State of Wisconsin

Court of Appeals District I

Case No. 2022AP187 and 2022AP188

State of Wisconsin,

Plaintiff-Respondent,
v.

Michele M. Ford,

Defendant-Appellant.

Milwaukee County Cases
21CM1807 and 21CM3452

On Appeal from Incompetency Finding,
Entered in the Milwaukee County Circuit Court,
Hon. Jack Davila, Presiding

Reply Brief of Defendant-Appellant

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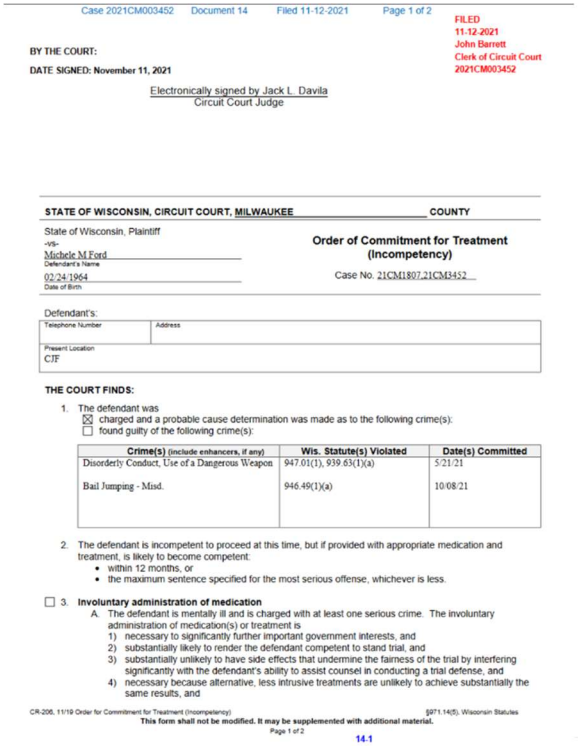
Argument

I. The notice of appeal was timely and the State's assertion that it was not is incorrect.

The State argues that Ms. Ford was subject to a shortened deadline to appeal her case because the circuit court e-filed this document:



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FILED
11-12-2021
John Barrett
Clerk of Circuit Court
2021CM003452

BY THE COURT:

DATE SIGNED: November 11, 2021

Electronically signed by Jack L. Davila
Circuit Court Judge

STATE OF WISCONSIN, CIRCUIT COURT, MILWAUKEE COUNTY

State of Wisconsin, Plaintiff
-vs-
Michele M Ford
Defendant's Name
02/24/1964
Date of Birth

Order of Commitment for Treatment (Incompetency)

Case No. 21CM1807,21CM3452

Defendant's:
Telephone Number | Address
Present Location
CJF

THE COURT FINDS:

1. The defendant was
☒ charged and a probable cause determination was made as to the following crime(s):
☐ found guilty of the following crime(s):

Crime(s) (include enhancers, if any)	Wis. Statute(s) Violated	Date(s) Committed
Disorderly Conduct, Use of a Dangerous Weapon	947.01(1), 939.63(1)(a)	5/21/21
Bail Jumping - Misd.	946.49(1)(a)	10/08/21

2. The defendant is incompetent to proceed at this time, but if provided with appropriate medication and treatment, is likely to become competent:
- within 12 months, or
- the maximum sentence specified for the most serious offense, whichever is less.

☐ 3. **Involuntary administration of medication**
A. The defendant is mentally ill and is charged with at least one serious crime. The involuntary administration of medication(s) or treatment is
1) necessary to significantly further important government interests, and
2) substantially likely to render the defendant competent to stand trial, and
3) substantially unlikely to have side effects that undermine the fairness of the trial by interfering significantly with the defendant's ability to assist counsel in conducting a trial defense, and
4) necessary because alternative, less intrusive treatments are unlikely to achieve substantially the same results, and

CR-206, 11/19 Order for Commitment for Treatment (Incompetency) §971.14(5), Wisconsin Statutes
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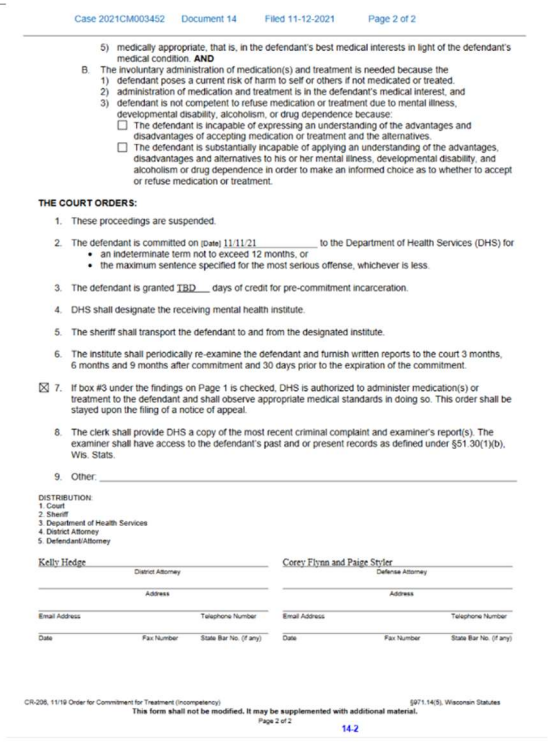
14.1



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5) medically appropriate, that is, in the defendant's best medical interests in light of the defendant's medical condition. **AND**
B. The involuntary administration of medication(s) and treatment is needed because the
1) defendant poses a current risk of harm to self or others if not medicated or treated.
2) administration of medication and treatment is in the defendant's medical interest, and
3) defendant is not competent to refuse medication or treatment due to mental illness, developmental disability, alcoholism, or drug dependence because:
☐ The defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
☐ The defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, and alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

THE COURT ORDERS:

1. These proceedings are suspended.
2. The defendant is committed on [Date] 11/11/21 to the Department of Health Services (DHS) for
- an indeterminate term not to exceed 12 months, or
- the maximum sentence specified for the most serious offense, whichever is less.
3. The defendant is granted TBD days of credit for pre-commitment incarceration.
4. DHS shall designate the receiving mental health institute.
5. The sheriff shall transport the defendant to and from the designated institute.
6. The institute shall periodically re-examine the defendant and furnish written reports to the court 3 months, 6 months and 9 months after commitment and 30 days prior to the expiration of the commitment.
☒ 7. If box #3 under the findings on Page 1 is checked, DHS is authorized to administer medication(s) or treatment to the defendant and shall observe appropriate medical standards in doing so. This order shall be stayed upon the filing of a notice of appeal.
8. The clerk shall provide DHS a copy of the most recent criminal complaint and examiner's report(s). The examiner shall have access to the defendant's past and or present records as defined under §51.30(1)(b), Wis. Stats.
9. Other:

DISTRIBUTION:
1. Court
2. Sheriff
3. Department of Health Services
4. District Attorney
5. Defendant/Attorney

Kelly Hedge
District Attorney
Address
Email Address Telephone Number
Date Fax Number State Bar No. (if any)

Corey Flynn and Paige Styler
Defense Attorney
Address
Email Address Telephone Number
Date Fax Number State Bar No. (if any)

CR-206, 11/19 Order for Commitment for Treatment (Incompetency) §971.14(5), Wisconsin Statutes
This form shall not be modified. It may be supplemented with additional material.
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14.2

In other words, the State is trying to get this court to altogether deny Ms. Ford her right to an appeal by construing an "Order of Commitment for Treatment" from a judge as a "notice of entry of a final judgment or order" under Wis. Stat. § 808.04(1). (State's Br., p. 5).

This is wrong. A "notice of entry of a final judgment or order" is a separate written document, other than the judgment or order, served by a party after the order was entered, containing the date of entry of the final order. *See* 806.06(3); *Soquet v. Soquet,* 117 Wis.2d 553, 557, 345 N.W.2d 401 (1984).

The above document is not the sort of document that the State can use to reduce the time for an appeal. For one thing, a notice of entry is to be served

by a party, not the court. *Id.* The State never served her with anything of the kind.

But the State argues that, because the "Order of Commitment for Treatment" is in writing, and because it says she was committed on November 11, 2021, and because this happens to be the same day that the court found her incompetent, and because after all her attorneys were present in court when she was found not competent, Ms. Ford had notice of the court's decision and should be subject to the shorter deadline. (State's Br., p. 7).

This argument is precluded by *Soquet v. Soquet*, which says that precise written notice, not just actual notice, is required to shorten the deadline. *Id* at 558. The argument is also nonsensical. Appeals are not possible unless there is a written order or judgment. Since all court orders must be served on all parties, under this argument, all appeals would be subject to a 45-day deadline and the 90-day deadline would never apply.

The State did not serve a notice of entry on Ms. Ford. Therefore, the deadline was not shortened to 45 days. Ms. Ford's appeal, which was filed on the 88th day, was timely, and this court has jurisdiction over this appeal.

II. Ms. Ford's liability for the cost of care during her commitment is a collateral consequence that precludes the State's mootness argument.

The State argues that this appeal is moot because Ms. Ford was later found competent to proceed and because the cases were administratively closed. It argues that the incompetency finding therefore no longer has any force, meaning, or impact. (State's Br., p. 8).

But an appeal is not moot if the direct or collateral consequences of the order persist and vacatur of that order would practically affect those consequences. *Sauk County v. S.A.M.*, 2022 WI 46, ¶19. It is therefore not enough for the State to show that Ms. Ford was found competent and the underlying proceedings closed. It must show that there is no practical effect to leaving the orders in place.

The mootness argument fails because of the holding in *Sauk County v. S.A.M.*, which found that a person's mandatory liability for the cost of the care received during a commitment is a collateral consequence. *Id.* at ¶24.

S.A.M. pointed to Wis. Stat. § 46.10(2), under which a committed person:

> [S]hall be liable for the cost of the care, maintenance, services and supplies related to each commitment period. If the underlying commitment order is vacated, however, the liability tied to that particular commitment period no longer exists. See *Jankowski v. Milwaukee County*, 104 Wis.2d 431, 438-40, 312 N.W.2d 45 (1981); *Ethelyn I.C. v. Waukesha County*, 221 Wis.2d 109, 120-21, 584 N.W.2d 211 (Ct. App. 1998). For that reason, a direct causal relationship exists between vacating an expired recommitment order and removing the liability it creates, sufficient to render recommitment appeals not moot.
>
> *Id.* at ¶24.

Ms. Ford is in the exact same situation as S.A.M. because Wis. Stat. § 46.10(2) applies to people like Ms. Ford, committed for competency remediation under § 971.14(5). This case is therefore not moot.

III. Remand for a *Machner* hearing is not required but would be welcomed if ordered.

The State argues that Ms. Ford cannot raise the issues in her brief because they were raised for the first time on appeal. (State's Br., p. 9). But Ms. Ford has argued that her constitutional right to counsel was violated. Failure to object cannot forfeit constitutional rights. *See State v. Ndina,* 2009 WI 21, ¶¶ 29–31, 315 Wis.2d 653, 761 N.W.2d 612 (citations omitted).

Next, the State argues that Ms. Ford should have raised the issue of ineffective assistance of counsel before filing this appeal and cites *State ex rel. Kyles v. Pollard*, 2014 WI 38, 354 Wis. 2d 626, 847 N.W.2d 805 for the proposition that ineffective assistance of counsel claims should start in the circuit court unless the circuit court is unable to grant relief. (State's Br., p. 10). The circuit court was unable to grant relief here because civil appeals like this one begin in the court of appeals. That is why Ms. Ford included an alternate request for remand for postconviction factfinding in her opening brief.

Finally, the State tries to make it seem that remand for fact-finding is strictly necessary because it is otherwise unclear how trial counsel's breach of the duty of confidentiality amounted to ineffective assistance of counsel under the facts of this case. (State's Br., p. 10-11). It does this by building and then knocking down a straw man—pretending that Ms. Ford has argued that all breaches of confidentiality are per se deficient performance—instead of engaging with her real argument. There is no need for a finding that confidentiality was breached because it was obviously breached. Ms. Ford wanted to be found competent. Trial counsel provided the competency evaluator with information that helped accomplish the opposite. The record allows no other reasonable inference, and the State does not suggest one.

Moreover, the State sidesteps the real nature of Ms. Ford's reliance on *Weaver v. Massachusetts*. Although *Weaver* found there was no per-se fundamental unfairness under the facts of that case, it made it clear that prejudice is not required in every single case alleging ineffective assistance of counsel if the defendant can show that the proceedings were rendered fundamentally unfair. 137 S. Ct. 1899, 1910, 1911 (2017). Ms. Ford argued at length that her trial counsel's breach of confidentiality in order to advocate *against* Ms. Ford's goals is the sort of case in which counsel's deficient performance rendered the proceedings fundamentally unfair. (Ms. Ford's Br., p. 9-11). The State simply refuses to engage this argument. (State's Br., p. 11).

In short, Ms. Ford believes that this court can decide this case without a *Machner* hearing but would welcome such a hearing if ordered on remand.

Conclusion

For these reasons, Ms. Ford again asks the court to reverse the finding of incompetency entered against her on November 11, 2021 or, in the alternative, remand to the circuit court for a *Machner* hearing.

Dated this 13th day of February, 2023.

Respectfully submitted,

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Certification as to Form/Length

I hereby certify that this brief conforms to the rules contained in §. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 1,266 words.

Dated this 13th day of February, 2023.

Respectfully submitted,

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