STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000102

In the matter of the mental commitment of C.B.O.:
TREMPEALEAU COUNTY,

Petitioner-Respondent,

v.

C.B.O.,

Respondent-Appellant.

On Appeal from a Commitment Order and Involuntary Medication Order Entered in the Trempealeau County Circuit Court, the Honorable Scott L. Horne Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. The evidence was insufficient to sustain a finding that C.B.O. was dangerous to himself or others.

To recommit C.B.O., the county was required to prove that C.B.O. would be a proper subject for commitment if treatment were withdrawn. Wis. Stat. § 51.20(1)(am). The circuit court found that the applicable standard of dangerousness was Wis. Stat. § 51.20(1)(a)2.b. (R.96:10-11; A-App.15-16), which requires proof of "a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm. . . ." Wis. Stat. § 51.20(1)(a)2.b. In a recommitment proceeding, the county is not required to prove recent acts or omissions, Wis. Stat. § 51.20(1)(am); however, the standard otherwise remains the same.

The evidence of purported dangerousness used as the basis for C.B.O.'s original commitment was insufficient to meet the Wis. Stat. § 51.20(1)(a)2.b. standard. Therefore, a finding that equivalent behavior would recur if treatment were withdrawn was also insufficient to extend the commitment under the recommitment standard.

The county asserts that, "the sufficiency of the evidence supporting prior orders has no impact on any

subsequent order," but its case citation does not support that broad contention. (Response Brief at 3) (citing *Portage Cty. v. J.W.K.,* 2019 WI 54, ¶21, 386 Wis. 2d 672, 927 N.W.2d 509). In *J.W.K.*, the Wisconsin Supreme Court declined to reach the appellant's claim that the evidence was insufficient. Instead, it dismissed the appeal as moot.

J.W.K. addressed the broad contention that any deficient recommitment proceeding results in a domino effect whereby all future recommitment orders are invalid and must be reversed as well. The Wisconsin Supreme Court rejected this broad legal argument. *J.W.K.*, 386 Wis. 2d, ¶21. It was in *that* context that the Court stated that the sufficiency of the evidence at an original commitment hearing did not impact a subsequent order. Notably, J.W.K. did not argue that his subsequent recommitment was, *in fact*, based on insufficient evidence. Only that the domino theory knocked it down.

Unlike *J.W.K.*, C.B.O. does not argue that, simply because the evidence at his original commitment hearing was invalid, that the instant recommitment order must be reversed. Instead, he argues that the evidence at the recommitment hearing was *in fact* insufficient.

A. The court relied on clearly erroneous findings of fact.

The circuit court based the recommitment order in part on erroneous findings of fact. An arguable claim of dangerousness can be made based on those

purported facts. However, those facts are not based in evidence. Instead, the testimony from Deputy Huson contradicts the court's findings.

The county's brief does not address C.B.O.'s argument that certain of the court's findings of fact were clearly erroneous. It does not discuss any of the discrepancies between the court's findings and the actual testimony. "[A]rguments not rebutted on appeal are deemed conceded." *Shadley v. Lloyds of London*, 2009 WI App 165, ¶26.

Instead, the county argues that the court was "required to make separate findings on dangerousness, separate from the original commitment hearing, based on the testimony presented at the recommitment hearing." (Response Brief at 4). Yet, Dr. Persing did not testify to the specifics of the original detention. (R.95:10-17; A-App. 34-40).[1] The court did not base its decision solely on the evidence at the recommitment hearing.

The court erroneously found that C.B.O. "armed himself" to "ward off the threat," and more specifically that he "armed himself" with cross-bow and knives against law enforcement officers. (R.96:12; App.17). C.B.O. never armed himself or wielded a weapon. (R.52:13; App.68). Deputy Huson did not see any

[1] This is what the doctor had to say about the emergency detention: it involved "him potentially having a potential harm to someone who may or may not be present, may or may not have a weapon, may or may not be intending him harm." (R.95:15; A-App. 39).

potentially dangerous items until C.B.O. invited him inside and Deputy Huson and other officers performed a consent-based search of the apartment. The court found that C.B.O. sought to "acquire" a firearm from family for the "purpose of defending himself" (R.96:12; App.17). Deputy Huson testified that C.B.O. asked his son to return his firearm to him, and had asked law enforcement for assistance in retrieving his property, but this occurred weeks earlier. At the original hearing, the court was not convinced that this was linked to C.B.O.'s mental state. (R.52:31; App.86).

If the court's erroneous findings of fact were accurate, there would be an arguable claim of an implied threat. But the findings were not accurate.

B. The evidence does not meet the Wis. Stat. § 51.20(1)(a)2.b. standard of dangerousness.

The county appears to agree that C.B.O.'s behavior underlying the original commitment must be found dangerous in order to find the dangerousness element for the recommitment. It asserts that, "[b]latantly stating that one will not follow treatment recommendations that are clearly to your benefit, psychiatrically, definitively supports the Court's finding that if treatment were withdrawn, C.B.O. would pose a substantial risk of harm to others, as he did prior to his original commitment." (Response Brief at 8). Yet, being mentally ill and disagreeable to medication is not dangerous. Instead, mental illness

and dangerousness are separate elements. *See J.W.K.*, 386 Wis. 2d 672 ¶18.

The evidence showed that C.B.O. was living independently, accepting treatment, taking care of himself, making no threats to himself or others, and doing "quite well." (R.95:12, 17; A-App.36, 44). He did not agree to take Invega if not so ordered, but he *did* agree to continue to accept CSP mental health services. (R.95:27; A-App.51).

Dr. Persing testified that he was concerned that C.B.O. did not "have any recollection" of the details of the emergency detention (R.95:15; A-App.39); but C.B.O. testified about what happened—and his testimony showed that he *did remember*, he just did not agree with the county's version of what transpired. (R.95:23-24; A-App.47-48). C.B.O. testified that he "didn't harm anybody or do anything," that he "didn't say bad words to anybody," and that what his children claimed he said to them was not accurate. (R.95:23-24; A-App.47-48). He further explained that he had "filed a complaint to the cop shop. I wanted an investigator because I had a man in my hallway with a gun. And so they came out and investigator, three of them, and the guy was gone already by the time he got there, with the gun." (*Id.*).

To the extent that Dr. Persing relied on the fact C.B.O. believed that his original commitment was unjust, that consideration is unreasonable. (*See* R.95:15; App.39). C.B.O. is appealing the original commitment (by the undersigned counsel in Appeal

No. 21AP1955), and cannot be faulted for exercising his constitutional right to appeal.

The county failed to prove that C.B.O. was dangerous, as is required to support the recommitment order. The order must be reversed.

CONCLUSION

For the reasons stated herein and in C.B.O.'s Appellant's Brief, this Court is asked to conclude that the evidence was insufficient to sustain the recommitment order, and to reverse the order.

Dated this 13th day of June, 2022.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,150 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rules or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review or an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 13th day of June, 2022.

Signed:
Electronically signed by
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