N.W.2d 517 (Ct. App. 1990). As a legal question intertwined with factual findings, this Court should accord great weight deference to the circuit court's determination. *See Clean Wis., Inc. v. Pub. Serv. Comm'n*, 2005 WI 93, ¶ 135, 282 Wis. 2d 250, 700 N.W.2d 768. This Court should accept the inferences drawn from the circuit court even though this Court may draw other reasonable inferences. *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 644, 340 N.W.2d 575 (Ct. App. 1983).

C. This Court should affirm the involuntary medication order because the circuit court's incompetency determination was not clearly erroneous.

This Court should find that the circuit court's incompetency determination was not clearly erroneous. The

circuit court reasonably found that Treadway was not competent to refuse medication. (R. 150:22-24.)

The circuit court based its incompetency findings on the evidence it received from Dr. Weiler. (R. 150:5-20, 22-24.) Such evidence sufficiently showed that, because of schizophrenia, Treadway was substantially incapable of making an informed choice whether to accept or refuse medication. (R. 150:6-11, 20.) The evidence further showed that Dr. Weiler and other medical personnel discussed with Treadway the advantages and disadvantages of medication, including considerations of alternative dosing levels of different medications. (R. 150:6-7, 9-10, 12-15.) The circuit court's incompetency determination was not clearly erroneous—the court grounded its findings in the testimony and evidence received from the psychiatrist who had treated Treadway for schizophrenia for the past five and-a-half years. (R. 150:6, 22-24.)

Treadway fails to show that the circuit court's incompetency determination was clearly erroneous. Treadway focuses his argument on whether the record

sufficiently showed that he received an explanation of the advantages and disadvantages of and alternatives to accepting medication. (Resp't-Appellant Br. 10-12.) But the record shows that Dr. Weiler discussed the advantages of medication treatment during nearly every visit he had with Treadway. (R. 150:9-10.) Dr. Weiler also explained that he discussed with Treadway alternative dosing levels and different options for medication, which prompted a change in from Haloperidol to Olanzapine. (R. 150:6-10.) And even when Treadway refused to continue such discussions with Dr. Weiler, two primary care physicians engaged in such discussions with him. (R. 150:18-19.) Treadway does not explain why it was clearly erroneous for the circuit court to base its decision on such evidence.

This Court should affirm the circuit court's order for involuntary medication. This Court has explained that whether an individual was advised of the advantages and disadvantages of treatment or alternatives to medication is an evidentiary matter. *In Matter of Mental Condition of K.S.*, 147 Wis. 2d 575, 578, 433 N.W.2d 291 (Ct. App. 1988).

So this Court accepts the circuit court's determinations under the clearly erroneous standard, including the reasonable inferences drawn from the evidence. *Id.* The evidence received—and the reasonable inferences drawn from the evidence—show that Treadway received multiple explanations about the advantages and disadvantages of and alternatives to medication treatment. This Court should affirm the involuntary medication order based upon the circuit court's incompetency determination.

II. This Court should affirm the circuit court's involuntary medication order because a situation existed in which the medication was necessary to prevent serious physical harm.

A. The circuit court had the authority to order involuntary medication based upon Treadway's dangerousness.

The circuit court found that Treadway posed “a current risk of harm to himself or to others if not medicated.” (R. 146:2.) Thus, the circuit court correctly understood the case to be about its authority to order involuntary medication upon a finding of dangerousness. *See* Wis. Stat. § 51.61(1)(g)3.

The circuit court had the authority to order involuntary medication to prevent serious physical harm. Following a commitment, Treadway did not have the right to refuse medication when a situation existed in which the medication was necessary to prevent serious physical harm to himself or others. *See* Wis. Stat. § 51.61(1)(g)3. In *Anthony D.B.*, the supreme court observed that Wis. Stat. § 51.61(1)(g) does not specifically set forth the procedure for an involuntary medication order. 237 Wis. 2d 1, ¶ 28. But the court concluded that Wis. Stat. §§ 51.20(16) and 51.61(1)(d) provide a mechanism for a circuit court to conduct an involuntary medication review. *Id.* ¶ 33. So the circuit court had the authority to order involuntary medication based upon Treadway's dangerousness.

Here, the circuit court found dangerousness. (R. 146:2; 150:24.) Having made such a determination, the circuit court had the authority to order involuntary medication.

B. This Court reviews a circuit court's dangerousness determination under the sufficiency of the evidence standard.

This Court reviews the circuit court's dangerousness finding under the sufficiency of the evidence standard. *Cf. State v. Randall*, 2011 WI App 102, ¶¶ 11-13, 336 Wis.2d 399, 802 N.W.2d 194 (standard for dangerousness finding under Wis. Stat. § 971.17). Under this standard, the appellate court gives deference to the circuit court's "determination of credibility and evaluation of the evidence and draw[s] on its reasoning and adopt[s] the trial court's reasonable inferences." *Id.* ¶ 14.

C. This Court should affirm the involuntary medication order because sufficient evidence supported the circuit court's uncontested dangerousness determination.

This Court should find that there was sufficient evidence in support of the circuit court's dangerousness determination. And further find Treadway has forfeited any argument to the contrary.

The circuit court reasonably found that a situation existed in which medication was necessary to prevent harm. (R. 146:1-2; 150:22-24.) The circuit court explained its

findings within the evidence it received from Dr. Weiler. (R. 150:22-24.) Dr. Weiler testified that Treadway was noncompliant with dosage levels for months and then had stopped taking medication entirely. (R. 150:7-8, 12, 22.) Dr. Weiler testified that Treadway has schizophrenia with a long history of being very aggressive toward others when undertreated or not medicated. (R. 150:6-8.) Dr. Weiler testified that Treadway's condition had deteriorated over the past two to three months leading to escalated psychotic behavior, manifesting in a recent homicidal threat. (R. 150:10-11, 20.) Dr. Weiler testified that Treadway "very much needs the medication for his own and other's safety." (R. 150:13.) Such evidence sufficiently showed that medication was necessary to prevent serious physical harm. (R. 150:7-8, 10-11, 13, 20, 22-24.)

Treadway does not appeal the circuit court's ruling on dangerousness. Treadway's notice of appeal generally states that he appeals the involuntary medication order. (R. 147:1.) And Treadway similarly states the issue broadly. (Resp't-Appellant Br. 1.) But, in his argument, Treadway

does not address the court's dangerousness finding—his brief only addresses the court's incompetency determination. (*Id.* at 5-12.)

Treadway therefore forfeits his right to appeal the dangerousness determination. *See State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612 (forfeiture); *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (undeveloped arguments). And he cannot make such an argument for the first time in his reply brief. *Roy v. St. Lukes Med. Ctr.*, 2007 WI App 218, ¶ 30 n.6, 305 Wis. 2d 658, 741 N.W.2d 256.

This Court may properly affirm the circuit court's order for involuntary medication based on the dangerousness ruling alone. Again, the circuit court based its order upon two determinations: (1) incompetency; and (2) dangerousness. (R. 146:1-2; 150:22-24.) Each determination provides an independent basis to issue an order under Wis. Stat. § 51.61(1)(g)3. because the statute states that a patient does not have the right to refuse medication when either incompetent or

dangerous. *See In Matter of Mental Condition of Virgil D.*, 189 Wis. 2d 1, 10, 524 N.W.2d 894 (1994). An incompetency determination does not consider dangerousness. *See State v. Wood*, 2010 WI 17, ¶¶ 81-86, 323 Wis. 2d 321, 780 N.W.2d 63 (Abrahamson, C.J., dissenting). Just as a dangerousness determination does not consider competency. *See Sherry v. Salvo*, 205 Wis. 2d 14, 29 n.8, 555 N.W.2d 402 (Ct. App. 1996) (dangerous discussion with no competency discussion). Even assuming for the sake of argument that the circuit court erred in its incompetency determination, Treadway does not contest the circuit court's independent dangerousness determination. So this Court should affirm.

* * * * *

Here, the circuit court issued an involuntary medication order after determining that Treadway was incompetent and dangerous. Treadway only challenges the court's incompetency determination—not its independent dangerousness determination. This Court should affirm the involuntary medication order because the circuit court's incompetency determination was not clearly erroneous. And

the circuit court's uncontested dangerousness determination provides an independent basis for the order.

CONCLUSION

This Court should affirm the circuit court's order for involuntary medication.

Dated this 22nd day of June, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,450 words.

Dated this 22nd day of June, 2015.

WINN S. COLLINS
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**CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (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 22nd day of June, 2015.

WINN S. COLLINS
Assistant Attorney General