STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2023AP000715-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

J.D.B.

Defendant-Appellant.

Appeal from Order of Commitment for Treatment (Incompetency) Entered in the Milwaukee County Circuit Court, the Honorable Milton L. Childs, Sr., Presiding.

SUPPLEMENTAL BRIEF OF RESPONDENT-APPELLANT

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INTRODUCTION

The court asked the parties to brief two additional questions. Each question will be addressed below. However, Jared[1] acknowledges that the questions presented are generally outside the scope of this appeal, which only challenged the involuntary medication order. As such, the record is limited. Nonetheless, the questions presented encompass an overarching theme that also relates to the first *Sell*[2] factor—namely, what is the government's interest (or purpose) in infringing upon Jared's significant liberty interest in the manner it did, through prolonged detention without the opportunity for release, delayed treatment, and an involuntary medication order.

Jared—a 19-year-old with no criminal history, a traumatic brain injury, and schizophrenia—was arrested in the midst of a mental health crisis. Competency was raised at his first court appearance and he was detained without bail for nearly two months—contrary to the constitutional and statutory protections afforded every (presumed innocent) person accused of a crime. Once Jared was found not competent and committed to Department of Health Services (DHS) custody, the purpose of his commitment was competency restoration. Yet, Jared was held in jail for an additional 106 days before he

[1] Taking guidance from Wis. Stat. § 809.81(8), this brief refers to J.D.B. as "Jared," a pseudonym.

[2] *U.S. v. Sell*, 539 U.S. 166, 180 (2003).

was transported for inpatient treatment—likely receiving inadequate treatment to alleviate the concerns underlying the commitment.

The overall purpose of the government's infringement on Jared's liberty—detention and forced treatment—appears to be more concerned with public safety and treating his mental illness, and less about prosecution. Those purposes align with a civil commitment, where Jared would have been afforded due process protections appropriately tied to the reason for the government's infringement on his liberty—that is, short deadlines to ensure use of the least restrictive detention and, if committed, to effectuate *timely* treatment. *See* Wis. Stat. § 51.20(7).

I. Does a defendant ordered to submit to a competency examination under Wis. Stat. § 971.14(2) have a constitutional or statutory right to conditional pretrial release or a bail hearing, and if so, was that right violated as to Jared?

A person charged with a crime has both statutory and constitutional rights to have eligibility for pretrial release determined by the court. The court did not have the authority to deny Jared pretrial release and the fact that competency was raised at Jared's first court appearance did not alter this right. The court was required to set conditions of bond and determine whether bail was necessary. Only upon suspension of the proceedings and commitment to DHS custody does the bond statute no longer apply.

A. Statutory right.

At the initial appearance, "[t]he judge shall admit the defendant to bail in accordance with ch. 969." Wis. Stat. § 970.02(2). Pursuant to Wis. Stat. § 969.01(1)(a), a person arrested for a criminal offense "is eligible for release under reasonable conditions designed to assure his or her appearance in court, protect members of the community from serious harm, and prevent the intimidation of witnesses," except as provided in Wis. Stat. §§ 969.035 and 971.14(1r). Neither section permits detaining Jared without bail.

First, s. 969.035 provides a process for denying release from custody. The state did not seek to deny Jared's release through the process in s. 969.035, nor could it. Jared was charged with battery to law enforcement, contrary Wis. Stat. § 940.203(2), which is not an offense eligible for the denial of pretrial release. Even if his charge was deemed a violent crime per s. 969.035(1)(b)—it is not—he would still need to have a prior conviction for a violent crime, and Jared has no criminal history. (R.15:3). Thus, the court did not have the authority to deny pretrial release altogether.

Second, s. 971.14(1r) does not authorize pretrial detention without the opportunity for release. Section 971.14(1r)(a), explains that the court shall proceed under s. 971.14 when there is reason to doubt the accused's competency to proceed. The only references to bail in s. 971.14 address how to proceed when an individual is released on bail. Wis. Stat. § 971.14(2)(am), (b), (d). There is nothing in s. 971.14

that authorizes a court to detain a person accused of crime without bail simply because competency was raised.

In Jared's case, when competency was raised at the initial appearance, the court ordered the examination to be conducted by DHS, but failed to address bond. (R.4). When the court orders an individual to be examined by DHS, DHS will decide where the examination takes place and whether it is inpatient or outpatient. Wis. Stat. § 971.14(2)(am); (R.4). If the person is released on bail, an involuntary inpatient examination can only be ordered if the accused fails to cooperate or the examiner informs the court it is necessary for an adequate examination. Wis. Stat. § 971.14(2)(b). Nothing prevents the court from setting bail as it is otherwise required to do.

Based upon s. 969.01 and s. 971.14, the court did not have the authority to remand Jared into the custody of the Milwaukee County Sheriff's Department without considering and imposing conditions for pretrial release. It was only when the court determined Jared was incompetent and likely to regain competency within the statutory timeframe that the proceedings were suspended and the bail statute no longer applied. *See* Wis. Stat. § 971.14(5)(a) (authorizing DHS to determine the place of treatment, regardless of whether an individual has been released).

B. Constitutional right.

Jared also had constitutional rights to have the court consider and impose pretrial release. The Wisconsin Constitution states, "All persons, before conviction, shall be eligible for release under reasonable conditions designed to assure their appearance in court, protect members of the community from serious bodily harm or prevent intimidation of witnesses." Wis. const. art. 1, § 8(2). Consistent with s. 969.035, the Wisconsin Constitution permits the court to deny release for limited alleged crimes. Wis. const. art. 1, § 8(3). It also provides specific procedures that must be followed before pretrial release can be denied. *Id.* The allegations against Jared would not qualify for *denial* of release nor were any of the procedures followed.

In addition to the explicit statutory and constitutional provisions requiring consideration of bail, Jared had a due process right to consideration and imposition of conditional pretrial release, as outlined in s. 969.01. The general rule is that substantive due process prohibits detention of a person prior to judgment of guilt in a criminal trial. *See U.S. v. Salerno*, 481 U.S. 739, 749 (1987). There are a number of exceptions—including those outlined in s. 969.01 and Wis. const. art. 1, § 8(2)-(3). However, given it appears the procedures for those exceptions

were not followed here,[3] Jared's substantive and procedural due process rights were violated.

C. Comparison to chapter 51 detentions.

Chapter 51 provides strict timelines related to pre-disposition detention to ensure the detention comports with due process. *See Lessard v. Schmidt*, 349 F. Supp. 1078 (E.D. Wis. 1972).[4] For example, a probable cause hearing must be held within 72 hours from when a person subject to a chapter 51 petition is taken into custody. Wis. Stat. § 51.20(7)(a). And, if the court finds probable cause, the court must schedule the final hearing "within 14 days from the time of detention." Wis. Stat. § 51.20(7)(c).

Now compare this to what occurred in Jared's case—where he was held without bail due to suspected mental illness. Jared was arrested on August 23, 2022 and proceedings were not suspended until the court made an incompetency finding on October 12, 2022—nearly two months. (R.2; 8). Thus, he was detained for nearly two months without any of the due process

[3] Since the subject of this appeal is solely the involuntary medication order, there is no transcript of Jared's initial appearance where competency was raised. However, the court entries show no sign of bail imposed and state "Court ordered defendant REMANDED into custody of Milwaukee County Sheriff's Department" in the notes on August, 31, 2022, Jared's first hearing. (R.25:1).

[4] *Lessard* "has a complicated procedural history but the substance of its holding was never overruled." *Outagamie Cty. v. Michael H.*, 2014 WI 127, ¶25 n.19, 359 Wis. 2d 272, 856 N.W.2d 603.

protections ordinarily afforded people detained because of their mental health pursuant to ch. 51. And, because he was also not provided the protections in s. 969.01, Jared was deprived of all protection against arbitrary detention.

As noted above, this is not the issue raised on appeal. However, the issue of detention without the opportunity for release—a process used in ch. 51 cases—relates to the first *Sell* factor which considers the government interest before it can involuntarily medicate a person in an attempt to restore competency for the purpose of prosecuting that person. *Sell*, 539 U.S. at 180. If the government interest is less about prosecution and more about the need to detain a mentally ill person to protect the community and provide treatment, then the interest *in prosecuting* that person is not important enough to permit involuntary medication for competency restoration.

II. Does a defendant ordered to submit to competency restoration treatment under Wis. Stat. § 971.14(5) have a due process right to receive that care in a timely manner, and if so, was that right violated as to Jared?

Under the Due Process Clause, people—including those accused of a crime—have a significant liberty interest in refusing involuntary medication. *State v. Fitzgerald*, 2019 WI 69, ¶13, 387 Wis. 2d 384, 929 N.W.2d 165 (quoting *Washington v. Harper*, 494 U.S. 210, 221 (1990)). Whether to receive medical

care—whether it is medication or other treatment—is a personal and constitutionally protected decision. Psychotropic medication, for example, can have "serious, even fatal side effects." *See Harper*, 494 U.S. at 229-30. Given the liberty interests and potential risks involved, absent an appropriate court order, the decision to accept treatment is, and should be, a personal decision.

When a person is deemed incompetent in a criminal case, the general rule allowing people to make their own, personal treatment decisions is turned on its head. It is difficult to answer whether a person committed for purposes of competency restoration, generally, has a due process right to receive care in a timely manner because it depends on the individual. A person that *wants* the restorative treatment certainly has a due process right to timely restorative treatment as outlined in Wis. Stat. § 971.14(5)(a). And, the state does not have the authority to commit a person without following through on the purpose for that commitment. *See e.g. Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("due process requires that the nature and duration of commitment bear some reasonable relations to the purpose for which the individual is committed.")

But, it is important to note that the liberty interest related to treatment hinges upon the right to make decisions *about* treatment, not the right to *be* treated. A due process right to be treated timely does not protect a person's liberty interest if that person does not want treatment. Thus, asking about the right

to receive care in a timely manner presumes the person wants restorative treatment. That may not be the case, especially when that care involves forced psychotropic medication.

Having said that, the state (DHS) is required to provide treatment to individuals deemed incompetent but likely to regain, as outlined in statute. Specifically, s. 971.14(5)(a)1., permits DHS to decide if the individual will receive treatment: (1) in an appropriate institution, (2) in a community-based treatment program, or (3) "in a jail or locked unit of a facility that has entered into a voluntary agreement with the state to serve as a location for treatment." When DHS commences services in a jail, DHS "shall, as soon as possible," transfer the individual to an institution or provide services in a community-based treatment program. Wis. Stat. § 971.14(5)(a)2.

In this case, the examining doctor recommended "inpatient psychiatric treatment" (R.5:6) and the court ordered transport to an appropriate facility "forthwith" on October 11, 2022. (R.8; 10). Still, Jared was held in the jail utilizing the Jail Based Competency Restoration Program until January 25, 2023—106 days later. (R.15:4).

This Court cited *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101 (9th Cir. 2003), in its order. That case involved a lawsuit where individuals found to be incompetent in criminal cases sued Oregon State Hospital because the hospital did not timely accept individuals for restorative treatment. The court

concluded "incapacitated" defendants have liberty interests in freedom from incarceration and in restorative treatment. *Id.* at 1121. It appears the latter interest regarding restorative treatment comes from *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1980), which held "the Fourteenth Amendment Due Process Clause requires states to provide civilly-committed persons with access to mental health treatment that gives them a realistic opportunity to be cured and released."

As explained above, Jared does have the right to have access to treatment, however, when and how he engages with that access is the liberty interest at stake. The state has an obligation to treat people committed for competency restoration as required by s. 971.14. Meaning, it must provide adequate treatment to alleviate the issues underlying the commitment and cannot allow individuals to languish in jail. The overarching problem with both detaining a person without bail for purposes of (eventual) treatment and committing a person but providing delayed or inadequate treatment is that the individual is subjected to an unnecessary, ineffective, and ultimately harmful detention.

CONCLUSION

As explained in Jared's briefs and at oral argument, this Court should vacate the order for involuntary medication.

Dated this 10th day of May, 2024.

Respectfully submitted,

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