STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2023AP000533

In the matter of the mental commitment of M.A.C.:
WAUKESHA COUNTY,

Petitioner-Respondent,

v.

M.A.C.,

Respondent-Appellant.

Appeal from an Order for Recommitment and an Order for Involuntary Medication and Treatment entered by the Waukesha County Circuit Court, the Honorable Laura F. Lau, Presiding

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REPLY BRIEF OF RESPONDENT-APPELLANT

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ARGUMENT

I. The County's failure to notify Melissa of her recommitment hearing violated the 14th Amendment and § 51.20(10)(a).

Melissa was entitled to personal notice of the recommitment proceedings. Wisconsin section 51.20(10)(a) imposes a notice requirement, stating that, "[w]ithin a reasonable time prior to the final hearing, the petitioner's counsel shall notify the subject individual *and* his or her counsel of the time and place of the final hearing." Wis. Stat. § 51.20(10)(a) (emphasis added).

The County argues that service on Melissa's counsel constituted service on Melissa. (Response Brief at 24-25). Melissa acknowledges that *S.L.L.* addressed whether a recommitment petition must be served personally on the respondent. *Waukesha County v. S.L.L.*, 2019 WI 66, ¶¶11-13, 17-21, 387 Wis. 2d 333, 929 N.W.2d 140. However, the case was not decided based on an interpretation of Wis. Stat. § 51.20(10)(a). Instead, the respondent argued that Wis. Stat. § 51.20(2)(b), specifically, required that the petition be served on her. By interpretation of this particular statute, the court rejected this claim. *Id.*, ¶26. In a footnote, the court also acknowledged that the dissent had made an argument that the respondent did not make: that Wis. Stat. § 51.20(10)(a) entitled the respondent to personal service. *Id.*, ¶ 27, n.18. *See* dissent, *id.*, ¶57. Although the majority noted

that persuading on this argument would have been a "difficult task" (*id.*, n.8), it did not substantially address the issue because the parties did not raise it.

Had the *S.L.L.* majority undertaken statutory interpretation of Wis. Stat. § 51.20(10)(a), it would have considered the canon of statutory construction that statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *State ex rel. Kalal v. Circuit Court*, 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110. By use of the word "and," the Legislature decided that there must be *both* notice to "the subject individual" and to "counsel"—if constructive notice through counsel was sufficient, it would have used "or" instead.

In *Vitek v. Jones*, 445 U.S. 480, 491-492 (1980), the Supreme Court held that, before an incarcerated person could be transferred to a mental institution for involuntary treatment, they were entitled to notice of the proceeding. Notice must be "written notice *to the prisoner*." *Id*. at 494-495 (emphasis added). The Court observed that "notice is essential to afford the prisoner an opportunity to challenge the contemplated action and to understand the nature of what is happening to him." *Id*. at 496 (citation omitted). The *S.L.L.* court did not reference or apply *Vitek*.

The County attempts to distinguish *Vitek* because giving personal notice to a prisoner is "far easier" given that their whereabouts are known. (Response Brief at 21). The due process right to notice is not contingent on whether providing personal notice

is convenient. The County also asserts that *Vitek* only establishes a right to personal notice for an initial commitment. (*Id*. at 23). *Vitek* does not contain that limitation, and the values served by personal notice logically extend to recommitment proceedings.[1]

Contrary to the County's assertion, the values underlying the forfeiture rule are not served here. (*See* Response Brief at 19-20). The County has had a full and fair opportunity to respond to Melissa's claims. Forfeiture in this context does not enhance "efficiency" or "lessen the need for an appeal." (*See id*. at 20).[2] The County requested default, relying on *S.L.L.*, and the circuit court accepted this argument. (*See* R.104:3; A-App. 9). There is no reason to believe the error would have been corrected in the circuit court, thus obviating the need for an appeal. [3]

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[1] At the hearing, the County asserted that it was in Melissa's "best interests" to remain outpatient, and therefore, the court should not issue a detention order. (R.104:2-3; A-App. 8-9). However, the County did not even know her current condition. And reasonable minds may differ as to whether short-term detention is preferable to being committed and compelled to take medication for an entire year.

[2] The County is mistaken in arguing that Melissa should have filed a motion for reconsideration. (Response Brief at 20). Under the rules of appellate procedure, a subject of a Chapter 51 commitment shall file a notice of intent to pursue postconviction relief, not a reconsideration motion. *See* Wis. Stat. § 809.30(2)(a).

[3] This reply also applies to Argument II regarding default, which the County also argues was forfeited. (Response Brief at 19-20). *See also, Outagamie County v. R.G.K.,* No. 2019AP2134, unpublished slip op, ¶19, n.5 (WI App Sept. 20,

II. The circuit court erroneously entered a default judgment against a person who appeared at a civil hearing by counsel.

Melissa should not have been defaulted because she appeared by counsel at the hearing. When a person appears by counsel in a civil case, the court may not enter a default judgment under Wis. Stat. § 806.02(5). *Sherman v. Heiser*, 85 Wis. 2d 246, 254, 270 N.W.2d 397 (1978); *Evelyn C.R. v. Tykila S.*, 2001 WI 110, ¶17, 246 Wis. 2d 1, 629 N.W.2d 768.

The County does not contend with the cases cited by Melissa, instead relying entirely on *S.L.L.* (*See* Response Brief at 28). Melissa acknowledges that *S.L.L.* upheld a default judgment against an individual in a case where there was a defense attorney in court. However, the *S.L.L.* court was not asked to decide whether a person can be defaulted when they appear by counsel.[4] The County also cites *R.G.K.* (response brief at 28); however, the respondent did not make this argument in that case either. *R.G.K.,* No. 2019AP2134, unpublished slip op. ¶22 n.7 (App.13-14). The *R.G.K.* court in fact suggested the viability of the argument. Yet, because the issue was not argued, it was not decided. *Id.*, ¶28 n.8. (App.16). [5]

2022) (addressing an appeal of default judgment raised for the first time on appeal). (App.12).

[4] Even if *S.L.L.* is read to answer the question presented, this Court should certify the case to the Wisconsin Supreme Court instead of affirming an unconstitutional order.

[5] The *R.G.K.* court also noted that *S.L.L.* did not consider this argument. However, it acknowledged that if the argument

The County also argues that Attorney McMahon did not actually appear for Melissa. (Response Brief at 27). The State Public Defender appointed Attorney McMahon as counsel for Melissa. (R.72). At the hearing, Attorney McMahon stated that, she "appears on behalf of Melissa." (R.104:2; A-App. 8). The circuit court specifically found that, "[Melissa] appeared today by counsel." (R.104:6; A-App.12). The County claims Melissa has to prove that she gave her attorney specific instructions on how to proceed at the hearing (response brief at 29); yet it cites no authority for this assertion. Under SCR 11.02(1), "[e]very person of full age and sound mind may appear by attorney in every action. . ." This provision is not conditional on the degree of instruction the individual has provided to counsel. *See also, Heiser*, 85 Wis. 2d at 256 (sympathizing with the attorney and court's "frustration" that there was no explanation for the defendant's nonappearance, but nonetheless reversing the default judgment).

III. The County's evidence was insufficient to support the circuit court's order for recommitment and order for involuntary medication.

A. The County relies on facts not in evidence.

The County heavily relies on facts alleged in the petition for recommitment. (Response Brief at 10-11, 32-35, 40-43). The petition included a report written

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was to be considered, it may need to be considered by the Wisconsin Supreme Court. *Id.*, ¶22 n.7.

by a county social worker, Danielle Weber (hereinafter "petition/report"). (R.69). The petition/report was not introduced into evidence and the circuit court did not rely on it. It should not be considered on appeal.

The County attempts to analogize the petition/report to an expert evaluation. (Response Brief at 47). It cites *L.X.D.-O.*, which held that in an original commitment, the court may rely on court-appointed examiner reports in its evaluation of the evidence even if the reports were not entered into evidence. *Outagamie County v. L.X.D.-O.*, 2023 WI App 17, —N.W.2d— (emphasis added). First, Melissa's appeal is from a recommitment, not an original commitment. The court reaffirmed that, in a recommitment hearing, examiner reports must in be introduced into evidence. *Id.*, ¶¶30, 33 (citing *Langlade County v. D.J.W.*, 391 Wis. 2d 231, ¶7 n.4, 391 Wis. 2d 231, 942 N.W.2d 277). Furthermore, the petition/report was written by a county social worker; it was not a court-appointed examiner's report.

The County makes a cursory assertion that the report did not need to be formally received because "Wis. Stat. 51.20(13)(g)2r. requires the 51.42 Board to file an Evaluation and Recommendation for Recommitment with the committing court, the procedure is akin to Wis. Stat. 51.20(9)(a)5" and therefore, "*L.X.D.-O.*'s reasoning applies." (Response Brief at 47, citing *L.X.D.-O.* 2023 WI App 17, ¶¶33-34). This argument is undeveloped and therefore, need not be considered. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Regardless,

Wis. Stat. § 51.20(13)(g)2r. simply establishes a timeline and procedure for initiating a recommitment proceeding. It applies to all recommitments. Therefore, accepting the County's assertion would require overruling *D.J.W.* and *L.X.D.-O.*, which held that examiner reports in recommitment proceedings must be formally received into evidence in order for the court to rely on them. *See L.X.D.-O.*, 2023 WI App 17, ¶¶30, 33 (citing *D.J.W.*, 391 Wis. 2d 231, ¶7 n.4).

Neither the petition/report nor doctors' reports were introduced or received by the court at the hearing. Therefore, their contents may not be relied upon. The County asserts that by asking the court to "rely" on the doctors' reports, it was asking the court to "receive" the reports. (Response Brief at 14). However, reliance is not the same as receipt into evidence. The County did not supply foundation or formally move the reports into evidence. Yet, even if the *doctors'* reports are considered received, it is clear that the petition/report cannot. The County said that it was "asking the Court to rely upon the *doctors' reports*." (*Id.*) (emphasis added). The court stated, "[b]ased upon the *doctors' reports*" it was finding grounds. (R.104:5; A-App.11) (emphasis added). Finally, the County faults defense counsel for not objecting. (Response Brief at 14). Yet, counsel did not stipulate or affirmatively forego an objection. She stated that she did not believe she was in the position to object without her client. (R.104:5; App.11). In such circumstances, the County must still be held to its burden of proof. Furthermore, this is a sufficiency of

the evidence claim, and sufficiency claims may be raised directly on appeal. *See* Wis. Stat. § 809.32(h).

B. The evidence was insufficient to support the recommitment order.

The County failed to prove by clear and convincing evidence that Melissa was dangerous to herself or others. The County does not dispute that its request for default judgment did not relieve it of its obligation to present clear and convincing evidence to carry its burden of proof. *See* Wis. Stat. § 806.02(5). Without the petition/report or doctors' reports, there was no properly-admitted evidence.

Even if the Court considers the contents of the doctors' reports, the evidence is still insufficient. The incidents described by Dr. Piering did not prove by clear and convincing evidence that, if treatment were withdrawn, Melissa would "evidence[ ] such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals." *See* Wis. Stat. § 51.20(1)(a)2.c. The allegations were as follows: Melissa had used 911 inappropriately; had been revoked to inpatient treatment in December of 2021; missed some of her medication appointments in 2022; was evicted from her rooming house and became homeless; missed medication appointments, appeared paranoid, was victim of domestic violence, and was charged with disorderly conduct, bail jumping, and mail theft (all in the year 2020); and at some

unspecified point in the past was hospitalized for suicidal behavior and vague homicidal threats. (R.75:1-2).

These allegations were vague, and either undated or too old to be probative of current dangerousness. "Each extension hearing requires proof of current dangerousness. It is not enough that the individual was at one point a proper subject for commitment." *Portage County v. J.W.K.*, 2019 WI 54, ¶24, 386 Wis. 2d 672, 927 N.W.2d 509. Dr. Piering did not even identify what physical impairment or injury to Melissa or others was substantially likely to occur if treatment were withdrawn. Being homeless and paranoid does not amount to dangerousness. The 2020 criminal charges occurred years prior and are not violent offenses. And it should be beyond dispute that being the victim of someone else's violent behavior does not make Melissa dangerous.

C. The evidence was insufficient to support the involuntary medication order.

Even if this Court finds that there was sufficient evidence for the recommitment, it should conclude that the evidence was insufficient to prove that Melissa was incompetent to refuse medication. Again, there actually was no properly-admitted evidence. Yet, even if the Court considers the contents of the reports, the evidence was still insufficient.

Two showings are required before a court can find a person incompetent to refuse medication: (1), an examiner must provide the person with "a reasonable

explanation of the proposed medication, including why the 'particular drug' is being prescribed, the advantages, side effects, and alternatives to that medication," and (2), the examiner must determine that the person either is incapable of understanding this information or is substantially incapable of applying this information to their own condition. *Outagamie County v. Melanie L.,* 2013 WI 67, ¶67, 349 Wis. 2d 148, 833 N.W.2d 607 (citing Wis. Stat. 51.61(1)(g)4.). Neither Dr. Kohlenberg nor Dr. Piering examined Melissa in preparation of their reports. The last time either doctor met with her was a year earlier, in August 2021. (R.74:2; R.75:1).

The County asserts that the "51.42 board" supplied Melissa with the requisite explanation of the advantages, disadvantages, and alternatives to medication. (*See* Response Brief at 38). It later identifies the person who gave an explanation about Abilify Maintena on April 27, 2022, as Mercy Mahaga, an advanced practice nurse prescriber. (Response Brief at 38-39). All of these facts are derived from the petition/ report, which, again, is not in evidence.

The alleged discussion between Ms. Mahaga and Melissa was not sufficient.[6] Subsection 51.61(1)(g)3. requires that a petition for involuntary medication be accompanied by a "statement signed by a *licensed*

[6] These arguments were not made in Melissa's opening brief because the petition/report is not in evidence and the circuit court did not rely on it. She could not anticipate that the County would rely on it in this Court.

physician asserting that the subject individual needs medication or treatment and that the individual is not competent to refuse medication or treatment, *based on an examination of the individual by a licensed physician*." Wis. Stat. § 51.61(1)(g)3. (emphasis added). Ms. Mahaga was not a licensed physician.

The explanation and competency opinion must be from the same person. In other words, the doctor providing the competency opinion must have the conversation with the person in order to determine whether they understand the explanation and/or can apply that information to their own condition. *See Walworth County v. Therese B.*, 2003 WI App 223, ¶16, 267 Wis. 2d 310, 671 N.W.2d 377 ("it is crucial that the examining professional reach his or her conclusion through an independent evaluation of the proposed ward …").

Ms. Mahaga's explanation was also insufficient because she only discussed Abilify Maintena, and not the other prescribed psychotropic medications (Depakote and Gabapentin). (*See* Response Brief at 39 citing R.69:7). The County asserts that Melissa was only entitled to an explanation regarding Abilify Maintena because it was an an injection, whereas the other medications were oral medications. The County argues that, "[t]he 51.42 Board cannot involuntarily administer an oral medication." (Response Brief at 38, n.11). The County erroneously conflates "involuntary" with "forcible." Melissa had no legal right to refuse any of these medications. In the past, Melissa was

detained and taken inpatient when she did not comply with the medication order. (*See* Response Brief at 41).

Finally, Ms. Mahaga's explanation was not timely, apparently having been given nearly four months prior to the recommitment hearing. (*See* R.104:1). *Melanie L.*, 349 Wis. 2d 148, ¶67, (the medication explanation must be "timely"). Contrary to the County's assertion, Melissa did not waive her right to a timely evaluation of her competency. (*See* Response Brief at 42-45). The County points to other times in the past that Melissa allegedly declined to speak with providers about medication (the most recent being in January, nearly six months prior to the hearing). (Response Brief at 39-40). The fact that Melissa declined to discuss medication with providers in the past does not mean that she waived her right to an explanation of the advantages, disadvantages, and alternatives to medication by a licensed physician in order to determine her current incompetency under the applicable legal standard. The County can seek a medication order at any time during the commitment. *See* Wis. Stat. § 51.61(1)(g)3. If upon establishing contact with Melissa the County believed a medication order was warranted, the County could file a petition at that time, and proceed with a legal process.

This is not *Therese B.* where the individual had personal notice of the proceeding and declined the initial interview. *Therese B.*, 267 Wis. 2d 310, ¶20. In *Waukesha County v. M.J.S.*, No. 2017AP1843, unpublished slip op. ¶27 (WI App Aug 1, 2018), this Court reversed a medication order, after finding that

the right to a medication explanation cannot be forfeited, only waived through an intentional waiver. (App.30-31). Here, Melissa did not have personal notice of the proceeding or that she had been instructed to call the doctors to make appointments with them. (*See* R.70). She did not knowingly and voluntarily waive her rights.

CONCLUSION

For the reasons stated above and in her Appellant's Brief, M.A.C. respectfully asks this Court to reverse the recommitment order and order authorizing involuntary medication and treatment.

Dated this 20th day of June, 2023.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 2,999 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 20th day of June, 2023.

Signed:
Electronically signed by
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