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COURT OF APPEALS

DISTRICT II

Case Nos. 2022AP2079; 2023AP904

In the matter of the mental commitment of B.M.T.:

MANITOWOC COUNTY HSD,

Petitioner-Respondent,

v.

B.M.T.,

Respondent-Appellant.

On Appeal from Orders Extending Commitment and Orders for Involuntary Medication and Treatment Entered in the Manitowoc County Circuit Court, the Honorable Robert Dewane, Presiding

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BRIEF OF RESPONDENT-APPELLANT

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ISSUES PRESENTED

1. Did the delay in the 2022 recommitment hearing deprive the court of competency?

The circuit court did not address this issue.

2. Did the circuit court make sufficient factual findings in the 2023 recommitment?

The circuit court failed to cite or to make factual findings related to the statutory subdivisions. (318:40-45; App. 14-19).

3. Did the county meet its burden of proving dangerousness in the 2023 recommitment?

The circuit court found the county met its burden. (318:40-45; App. 14-19).

4. Must the involuntary medication order be reversed because the county's sparse evidence failed to meet its burden of proof?

The circuit court ordered B.M.T. be subjected to forced, psychotropic medication for one year. (318:40-45; App. 14-19).

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested. Counsel anticipates that the briefs will adequately address the issue presented, and

publication is not permitted because this is a one-judge appeal under Wis. Stat. § 752.31(2)(d).

STATEMENT OF THE CASE

This appeal involves two recommitment orders: one from 2022 and one from 2023. (260, 261, 304, 305; App. 4-5, 11-13).

On January 25, 2022, the county filed a petition to extend Brett's[1] commitment order. (238). The case proceeded to a contested hearing on March 8, 2022, where the circuit court extended Brett's commitment for 12 months and ordered involuntary medication. (260, 261; App. 4-5).

Brett filed a notice of intent to pursue postdisposition relief from those orders and appellate counsel was appointed. (263, 269). The first appointed appellate counsel left the Office of the State Public Defender. (272, 277). Successor appellate counsel was appointed and filed a Notice of Appeal, but had to withdraw before the brief was filed. (276, 278). A third appellate counsel was appointed on March 2, 2023. (309).

While the appellate process on the 2022 recommitment moved forward, the county filed a new petition for recommitment on February 9, 2023. (292). A contested hearing on this petition was held on

[1] Pursuant to Wis. Stat. § 809.19(1)(g), B.M.T. will be referred to by a pseudonym, Brett.

March 1, 2023. (318). The circuit court entered orders extending Brett's commitment by another year and again ordered involuntary medication. (304, 305; App. 11-13).

Appellate counsel who was handling the appeal in the 2022 extension was appointed to represent Brett on the 2023 extension. Counsel moved to consolidate the two cases and on May 30, 2023, this court granted that motion. (324).

STATEMENT OF FACTS

2022 Recommitment

Brett was under a recommitment order set to expire on February 27, 2022. (238:3). On January 25, 2022, the county filed a petition to extend that order. (238). A hearing on the recommitment was scheduled for February 25, 2022. *Id*.

Brett appeared in person on February 25, 2022, as did assistant corporation counsel, two individuals from the human services department and the judge. (267:2; App. 8).

Defense counsel appeared via Zoom. The circuit court explained:

> Matter had been on the calendar today for an extension hearing. Due to the level of snow we got last night, [Defense counsel] has not been able to make it in to the office. In anticipation of this, this possibility was apparently discussed with [Brett]

> prior to this morning, and it's my understanding that – [Defense counsel], that your client wishes to stipulate to an extension of the extension hearing so that we can have you here in person. Is that correct?

(267:2; App. 8).

Defense counsel agreed that this was correct and Brett confirmed that this was also his request. (267:2; App. 8).

The circuit court then stated:

> Based on [Brett's] request and the fact that [Defense counsel] is not able to be with us today, the Court is going to find the necessary cause to extend the hearing until March 8th at 9:00…

(267:2; App. 8).

Corporation counsel, defense counsel and Brett all agreed that the date worked for them. Corporation counsel clarified that the "order and conditions are all being extended until that time" and the circuit court said that was correct. Defense counsel told the circuit court "I would apologize for my absence and thank you for your flexibility." The hearing was then adjourned. (267:2; App. 8).

The case proceeded to the March 8, 2022, extension hearing. The county presented the testimony of Dr. Marshall Bales, Dr. Basil Spyropoulos and Pafoua Kue. (268:4-65). Brett testified on his own behalf. (268:66-70).

The circuit court held that "it's clear based on the record today that the County has met its burden." (268:83). Specifically, the circuit court found Brett was mentally ill, a proper subject for treatment and "dangerous as defined by statute as he poses a substantial probability of physical harm to other individuals as manifested or shown by a substantial likelihood based on the subject's individual treatment records that the individual would be a proper subject for commitment if treatment were withdrawn." (268:84).

In regards to involuntary medication, the circuit court found that Brett was in need of the medication, the advantages, disadvantages and alternatives to treatment were explained to him but due to his mental illness Brett was not competent to refuse the medication or treatment because he is incapable of applying an understanding of the advantages, disadvantages and alternatives to his condition to make an informed choice regarding medication. (268:84-85).

The circuit court entered a written order extending Brett's commitment for 12 months and ordering involuntary medication. (260, 261; App. 4-6).

2023 Recommitment

The county filed another recommitment petition on February 9, 2023. (292). On March 1, 2023, the circuit court held a contested hearing on that petition. (318).

The county presented two witnesses: Dr. Marshall Bales and Heidi Barnes. (318: 4, 28).

Dr. Bales testified he did not interview Brett. He called Brett but once received "the voice machine" and once a person answered and said he had the wrong number. (318:5). Eventually, Dr. Bales reached out to Brett's social worker but was told Brett did not want to meet with him. Instead of speaking with Brett, Dr. Bales reviewed "the records." (318:5).

When asked specifically what he reviewed, Dr. Bales said "prior court examination, Wisconsin Circuit Court Access and then some Manitowoc County records." He also "spoke to the case manager, I believe…" (318:6-7). Regarding "the records" Dr. Bales was particularly troubled by the Circuit Court Access Records (CCAP). He told the court it was concerning because someone with Brett's name and date of birth "has all kinds of criminal charges going on…" (318:6).

Dr. Bales diagnosed Brett with schizoaffective disorder. (318:8). He told the court this illness manifests itself with paranoia and thoughts jumping around. However, Dr. Bales testified "I truly forget if he hears voices any time recently…" (318:9).

Dr. Bales noted that Brett is treatable and has been a manageable outpatient "I want to make sure I give him credit for that." (318:9). While according to Dr. Bales Brett has chronic poor judgment, he conceded that "not all of which can be affixed to the mental health problem, but much of it is." (318:9).

In regards to Brett's insight into his condition, Dr. Bales testified that "I think the social worker put it well that he lacks insight and takes no responsibility…" (318:10). When pressed for his own opinion, Dr. Bales explained that Brett "will defend methamphetamine but bash psychiatric medication. That's very serious lack of judgment." (318:10).

Dr. Bales opined that Brett would not get help on a voluntary basis, noting that "he has to be given, for example, the medication injectably once a month or once every two weeks, I forget which, because he can't be relied on to take pills properly on his own." (318:11).

As far as dangerousness, Dr. Bales answered "Yes" when asked if he thought Brett would become a proper subject for commitment if treatment were withdrawn. (318:11). When asked how Brett would become dangerous, the doctor referenced his review of CCAP, pointing out "all these disorderly conduct, battery charges that are pending" while at the same time conceding that "I don't know if that was from methamphetamine use or a manic state, I really don't." (318:11-12).

However, Dr. Bales admitted that he found the information on CCAP and was not familiar with the specific factual circumstances of the pending cases, nor did he know the strength of those cases. (318:24). He also noted that Brett had "not been as assaultive as he has previously been." (318:23). The doctor also acknowledged that Brett has been largely in compliance with keeping his appointments and has

shown improvement now that he is outpatient. (318:25-26).

Pressed to opine about whether the charges on CCAP indicate manic, psychotic behaviors that indicate dangerousness, Dr. Bales answered "It's either mental health condition and/or antisocial behavior or it's drug use, and, frankly, it's probably some of all three." (318:12).

In an attempt to get Dr. Bales to provide more specific testimony regarding dangerousness, the county repeatedly asked the doctor to "directly" answer the question. (318: 14-15). The county then asked Dr. Bales if he believed there was a substantial probability that Brett is dangerous to others. Dr. Bales answered "yes." The county then asked if that opinion was based on Brett's treatment record, and Dr. Bales again answered "yes." When asked what specifically in the treatment record led to that opinion, Dr. Bales answered "If he's voluntary, he will stop his psychiatric medications and then become dangerous in some way. This goes back 20 years." (318:14-15).

Moving on, the county asked Dr. Bales if, due to Brett's impaired judgment, "there is a substantial probability that he would suffer from a physical impairment or another injury to the point where he would again be a proper subject for commitment if his treatment were withdrawn." Dr. Bales answered "yes." (318:15). When asked why, Dr. Bales admitted "to me it's difficult to predict how he would be dangerous under standard three…" He offered the possibility that

generally people with manic, assaultive behaviors while paranoid and psychotic are "very commonly assaultive themselves, and that's a big concern here." (318:15-16).

Dr. Bales told the court that he believed Brett would go off his medications without a court order and that would create a substantial probability that he would harm someone, appearing to again rely on his review of the CCAP records "Yes, or be harmed, or be in jail or something, but he's had issues within the last few months. I just can't say exactly what's happened here, battery, disorderly conduct, possession of meth, and that's all red flags. That's what you, you simply don't get that kind of problem cropping up if you want off commitment in my book, excuse me, I don't have a book, but that's my view." (318:17).

Because he never spoke to Brett, Dr. Bales could not explain the advantages, disadvantages and alternatives to medication. (318:20). Based on a conversation about medications he had "previously" Dr. Bales testified that Brett was incapable of expressing an understanding of the advantages, disadvantages and alternatives to medication. (318:21).

Dr. Bales conceded that he did not know the specific medications Brett was taking "I did not have that. He's on an injectable antipsychotic and I could not find that in the records I have." (318:22).

Heidi Barnes, the county's court liaison, testified that she made the recommendation that Brett's commitment be extended. (318:30). She based this decision on information from "the psychiatrist and case manager" along with conversations with Brett. (318:30).

According to Ms. Barnes, Brett "doesn't really think" he has a mental illness or at least that his illness is misdiagnosed. Ms. Barnes also reported that Brett said he would not take his mediations or continue with services if not ordered to do so. (318:31).

In regards to possible use of illicit drugs, Ms. Barnes reported that Brett's case manager told her that Brett "admitted to her that he had used methamphetamine." Ms. Barnes said this happened "I believe in December or January maybe, end of December I think." (318:32).

Ms. Barnes opined that Brett has a mental illness, needs medication, is treatable and that if he was not on a commitment order Brett would discontinue all services. In Ms. Barnes' opinion, this would result in Brett becoming psychotic. When asked if he would become dangerous, she answered "There is the potential, yes, per his history. I can't predict, but I would – there is a great likelihood that he could become dangerous, yes." (318:35).

The circuit court noted that Brett "does make some effort to comply with the conditions" and that Brett "is certainly doing better than he has been in the past." (318:40-41; App. 14-15). The circuit court

referenced the pending charges from CCAP but stated it wasn't "particularly" persuaded by them. (318:40; App. 14). The circuit court's "bigger concern" was Brett's denial that he has a mental illness. (318:41; App. 15). The circuit court held that Brett is mentally ill and dangerous because he "poses a substantial probability of physical harm to other individuals. Any substantial probability of physical impairment or injury to himself or herself or other individuals due to impaired judgment as manifested or shown by a substantial likelihood based on his individual treatment record that he would be a proper subject for commitment if treatment were withdrawn." (318:42; App. 16).

The circuit court ordered a 12-month recommitment, with outpatient placement. (318:42; App. 16). The court also ordered forced medication, noting that while the advantages, disadvantages and alternatives were not explained to Brett in this recommitment they "have been explained to him in the past." Further, the court found that Brett was not competent to refuse medications. (318:43; App. 17).

ARGUMENT

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

A. Introduction.

Given the severe deprivation of liberty an involuntary commitment inflicts, subjects in ch. 51 proceedings are entitled to due process. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Chapter 51's strict time limits are key to this due process guarantee—and thus to the constitutionality of ch. 51 proceedings. *See Dodge County v. Ryan E.M.*, 2002 WI App 71, ¶¶5, 11, 252 Wis. 2d 490, 642 N.W.2d 592. Accordingly, violating a time limit, including the one governing recommitment hearings, can deprive the circuit court of competency. *See G.O.T. v. Rock County*, 151 Wis. 2d 629, 636, 445 N.W.2d 697 (Ct. App. 1989).

In this case, the parties agreed to holding Brett's recommitment hearing 9 days after the expiration of the order. (267: App. 7-10). Without asking questions or addressing the deadline at stake, the circuit court simply announced the hearing would be held on March 8, 2022. (267:3; App. 9). Pursuant to Wis. Stat. § 51.20(10)(e), the circuit could only postpone the hearing by 7 calendar days. There was no exception to the applicable deadline that permitted a 9-day adjournment. Thus, the circuit court lost competency. Since the delay wasn't the product of any effort by Brett to manipulate the system, reversal is warranted.

B. Governing law and standard of review.

A circuit court must hold a recommitment hearing before the subject's prior commitment expires, unless a statute permits a delay. *G.O.T.*, 151 Wis. 2d at 633. There are four scenarios in which statutes may permit a delay:

1. A subject can waive the final hearing time limit for up to 90 days (from the date of the waiver) to get treatment pursuant to a court-approved settlement agreement. *See* Wis. Stat. § 51.20(8)(bg)-(bm).

2. If a subject fails to appear for their final hearing and the circuit court issues a detention order, then the time limit for the final hearing becomes seven days from the date the subject is ultimately detained. *See* § 51.20(10)(a).

3. ***At the subject's request, the circuit court can postpone the final hearing for up to seven days from the date the hearing was originally scheduled***. *See* § 51.20(10)(e). (emphasis added)

4. When a subject demands a jury trial, the final hearing must be held within 14 days of the filing of the demand—regardless of when the subject's prior commitment is set to expire. *See* § 51.20(11)(a).

If a circuit court delays a recommitment hearing beyond the end of the subject's prior commitment without statutory authorization, or if it delays the recommitment longer than the statutes allow, it loses competency to proceed. *G.O.T.*, 151 Wis. 2d at 636. A recommitment order entered without competency "must be vacated and the petition [for recommitment] dismissed." *Id.*

There is just one exception to this rule: a commitment ordered after an impermissibly delayed final hearing will be upheld "when the subject of the commitment create[d] the need" for the delay. *Milwaukee County v. Edward S.*, 2001 WI App 169, ¶1, 247 Wis. 2d 87, 633 N.W.2d 241. This is the doctrine of judicial estoppel. *See id.*, ¶10.

"The equitable doctrine of judicial estoppel ... is intended to protect against a litigant playing fast and loose with the courts by asserting inconsistent positions." *State v. Petty*, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (internal quotation marks omitted). Since "the rule looks toward cold manipulation and not unthinking or confused blunder, it has never been applied where [the subject's inconsistent positions] were based on fraud, inadvertence, or mistake." *Id.*

The facts of *Edward S.* illustrate the scope of the judicial estoppel exception. Edward fired his lawyer the day before his final hearing, which was scheduled to occur on the last day the governing statute allowed. *Edward S.*, 247 Wis. 2d 87, ¶3. The circuit court responded by continuing the final hearing for two

weeks so that Edward could seek new counsel. *Id.* Edward stipulated to the continuance. *Id.* Postcommitment, however, he argued that the circuit court lacked authority to delay his final hearing past the statutory deadline. *Id.*, ¶4.

The court of appeals affirmed on judicial estoppel grounds. *See id.*, ¶10. It held that the mandatory deadline for final hearings permits circuit courts to grant "a reasonable extension" when "the extension is caused solely by the [subject's] conduct and manipulation." *Id.*, ¶9. "If we were to accept Edward S.'s argument," the court of appeals explained, "a detained subject could fire his attorney on the fourteenth day in order to secure dismissal of the commitment action .... Such an interpretation would defy common sense and create an absurdity, which we are unwilling to do." *Id.*, ¶8. Thus, for public policy reasons, the court of appeals carved out an exception to the general rule that final hearing deadlines are mandatory. *Id.*

While *G.O.T.* speaks in broad terms, *Edward S.* emphasizes its narrow scope, articulating a rule rooted in the policy implications of granting relief under the specific circumstances presented in that case.

C. The circuit court lacked competency to hold Brett's recommitment hearing.

Brett's recommitment order expired on February 27, 2022. (238:3). The recommitment hearing was set for February 25, 2022. (267; App. 7-10). After the adjournment, the recommitment

hearing took place on March 8, 2022, 9 days after the originally scheduled February 25 date. (268). There is no statute that authorized this delay. Thus, under *G.O.T.*, the circuit court lost competency and Brett's commitment should be reversed. Further, nothing in the record suggests Brett sought to manipulate the system by stipulating to this delay. Thus, *Edward S.* does not dictate a different result. This was court error, stemming in part from a "confused blunder" by the parties. *See Petty*, 201 Wis. 2d at 347. The doctrine of judicial estoppel is inapposite.

Four factors demonstrate that relief is warranted despite Brett's stipulation to a delayed recommitment hearing.

First, Brett did not create a "need" for an adjournment. *See Edward S.*, 247 Wis. 2d 87, ¶1. The stated reason for the parties' request was that defense counsel could not make it to court due to a snowstorm. (267:2; App. 8). When the parties made their request, there were 2 days left until Brett's commitment was set to expire. Pursuant to Wis. Stat. § 51.20(10)(e), the circuit court could have lawfully ordered a postponement of 7 days after the originally scheduled hearing: until March 6, 2022. The postponement was not based on anything Brett did or anything Brett caused. The postponement was not required due to a lack of preparation or a need for additional information; it was simply weather-related. Therefore, the circuit court could have scheduled the hearing the next day, or any day within the 7-day time limit. It did not, and that error caused it to lose competency.

Second, this was not a case of manipulation; Brett cooperated with the recommitment process from start to finish. Instead of recalcitrance or outright scheming, it was a snowstorm that led the parties to seek the extension. (267:2; App. 8). Everyone involved appeared to believe such a delay was statutorily permitted, and they also thought it would make things easier. But adherence to due process sometimes means enduring difficulties, including logistical ones. Easier is not always better.

Third, the county joined in the stipulation here, so it was not a unilateral action by Brett that led the circuit court to approve an impermissible delay. By contrast, in *Edward S.*, "the hearing was adjourned and the fourteen-day time limit was modified because of Edward S.'s *unilateral action of firing his lawyer* the day before the fourteen-day time limit, which made it *impossible* to obtain new counsel to effectively represent [him] by the next day." *Id.*, ¶7 (emphasis added). As noted above, Brett did not make it impossible to adhere to the deadline for his recommitment hearing, and insofar as he aided that deadline's violation, he did so along with the county's attorney and his own.

Finally, outside of the ch. 51 domain, judicial estoppel is often applied when a litigant takes a *lawful* position at one point in the litigation, then a different *lawful* position later on. For example, a criminal defendant who requests a sentence (one within the penalty parameters set by the legislature) is judicially estopped from challenging that sentence as excessive.

See, e.g., *State v. Magnuson*, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998). But here, the parties requested an adjournment and the circuit court set a date it had no authority to grant; the challenged action is the circuit court's failure to follow the law. *See* § 51.20(16)(g) ("Upon the filing of the [reexamination] reports *the court* shall fix a time and place of hearing ...." (emphasis added)); *see also Wisconsin Judicial Benchbook,* vol. 5, MH-1, § 18.62 (2020) (reiterating that the circuit court must set the recommitment hearing and discussing applicable time limits). There was no discussion on the record of scheduling conflicts and no other dates were offered. The circuit court chose a day outside of the statutory time limit.

In sum, this is not an *Edward S.* case; it's a *G.O.T.* case. The circuit court granted an adjournment in excess of what it had the legal authority to grant. It should not have set a hearing after March 6 and it lost competency as a result. Due process demands reversal. *G.O.T.*, 151 Wis. 2d at 636.

Because the circuit court had no competency to enter the 2022 recommitment order, the circuit court had no competency to enter the 2023 recommitment order. The circuit court's competency to enter a recommitment order is contingent on the prior order still being in existence. "[T]he expiration of the immediately preceding commitment order is always relevant when we determine whether a circuit court had competency to grant an extension order." *Walworth County v. M.R.M.*, 2023 WI 59, ¶¶25-27, 408 Wis.2nd 316, 992 N.W.2d 809. Pursuant to *M.R.M.*,

the circuit court could only issue the 2023 extension order *before* the previous order expired. But the circuit court never entered a valid 2022 order because it had no competency to do so. And any order prior to 2022 had expired by 2023. Thus the circuit could had no competency to enter an order in 2023. This court should reverse both the 2022 and the 2023 recommitment orders on competency grounds.

II. The recommitment and associated involuntary medication order must be reversed because the circuit court failed to make the required factual findings and the county failed to prove dangerousness.

If this court finds that the circuit court had competency to extend Brett's commitment in 2022, Brett argues that the 2023 order must be reversed because the circuit court failed to make factual findings linked to the statutory basis for its determination of dangerousness as required by *Langlade County v. D.J.W.*, 2020 WI 41, ¶40, 391 Wis. 2d 231, 942 N.W.2d 277 and because the county failed to prove dangerousness.

A. The circuit court failed to make the required factual findings as mandated by *D.J.W.*

This court will uphold the circuit court's findings of fact unless they are clearly erroneous. Whether those facts satisfy the statutory standard is a question of law this court reviews independently. *Waukesha*

County v. J.W.J., 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783.

D.J.W. requires a circuit court to "make specific factual findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2 on which the recommitment is based." *Id.* at ¶3. *D.J.W.* explained that this requirement "provides clarity and extra protection to patients," and "will clarify issues raised on appeal…and ensure the soundness of judicial decision making." *Id.* ¶42-44.

In Brett's case, the petition for recommitment did not cite any subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. (292). In their hearing testimony, neither witness cited any subdivision paragraph of Wis. Stat. § 51.20(1)(a)2.

The circuit court never stated which subdivision of Wis. Stat. § 51.20(1)(a)2 it based its ruling on. Instead, the circuit court's ruling mirrored the language of the second and third standards of dangerousness. (318:40-45; App. 14-19).

But *D.J.W.* requires more than just reading the language of the statute. *D.J.W.* requires the circuit court "to make specific factual findings" The circuit court failed to make these specific factual findings in Brett's case. *See D.J.W.*, 391 Wis.2d 231, ¶3.

The circuit court began its ruling noting that "to a certain degree everybody acknowledges that [Brett] does make some effort to comply with the conditions." (318:40; App. 14). The circuit court then expressed

concern that Brett does not believe he has a mental illness, but observed that Brett "is certainly doing better than he has been in the past." (318:41; App. 15).

At this point the court found Brett was "dangerous as defined by statute" and simply recited the statutory language in the second and third dangerousness standards. (318:42; App. 16).

This ruling contains absolutely no factual findings related to the statutory subdivisions. As set forth below, this may be because there were not sufficient facts elicited that proved dangerousness. Regardless, the circuit court merely repeated language in the statute without identifying any specific facts that supported the statutory language it read aloud.

Because the circuit court failed to make the required findings, the recommitment order must be reversed. Brett has not been afforded the clarity and additional protections guaranteed by *D.J.W.* Outright reversal assures that Brett is not deprived of his right to a meaningful appeal, as it would be unlikely that he would have time to appeal from the results of a new hearing before this recommitment order expires.

B. The county failed to prove dangerousness.

1. Introduction

Brett asserts that the recommitment order must be reversed due to the lack of sufficient *D.J.W.* findings. If this court does not reverse on that issue, it should reverse the recommitment order because the

county did not prove by clear and convincing evidence that Brett was dangerous. Dangerousness cannot be assumed from the prior commitment order and the county provided no evidence of dangerous acts that meet the standards in Wis. Stat. § 51.20(1)(a)2.b and c.

Whether the county has met its burden of proof to extend an individual's commitment presents a mixed question of law and fact. This court will uphold the circuit court's findings of fact unless they are clearly erroneous. Whether those facts satisfy the statutory standard is a question of law this court reviews independently. *Waukesha County v. J.W.J.*, 375 Wis. 2d 542, ¶15.

An initial commitment may be extended for up to one year if the county again proves "the same elements necessary for the initial commitment by clear and convincing evidence – that the patient is (1) mentally ill; (2) a proper subject for treatment; and (3) dangerous to themselves or others." *Langlade County v. D.J.W.*, 391 Wis. 2d 231, ¶31.

Unique to recommitments is that Wis. Stat. § 51.20(1)(am) permits the county to prove current dangerousness without evidence of "recent" overt acts or omissions demonstrating dangerousness. *See* Wis. Stat. § 51.20(1)(am). Instead, the county may prove dangerousness "by showing that there is 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." *Id.*

Still, each recommitment must be based on "current, dual findings of mental illness and dangerousness." *J.W.J.*, 386 Wis. 2d 672, ¶21. The county must prove that the individual "is dangerous." *Id.*, ¶24. "It is not enough that the individual was at one point a proper subject for commitment." *Id.*

Brett does not contest the findings that he was mentally ill and a proper subject for treatment. The focus in this appeal is on the insufficient proof of dangerousness.

Dangerousness cannot be assumed simply from the prior commitment order. "It could be a winning argument against recommitment that dangerous statements or conduct old enough, weak enough, or otherwise insufficient to support clear and convincing evidence under the substantial likelihood of the dangerousness test." *Winnebago County v. S.H.,* 2020 WI App 46, ¶13, fn.6, 393 Wis. 2d 511, 947 N.W.2d 761.

The alleged dangerous conduct in Brett's case was "weak enough, or otherwise insufficient to support clear and convincing evidence" of dangerousness.

2. The county failed to prove the second standard of dangerousness.

Pursuant to Wis. Stat. § 51.20(1)(a)2.b, the county had to prove:

> a substantial probability of physical harm to others 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…

"Substantial probability" means "much more likely than not." *Marathon County v. D.K.*, 2020 WI 8, ¶35, 390 Wis. 2d 50, 937 N.W.2d 901.

When the county specifically asked Dr. Bales if it was his opinion that there was a substantial probability Brett would hurt someone, Dr. Bales said "yes" and supported that answer by saying that back in 2015 Brett was "very assaultive." (318:14).

But Dr. Bales failed to testify about any specific examples of what "very assaultive" meant and what, if anything, had been "very assaultive" in the 8 years that passed since 2015.

And when the county attempted to have Dr. Bales provide specifics to support this opinion, Dr. Bales appeared to refer to what he read on CCAP "Yes, or be harmed, or be in jail or something, but he's had issues within the last two months. I just can't say exactly what's happened here, battery, disorderly conduct, possession of meth, and that's all red flags." (318:17).

But the problem with relying on CCAP is not only that the charge have not been proven, but also

that CCAP does not provide any facts supporting the charges. Dr. Bales conceded this by testifying that he “basically” was not familiar with the specific factual circumstances of the cases listed on CCAP, did not know the strength of those charges and “I really do not know much beyond” what is listed on CCAP. (318:24). Exposing the danger of relying on CCAP to draw conclusions, Dr. Bales was unable to even state whether these alleged crimes were triggered by mental health issues or drug use “I don’t know why all these disorderly conduct, battery charges that are pending, but I don’t know if that was from methamphetamine use or a manic state, I really don’t.” (318:12).

Specifically as to dangerousness, Dr. Bales told the court Brett would become dangerous if treatment were withdrawn because “it’s very manic, very psychotic and it becomes assaultive and threatening to people.” (318:11). Again, this assertion appears to come from Dr. Bales review of CCAP or, perhaps, from something that took place in 2015. The county was unable to elicit any specifics from Dr. Bales about how Brett was assaultive or how Brett was threatening.

Testimony that a person is “assaultive” without a single supportive fact or example supporting that assertion in no way meets the burden of proof. The county failed to prove the second standard of dangerousness.

3. The county failed to prove the third standard of dangerousness.

Pursuant to Wis. Stat. § 51.20(1)(a)2.c. the county had to prove:

> Evidences such impaired judgment…that there is a substantial probability of physical impairment or injury to himself or herself or other individuals.

In regards to this third standard, the county asked Dr. Bales directly if he had an opinion about whether Brett met this standard. Dr. Bales answered "yes" but when asked to explain why, Dr. Bales responded "to me it's difficult to predict how he would be dangerous under standard three, but I would add here people with these manic, assaultive behaviors while paranoid and psychotic that they are very commonly assaultive themselves, and that's a big concern here. Is somebody going to pull a gun and shoot him when he's so psychotic and out of control and manic…" (318:15-16).

As noted above, there was no testimony of any specific assaultive behaviors. All that is provided by Dr. Bales in regards to the third standard is the hypothetical that perhaps Brett will become out of control and his behavior will cause another person to "pull a gun and shoot him." (318:15-16).

It is also pertinent to note not only did Dr. Bales not speak with Brett, but Dr. Bales seemed uncertain about basic facts involving Brett's case: "I truly forget

if he hears voices any time recently…"; "I spoke to his case manager, I believe…"; "he has to be given, for example, the medication injectably once a month or every two weeks, I forget which…"; "I could not find the name of the medicine,,,"; (in response to the question of which medications Brett is currently prescribed) "I did not have that. He's on an injectable antipsychotic and I could not find that in the records I have"; "he's been outpatient as far as I know most of the last year…" (318:9, 7, 11, 13, 22,18).

In terms of proof of impaired judgment, Dr. Bales testified "he has very chronic poor judgment, not all of which can be affixed to the mental health problem, but much of it is." (318:9).

That "poor judgment" hinged in large part on Brett's general unwillingness to take responsibility for unspecified things that Dr. Bales and Ms. Barnes felt Brett should be accepting blame for.

Dr. Bales told the court that Brett lacked insight into his condition, and illustrated that by noting that Brett "takes no responsibility for his actions or words and not all of this can be related to his mental health condition…" "he blames everybody except himself" and "he will defend methamphetamine but bash psychiatric medication." (318:10).

Ms. Barnes testified that Brett failed to take responsibility for his actions "it's usually he has a reason why something happened and it's usually not his fault." (318:32).

No specific examples of how this behavior manifested as dangerous was provided. No one could reasonably assert that blaming others and refusing to accept responsibility satisfies the legal standard of dangerousness.

Stating that Brett "blames everybody except himself" is subjective to the point of meaninglessness. Without any facts supporting dangerousness, this testimony reflects nothing more than a common human condition. The county simply failed to clarify any of these broad statements with facts.

The other issues were Brett's alleged illicit drug use and his refusal to admit he had a mental illness. Dr. Bales appeared to rely on CCAP regarding any current drug use and Ms. Barnes had no personal knowledge of this and was only able to offer the hearsay testimony that Brett's case manager "related that [Brett] admitted to her that he had used methamphetamine." (318:32).

And a refusal to accept a mental health diagnosis does not make a person dangerous. A patient is not required to remain silent about his opinions on a diagnosis, how medication makes him feel and whether other options should be considered. Many people might agree with Brett's inclination to "bash psychiatric medications." (318:10). It may be frustrating to a doctor who is treating a patient when the doctor is confident that he knows what is best for the patient, but the patient's refusal to agree with the

doctor's opinion, without more, simply doesn't equate to dangerousness under the statutory standards.

The failure of the county's case really comes down to the lack of specificity in the testimony. When directly asked whether Brett would become dangerous if he stopped taking medications and receiving treatment, Ms. Barnes was equivocal, stating "there is that potential, yes, per his history. I can't predict, but I would – there is a good likelihood that he could become dangerous, yes." (318:35).

Based on this record, the county failed to establish, by clear and convincing evidence, that Brett would be a proper subject for commitment if treatment were withdrawn. The county's case consisted of a doctor's non-specific testimony that was almost entirely reliant on CCAP and "the records." (318:5). The county failed to present any eyewitness testimony or direct evidence and the county failed to introduce any treatment records into evidence. (318).

Because an involuntary commitment constitutes "'a significant deprivation of liberty that requires due process protection'", proof of dangerousness is compelled not just by statute but also by the due process guarantees of the Fifth Amendment to the United States Constitution. *Portage County v. J.W.K.,* 2019 WI 54, ¶16, 386 Wis. 2d 672, 927 N.W.2d 509, *quoting Jones v. United States*, 463 U.S. 354, 361 (1983). The record simply does not support a finding of dangerousness.

III. The order allowing the involuntary administration of medication must be reversed because the county failed to meet its burden where the testimony was perfunctory and lacking in detail.

Dr. Bales was not able to interview Brett, therefore he could not assert that he explained advantages, disadvantages and alternatives to medication. (318:20). The county failed to provide any treatment records or additional evidence addressing the medication question. This perfunctory evidence failed to meet the county's burden of proof and therefore the involuntary medication order must be reversed.

A mentally ill person, like Brett, who has been committed for treatment under § 51.20 is a "patient" entitled to various rights under the "patient rights" statute, Wis. Stat. § 51.61(1). A patient, including a person under a commitment order, may not be involuntarily medicated unless: (1) the individual is determined to be incompetent under the standard set forth in § 51.61(1)(g)4.; or (2) in an emergency, which the statute describes as "a situation in which the medication or treatment is necessary to prevent serious physical harm to the patient or to others." Wis. Stat. § 51.61(1)(g)1. At issue here is the first exception to the right to refuse medication and treatment.

Under § 51.61(1)(g)4., a person is competent to refuse medication and treatment unless the county proves:

> [B]ecause of mental illness … and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> a. The individual is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives.
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness … in order to make an informed choice as to whether to accept or refuse medication or treatment.

Several legal principles govern this court's review.

First, the county carries the burden of proving Brett incompetent to refuse medication by clear and convincing evidence. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶37, 349 Wis. 2d 148, 833 N.W.2d 607.

Second, although the circuit court's findings must be accepted unless clearly erroneous, the application of the facts to the statutory standard in § 51.61(1)(g)4. is a question of law reviewed independently. *Id*. at ¶¶38-39. The question in Brett's

case is whether the doctor's testimony satisfies the statutory standard.

Third, when asked to determine whether a person is competent to refuse medication or treatment under the statute, the court "'must presume that the patient is competent to make that decision.'" *Id.* at ¶49, *quoting Virgil D. v. Rock County*, 189 Wis. 2d 1, 14, 524 N.W.2d 894 (1994).

Fourth, the explanation that must be proven – that a doctor explained to Brett the advantages, disadvantages and alternatives – is not a technical requirement but "a necessary prerequisite" to a determination as to his competency to exercise informed consent. *Waukesha County v. M.J.S.*, No. 2017AP1843, unpublished slip op., ¶21 (Wis. Ct. App. Aug. 1, 2018) (App. 20). As this court wrote:

> The statutorily required explanation is not just a magnanimous nicety. It is an information disclosure that the County must prove as a prerequisite to forcibly injecting medication into someone who does not want it. The statutory right is highly important.

Id. at ¶27 (App. 24).[2]

Here, the scant evidence presented by the county failed to meet this burden.

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[2] All of the unpublished, authored opinions are cited in this brief for their persuasive value pursuant to Wis. Stat. § (Rule) 809.23(3)(b).

As already noted, Dr. Bales did not speak with Brett as a part of his evaluation in this extension. (318:20). However, this lack of any discussion regarding the advantages, disadvantages and alternatives to medication did not make it impossible for the county to satisfy its burden of proof. The record in this case might have been sufficient had the county introduced the treatment records, the treating psychiatrist's records or notes or if the county conducted more detailed questioning of the doctor.

Further, Dr. Bales was wholly unable to testify about the medication issue. He did not know what medications Brett was taking or how often he was required to take them. (318:22). Because he didn't know the medications, Dr. Bales offered no testimony about the specific purpose of the medications.

The supreme court in *Melanie L.* stated that "[m]edical professionals and other professionals should document the timing and frequency of their explanations so that, if necessary, they have documentary evidence to help establish this element in court." *Id.*

In *M.J.S.*, the individual did not receive the explanation because he had not met with the examiners. *M.J.S.*, slip op., ¶¶6-10, 22 (App. 20-21). Although the court of appeals affirmed the order extending the commitment, it reversed the medication order because M.J.S. had not received the required explanation and had not relinquished his right to be so advised. *Id.* at ¶18 (App. 22). The court noted that the

right to be informed of medical options and to refuse medication "represents a competent individual's 'significant liberty interest in avoiding forced medication of psychotropic drugs.'" *Id.* at ¶27, *quoting Melanie L.*, 349 Wis. 2d 148, ¶43. (App.24). To ensure protection of that liberty interest, our law requires the county, as a prerequisite to forcible administration of medication, explain "'the advantages and disadvantages of and alternatives to … medication or treatment.'" *Id.* at ¶32, *quoting* § 51.61(1)(g)4., ¶53 (App. 24).

In three other cases, doctors met with the individuals and at the hearing provided some testimony about their discussions, but nevertheless, this court held that the county failed to prove that the individuals received an adequate explanation.

In *Waukesha County v. Kathleen H.*, No. 2014AP90, unpublished slip op., ¶9 (Wis. Ct. App. June 25, 2014) (App. 28), the doctor's testimony "seemed to suggest that he did not enter into a detailed discussion with Kathleen about the medications because he knew she would protest their administration." And in the section of the doctor's written report regarding alternatives, the doctor had written "none." *Id.* at ¶8 (App. 28). The court of appeals held that the county failed to prove by clear and convincing evidence that the doctor gave Kathleen a reasonable explanation of the proposed medications and, consequently, reversed the medication order. *Id.* at ¶9 (App. 28).

In *Eau Claire County v. Mary S.*, No. 2013AP2098, unpublished slip op., ¶15 (Wis. Ct. App. Jan. 28, 2014) (App. 33), the court of appeals reversed the medication order because, although the doctor's testimony touched on the advantages, disadvantages and alternatives, "his conclusory testimony does not establish by clear and convincing evidence that the explanation he gave Mary was reasonable." In *Winnebago County v. Donna H.*, No. 2013AP80, unpublished slip op., ¶8 (Wis. Ct. App. July 31, 2013) (App. 36), a protective placement case under Wis. Ch. 55, the court of appeals reversed because the doctor's testimony did not "explicitly establish that the advantages and disadvantages of medication were explained to Donna." Although the circuit court inferred that the explanation was given, this court held that under *Melanie L.* "such an inference is no longer permissible." *Id.*

> Testimony must now track the particular statutory language to establish the statutory requirements, and medical experts must now apply and enunciate the standards set out in the competency statutes.

Id.

The county failed to meet its burden of proving by clear and convincing evidence that Brett received an explanation about the advantages, disadvantages and alternatives, a prerequisite to a determination of whether Brett is competent to exercise informed consent.

Finally, the circuit court's ruling reflected the lack of proof, as the circuit court simply repeated the standards without applying any specific facts: "the advantages, disadvantages and alternatives to the medication were not explained to him on this current go-around but have been explained to him in the past and due to his mental illness, he's not competent to refuse psychotropic medication for treatment because he's substantially incapable of applying the advantages, disadvantages and alternatives to his condition in order to make an informed choice as to whether or not to accept or refuse psychotropic medications." (318:43; App. 17).

In *Melanie L.*, the supreme court warned that these hearings "cannot be perfunctory under the law" and that "[a]ttention to detail is important." *Melanie L.*, 349 Wis. 2d 148, ¶94. More recently, the supreme court "pause[d] once more to speak to the bench and bar", noting that the county "could have further developed its medical expert's testimony" and the circuit court could have "made more detailed and thorough factual findings and clarified its legal conclusions." *Marathon County v. D.K.*, 2020 WI 8, ¶55, 390 Wis. 2d 50, 937 N.W.2d 901. This court and the parties must heed the supreme court's admonishments. The reality is that when the county's evidence falls short but, despite that, the circuit court enters a medication or commitment order, it is the subject of the order who is treated unjustly. That individual, like Brett, is subject to forced, psychotropic medication without the county having proved that he is incapable of exercising informed consent.

The county and circuit court did not adhere to the statutory standard. This court must make the correction and reverse the involuntary medication order that should not been entered in the first place.

CONCLUSION

For these reasons, Brett respectfully requests that that this court reverse both recommitment orders.

Dated this 7th day of August 2023.

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 7,729 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 7th day of August, 2023.

Signed:
Electronically signed by
Susan E. Alesia
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