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FILED
05-12-2021
**CLERK OF WISCONSIN
COURT OF APPEALS**

May 12, 2021

Ms. Sheila T. Reiff
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Via Hand Delivery

Re: *State of Wisconsin v. Joseph G. Green*
Court of Appeals Case No. 2020AP000298-CR, District 4

Dear Ms. Reiff:

On April 28, 2021, this Court ordered the parties to file letter briefs addressing: (1) whether Wis. Stat. Rule 809.26(1) or 809.62(5) prevent the Court from remanding the record while the State's petition for review is pending, and (2) whether the circuit court has authority under Wis. Stat. §§ 808.075(1) and 806.07 to vacate or otherwise reconsider its December 21, 2020 order without remand of the record. Mr. Green submits this letter brief in response.

ARGUMENT

This case comes before the Court under unique circumstances. On February 10, 2020, the circuit court found Mr. Green incompetent and entered an order of commitment for treatment (incompetency) which allowed for the involuntary administration of psychotropic medications. That order was the subject of Mr. Green's appeal and the State's subsequent petition for review. While the parties have been litigating the appeal of the February 10, 2020 order, proceedings in the circuit court have continued.¹ Specifically, as relevant here, on December 21, 2020, the circuit court held a competency hearing at which it found Mr. Green competent and entered a new order allowing the continued involuntary administration of medication. Mr. Green later sought to have this second order vacated.² The circuit court, however, determined that it had no jurisdiction and stated that it would not take any action on the motion to vacate without remand of the record or further guidance from this Court. In response, Mr. Green filed a petition for remand pursuant to § 808.075(5), which is the subject of this brief.

¹ See Wisconsin Circuit Court Access Program (CCAP) records for Dane County Case 19-CF-3019 indicating that the circuit court has continued to hold proceedings in this case, including a competency hearing, a preliminary hearing, and arraignment.

² Contrary to the State's assertions, Mr. Green has never taken the position that the two involuntary medication orders are not two separate orders.

Neither Rule 809.26(1) nor 809.62(5) prevent the Court from remanding the record for specific proceedings in the circuit court while the State's petition for review is pending. Remand, however, is not necessary. The circuit court has jurisdiction under §§ 808.075(1) and 806.07, and otherwise, to vacate or reconsider the December 21, 2020 order without remand. Consequently, Mr. Green respectfully requests that this Court enter an order which either: (1) remands the record to the circuit court for it to vacate or reconsider the December 21, 2020 involuntary medication order, or (2) advises the circuit court that remand is not necessary in order for it to hear and decide Mr. Green's motion to vacate. Without either, Mr. Green will continue to be involuntarily medicated under an order that even the State concedes is not supported by the record made when it was entered. (State's Response to Petition for Remand at ¶¶8-9).

I. Remand of the record for specific proceedings under § 808.075(5) is not barred by Rules 809.26(1) or 809.62(5).

Rule 809.26(1) states, in relevant part, “[t]he clerk of the court of appeals shall transmit to the circuit court the judgment and decision or order of the court and the record in the case filed pursuant to s. 809.15 31 days after filing of the decision or order of the court, or as soon thereafter as practicable. If a petition for review is filed pursuant to s. 809.62, the transmittal is stayed until the supreme court rules on the petition.” Rule 809.62(5), similarly provides that “the filing of the petition stays further proceedings in the court of appeals.” Neither rule prevents the Court from remanding the case to the circuit court for specific proceedings on the December 21, 2020 medication order.

The language of Rule 809.26(1) is clear and straightforward. That rule governs remittitur. Specifically, it controls when the court of appeals' decision, as well as the court record, are transmitted to the circuit court after the appeal has concluded. The clerk must transmit both the decision and the record to the circuit court 31 days after the court of appeals' decision is entered unless a petition for review is filed, in which case, remittitur is stayed pending a decision on the petition for review. Wis. Stat. § 809.26(1). Upon remittitur, the appellate court loses jurisdiction and the matter is returned to the circuit court which must then proceed in accordance with the court of appeals' decision. Wis. Stat. § 808.09; *State ex rel. Fuentes v. Court of Appeals*, 225 Wis. 2d 446, 593 N.W.2d 48 (1999).

Thus, Rule 809.26(1) governs a specific procedure – remittitur – which is distinct from remand under § 808.075(5), which Mr. Green seeks. *See Tietsworth v. Harley-Davidson, Inc.*, 2007 WI 97, ¶90, 303 Wis. 2d 94, 138, 735 N.W.2d 418, 439 (Abrahamson, J., dissenting)(“The word “remand” does not have the same meaning as “remit.” The process by which the decision and mandate of the appellate court, along with the circuit court record, are returned to the circuit court is referred to as remittitur”). Section 808.075(5) allows any party to “petition the appellate court for remand to the circuit court for action upon specific issues” during the pendency of the appeal. Contrary to remittitur, remand under § 808.075(5) occurs prior to the conclusion of the appeal and the appellate court retains jurisdiction while the additional proceedings occur in the

circuit court. *See* Wis. Stat. § 808.075(5)-(8).

Finally, while Rule 809.62(5) stays “further proceedings” in the court of appeals until the petition for review is decided, that rule does not prevent the Court from remanding the case for the specific proceedings Mr. Green requests. When both rules are read together, and in context, it is apparent that they are meant to maintain the status quo in the event the petition for review is granted. The effect of both stays is to allow a party who is dissatisfied with the court of appeals’ decision the chance to seek meaningful review by the supreme court. *State v. Patterson*, 2009 WI App 128, fn. 7, 321 Wis. 2d 240, 773 N.W.2d 225 (“Delayed remittitur allows a party dissatisfied with the holding of the court of appeals the chance to petition the supreme court to review the court of appeals decision...”)(unpublished)(attached).

Here, however, Mr. Green seeks remand in order to allow the circuit court to decide whether to vacate the December 21, 2020 order, an order which is separate and distinct from the order which was before the Court in Mr. Green’s appeal and which is the subject of the State’s petition for review. Neither this Court’s granting of the petition for remand, nor the circuit court’s potential vacating of the December 21, 2020 order, would undermine or interfere with the Supreme Court’s authority or render further appeal meaningless. Moreover, if a decision is ultimately issued by the Wisconsin Supreme Court on appeal of this Court’s decision, that decision would not have any bearing on the appropriateness of the December 21, 2020 order.

In sum, Rules 809.26(1) and 809.62(5) do not prevent this Court from remanding the case to the circuit court for the specific proceedings Mr. Green requests. If, however, this Court determines that it does not have the ability to remand for specific proceedings, Mr. Green requests that it find that, for the reasons set forth below, the circuit court nonetheless has jurisdiction to hear and decide his motion to vacate the December 21, 2020 order.

II. The circuit court has authority under §§ 808.075(1) and 806.07 to vacate the December 21, 2020 order without remand from this Court.

The December 21, 2020 order can be vacated under § 806.07(1) regardless of whether the record is remanded to the circuit court. Mr. Green relied, in part, on § 806.07(1) in his argument in support his motion to vacate below. The circuit court, however, denied the motion, finding that it had no jurisdiction to act on this matter until remand and remittitur occurred, or it received further guidance from this Court. (Petition, Ex. C, p. 4-5). The circuit court was mistaken.

Section 808.075, entitled “Permitted court actions pending appeal,” plainly provides the circuit court with the authority to vacate the December 21, 2020 order. Specifically, § 808.075(1) sets forth the actions a circuit court may take, “[i]n any case, whether or not an appeal is pending.” Among the actions listed is action under § 806.07, relief from judgment or order. Similarly, § 808.07(2)(am), states, “[d]uring the pendency of an appeal, the trial court may hear and determine a motion filed under s. 806.07.”

As relevant, § 806.07(1) states:

On motion and upon such terms as are just, the court, subject to (2) and (3), may relieve a party or legal representative from a judgment, order or stipulation for the following reasons:

- (a) Mistake, inadvertence, surprise, or excusable neglect;
- (b) Newly-discovered evidence which entitles a party to a new trial under s. 805.15(3);
- (c) Fraud, misrepresentation, or other misconduct of an adverse party;
- (d) The judgment is void;
- (e) The judgment has been satisfied, released or discharged;
- (f) A prior judgment upon which the judgment is based has been reversed or otherwise vacated;
- (g) It is no longer equitable that the judgment should have prospective application; or,
- (h) Any other reasons justifying relief from the operation of the judgment.

Wis. Stat. § 806.07(1).

The statutes are clear – a circuit court may hear a motion to vacate brought under § 806.07 at any time, in any case, regardless of whether an appeal is pending. This Court confirmed the same in *Metro. Greyhound Mgmt. Corp. v. Wisconsin Racing Bd.*, 157 Wis. 2d 678, 460 N.W.2d 802 (Ct. App. 1990) when it held, “[t]rial courts in Wisconsin may consider motions brought under Rule 806.07(1), Stats., that seek relief from a judgment or order even though an appeal from that judgment or order is pending.” *Metro. Greyhound Mgmt. Corp.*, 157 Wis. 2d 678 at 696.

Accordingly, the circuit court has authority to hear and decide Mr. Green’s motion to vacate the December 20, 2020 order without remand or remittitur from this Court.

III. The circuit court otherwise has jurisdiction to vacate or reconsider the December 21, 2020 order without remand from this Court.

As it is the February 10, 2020 medication order, and not the December 21, 2020 order, that is the subject of the appeal and petition for review, the pendency of that appeal does not deprive the circuit court of authority to vacate or reconsider the December 21, 2020 order. While the appeal deprived the circuit court of jurisdiction over the February 10, 2020 medication order – the subject of that appeal – it did not deprive the circuit court of jurisdiction over other, separate proceedings in the case.

“Once a Notice of Appeal has been filed with the circuit court and the record has been transmitted to the court of appeals, a circuit court’s authority is limited. ‘An appeal from a judgment or order strips the trial court of jurisdiction *with respect to the subject matter of the judgment or order*, except in certain unsubstantial and trivial matters,’ unless explicit contrary authority is noted in the statutes.” *Madison Teachers, Inc. v. Walker*, 2013 WI 91, ¶18, 351 Wis. 2d 237, 839 N.W.2d 388 (internal citations omitted)(emphasis added); *See also State ex rel. Van Dyke Ford, Inc. v. Cane*, 70 Wis. 2d 777, 780, 235 N.W.2d 672 (1975)(explaining the general rule is that an appeal “divests the trial court of jurisdiction of the subject matter of the appeal.”). This rule is meant to

prevent the circuit court from taking action “that may interfere with the pending appeal.” *Madison Teachers, Inc.*, 2013 WI 91, ¶21. It is meant to “ensure the orderly administration of justice and to prevent the trial court from doing anything that might adversely affect the rights and interest of the parties to the appeal.” *Hunter v. Hunter*, 44 Wis. 2d 618, 621, 172 N.W.2d 167 (1969).

Here, the subject matter of the appeal is the February 10, 2020 medication order. That order was a “final order from a special proceeding.” *State v. Scott*, 2018 WI 74, ¶31, 381 Wis. 2d 476, 914 N.W.2d 141. The February 10, 2020, competency proceedings resolved “an issue separate and distinct” from the issues presented in Mr. Green’s underlying criminal proceeding and is to be “treated as being commenced independently of any other action or proceeding.” *See Id.* ¶33 (quoting *State v. Alger*, 2015 WI 3, ¶76, 360 Wis. 2d 193, 858 N.W.2d 346).

Accordingly, the fact that the appeal of the February 10, 2020 medication order is not yet complete, and remittitur has not yet occurred, does not deprive the circuit court of jurisdiction to take action on separate, although related, proceedings in Mr. Green’s case, including the December 21, 2020 order. This is further demonstrated by the fact that the record related to the December proceedings remains in the circuit court. Finally, any action taken by the circuit court in relation to the December 21, 2020 order would not interfere with the pending appeal or adversely affect the rights of the parties to the appeal. The two medication orders are separate and distinct final orders from two independent special proceedings. An appeal of one does not affect the circuit court’s jurisdiction over the other.

CONCLUSION

For the reasons stated above, Mr. Green respectfully requests that this Court enter an order remanding the case to the circuit court to hear and determine his motion to vacate the December 21, 2020 order, or clarifying that the circuit court has jurisdiction to hear that motion without remand or remittitur.

Sincerely,

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cc: A.A.G. Maura F.J. Whelan (*Via U.S. Mail*)
Mr. Joseph Green (*Via U.S. Mail*)

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief complies with the word limit established by this court's April 28, 2021, order regarding letter briefs. The length is 2,237 words.

**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 § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 12th day of May, 2021.

Signed:

KATHILYNNE A. GROTELUESCHEN
Assistant State Public Defender