

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 REPLY BRIEF

SISSON AND KACHINSKY LAW OFFICES

By: Len Kachinsky

State Bar No. 01018347

103 W. College Avenue #1010

Appleton, WI 54911-5782

Phone: (920) 993-7777

Fax: (775) 845-7965

E-Mail: LKachinsky@core.com

Attorneys for the
Respondent-Appellant

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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 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 State took exception¹ to Treadway's statement that, "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)." A review of the record indicated that is *exactly* what page 1 of the report could be characterized as. It contained no dates of when Treadway was advised of the advantages, disadvantages and alternatives to medication. It was a standard form ME-917 promulgated by the court system. Pages 2 and 3 of the report (143: 2-3) [introduced as Exhibit 2 (145: 2) at the hearing] also provided no specifics as to where and when Dr. Weiler discussed with Treadway the advantages, disadvantages and alternatives to medication. Treadway's comments in his initial brief were totally appropriate. Treadway sought to highlight that in order for this court to see if the requirements of Sec. 51.61(1) (g) 4 were met it would have to look elsewhere in the record, such as testimony at the hearing.

There was testimony at the hearing of November 6, 2014 by Dr. Weiler that was presented in an objective fashion in his Statement of Facts. Treadway also discussed it in the argument section of his brief.

¹ Page 1 of State's brief.

ARGUMENT

I. THE RECORD WAS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S ORDER FOR INVOLUNTARY ADMINISTRATION OF PSYCHOTROPIC MEDICATION BECAUSE OF INCOMPETENCE TO REFUSE MEDICATION.

A. Standard of review.

The State does not appear to disagree with Treadway's endorsement of the clearly erroneous standard of review regarding the facts the trial court found (pages 6-7 of State's brief). However, as to the undisputed facts in this case and their application to the law, Treadway maintains this court owes no deference to the trial court. This is a well established principle applied to a wide variety of cases this court routinely considers. Many of this court's own decisions cite *Secor* in cases other than workman's compensation because the idea applies to them. The same is true here.

B. Relevant statutes

The State claims that in addition to Sec. 51.61(1)(g)4, Wis. Stats., the State's petition for involuntary medication could be based upon Sec. 51.61(1)(g)3 which provides in part as follows:

3. Following a final commitment order, other than for a subject individual who is determined to meet the commitment standard under s. 51.20(1) (a) 2. e., have the right to exercise informed consent with regard to all medication and treatment unless the committing court or the court in the county in which the individual

is located, within 10 days after the filing of the motion of any interested person and with notice of the motion to the individual's counsel, if any, the individual and the applicable counsel under s. [51.20\(4\)](#), makes a determination, following a hearing, that the individual is not competent to refuse medication or treatment *or (emphasis added)* unless a situation exists in which the medication or treatment is necessary to prevent serious physical harm to the individual or others. A report, if any, on which the motion is based shall accompany the motion and notice of motion and shall include a statement signed by a licensed physician that asserts that the subject individual needs medication or treatment and that the individual is not competent to refuse medication or treatment, based on an examination of the individual by a licensed physician....

Treadway disagrees that under the facts of this case the court ordered involuntary medication based on a necessity to do so to prevent serious physical harm to Treadway or others or that the State even asked the court to do so (prior to the State's brief in this case). Further argument on that issue will be set forth below.

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

The State did not question or even discuss the history of appellate cases dealing with the sufficiency of evidence to support an involuntary medication order as set forth on pages 6-10 of Treadway's brief.

While Dr. Weiler may have treated Treadway during the last five and one half years, the record does not show the treatment was continuous or clearly

documented when Dr. Weiler provided the statutorily provided explanation or if that explanation included disadvantages and alternatives as well as the advantages (150: 9-10). It was certainly not sufficient to engage in the conversation with Treadway on one or even several times during a five year plus period and then infer from that a permanent lack of competency to refuse medication. Yet, that is close to what the State is arguing. The State could not point to any specificity in the record to refute Treadway's argument the discussions with him were vague for a very simply reason: such specificity did not exist.

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.

II. UNDER THE FACTS OF THIS CASE, TREADWAY COULD NOT BE INVOLUNTARILY MEDICATED BASED UPON DANGEROUSNESS ALONE WITHOUT PROOF OF INCOMPETENCY.

The State argued that Treadway could be involuntarily medicated because of dangerousness without a showing of incompetence to refuse medication (pages 10-15 of State's brief). Treadway disagrees.

First, Dr. Weiler's petition did not ask for an order on that basis. It merely claimed that Treadway was becoming increasingly psychotic and more easily agitated (145: Exhibit 2: 2).

Second, the statute cited by the State [§51.61(1)(g)3]² is part of the Patient Bill of Rights. It states the rights of patients to refuse medication except in two situations: a court order (which requires a finding of incompetency) *or* a situation of necessity to avoid serious physical harm to the patient or others. In other words, an institution such as Sand Ridge can involuntarily medicate a patient immediately to prevent serious physical harm to the patient or others even in the absence of a court order. The exception to the right to refuse medication in Sec. 51.61(1)(g)3 is for emergency decisions by physicians. Sec. 51.61(1)(g)3 is not a license for courts to forego consideration of competency simply because a patient might, if untreated, be physically dangerous to himself or others.

The trial court did not make findings of immediate physical danger. The record revealed Treadway made threats but was unclear how imminent action on

² Reproduced on pages 3-4 of this brief

those threats was. In any event, the clear basis of Judge Witkowiak's ruling was Witkowiak's finding of incompetency to refuse medication, not immediate dangerousness.

The State has injected into this case an issue never considered at the trial level. It does not apply to this case. This court should not affirm for a reason not offered below as a rationale for an involuntary medication order and one not authorized by statute in situations such as these.

CONCLUSION

For the reasons stated above and in his brief-in-chief, 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 7th day of July, 2015.

SISSON AND KACHINSKY LAW OFFICES

By: Len Kachinsky

Attorneys for the Respondent-Appellant

State Bar No. 01018347

103 W. College Avenue #1010

Appleton, WI 54911-5782

Phone: (920) 993-7777

Fax: (775) 845-7965

E-mail: LKachinsky@core.com

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 1567 words including certifications.

Dated this 7th day of July, 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 7th day of July, 2015.

LEN KACHINSKY