STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2017AP001586-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JUSTICE G. ARMSTEAD,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM DECISION AND FINAL ORDER DENYING POST-CONVICTION MOTION ENTERED ON JULY 26, 2017, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY, THE HONORABLE JEAN M. KIES, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Should Armstead's involuntary medication order be reviewed, even though the commitment order expired prior to the filing of this appeal?

   Trial Court answered: This issue was not presented to the trial court.

2. Did the trial court apply the proper statutory standard in requiring an involuntary medication order for Armstead?

Trial Court answered: Yes. The trial court heard testimony by both the examining psychologist and Armstead, and applied the statutory standard set out in Wis. Stat. § 971.16(3)(b) and 971.17(3)(b).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. See Wis. Stat (Rule) 809.23(1)(b)4.

STATEMENT OF THE CASE

On July 29, 2016, Justice G. Armstead was charged with Criminal Damage to Property (less than $2,500 damage), contrary to Wis. Stat. § 943.01(1), and Entry Into Locked Building, Dwelling, or Room, contrary to Wis. Stat. § 943.15(1), in Milwaukee County Circuit Court case number 16CM002512, as a result of an arrest made by Milwaukee Police Officer Michelle Farney. (R1:1-2).

The criminal complaint alleged that Officer Farney had spoken to KP, who reported that she observed her neighbor, Armstead, walk up to KP's garage, kick in the locked side door, and enter her garage, causing damage to the door and lock, all without KP's consent. (R1:1-2)

The case was assigned to Milwaukee County Circuit Court Branch 45, the Honorable Jean Kies presiding. (R4:1). On October 26, 2016, the special plea of not guilty by reason of mental disease or defect was entered and an order for a psychological examination was entered by the court. (R11:1).

Dr. John Pankiewicz filed a report, dated November 7, 2016, which stated that he believed to a reasonable degree of medical certainty Armstead met the criteria for the special plea of not guilty by reason of mental disease or defect. (R17:4).

Additionally, Dr. Pankiewicz stated in his report that he believed that the "most important conditions" for Armstead to be maintained in the community would be "absolute medication compliance," as he believed to a reasonable degree of medical certainty Armstead was not competent to refuse medications. (R17:4-5).

Dr. Pankiewicz offered support for an involuntary medication order by opining that Armstead had a skewed perception of his medication's side effects, had little ability to describe any benefits or advantages of taking his medications, and was unable to make a connection between hospitalizations and non-compliance with treatment. (R17:5).

On January 20, 2017, Armstead pled no contest to the charge of Criminal Damage to Property, and the prosecution moved to dismiss and read-in the charge of Entry Into Locked Building, Dwelling, or Room. (R14:1-2). On that same date, a court trial occurred as to Armstead's mental responsibility. (R49:1-3). Dr. John Pankiewicz testified to his November 7, 2016 report, including his belief to a reasonable degree of medical certainty that Armstead would need an involuntary medication order. (R49:9).

Dr. Pankiewicz discussed Armstead's inability to understand the advantages and disadvantages of the medications. Dr. Pankiewicz stated that:

> Although Mr. Armstead had some understanding of his medications, I don't believe that he had a complete, rational understanding of the advantages and disadvantages. This comes in part from his own perceptions about side effects that are wholly not associated with the medicine he's on as well as a fairly well documented record of frequent self-initiated interruptions of treatment.

(R49:9-10). Dr. Pankiewicz further testified that non-compliance with medical treatment can result in property damage and potentially other dangerous acts. (R49:14).

At the January 20, 2017 court trial, Armstead testified that his medical treatment, specifically the Invega injection, caused "severe life threatening side effects" as a disadvantage.

Armstead also testified that he has been "off and on" his medications due to "life threatening side effects" and that he was not taking his medications on a "high, consistent basis" at the time of the incident (R49:21; 24). Armstead also testified to different negative side effects, such as shortness of breath and "retired dyskinesis." (R49:20).

Armstead testified that advantages of taking his medication included a lack of auditory or visual hallucinations. (R49:19-20). Additionally, Armstead testified that the medications allowed him mindfulness, as well as not harming himself or others. (R49:19-20).

Judge Kies made the finding that Armstead was not guilty by reason of mental disease or defect and that Armstead was appropriate for conditional release into the community for a period of six months. (R49:31-33). In light of Dr. Pankiewicz's testimony, Judge Kies also stated that because Armstead's view of the medication was skewed as to side effects and Armstead's own admission of intermittent non-compliance with medication treatment, an involuntary medication order was appropriate. (R49:34-35).

Armstead, by counsel, filed a motion for post-disposition relief on July 20, 2017, moving the Court to reverse her order for the involuntary medication order. (R34:1-2). This motion was denied by Judge Kies on July 26, 2017, on the grounds that the motion lacked any legal argument or support from the record and that the filing was insufficient. (R35:1).

Armstead was discharged from commitment for conditional release on August 4, 2017, due to the expiration of the order. (R37:1-3). A notice of appeal was filed on August 14, 2017. (R39:1).

STANDARD OF REVIEW

Whether an issue is moot is a question of law for this court's *de novo* review. *McFarland State Bank v. Sherry*, 2012 WI 124, ¶ 9, 338 Wis. 2d 462, 809 N.W.2d 58.

The standard of review for forced medication orders is a mixed question of law and fact. The facts shall not be disturbed unless they are "clearly erroneous." *K.N.K. v. Buhler*, 139 Wis. 2d 190, 198, 407 N.W.2d 281, 285 (Ct. App. 1987). Reasonable inferences from the facts available to the court shall also be accepted. *K.S. v. Winnebago Cnty*, 147 Wis. 2d 575, 578, 433 N.W.2d 291, 292 (Ct. App. 1988).

An application of facts to the statutory standard and an interpretation of the statute are questions of law that the court reviews *de novo*. *In re Melanie L.*, 2013 WL 67, ¶ 39, 349 Wis. 2d 148, 167, 833 N.W.2d 607, 616-17 (citing *Estate v. Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 10, 318 Wis. 2d 553, 561-62, 760 N.W.2d 481, 486).

ARGUMENT

I. BECAUSE THE INVOLUNTARY MEDICATION ORDER EXPIRED AND THERE IS NO REMEDY IN THIS CASE, THIS ISSUE IS MOOT.

An issue is moot "when a determination is sought upon some matter which, when rendered, cannot have any practical legal effect upon a then existing controversy." *In re Sheila W.*, 2013 WI 63, ¶ 4, 348 Wis. 2d 674, 835 N.W.2d 148. When an appellant appeals an order to which he or she is no longer subjected, an "apparent lack of a live controversy" is created. *In re Mental Commitment of Aaron J.J.*, 2005 WL 162, ¶ 3, 286 Wis. 2d 376, 378, 706 N.W.2d 659, 661.

An appellate court may exercise its discretion to review an issue, even though it is moot. Some exceptions that the court considers when determining whether to decide a moot issue include:

> (1) of great public importance; (2) occurs so frequently that a definitive definition is necessary to guide circuit courts; (3) is likely to arise again and a decision of the court would alleviate uncertainty; or (4) will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties.

In re Commitment of Morford, 2004 WI 5, ¶ 7, 268 Wis. 2d 300, 306, 674 N.W.2d 349, 352.

In this case, this appeal is moot, as Armstead is no longer the subject of an involuntary medication order. The appeal of the involuntary medication order was not even filed until after the commitment which included the involuntary medication order had expired. (R37:1-3; R39:1). A decision in this appeal would have no practical effect on a matter that lacks any live controversy.

None of the exceptions for when a moot issue may be decided apply here. There is no issue of great public importance challenged for an expired involuntary medication order. Further, there is no indication that this issue arises "so frequently" as to become necessary for a decision to be made to guide the lower courts and there is no indication that uncertainty exists in relation to the statutory guidelines.

Armstead's brief claims that this moot issue is likely to be repeated. As support for that claim, Armstead points to his two new felony cases in Milwaukee County Circuit Court, Case Numbers 17CF004142 and 17CF005110. These two new cases are completely unrelated to the matter appealed here. There is no allegation of a factual tie between the three cases. The case procedure is not tied to the matter appealed here. The judge in the matter appealed here is not the judge who will hear the two new cases.

There is also no indication by Armstead that the two new cases involve a special plea, namely that Armstead was not guilty by reason of mental disease or defect in the new incidents. The circumstances of the two new cases are not part of this record. Armstead's circumstances cannot be repeated as the order is now expired and the case is no longer active.

Further, in the two new cases, Armstead has many active remedies if this issue was to arise again. Armstead has the right to a hearing and the option to file a permissive appeal. Armstead chose not to exhaust his remedies in the case at hand, and therefore, the issue has become moot as a result of that choice. A decision in this case would have no practical effect.

Reversing an expired order that cannot be renewed will have no bearing on Armstead's circumstances.

Armstead's brief cites to *In re Melanie L.*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607, as a comparable case. However, *Melanie L.* is distinguishable from the case at hand, as to the issue of mootness. In *Melanie L.*, the County had filed for an extension of the involuntary medication order. *Id.* at 160. Therefore, as the involuntary medication order was likely to repeat itself—in fact, the County was actively asking for the order to repeat itself—one of the exceptions to mootness applied. In the present case, at the time Armstead's appeal was filed, the order had already expired and the case ended, with the State unable to apply for an extension. (R37:1-3).

As this issue is moot, and none of the circumstances that would cause an appellate court to review a moot issue are present, this appeal should be dismissed as moot.

II. THE TESTIMONY PRESENTED AND THE COURT'S FINDINGS SUPPORTED AN INVOLUNTARY MEDICATION ORDER UNDER WIS. STATS. §§ 971.16(3)(b) AND 971.17(3)(b).

Even if the court finds that the issue is not moot, or that the involuntary medication order should be reviewed despite the mootness of the issue, Armstead's appeal should still be denied.

The statutory standard to determine when an involuntary medication treatment is appropriate is governed by Wis. Stat. § 971.16(3)(b). The court must determine if the defendant 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.

Id. The State's burden to establish this factual basis is clear and convincing evidence. Wis. Stat. § 971.17(3)(b).

At the court trial regarding the mental responsibility of Armstead, the examining psychologist Dr. Pankiewicz stated that:

> Although Mr. Armstead had some understanding of his medications, I don't believe that he had a complete, rational understanding of the advantages and disadvantages. This comes in part from his own perceptions about side effects that are wholly not associated with the medicine he's on as well as a fairly well documented record of frequent self-initiated interruptions of treatment.

(R49:9-10).

This is specific testimony regarding his determination of whether Armstead is capable of applying an understanding of the advantages and disadvantages to make an informed choice. Dr. Pankiewicz's determination was that Armstead had such irrational perceptions about the disadvantages of his medication that he could not make an informed choice to refuse medication. (R49:9-10) Dr. Pankiewicz also testified that Armstead was attributing many of his symptoms to the side effects of the medicine, although they were "wholly not associated with the medicine." (R49:10).

While Armstead did testify to the advantages and disadvantages of the medical treatment at the court trial, he repeatedly referred to the Invega shot as having "life threatening side effects." When interpreting Armstead's testimony and Dr. Pankiewicz's testimony together, it is clear that while Armstead has *an* understanding of the advantages and disadvantages of the medicine, he does not have a *rational* understanding of the medicine, due in large part to his mental illness. (R49:9-10). Armstead himself testified that he frequently is "off and on" his medications due to his perception of the side effects. (R49:21).

The testimony regarding advantages and disadvantages of the medication, and the rational understanding of Armstead to make an informed choice "closely tracked" the statutory language, even if it did not directly quote the language. *In re Mental Commitment of Christopher S.*, 2016 WI 1, ¶ 54, 366 Wis. 2d 1, 41, 878 N.W.2d 109, 128

The trial court determined a factual basis to which the statutory standard would be applied after listening to testimony from both Dr. Pankiewicz and Armstead. The trial court's findings that Armstead's view of the medication is "actually skewed . . . in terms of side effects" and "non compliance with treatment" was grounded in the evidence presented. (R49:34-35). The trial court applied the proper statutory standard to the facts that were elicited throughout the court trial. The trial court found that the facts supported an involuntary medication order.

The trial court's consideration of the intermittent compliance with the necessary medical treatment was not improper, as the actions of Armstead contribute to the determination of whether Armstead is substantially incapable of making an informed choice. The testimony of Armstead included his discussion of the medication's advantages, including "clear mindfulness" and not harming himself or others. (R49:19-20).

However, by his own testimony and by Dr. Pankiewicz's testimony, Armstead repeatedly terminated his medical regimen on his own initiation, despite knowing that the medication stopped him from harming himself and others, as well as gave him a clear mind. (R49:9-10; 19-20). Armstead's actions and his own words demonstrated that Armstead was substantially incapable of making an informed choice about his medication, as the trial court determined.

The statutory standard is that Armstead is substantially incapable of *applying* an understanding of the advantages, disadvantages, and alternatives to his mental illness in order to make an informed choice regarding medication or treatment. Wis. Stat. § 971.16(3)(b) (emphasis added). Armstead did testify to some advantages and disadvantages, and even testified to some of his skewed perceptions of the side effects, namely that the medication was life threatening. However, Armstead's *application* of that understanding is substantially lacking, shown by his actions. The trial court's consideration and interpretation of Armstead's actions was appropriate under the statutory standard.

Additionally, in *Melanie L.*, the Supreme Court of Wisconsin stated that a person's "history of noncompliance in

taking prescribed medication is clearly relevant," as it goes to the "issue of whether the person can 'apply' his or her understanding to his or her own mental condition." *Melanie L.*, 2013 WL 67, ¶ 74-75, 349 Wis.2d at 183-84, 833 N.W.2d at 625. Armstead's history of non-compliance with his medication regimen demonstrated his substantial incapability to apply an understanding to his mental illness.

The trial court determined the facts to apply to the statutory standard through its review of Dr. Pankiewicz's report, Dr. Pankiewicz's testimony, and Armstead's testimony. The facts that were determined by the trial court were applied to the proper statutory standard, and the determination that an involuntary medication order should be entered as part of the court's decision was appropriate.

CONCLUSION

Because this issue is moot and there is no practical effect on the controversy, this appeal should be dismissed on the grounds of mootness. Even if this appeal is not dismissed on mootness, the appeal should still be denied as the proper statutory standard was applied by the trial court. The involuntary medication order was appropriate under the facts testified to in the court trial and adopted by the trial court's determination. Therefore, this appeal should be denied in full.

Dated this _____ day of February, 2018.

Respectfully submitted,

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_____
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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 word count of this brief is 2,785.

_____ _____

Date Alicia H. Kort
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CERTIFICATE 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 with the requirements of s. 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.

_____ _____

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