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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP001072

In the matter of the mental commitment of K.A.D.:

DOUGLAS COUNTY,

Petitioner-Respondent,

v.

K.A.D.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. What is "evidence?" Is evidence the sworn testimony of witnesses, documents the court has received, or any facts to which the parties have stipulated? *See* WIS JI-CIVIL 50. Or is evidence any document statutorily required to be filed with the court prior to the relevant evidentiary hearing even if never introduced or admitted into evidence?

Here, the court of appeals, applying *Outagamie County v. L.X.D.-O.*, 2023 WI App 17, 407 Wis. 2d 441, 991 N.W.2d 518, held that the county met its burden to present clear and convincing *evidence* that K.A.D. ("Kyle")[1] was incompetent to refuse medication based on a physician's report that was never admitted into evidence.

The issue presented to this Court is whether *Outagamie County v. L.X.D.-O.* must be overruled?

The court of appeals relied on *L.D.X.-O.* to affirm Kyle's order for involuntary medication.

This Court should accept review, overrule *L.X.D.-O.*, and reverse the order authorizing Kyle's involuntary medication.

[1] K.A.D. is referred to by the pseudonym "Kyle" in this petition as he was in the court of appeals. *See* Wis. Stat. § (Rule) 809.19(1)(g).

2. Whether the county presented sufficient evidence under Wis. Stat. § 51.61(1)(g)4. to establish that Kyle was incompetent to refuse medication?

The court of appeals agreed with Kyle that the evidence presented at the final hearing was insufficient, but affirmed the order for involuntary medication after considering the report filed by a physician pursuant to Wis. Stat. § 51.20(9)(a)5.

This Court should accept review, overrule *L.X.D.-O.*, and then reverse the involuntary medication order at issue in this case.

CRITERIA FOR REVIEW

The first issue presented poses a recurring legal question, and a decision on it will help develop, clarify, and harmonize the law. Wis. Stat. § (Rule) 809.62(1r)(c)3. The second issue presented should be decided by this Court if review is granted on the first issue.

In *Langlade County v. D.J.W.*, 2020 WI 41, ¶3, 391 Wis. 2d 231, 942 N.W.2d 277, this Court reversed an order extending a civil commitment under Chapter 51 based on the conclusion that the county failed to present sufficient *evidence* of dangerousness. The evidence examined by the court was limited to the testimony presented at D.J.W.'s recommitment hearing. *Id.*, ¶46. In a footnote, the court explained that "the evidence presented by the County at the

recommitment hearing consisted solely of [the physician's] testimony" because "the report was never admitted into evidence at the recommitment hearing." *Id.*, ¶7, n.4

The court's point was simple, straightforward, and uncontroversial: within the context of a sufficiency of the *evidence* claim, a document filed with the court, but not admitted as evidence at the relevant evidentiary hearing is not *evidence*.

In *L.X.D.O.*, the court reviewed an order for involuntary medication under Wis. Stat. § 51.61(1)(g)4. issued at the same time the circuit court entered an original commitment order. 407 Wis. 2d 441, ¶¶1-3. The court held that "[the physician's] hearing testimony *alone* was insufficient to establish that [L.D.X.-O.] was not competent to refuse medication." *Id.*, ¶25. However, at the county's request, the court looked past the evidence presented at the recommitment hearing and distinguished *D.J.W.* as applying only to recommitment hearings. *Id.*, ¶¶29-30.

In support of its holding, the court relied on Wis. Stat. § 51.20(9)(a)5. This subdivision provides that examiners appointed by the court "shall make independent reports to the court" and that "[a] written report shall be made of all such examinations and filed with the court." Wis. Stat. § 51.20(9)(a)5. The subdivision further provides that "the report and testimony, if any, by the examiners shall be based on

beliefs to a reasonable degree of medical certainty, or professional certainty…" *Id.*

From this, the *L.D.X.-O.* court held that reports filed by physicians pursuant to Wis. Stat. § 51.20(9)(a)5. are transformed into evidence upon which a circuit court may enter an order for involuntary medication. In so doing, the court went so far as to conclude that testimony need not be considered by a court before entering such an order. *Id.*, ¶¶30-34.

To distinguish *D.J.W.*, the court relied on *Waukesha County v. S.L.L.*, 2019 WI 66, ¶24, 387 Wis. 2d 333, 929 N.W.2d 140,[2] where this Court held that "the procedure for extending a person's commitment is governed by Wis. Stat. § 51.20(10) through (13), not § 51.20(1)." In other words, because *D.J.W.* was a recommitment case, which proceeds, according to *S.L.L.* under § 51.20(10)-(13) only, the report filed under § 51.20(9)(a)5. was not mandatory and therefore had to be moved into evidence in order to be considered.

[2] This Court is presently considering a case, *Waukesha County v. M.A.C.*, No. 2023AP533, unpublished slip op., (WI App July 28, 2023) (Pet. App. 63-75), in which the court is being asked to reexamine and overrule *Waukesha County v. S.L.L.* Any decision that modifies or overrules *S.L.L.* would further undercut the court of appeals decision in this case and in *L.X.D.-O.*

The court of appeals is wrong. Nothing in § 51.20(9)(a)5. or this Court's prior decisions transforms a physician's report into evidence. In Kyle's case, just as in *L.X.D.-O.*, the court of appeals agreed that the evidence introduced at the final hearing was insufficient to establish Kyle was incompetent to refuse medication, but, pursuant to *L.X.D.-O.*, the court affirmed after relying on the physician's report.

Review is necessary to confirm that the scope of *D.J.W.'s* sufficiency of the *evidence* analysis applies equally to original commitments and recommitments as well as sufficiency of the *evidence* challenges to orders for involuntary medication.[3]

STATEMENT OF CASE AND FACTS

In February 2023, Douglas County initiated proceedings to involuntarily commit and medicate Kyle. (2). After a finding of probable cause, a physician, Marshall J. Bales, M.D., and a psychologist,

[3] While not at issue in this case, the court of appeals has now extended *L.X.D.-O.'s* holding to whether sufficient evidence was presented on the issue of dangerousness at an original commitment hearing. *See Racine County v. P.J.L.*, No. 2023AP254, unpublished slip op., (WI App July 19, 2023). (Pet. App. 76-87) As such, the current state of the law is that pursuant to *D.J.W.*, a report must be admitted into evidence to count as "evidence" upon which a sufficiency of the evidence claim is judged, but if the order at issue is an original commitment or medication order, then no such report (or testimony) need be introduced.

James Black, Ph.D., were appointed by the court to examine Kyle. (15). Kyle was detained at Winnebago Mental Health Institute pending his final hearing. (6; 7; 9; 15).

On February 9, 2023, Dr. Bales filed a report of his examination and a form statement regarding involuntary medication or treatment. (20; 21). On February 10, 2023, Dr. Bales filed an amended report, which clarified that Kyle was subject to petition for a six-month original commitment as opposed to a 12-month extension. (*See* 22:5 *contra* 20:5; 32:7; App. 9). Dr. Black filed his report on February 13, 2023. (20; 23).

As relevant here, Dr. Bales' report addressed involuntary medication, and Dr. Black's report did not. (*See* 21; 22 *contra* 23).

At Kyle's final hearing, the county called Dr. Bales as its first witness. (32:5-19; Pet. App. 23-37). With regard to his examination of Kyle, Dr. Bales explained that his interview was "abbreviated because of a concern for my safety." (32:6; Pet. App. 24). Dr. Bales explained that Kyle was "agitated, paranoid, angry, and hostile, and so I -- I did not think it was safe to try to talk to him for a long time." (32:6; Pet. App. 24).

Dr. Bales, stated, however, that he "did get a chance to talk about medications, though." (32:6; Pet. App. 24). According to Dr. Bales, "[w]hen someone is upset like he was, and frankly psychotic, I jump, so to speak, to the medicine review, and -- and basically I

was met with profanities and an obscene gesture, and then he walked off." (32:6; Pet. App. 24). Upon further questioning, Dr. Bales stated that his examination lasted "approximately five minutes" and that "I was trying to tell him the purpose of the exam, I -- I said I'm friendly. Why don't you calm down, and let's have [a] conversation. Although, I informed him you don't have to talk to me. You can remain silent and -- and so forth." (32:7; Pet. App. 25).

Dr. Bales continued: "He was very unreasonable, hostile, and angry, uncooperative, defiant, and overall, that -- that's how he has been." (32:7; Pet. App. 25). Asked how he makes a recommendation to the court after someone elects not to be examined, Dr. Bales explained: "Well, I always respect their right to not participate. And -- and sometimes, though, they elected not to participate or remain silent, but hey, I have the right to mention medications and that they can help and -- and have benefits with low side effects and no good alternatives, which I did in as much detail as I could. And, again, I was met with obscenities and an obscene gesture, and then he walked off." (32:8; Pet. App. 26).

With regard to the county's petition, Dr. Bales recommended a six-month commitment with an "involuntary medication order. He will not take medication voluntarily. He -- he -- on -- simple example, on 2/5/23, he refused his medication, all of it, medical and mental health. He said simply, I do not take medication, end quote, and that's his pattern." (32:13; Pet. App. 31).

Asked again whether he attempted to discuss medication with Kyle, Dr. Bales responded: "I did discuss medication…[a]s best I could, and I might add I have in the past. Other people have during this hospitalization, and he's not proven to be frankly competent to refuse at all." (32:14; Pet. App. 32).

On cross-examination, Dr. Bales was again asked about his brief examination of Kyle and whether he was able to explain the advantages of medication to Kyle. (32:17; Pet. App. 35). Dr. Bales responded: "As best I could. I was getting interrupted, a thousand-yard stare. He was agitated. He would not sit down, but I -- I did the best I could. When he's in that kind of when the person is agitated like that, I -- I simply cannot go into as much detail." (32:17; Pet. App. 35). Dr. Bales continued: "I would add there, though, I -- I did mention the medicine is -- is helpful. The side effects are manageable. I mentioned a few other things, and there are no good alternatives and -- and I would add here, I reviewed medicine with him a year ago. Others have reviewed medicine so he has had definite medication reviews, but I'm not going to try to talk to an obscene gesture." (32:17; Pet. App. 35). Dr. Bales, when asked whether prior medication reviews included Abilify, he testified that "[h]e's had this reviewed with him. Yes." (32:17-18; Pet. App. 35-36). Asked whether Kyle offered an opinion about Abilify, Dr. Bales responded by saying no, and that instead he "got an obscene gesture. The staff had noted him refusing all medications. I simply don't think he's

reasonable or rational about psychotropics." (32:18; Pet. App 36).

After the doctors testified, the county called Raymone Grier, a mental health worker at Tradewinds Residence. (32:29; Pet. App. 47). Ms. Grier testified that Kyle refused medications "recently," "[l]ike a month or so ago." (32:30; Pet. App. 48).

Kyle called no witnesses and did not testify. (32:35; Pet. App. 53). The county then argued in support of its petition to commit Kyle and to involuntarily medicate him. (32:36-37; Pet. App. 54-55). The county relied on Dr. Bales' testimony that Kyle "is not competent to refuse medication. Even though he had explained the advantages, disadvantages, and alternatives, [Kyle] is not able to apply and understand that information, and Dr. Bales testifies that he's not competent to refuse medication." (32:36; Pet. App. 54). Counsel for Kyle expressed concerns about the county's requests, specifically noting that it was "unclear to me how well both the benefits and denials (sic) were explained." (32:37; Pet. App. 55). Counsel further noted that Kyle had been taking medication and then decided to stop and that "[p]eople are allowed to refuse medications as long as the understand the benefits of those." (32:37-38; Pet. App. 55-56).

The court granted the county's petition and request for an order for involuntary medication. (32:38; Pet. App. 56). With regard to the request for involuntary medication, the court stated the following:

"I don't find he's able to express an understanding of the risks and benefits and alternatives to medication. He's manic. He's in a psychotic state. He's not understanding medications or their benefits." (32:39; Pet. App. 57). The court entered orders committing Kyle to the care and custody of Douglas County for six months and for involuntary medication and treatment. (26; 27; Pet. App. 60-62).

Kyle challenged only the court's order for involuntary medication on appeal. (34; 35). As relevant here, the court of appeals agreed that the county failed to present sufficient testimony or other admissible evidence that Kyle is incompetent to refuse medication. *See Douglas County v. K.A.D.*, No. 2023AP1072, unpublished slip op., ¶¶18-19 (WI App Feb. 13, 2024). (Pet. App. 3-18) ("Doctor Bales' testimony alone provides neither the circuit court nor this court with any basis to determine whether Kyle received a reasonable explanation of the proposed medication as required under Wis. Stat. § 51.61(1)(g)4.") (cleaned up).

Nevertheless, relying on *L.X.D.-O.*, the court concluded that "Dr. Bales' reports together with his testimony provide sufficient evidence to meet the requirements under Wis. Stat. § 51.61(1)(g)4." (Opinion, ¶20; Pet. App. 12).

Kyle now seeks review and asks this Court to overrule *Outagamie County v. L.X.D.-O.*, and thereafter reverse the order authorizing the county to involuntarily medicate Kyle.[4]

ARGUMENT

I. This Court should accept review and overrule *Outagamie County v. L.X.D.-O.*

A. The filing of a statutorily required report does not transform the report into evidence upon which an order for involuntary medication may be based.

There should be no need for Kyle's petition for review in this case. This Court recently explained that a doctor's report, which was not admitted into evidence at a contested Chapter 51 hearing, is not evidence upon which a sufficiency of the *evidence* claim is to be evaluated. *Langlade County v. D.J.W.*, 391 Wis. 2d 231, ¶7 n.4. This Court has said the same in a

[4] The medication order at issue here expired on or about August 2023. The parties below disputed whether Kyle's appeal was moot or whether Kyle's liability for the cost associated with the involuntary medication order rendered the order not moot. (Opinion, ¶¶9-13; Pet. App. 7-9). The court of appeals "assume[d] without deciding that Kyle's cost-of-care liability does not save the expired medication order from mootness," but conclude[d] that Kyle's case falls within an exception to the mootness doctrine." (Opinion, ¶¶11-13; Pet. App. 8-9). Kyle does not seek review of this conclusion and instead focuses his petition on the need for this Court to overrule *Outagamie County v. L.X.D.-O.*

contested guardianship proceeding. *See R.S. v. Milwaukee County*, 162 Wis. 2d 197, 470 N.W.2d 260 (1991) (reversing a guardianship order that was based on a psychologist's written report that had been submitted to the court, but was not admitted into evidence).

Unlike the court of appeals, this Court has never held that an examiner's report prepared and filed with the circuit court pursuant to Wis. Stat. § 51.20(9)(a)5. is transformed into admissible evidence upon which a Chapter 51 order may be based.

Because the court of appeals has mistakenly read *D.J.W.* to apply only at recommitment hearings, and because there is no sound legal reason for one definition of "evidence" at an original commitment hearing and another at recommitment, review is necessary and appropriate in this case.

B. The court of appeals statutory interpretation of Wis. Stat. § 51.20(9)(a)5. is substantively flawed.

Simply put, had the legislature intended to create such a broad hearsay exception for court appointed examiner reports under Chapter 51, it could have done so. It did not. The statutory requirement to examine, prepare, and file a court ordered report does not magically transform the report into "evidence." Further, the law is clear that petitioners bear the burden to prove by clear and convincing *evidence* every element necessary to involuntarily commit and medicate an individual. *See Outagamie County v.*

Melanie L., 2013 WI 67, ¶37, 349 Wis. 2d 148, 833 N.W.2d 607; *Waupaca County v. K.E.K.*, 2021 WI 9, ¶27, 395 Wis. 2d 460, 954 N.W.2d 366; *Winnebago County v. J.M.*, 2018 WI 37, ¶59, 381 Wis. 2d 28, 911 N.W.2d 41.

Further, the court of appeals has taken § 51.20(9)(a)5.'s reference to "testimony, if any," out of its proper context. The portion of the subdivision from which the *L.X.D.-O.* court plucked this phrase reads in full:

> *The report and testimony, if any*, by the examiners shall be based on beliefs to a reasonable degree of medical certainty, or professional certainty if an examiner is a psychologist, in regard to the existence of the conditions described in sub. (1), and the appropriateness of various treatment modalities or facilities. If the examiners are unable to make conclusions to a reasonable degree of medical or professional certainty, the examiners shall so state in their *report and testimony, if any*.

Wis. Stat. § 51.20(9)(a)5.

These two sentences simply concern the "reasonable degree of certainty" any examiner's report or testimony must be based upon. These sentences say nothing about whether a court may rely on an examiner's report at a final hearing without the report being moved into evidence. Further, to the extent this subdivision acknowledges that testimony may not ultimately be necessary, there are clear explanations for such a scenario. First, an individual and the

petitioner may enter a "settlement agreement" under Wis. Stat. §§ 51.20(8)(bg)-(br). A settlement agreement allows the parties to waive a right to a final hearing in exchange for an agreed upon treatment plan. Second, an individual may ultimately stipulate to or not contest a petition for commitment or involuntary medication. *See e.g. Sauk County v. Aaron J.J.*, 2005 WI 162, 286 Wis. 2d 376, 706 N.W.2d 659 (per curiam, dismissing petition for review as improvidently granted but recognizing the unsettled issue of whether a subject of an involuntary commitment proceeding has a due process right to a personal colloquy regarding a *voluntary stipulation* to an involuntary commitment).

Neither the plain text, context, or common sense support the court of appeals' interpretation of and reliance on § 51.20(9)(a)5. This Court should accept review and clarify the simple point made in *D.J.W.*, that within the context of a sufficiency of the *evidence* claim, a report filed with the court is not *evidence* unless it is properly admitted by the court at the relevant evidentiary hearing.

II. The court of appeals was correct to conclude Douglas County failed to present sufficient *evidence* necessary to involuntarily medicate Kyle and without consideration of Dr. Bales' report, the circuit court's order must be reversed.

In both *L.X.D.-O.* and in this case, the court of appeals set forth the applicable law related to a

county's request to involuntarily medicate an individual pursuant to Wis. Stat. § 51.61(1)(g)4. *See L.X.D.-O.*, 407 Wis. 2d 441, ¶¶21-28. (*See also* Opinion, ¶¶14-19; Pet. App. 9-12). The controlling question in each case is not complicated: May a circuit court rely upon, and may an appellate court consider, within the context of a sufficiency of the evidence challenge, a report filed pursuant to Wis. Stat. § 51.20(9)(a)5. Even if the report is never admitted into evidence at the relevant evidentiary hearing?

Under *Langlade County v. D.J.W.* and this Court's prior caselaw, the answer is no. The reason the answer is no is simple: even statutorily required reports not admitted into evidence are hearsay and not within the scope of a review of the sufficiency of the evidence.

The court of appeals decision should have ended after it concluded the county failed to present sufficient evidence at Kyle's final hearing to justify the circuit court's order for involuntary medication. If this Court accepts review and overrules *L.X.D.-O.*, the court should reverse the court of appeals decision and vacate Kyle's order for involuntary medication.

CONCLUSION

For the reasons stated above, Kyle respectfully requests that this Court grant Kyle's petition for review.

Dated this 14th day of March, 2024.

Respectfully submitted,

Electronically signed by
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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in s. 809.19(8)(b), (bm) and 809.62(4). The length of this petition is 3,373 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this petition 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 14th day of March, 2024.

Signed:
Electronically signed by
Jeremy A. Newman
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Assistant State Public Defender