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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2022AP603

In the matter of the mental commitment of L.A.T.:
KENOSHA COUNTY,

Petitioner-Respondent,

v.

L.A.T.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

ISSUE PRESENTED

1. Whether the circuit court must conduct a colloquy before accepting a stipulation to an involuntary commitment and medication order, and, if so, then whether L.A.T.'s stipulation was knowing, intelligent and voluntary?

The court of appeals held that a circuit court is not required to conduct a colloquy before accepting a stipulation to an involuntary commitment and that the colloquy in L.A.T.'s case was adequate.

CRITERIA FOR REVIEW

The supreme court should grant review because a decision on the issue presented will help develop and clarify Wisconsin law. The issue is a novel, recurring question of law, and its resolution will have statewide impact. Wis. Stat. §809.62(1r)(c).

A mental commitment "constitutes a significant deprivation of liberty that requires due process protections." *Addington v. Texas*, 441 U.S. 418, 425 (1979). Thus, the subject of a commitment proceeding has a host of 14th Amendment due process rights, including: the right to reasonable notice of the proceeding; the right to be informed of the evidence relied upon for the commitment; the right to be heard in person; the right to present documentary evidence, to call witnesses, and to confront and cross-examine the county's witnesses; the right to an independent decisionmaker; the right to a written statement by the

factfinder as to the evidence relied upon and the reasons for the transfer; and the right to effective and timely notice of all of these rights. *Vitek, v. Jones*, 445 U.S. 480, 494-495 (1980). In addition, the subject has a number of statutory rights, including the right to counsel. Wis. Stats. §51.20(5)(a).

Over 30 years ago, the supreme court established that the subject of a commitment proceeding may waive her statutory right to counsel. *S.Y. v. Eau Claire County*, 162 Wis. 2d 320, 328, 469 N.W.2d 836 (1991). The supreme court noted that a person is presumed competent to waive this right under §51.59(1). *Id*., 162 Wis. 2d at 334. And it adopted the factors set forth in *Pickens v. State,* 96 Wis. 2d 549, 568-569, 292 N.W.2d 601 (1980) for determining whether a person has made a knowing, intelligent, and voluntary waiver of that right. *S.Y.,* 162 Wis. 2d at 843-844.

The supreme court has not yet decided whether a colloquy is necessary for determining whether a person who stipulates to an involuntary commitment and medication is making a knowing, intelligent, and voluntary waiver of her due process rights. However, the issue is recurring at every level of the Wisconsin's court system.

In 2005, the supreme court heard argument on the question of whether a person's constitutional right to due process was violated "when the circuit court accepted a stipulation that grounds existed for an involuntary mental commitment under ch. 51 without conducting a colloquy to ensure a knowing, intelligent,

and voluntary agreement to the commitment." *Sauk County v. Aaron J.J.*, 2005 WI 162, ¶1, 286 Wis. 2d 376, 706 N.W.2d 659. The supreme held that review was improvidently granted because the parties' briefs failed to address matters essential to resolution of the case. It therefore dismissed the appeal.

In 2019, the court of appeals issued *Dane County v. N.W.,* 2019 WI App. 54, ¶1, 388 Wis. 2d 623, 935 N.W.2d 562 (unpublished) an unpublished opinion holding that a circuit court is not required to conduct a personal colloquy before accepting a person's stipulation to an extension of an involuntary commitment. (App.42).

In 2020, the Washington County Circuit Court considered whether a person undergoing a mental commitment had stipulated to a finding of probable cause. The person argued that circuit courts should be required to conduct personal colloquies to determine whether such stipulations are knowing, intelligent, and voluntary. The circuit court rejected this argument based on *N.W. Washington County v. C.M.R.*, 2019ME191 (*Wis. Cir. Ct. Washington County*, June 23, 3030)(App.49).

In 2021, the court of appeals addressed a no-merit report filed in an appeal from the extension of an involuntary commitment order and an involuntary medication order. The proceeding included a stipulated 30-day extension to allow an out-of-county judge to conduct the final hearing. In affirming the orders, the court of appeals, citing *N.W.*, held: "No arguable basis exists to challenge the stipulation.

Parties to a recommitment proceeding may stipulate to extension of the commitment." *Outagamie County v. C.J.*A., 2021 WL 8649402 at * 3 (Wis. Ct. App. 2021)(unpublished)(App.52).

Two years later, relying heavily on *N.W.* and *S.Y.*, the court of appeals issued the unpublished decision in Lauren's[1] case, which holds that: (1) circuit courts are not required to conduct a colloquy to determine whether a stipulation to an involuntary commitment and involuntary medication is knowing, intelligent and voluntary; and (2) the colloquy in this case was adequate.

[To be supplemented]

STATEMENT OF FACTS

Kenosha County petitioned for an initial commitment and involuntary medication order for Lauren. On November 3, 20221, the circuit court began to conduct a jury trial where, during their respective cases, the County planned to call 7 witnesses, and the defense planned to call one. (R.52:21; App. 29). After two of the County's witnesses testified, the court broke for lunch. When the parties returned, they told the court that they had reached a possible stipulation.

> The Court: Good afternoon. We are here to continue the jury trial that we started this morning. Are the parties prepared to proceed?

[1] Pursuant to §809.19(1)(g), this petition refers to L.A.T. by the pseudonym "Lauren."

Mr. Perz: Yes.

MR. Rolf: Yes.

The Court: Okay. Are there any stipulations before we proceed?

Mr. Perz: It's my understanding over the lunch hour that Lauren may be willing to stipulate to the commitment and medication order.

The Court: Attorney Rolf?

Mr. Rolf: That is my understanding at this moment, Your Honor.

The Court: Lauren, did you hear what your attorney has stated?

Lauren: I did.

The Court: Is that the case?

Lauren: I would -- yes, it is. I would like to see it on paper what the stipulation is. The medication is.

The Court: I can't understand you. If you would just –

Lauren: If I could just see it on paper what -- what the stipulation is.

The Court: Well, the stipu -- a stipulation is agreeing to the -- to the request. What's being requested here.

Mr. Perz: There would be a written order that would be provided to Lauren that has the -- the terms on it.

The Court: You mean the treatment conditions designated by the Kenosha Human Development Services?

Mr. Perz: Well, that and the order itself that says –

The Court: Oh, yeah.

Mr. Perz: -- this is a six-month commitment.

The Court: I just don't have that until I -- if -- if -- until I order that I don't have it in writing to give you. I can give it to you shortly thereafter, but the stipulation is to the six-month commitment and then to the medication order.

Lauren: Okay. Does this that's my understanding too, but what is it? What does it mean? What medication and –

The Court: Well, I -- you don't want me making the determination of what medication because I am trained in the law and not any type of medicine and not that. You wouldn't want me making that decision. It's the doctors and then if you -- you need to communicate with the doctors if you're on something and it's causing problems or something along those lines. You just have to communicate that and they can perhaps try different dosages or different types of medication. That's for those professionals to make the determination about. Not for any of us as legal professionals 'cause we're not medical or psychiatric professionals.

Lauren: I understand that.

The Court: Yeah.

Lauren: Yeah.

The Court: You wouldn't want us to do your open-heart surgery.

Lauren: No. No.

The Court: You wouldn't want us to do any of that type of stuff. Only the law stuff.

Lauren: Yes. I agree.

The Court: Okay?

Lauren: No, I wasn't -- I wasn't asking. Just was told it what it is so I can see it on paper.

The Court: Okay. I can -- I can give you a copy of that after I make the orders if you are in fact want to agree to it and then and I can give you a copy of that after. That wouldn't be a problem.

Lauren: Okay.

The Court: Okay?

Lauren: So -- so my question still is about the medication. What's required about the medications?

The Court: Well, the medication order would be that it would be a vol -- involuntary medication order which you could be administered medication without your consent. Not that it's a mandate, but you could be. It's always up to doctors and -- and communicating with the doctors on your part to get to that point because again I'm not the -- not the medical professional. Yeah.

Mr. Rolf: If I may just have a few seconds?

> The Court: Sure. Absolutely. (An off the record discussion was held)
>
> The Court: Attorney Rolf, did you have an opportunity –
>
> Mr. Rolf: Yes.
>
> The Court: -- to have whatever discussion you wanted with Lauren?
>
> MR. ROLF: I did, Your Honor. Yes.
>
> The Court: Lauren, did you have enough time to get whatever questions you had answered by Attorney Rolf?
>
> Lauren: I did.
>
> The Court: Okay. And based on that discussion what is the position of Lauren, Attorney Rolf? Or -- or Lauren? Are you agreeing to the six-month commitment with the involuntary medication order if it's need -- if that could be used if needed?
>
> Lauren: I think. Yes.
>
> Mr. Rolf: She says yes, Your Honor. (R.52:126-130; App.30-34).

Based on the stipulation and the testimony presented thus far in the case, the court ordered a 6-month initial commitment and involuntary medication. (R.52:13-131; R.36, 38; App.25-27). It also imposed a firearm ban. (R.52:131; R.37; App.28).

Lauren appealed and raised three issues: (1) whether a circuit court must conduct a colloquy before accepting a stipulation to an involuntary commitment

and medication order and whether her stipulation was knowing, intelligent and voluntary; (2) whether the County's evidence of her alleged dangerousness was sufficient; and (3) whether the circuit court complied with *Langlade County v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 31, 942 N.W.2d 277.

Regarding the question presented in this petition, the court of appeals first held that circuit courts are not required to conduct colloquies to determine whether a person is knowingly, intelligently, and voluntarily stipulating to an involuntary commitment. (Opinion; ¶¶14-16; App.9-10) (citing *Dane County v. N.W.,* 2019 WI App. 54, 388 Wis. 2d 623, 935 N.W.2d 562 (unpublished)).

The court of appeals explained that the subject of a commitment proceeding is presumed to be competent under §51.59(1), *S.Y.* and *Lessard v. Schmidt*, 349 F. Supp. 1078,1101 n.33 (E.D. Wis.), *vacated on other grounds*, 414 U.S. 473 (1974). (Opinion, ¶16, App.10).

Without citation to authority, the court of appeals reasoned:

> Not only is the lack of a mandatory colloquy in WIS. STAT. ch. 51 cases supported by case law, but it is also supported by practice and reality. Many persons in need speak with their counsel before a recommitment (or even initial commitment) and waive their rights to contest the petition, waive their right to appear in person (or by zoom or telephone), and stipulate to the entry of both orders for commitment/recommitment and for involuntary medication. That information is

> relayed to the trial court by letter and then affirmed on the record by counsel. This is done for many reasons, not the least of which is that some individuals find appearances in court to be traumatic or too stressful or they agree that that the supervision of the county and the administration of medications has been helpful in allowing them to remain in the community, a group home, or even inpatient placement.
>
> That being the case, it would be harmful to these individuals to require them to appear in court to undergo a colloquy before the trial court could accept their stipulation. This bolsters a conclusion that there should not be a bright-line mandatory colloquy rule in civil commitments. Moreover, when the individual is present in court and the trial court has the ability to conduct such a colloquy, some flexibility has to be permitted. People subject to civil commitment proceedings run the gamut from being able to verbally express themselves clearly to having disabilities that impair their speech; but they may still be able to express their choices. In addition, there may often be nervousness and possible agitation that could lead to the "logical tension" discussed in *S.Y.*, 162 Wis. 2d at 333. Even so, that presumption of competence exists, and there is no basis in law or in practice to require colloquies in all civil commitment cases. Since there was a colloquy with L.A.T., it can be reviewed by this court. (Opinion, ¶¶18-19)(App.11-12).

Next the court of appeals analyzed the "colloquy" in Lauren's case. It acknowledged that the circuit court was "a bit flippant and engaged in inappropriate joking banter" and "casual byplay but it was not excessive." It showed the court was treating Lauren

with a kind and friendly demeanor as it did with the jurors. (Opinion, ¶19)(App.11).

Lauren was concerned about the medication she might be forced to take so she wanted to see them in writing. The circuit court explained that it did not know the medication. Her treating doctors would choose it. The circuit court allowed defense counsel to speak with Lauren off the record. Afterward, the circuit court confirmed that defense counsel had an opportunity to discuss what he wanted with Lauren, and Lauren had time to discuss her questions with defense counsel. The circuit court did not inquire what subjects and concerns they discussed. It then asked whether Lauren was agreeing to a 6-month commitment with involuntary medication. She said "I think. Yes." Her lawyer said: "She says yes, Your Honor." (Opinion, ¶21, App.13).

The court of appeals held that "it is evident that the trial court conducted a thorough and sufficient colloquy with [Lauren] about the stipulation." (Opinion, ¶22, App.13). It was Lauren's burden to refute the statutory presumption that she was competent to stipulate to a commitment and medication, and she failed to overcome it. Thus, her stipulation was knowing, intelligent, and voluntary. (Opinion, ¶¶22-23, App.13-14).

ARGUMENT

[To be supplemented]

CONCLUSION

For the reasons stated above, L.A.T. respectfully requests that the supreme court grant this petition for review.

Dated this 3rd day of February, 2023.

Respectfully submitted,

COLLEEN D. BALL
Assistant State Public Defender
State Bar No. 1000729

Office of the State Public Defender
735 N. Water Street - Suite 912
Milwaukee, WI 53202-4116
(414) 227-4805
ballc@opd.wi.gov

Attorney for Respondent-Appellant-Petitioner

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 2,399 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding 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 3rd day of February, 2023.

Signed:

COLLEEN D. BALL
Assistant State Public Defender