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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP001292

In the matter of the mental commitment of L.E.:
TAYLOR COUNTY HUMAN SERVICES,

Petitioner-Respondent,

v.

L.E.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUE PRESENTED

When a person is subject to an involuntary commitment order under Chapter 51, the circuit court may also find a person incompetent to refuse medication or treatment if it finds certain criteria apply. Is the fact that a person “wants to die,” alone, enough to support a finding that a committee is incompetent to refuse medication or treatment?

The circuit court concluded that L.E.’s “belief that he should die prevents him from a legitimate thought-process regarding the risk and benefits of” treatment. (42:1, App. 18).

The court of appeals agreed, concluding that L.E.’s “mental illness interferes with his ability to make an informed and rational choice about whether to engage in the recommended treatment.” *Taylor County Human Services v. L.E.*, (hereinafter referred to as “Court of Appeals Decision”), No. 2021AP1292, slip op. ¶26 (Feb. 15, 2022) (App. 12).

CRITERIA FOR REVIEW

This case presents a real and significant issue of federal and state constitutional law. *See* Wis. Stat. § 809.62(1r)(a). The right to refuse treatment is grounded in the Fourteenth Amendment of the U.S. Constitution as well as the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution.

Further, the decision in this case is in conflict with controlling precedent from this Court, *Outagamie County v. Melanie L.*, 2013 WI 67, 349 Wis. 2d 148, 833 N.W.2d 607, as well as federal precedent on which *Melanie L.* is based. See Wis. Stat. § 809.62(1r)(d). The court of appeals concluded that L.E.'s mental illness rendered him not competent to refuse medication. This is in conflict with decades of case law which holds that the questions of mental illness and competency to refuse medication are two distinct questions, and that a person suffering from mental illness is presumed competent to refuse medication. *Melanie L.*, 249 Wis. 2d 148, ¶45 (citing *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 737, 416 N.W.2d 883 (1987)).

L.E. is no longer subject to the involuntary medication order at issue. A recommitment hearing was held on February 28, 2022. At that hearing, the court extended the commitment but did not enter an involuntary treatment order. See court record in *Taylor County v. L.E.*, Taylor County Case No. 20-ME-0019.¹ However, because the court of appeals' opinion is in direct conflict with precedent and is constitutionally problematic, this Court should accept review. Additionally, several mootness exceptions apply in this case. See *Portage County v. J.W.K.*, 2019 WI 54, ¶12, 386 Wis. 2d 672, 927 N.W.2d 509 (listing mootness exceptions, including when (1) an

¹ This court may take judicial notice of circuit court records. *Kirk v. Credit Acceptance Corp.* 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

issue “arise[s] so often [that] ‘a definitive decision is essential to guide the trial courts’; (2) it is “likely to arise again” and “should be resolved . . . to avoid uncertainty”; and (3) it is “capable and likely of repetition and yet evade[] review”).

First, involuntary medication orders are very common in Chapter 51 commitment cases, and this issue, therefore, is likely to arise again. Second, the relatively short duration of a Chapter 51 commitment in comparison with the relatively lengthy appellate process makes it difficult to achieve appellate review before an involuntary medication order expires. Third, resolving the recurring issue of whether the involuntary administration of medication is permissible will provide needed guidance to litigants and trial courts. Although the evidence will differ from case to case, deciding this case will give insight into the sort of record the law deems insufficient so that litigants and trial courts have a body of benchmarks to rely on.

STATEMENT OF FACTS

On September 13, 2020, the county emergently detained Luca² after he injured himself while in the emergency room. (1:1). On September 28, 2020, the circuit court entered an order committing Luca to the care and custody of Taylor County for a period of six months. (21). The court denied the county’s request

² Pursuant to Wis. Stat. § 809.19(1)(g), L.E. will be referred to by a pseudonym, Luca.

for an order authorizing the involuntary administration of medication or treatment (22).

On February 25, 2021, the county petitioned the court for a one-year extension of Luca's commitment (28). The circuit court held a recommitment hearing on March 18, 2021.

At the hearing, the county called three witnesses. First, it called Dr. Brian Stress, a psychologist who had examined Luca. (51:2-3). Dr. Stress described Luca as "very pleasant," "respectful," and "a pleasure" to work with. (51:6). He testified that Luca had a history of self-harm, including cutting himself. (51:9). He stated that during the evaluation, Luca discussed his history of suicidal thoughts and attempts as well as recent suicidal thoughts and the specific plans he had recently thought about. (51:8-9).

Dr. Stress then testified regarding Luca's mental health diagnoses, which include borderline personality disorder, adjustment disorder with depression and anxiety, chronic versus major depressive disorder, alcohol use disorder, and cannabis use disorder. (51:10). He added that each of these diagnoses are considered mental illnesses that can be improved with treatment. (51:11-12).

Dr. Stress stated that he believed Luca to be a danger to himself. (51:12). He opined that "if treatment were removed there's a more likely than not probability that [Luca] would unfortunately participate in behaviors that could result in his injury

or death based on his thoughts and past behaviors.” (51:12).

Dr. Stress also testified about Luca’s competency to refuse medication. Luca had been prescribed Gabapentin twice a day, but he was only taking it as needed. (51:6). Dr. Stress stated that he had discussed medications and alternatives with Luca. (51:13). When asked whether Luca understood the advantages and disadvantages of treatment, Dr. Stress responded, “He understood what I was saying. He didn’t -- he indicated that he didn’t want to participate in treatment. He just wanted to be dead.” (51:13). Dr. Stress also stated that Luca “was willing to take medications” if he thought they were beneficial. (51:13-14). He then opined that Luca was not competent to refuse medication “based on his suicidal thoughts and plan ideation impaired judgment.” (51:14). He also opined that Luca should remain in a locked inpatient facility. (51:16).

Next, the county called Brooke Bauer, a social worker from the Trempealeau County Health Care Center. (51:25). Ms. Bauer testified that Luca “goes to things that we ask him to go to,” but that she questions whether he thinks they are beneficial to him. (51:27). This included group therapy, exercise, mindfulness activities, and deep breathing activities. (51:27). She testified that Luca participated in developing his own treatment goals. (51:28).

Ms. Bauer opined that Luca was not progressing towards meeting his treatment goals because there was still fluctuation in his mood. (51:28). She stated that despite Luca's frequent discussion of suicide and death, they did not have him on a suicide watch because Luca "has made agreements with us that he has done a good job of asking for assistance going to a seclusion room to . . . separate from those feelings." (51:29). She elaborated that "he's got an internal alarm clock, per se, where he kind of lets staff know what he needs from them when he needs it." (51:29).

Finally, the state called Michelle Deml, Luca's case manager with Taylor County Human Services. (51:30-31). She testified that Luca discussed suicide every time they speak. (51:32).

Luca did not contest the commitment itself. Rather, he contested an involuntary medication order and an order keeping him in a locked inpatient facility. He argued that the county had not met its burden in showing that he was not competent to refuse medication because it was uncontroverted that he understood the advantages and disadvantages of medication. (51:36). Luca also argued that the court should order outpatient treatment because sufficient measures could be taken to ensure his safety while also allowing him more freedom. (51:37).

The circuit court concluded that the county had proven that Luca suffers from a mental illness, namely borderline personality disorder, adjustment disorder, and depressive disorder; that he is the proper subject

for treatment; and that he is dangerous because “[h]e has continued to have suicidal thoughts and even plans on how he would carry that out.” (51:37). The court ordered that the maximum level of confinement be a locked inpatient facility. (51:38-39). The court stated, “It hasn’t been demonstrated sufficiently that he wouldn’t engage in self-harm if he were allowed to be in a group home or that there are sufficient safeguards with that type of placement that would satisfy the court that he should be in a lesser restrictive environment.” (51:39).

The circuit court reserved judgment on the question of the involuntary medication order and issued a written decision. In it, the court concluded that the county had shown by clear and convincing evidence that Luca was not competent to refuse medication. (42:1; App. 18). The court reasoned that Luca “doesn’t want to participate in treatment and just wants to die” and that he “was unable to describe . . . the effect the medication had on him.” (42:1; App. 18). The court stated, “it is clear that [Luca’s] belief that he should die prevents him from a legitimate thought-process regarding the risk and benefits of taking Gabapentin.” (42:1; App. 18).

On appeal, Luca challenged the circuit court’s decision regarding the need for locked, inpatient treatment³ as well as the involuntary medication

³ Luca does not petition this Court for review of this issue. The only issue raised in this petition for review is whether the court properly ordered involuntary treatment or medication.

order. The court of appeals affirmed on both issues. Regarding the involuntary medication order, the court of appeals held that Luca's "mental illness interferes with his ability to make an informed and rational choice" about medication. Court of Appeals Decision, ¶26 (App. 12). It agreed with the circuit court that Luca's belief that he should die prevented him from applying his understanding of the risks and benefits of the recommended treatment to his mental illness. *Id.* ¶¶25-26 (App. 11-12).

ARGUMENT

This court should accept review and hold that "wanting to die" cannot be the sole factor supporting a finding that a person is not competent to refuse treatment.

An individual, even one under an involuntary commitment order, has the right to refuse unwanted medical treatment as long as he is competent to do so. *See Melanie L.*, 349 Wis. 2d 148, ¶¶42-43. This interest "emanates from the common law right to self-determination and informed consent, the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution." *Id.* (internal quotations and citation omitted). "The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Washington v. Harper*, 494 U.S. 210, 229 (1990).

Because of this significant liberty interest, individuals are presumed to be competent to refuse medication regardless of their commitment status. *Melanie L.*, 249 Wis. 2d 148, ¶45 (citing *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 737, 416 N.W.2d 883 (1987)). An involuntary commitment order does not automatically render a person not competent to refuse medication because “the concepts of mental illness and competency are not synonymous.” *Jones*, 141 Wis. 2d at 728. “An individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision.” *Id.* The right to refuse medical treatment extends to individuals even when the refusal will likely or inevitably lead to death. See *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) (holding that a competent individual has a protected Fourteenth Amendment liberty interest in refusing unwanted medical treatment); *Lenz v. L.E. Phillips Career Dev. Ctr.*, 167 Wis. 2d 53, 73, 482 N.W.2d 60 (1992) (“[T]he right to refuse all unwanted life-sustaining medical treatment extends to incompetent as well as competent individuals.”).

The burden is on the county to prove by clear and convincing evidence that an individual who has been involuntarily committed is not competent to refuse medication and treatment. To do so, it must show that after the advantages and disadvantages of and alternatives to a particular medication are explained to him, one of the following is true: (1) “The

individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives;” or (2) “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.” Wis. Stat. § 51.61(1)(g)4.

Both the circuit court and the court of appeals relied on the second method of proof, concluding that Luca was substantially incapable of applying his understanding of the advantages and disadvantages of Gabapentin to his mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment. The circuit court concluded that Luca was not competent to refuse medication “because he doesn’t want to participate in treatment and just wants to die.” (42:1; App. 18). It explained that “it is clear that [Luca’s] belief that he should die prevents him from a legitimate thought-process regarding the risk and benefits of taking Gabapentin.” (42:1; App. 18). The court’s holding closely mirrored Dr. Stress’s testimony that Luca was “not competent based on his suicidal thoughts and plan ideation [and] impaired judgment.” (51:14). The court of appeals agreed with this reasoning and concluded that Luca’s “mental illness interferes with his ability to make an informed and rational choice about whether to engage in the recommended treatment.” Court of Appeals Decision, ¶26 (App. 12).

This is in direct conflict with *Melanie L.* 349 Wis. 2d 148, ¶45. Because a person is presumed competent even if under an involuntary commitment, the circuit court cannot rely on mental illness alone as a reason for finding a person not competent to refuse treatment. Rather, the court must determine, as the statute indicates, whether a person can understand the advantages and disadvantages of medication and whether he can apply that understanding to his own condition in order to make an informed choice. *Id.* ¶53. The court must focus not on whether the patient’s decision is the wrong choice, but “whether the patient understands the implications of the recommended medication or treatment and is making an informed choice.”⁴ *Id.* ¶51 (internal citation and quotations omitted). In doing so, the court “must maintain the distinction . . . between a patient’s mental illness and his or her ability to exercise informed consent.” *Id.*

Here, rather than focusing on whether Luca understood the implications of Gabapentin, the circuit court focused on whether Luca’s decision was the wrong choice. It pointed to Luca’s decision—that he’d rather die than participate in treatment—and thought it was the wrong one. It then used this as its sole evidence of Luca’s inability to apply his understanding of the advantages and disadvantages of treatment to his condition. This is exactly what *Melanie L.* warned against.

⁴ This is true even when the person’s choice is potential or even inevitable death. See *Lenz*, 167 Wis. 2d at 73.

The court of appeals opinion did no better. It affirmed the reasoning of the circuit court and concluded that Luca's mental illness impeded his ability to make an informed choice. It pointed to no other facts that supported this conclusion except for Luca's choice of "wanting to die." As such, both the circuit court and the court of appeals failed to "maintain the distinction . . . between a [Luca]'s mental illness and his . . . ability to exercise informed consent." *Id.*

From a statutory perspective, the court of appeals' decision is also flawed. Like *Melanie L.*, the statutes recognize that just because a person is mentally ill does not mean they are incompetent to refuse medication. The statutes require courts to make separate findings about whether a person should be committed under Chapter 51 and whether a person is incompetent to refuse medication. *Compare* Wis. Stat. § 51.20(1)(a)1. (requiring a finding of mental illness in order to involuntarily commit someone), *with* Wis. Stat. § 51.61(1)(g)3. & 4. (requiring a separate finding that a person is incompetent to refuse medication or treatment).

The court of appeals concluded that Luca's "mental illness interferes with his ability" to make informed treatment decisions because Luca wants to die. Court of Appeals Decision, ¶¶25-26 (App. 11-12). In other words, the court of appeals held that because Luca suffers from a mental illness, he is incompetent to refuse treatment. But if all that is required to prove incompetency for treatment purposes is a showing of

mental illness, this would essentially collapse the questions of whether a person is mentally ill and whether a person is incompetent to refuse treatment into a single inquiry. It would render Wis. Stat. § 51.61(1)(g)3. & 4. meaningless. The statute, like the case law, requires more.

It's clear from the record that Luca understood the advantages and disadvantages of Gabapentin. Dr. Stress stated that he had explained the advantages, disadvantages, and alternatives to treatment with him and that Luca "understood what I was saying." (51:13; App.). Dr. Stress specifically discussed the medication Gabapentin with Luca, and stated that Luca understood the side effects and was able to express that he was not experiencing any. (51:18). Dr. Stress testified that Luca understood the potential benefits of the medication. (51:18). He also stated that Luca "appeared to understand what Gabapentin was prescribed for and what it could do or not do." (51:19).

It's also clear that Luca was capable of applying his understanding of the advantages and disadvantages of medication to his particular mental illness. According to Dr. Stress, Luca was willing to take medication if it was beneficial. Luca was, in fact, taking Gabapentin as needed without an involuntary medication order. He was able to connect the potential side effects and benefits of taking Gabapentin to his own mental illness by expressing how Gabapentin affected him. Luca did not challenge the extension of his commitment, implying that he recognized his own

mental illness and his need for help. *See Melanie L.*, 349 Wis. 2d 148, ¶90. Luca had also been participating in numerous therapeutic activities, participating in the development of his treatment plan, and implementing coping techniques to manage his symptoms. All of this indicates that Luca understood the advantages and disadvantages of Gabapentin, had an awareness of and understanding of his own mental illness, and was able to connect the two. *See id.* ¶71.

The court may not have agreed with Luca's decision to only take Gabapentin as needed or his statement that he wanted to die. But "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 to the person's own condition before making that choice." *Id.* ¶78. Here, everything indicates that Luca was able to do so. However, the court impermissibly used Luca's choice about treatment as the only reason justifying an involuntary medication order. This was in direct conflict with *Melanie L.* and the decades of federal and state precedent on which *Melanie L.* relies. This Court should accept review and hold that a court cannot use a client's choice about treatment, even if that choice is wanting to die, as the sole justification for an involuntary medication order.

CONCLUSION

For these reasons, Luca respectfully requests that this Court grant review and hold that the court of appeals erred in finding him incompetent to refuse medication or treatment.

Dated this 17th day of March, 2022.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 2677 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

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

Dated this 17th day of March, 2022.

Signed:

CARY BLOODWORTH
Assistant State Public Defender