STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2022AP000230

In the matter of the mental commitment of C.J.A.:

OUTAGAMIE COUNTY,

Petitioner-Respondent,

v.

C.J.A.,

Respondent-Appellant.

On appeal from orders for extension of commitment and for involuntary medication and treatment entered in the Outagamie County Circuit Court, the Honorable Timothy A. Hinkfuss, presiding.

REPLY BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

Page

ARGUMENT 6

I. The circuit court lacked competency to hold Catherine's recommitment hearing. 6

A. A competency claim for noncompliance with a statutory time limit cannot be forfeited. 7

B. The 57-day delay in holding Catherine's extension hearing was unreasonable and she is not judicially estopped from raising the competency claim. 8

II. The circuit court committed plain error by admitting hearsay about Catherine's treatment record. 13

A. The county's use of inadmissible hearsay was plain error. 14

B. The use of inadmissible hearsay was pervasive and not harmless error. 17

CONCLUSION..... 19

CASES CITED

Addington v. Texas,
441 U.S. 418 (1979)..... 9

City of Eau Claire v. Booth,
2016 WI 65, 370 Wis. 2d 595,
882 N.W.2d 738..... 7

Dodge County v. Ryan E.M.,
2002 WI App 71, 252 Wis. 2d 490,
642 N.W.2d 592 10

Eau Claire County v. S.Y.,
156 Wis. 2d 317, 457 N.W.2d 326
(Ct. App. 1990) 16

G.O.T. v. Rock County,
151 Wis. 2d 629, 445 N.W.2d 697
(Ct. App. 1989) 6

Green County v. H.N.
("In the Interest of B.J.N."),
162 Wis. 2d 635, 469 N.W.2d 845 (1991) 7

Milwaukee County v. Edward S.,
2001 WI App 169, 247 Wis. 2d 87,
633 N.W.2d 241 ..... 11, 12

Portage County v. J.W.K.,
2019 WI 54, 386 Wis. 2d 672,
927 N.W.2d 509 ..... 15, 17

Sauk County v. S.A.M.,
2022 WI 46, 402 Wis. 2d 379,
975 N.W.2d 162 15

Sheboygan County Department of Social
Services v. Matthew S.,
2005 WI 84, 282 Wis. 2d 150,
698 N.W.2d 631 8

State ex. rel. Lockman v. Gerhardstein,
107 Wis. 2d 325, 320 N.W.2d 27
(Ct. App. 1982) 10

State v. Counihan,
2020 WI 12, 390 Wis. 2d 172,
938 N.W.2d 530 14

State v. Jorgenson,
2008 WI 60, 310 Wis. 2d 138,
754 N.W.2d 77 15

State v. Michael S.,
2005 WI 82, 282 Wis. 2d 1,
698 N.W.2d 673 8

Village of Trempeleau v. Mikrut,
2004 WI 79, 273 Wis. 2d 76,
681 N.W.2d 190 7

Virgil v. State,
84 Wis. 2d 166, 267 N.W.2d 852 (1978) 18

STATUTES CITED

Wisconsin Statutes

Chapter 48 8

Chapter 51 .....8 passim

51.20 10

51.20(1)(am) 16

51.20(1)(e), (13)(g)2r 10

51.20(10) 6

51.20(10) to (13) 6

51.20(10)(e) 6, 11

51.20(13)(g)3 6

51.20(7)(a), (c), (10)(e) 10

51.20(9)(a)3 10

907.03 17

ARGUMENT

I. The circuit court lacked competency to hold Catherine's recommitment hearing.

The court has the authority to postpone an extension hearing at the request of the subject individual for no more than 7 days. Wis. Stat. § 51.20(10)(e). Specifically, "At the request of the subject individual or his or her counsel the final hearing the court may issue an order under par. (c) may be postponed, but in no case **may the postponement exceed 7 calendar days** from the date established by the court under this subsection for the final hearing."[1] (Emphasis added).

Here, Catherine's extension hearing was held 57 days beyond the expiration of her commitment order, far exceeding the 7-day postponement authorized by statute. The court lacks competency to proceed on an extension petition if the new extension order is not entered prior to the expiration of the previous order or following the postponement options authorized by statute – *i.e.*, s. 51.20(10). *G.O.T. v. Rock County*, 151 Wis. 2d 629, 636, 445 N.W.2d 697 (Ct. App. 1989). The county does not dispute that the court loses competency to proceed when it fails to abide

[1] Upon an application for extension of a commitment, "the court shall proceed under [Wis. Stat. § 51.20(10) to (13)]." Wis. Stat. § 51.20(13)(g)3. Thus, the timeframes established in s. 51.20(10)(e), apply to final extension hearings.

by the statutory time limits. Thus, those arguments will not be repeated herein. Instead, the county argues: (1) the competency claim was forfeited and (2) Catherine is judicially estopped from raising this claim. Each argument fails.

A. A competency claim for noncompliance with a statutory time limit cannot be forfeited.

The county fails to recognize the well-established rule that challenges to a court's competency for noncompliance with statutory time limits cannot be forfeited[2] by not raising the claim in the circuit court. Courts in Wisconsin "have consistently ruled that a court's loss of power due to failure to act within statutory time periods cannot be stipulated to nor waived." *Green County v. H.N. ("In the Interest of B.J.N.")*, 162 Wis. 2d 635, 656-57, 469 N.W.2d 845 (1991). The supreme court in *Village of Trempeleau v. Mikrut*, clarified when forfeiture applies to competency claims but explicitly chose not to decide whether to overrule prior cases concluding competency challenges premised upon noncompliance with statutory time limits could be forfeited. 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.

[2] Several cases cited in this section refer to "waiver" rather than "forfeiture." However, it has since been clarified that the "failure to make the timely assertion of a right" is forfeiture, not waiver. *City of Eau Claire v. Booth*, 2016 WI 65, ¶11, fn 5, 370 Wis. 2d 595, 882 N.W.2d 738. Thus, this brief will use the term "forfeiture."

Just one year later, the court confirmed the long-standing rule: a competency claim for noncompliance with statutory time limits cannot be forfeited. In *Matthew S.*, the court concluded forfeiture did not apply to a competency challenge for failure to abide by a statutory time period in chapter 48. *Sheboygan County Department of Social Services v. Matthew S.*, 2005 WI 84, ¶2, 282 Wis. 2d 150, 698 N.W.2d 631. Likewise, in *Michael S.*, the court concluded the expiration of the one-year juvenile disposition order cannot be forfeited. *State v. Michael S.*, 2005 WI 82, ¶¶70-74, 282 Wis. 2d 1, 698 N.W.2d 673. The strict time limits in chapter 51 cases is no exception.

Therefore, the county's argument that the competency claim has been forfeited because it was not raised in the circuit court fails.

B. The 57-day delay in holding Catherine's extension hearing was unreasonable and she is not judicially estopped from raising the competency claim.

The county makes Catherine out to be the villain here by arguing the near 2-month delay was caused by her "conduct and manipulation," and thus, she should not be afforded the protections mandated by the Legislature when it enacted strict statutory time limits for commitment proceedings. The county's argument fails.

To begin with, Catherine did not manipulate anything. The timeline is as follows:

- July 15, 2021 – petition filed (237);
- July 20, 2021 – order appointing counsel (238);
- July 21, 2021 – motion to withdraw as counsel (241);
- July 23, 2021 – attorney allowed to withdraw (243);
- August 2, 2021 – new order appointing counsel (244);
- August 10, 2021 – request for independent evaluation, asking for a hearing set out **30 to 45 days** (247);
- August 12, 2021 – stipulation to extend the commitment for **60 days** from August 18, 2021 (250);
- August 18, 2021 – order expired (201).
- October 14, 2021 – extension hearing (276).

Chapter 51 mandates quick proceedings. This is for good reason. Involuntary commitments involve a severe deprivation of liberty. *Addington v. Texas*, 441 U.S. 418, 425 (1979). The strict time limits are essential to the due process guarantee mandated when the government seeks to deprive a person of their liberty in this way. *See Dodge County v. Ryan E.M.*,

2002 WI App 71, ¶¶5, 11, 252 Wis. 2d 490, 642 N.W.2d 592.

The general timeframe for initial commitment proceedings is 14 days but can be postponed for 7 days, allowing **21 days** from the time of detention until final hearing. Wis. Stat. §§ 51.20(7)(a), (c), (10)(e). Likewise, the extension petition must be filed **21 days** prior to expiration of the commitment order and only a 7-day postponement of the hearing is authorized. Wis. Stat. §§ 51.20(1)(e), (13)(g)2r. With those short, mandated deadlines, s. 51.20, still permits an additional expert examination at the respondent's request. Wis. Stat. § 51.20(9)(a)3. And, accomplishing such requests within tight time limits is common for chapter 51 proceedings.[3] *See State ex. rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 328, 320 N.W.2d 27 (Ct. App. 1982) ("any person who is subject to an involuntary commitment proceeding has 'the right under most circumstances to a full commitment hearing within two weeks of being taken into custody.'") This case is no exception.

Even if a longer postponement was permitted, 57 days was unreasonable. On August 10, 2021,

[3] The county states "it is difficult to understand why the State Public Defender's Office" is arguing for strict adherence to the statutory timeframes. (Response, 16). The county conflates the role of advocate counsel with a position taken by the State Public Defender. Appointed counsel represents *their client*, not general positions of the State Public Defender. Despite this misunderstanding, it should be noted that these deadlines are strictly followed around the state.

Catherine's counsel initially requested a 30- to 45-day extension. (247). That would be September 9, 2021 on the short-end and September 24, 2021 on the long-end. This still is not authorized by statute but there is no reason there would need to be an extension so far outside this initial request. The hearing on October 14, 2021, was nearly 3 times longer than the normal statutory timeframe for extension proceedings (21 days).

Even if Catherine requested an independent evaluation on the day the county filed its petition on July 15, 2021, there would only be 34 days to obtain the report. And, if Catherine requested the 7-day postponement authorized by s. 51.20(10)(e), only 41 days would have elapsed between the filing of the petition and the final hearing. This illustrates the unreasonableness of a 57-day delay. Thus, this is not about manipulation on Catherine's part. The true issue here is about the mandated time limits – that are used routinely in chapter 51 cases – being ignored.

The county relies on *Edward S.* and argues that Catherine should be judicially estopped from raising the competency claim. Since both issues were addressed in Catherine's initial brief, only a few points will be made here. First, *Edward S.* provides only a "limited circumstance where the extension is **caused solely by the conduct and manipulation** of the detained subject." *Milwaukee County v. Edward S.*, 2001 WI App 169, ¶9, 247 Wis. 2d 87, 633 N.W.2d 241 (emphasis added). That is not what occurred here, as explained above. Catherine made a reasonable (and

common) request for an independent evaluation. The 57-day postponement for her final hearing far exceeded what was authorized by statute or what was reasonable.

Second, Edward S. fired his lawyer the day before the final hearing, leaving no option but to adjourn while he obtained counsel. *Id.* at ¶¶6-7. Even then, the postponement was only 14 days long. *Id.* at ¶¶2-3. This was reasonable.

On the other hand, as explained above, the 57-day extension, here, far exceeded a reasonable adjournment. It tripled the normal time period for extension proceedings. It was more than 2 weeks longer than initially requested by Catherine's counsel. There was no explanation as to why such a lengthy adjournment was needed. And, Catherine did not cause the delay. Even if her attorney withdrawing was considered similar to *Edward S.*, her first attorney sought withdrawal, 1 day after being appointed and 28 days before Catherine's commitment expired. That is nothing close to the eleventh-hour firing in *Edward S.* And, chapter 51 contemplates requests for an independent evaluation within strict time constraints. There is no reason this case prompted an exception to the strict timelines mandated for extension proceedings.

II. The circuit court committed plain error by admitting hearsay about Catherine's treatment record.

The county repeatedly elicited inadmissible hearsay in an effort to commit Catherine for the sixth year in a row. The information elicited was not simply for purposes of explaining treatment, it was used to prove alleged incidents of dangerous conduct actually occurred. For example, the county elicited testimony that Catherine threatened a judge in 2012 and then again in 2016 and went to his home with a knife.[4] With each allegation there were multiple layers of hearsay making it extremely difficult for Catherine to challenge because no witness had personal knowledge of the alleged incidents or was even the first-hand recipient of a description of the allegations. It was a wieldy game of telephone.

Still, Catherine again made clear she disputes the claims. And, the court made factual findings about these incidences occurring. "I think you did threaten Judge [ ] not once, but twice. I don't think you believe it. But I think it happened." (276:87). In other words, it was an important issue.

Before addressing the county's arguments, one point must be made. The county's brief and the witnesses against Catherine frequently mention that she fixates or perseverates on the allegations against

[4] Catherine's initial brief lists all the hearsay presented so the reply will focus more broadly on the issue. (Brief-in-Chief, 18-20).

her, namely those related to threats of a judge. Of course, she does. Year, after year, after year, the county uses those allegations against her in an effort to keep her committed. This year was the sixth such year. Catherine has adamantly denied the allegations. And although she has a conviction related to the first allegation, she still disputes it. As for the second allegation, there are simply layers and layers of hearsay without much detail. This is relevant as to the hearsay claims, but is also important context. If the government repeatedly uses an allegation against an individual person to deprive them of their liberty – in this case, for 6 years – it is unsurprising the person being deprived of their liberty would continue to focus on the allegations. That is simply human nature.

A. The county's use of inadmissible hearsay was plain error.

The county first argues Catherine's hearsay arguments have been forfeited and there is no plain error. First, "[t]he forfeiture rule is a rule of judicial administration, and thus a reviewing court may disregard a forfeiture and address the merits of an unpreserved issue in an appropriate case." *State v. Counihan*, 2020 WI 12, ¶27, 390 Wis. 2d 172, 938 N.W.2d 530 (citation omitted).

Generally, a forfeited claim is raised in the context of an ineffective assistance of counsel claim. *Id.* at ¶28. However, returning to the circuit court for postdisposition proceedings in a chapter 51 case is more challenging due to expiration of the order within

a year. If the postdisposition and subsequent appellate proceedings are not completed within a year – prior to the new extension hearing – the person subjected to the commitment order will not obtain their requested relief. *See Portage County v. J.W.K.*, 2019 WI 54, ¶15, 386 Wis. 2d 672, 927 N.W.2d 509. This is true even though a decision on the merits would still be required under *Sauk County v. S.A.M.*, 2022 WI 46, ¶27, 402 Wis. 2d 379, 975 N.W.2d 162. The appeal is not moot but the direct effect of the decision – *i.e.*, requested relief – disappears when the extension order expires.

Still, the errors here constitute plain error as explained in Catherine's initial brief. The county asserts a hearsay objection was necessary to ensure efficient and fair conduct before the circuit court. (Response, 20). The problem is that the hearsay issues here were obvious and substantial. *See State v. Jorgenson*, 2008 WI 60, ¶21, 310 Wis. 2d 138, 754 N.W.2d 77. And, it is inherently unfair to allow the county to repeatedly present hearsay – for which Catherine did not have a fair opportunity to defend – in order to continually commit her, and deprive Catherine of her liberty.

First, to be clear, the inadmissible hearsay presented against Catherine was not simply one layer of hearsay. It involved layer, after layer, after layer. For example, consider the allegations about Catherine making an additional threat against the judge and also going to his house with a knife. These are highly prejudicial allegations for which Catherine adamantly denies and she was never charged for the alleged

conduct. The alleged threat: (1) started with a family member telling a social worker, (2) that social worker talked to the judge (at an unknown time), (3) the judge told the social worker (or someone else) about Catherine coming to his house with a knife (details such as date, time, or the circumstances are unknown), (4) that information was conveyed at some point to the doctors through the 51 proceedings, and finally, (5) allegedly were in the treatment records but those records were never authenticated and admitted.

Following the trail of hearsay (or game of telephone) is challenging. At its core, it illustrates why hearsay is inadmissible. It is not reliable when there is not an opportunity to question the source – *i.e.*, the person with personal knowledge of what transpired. That is why the errors here were obvious and substantial, as explained in Catherine's initial brief.

The county suggests that because the extension standard in s. 51.20(1)(am), requires the county to prove "a substantial likelihood, **based on the subject individual's treatment record**, that the individual would be a proper subject for commitment if treatment were withdrawn," it can admit hearsay tied to the treatment record. This argument fails. First, the county did not authenticate or offer any treatment records. *See Eau Claire County v. S.Y.*, 156 Wis. 2d 317, 327, 457 N.W.2d 326 (Ct. App. 1990). Even if they had, the reference in s. 51.20(1)(am) to treatment records does not obviate the need to abide by evidentiary rules when seeking to continually commit someone.

Second, factual assertions about what Catherine allegedly did prior to her initial commitment do not escape fundamental protections afforded litigants. "While experts may rely on inadmissible hearsay evidence in forming opinions, sec. 907.03, Stats., the underlying evidence is still inadmissible." *Id.* at 328. The prejudicial hearsay presented here was offered to prove that the events happened, not provide the court with information about treatment, as evidenced by the court's fact finding that the threats happened. (276:87).

The county also argues it is permitted to use hearsay in this manner for an extension hearing because it is not a new proceeding, the court continues to receive evidence in the same case. (Response, 24). The county is wrong. Individual extension orders must stand on their own merits. "Each order must independently be based upon current, dual findings of mental illness and dangerousness; accordingly, the sufficiency of the evidence supporting prior orders has no impact on any subsequent order." *J.W.K.*, 386 Wis. 2d 672, ¶21.

B. The use of inadmissible hearsay was pervasive and not harmless error.

The county argues even if its repeated presentation of multi-layered hearsay constitutes plain error, the error was harmless. The county has the burden to prove harmless error, but has not done so here. "In determining whether an error is plain or harmless, the quantum of other evidence properly

admitted is relevant. Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." *Virgil v. State*, 84 Wis. 2d 166, 191, 267 N.W.2d 852 (1978).

The county alleges its theory was not centered on Catherine threatening a judge, yet it repeatedly elicited testimony about it. (276:8, 9, 13, 24, 32, 44, 45, 58). It's trying to have its cake and eat it too by repeatedly bringing up the alleged threats but then allege its not a big part of the case. It was a big part of the county's case. It used the prejudicial nature of threatening a judge, alleged feelings of fear from family members, and allegedly going to the judge's home with a weapon as justification for committing Catherine for the sixth year in a row.

And, the hearsay presented also included allegations about conduct with her family, as explained in Catherine's initial brief. (Brief-in-Chief, 18-20). The county does not individually address all the hearsay admitted and thus those will not be repeated herein, other than to note admission of hearsay was pervasive and not harmless. This is evidenced by the court's decision that relied on the hearsay evidence, including making a finding that that threats happened. (276:84, 87).

CONCLUSION

Catherine respectfully requests that this court vacate the recommitment order and the order for involuntary medication.

Dated this 23rd day of September, 2022.

Respectfully submitted,

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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 2,975 words.

Dated this 23rd day of September, 2022.

Signed:
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