FILED
03-19-2025
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2023AP1747-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KYLE A. SCHAEFER

Defendant-Appellant.

APPEAL FROM AN ORDER GRANTING A PETITION TO REVOKE CONDITIONAL RELEASE FROM AN NGI COMMITMENT ENTERED IN MARATHON COUNTY CIRCUIT COURT, THE HONORABLE MICHAEL K. MORAN, PRESIDING

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTORITIES

Cases

Statutes

ISSUE PRESENTED

This Court asked the parties to brief the following issue:

> This court in *State v. Olson*, 2019 WI App 61, ¶ 2, 389 Wis. 2d 257, 936 N.W.2d 178, held that a circuit court loses competency to consider the Department of Health Services' (DHS) petition to revoke an individual's conditional release when the DHS fails to submit a statement showing probable cause of an individual's commitment to the appropriate regional office of the state public defender within seventy-two hours of the detention, pursuant to Wis. Stat. § 971.17(3)(e).
>
> May the DHS's initial failure to comply with [the 72-hour rule] be remedied by refiling an identical petition (save for a date change) when the committed individual remains confined at all times before the DHS files the second petition—i.e., for longer than [72] hours prior to DHS filing the second petition? In other words, how is the second, identical petition compliant with § 971.17(3)(e) when the committed individual was confined more than [72] hours, without access to counsel, before that second petition was submitted to the applicable court and public defender's office?

This Court should hold that the circuit court's dismissal of a petition for violating the 72-hour rule ends the first proceedings and functions as a break in the defendant's detention pursuant to those proceedings. At that point, if the Department of Health Services (the Department) alleges that revocation is warranted, it may re-detain the individual and file a new petition, even if based on the same unlitigated facts and probable cause as the first petition.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument remains unnecessary. Publication may be warranted since this Court requested supplemental

briefing and existing case law has not addressed this specific question.

ARGUMENT

Olson and Wis. Stat. § 971.17(3)(e) do not require a committed person's "release" from "custody" before the Department can reassert an allegation that revocation is warranted.

The State summarizes its argument below as follows: When the circuit court dismissed Schaefer's first petition, that decision ended those proceedings and effectively Schaefer's temporary detention pursuant to those proceedings. After that happened, the Department again "alleged that a released person," i.e., Schaefer, "has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked." Wis. Stat. § 971.17(3)(e). Accordingly, when the Department later notified the court and public defender of Schaefer's subsequent temporary detention pursuant to the probable cause stated in the second petition, that action complied with the statutory rules and initiated new revocation proceedings that the circuit court had competency to consider.

A. A released person is always under the Department's custody and control; section 971.17(3)(e) permits their temporary detention pending a final hearing.

Because section 971.17(3)(e) uses the term "custody" in multiple senses, and Schaefer's briefing uses the words "custody," "detain," and "detention" interchangeably, (Reply Br. 4–6, 10–11, 13), it is important to clarify terminology at the outset.

"Custody" can carry a broader meaning than "detention" in the NGI context. A person adjudicated NGI who is on conditional release is placed "in the custody and control

of the" Department. Wis. Stat. § 971.17(3)(e). Thus, under the first sentence of paragraph (3)(e), Schaefer was in the Department's "custody and control" ever since he was put on conditional release; he remained in their custody and control throughout the initial revocation proceedings, including when the circuit court dismissed the first petition. Obviously, "custody and control" does not necessarily imply detention, since conditional release means that the individual is living in the community under the Department's supervision. Though Schaefer at times in his briefing suggests that his release from "custody" was required, he does not dispute that his conditional release status means that he remains in the Department's custody and control at all times.

Accordingly, when the State uses the word "custody" in this brief, it is referring to the Department's general "custody and control" of an NGI committee who is on conditional release.

Section 971.17 uses the word "custody" a few sentences later in a different sense, i.e., to describe detention: "If the [Department] alleges that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked, he or she may be *taken into custody* under the rules of the [D]epartment." Wis. Stat. § 971.17(3)(e). The statute further provides the requirement for the Department to show probable cause "of the detention . . . within 72 hours after the detention." Wis. Stat. § 971.17(3)(e). Finally, the released person may remain in that temporary detention until the revocation hearing, which is expected to occur within 30 days of the detention: "[p]ending the revocation hearing, the [Department] may detain the person in a jail or in a hospital, . . . or facility" specified under chapter 51 of the statutes. Wis. Stat. § 971.17(3)(e).

So, "taken into custody" and subsequent references in that sentence mean some form of detention in jail or in a

facility. Wis. Stat. § 971.17(3)(e). Again, there is no real dispute on this point: Schaefer and the State appear to agree that "taken into custody" in the statute means "detained." Accordingly, in this brief, the State uses the words "detained," "confined," and variants of those words—but not "custody"—to describe the temporary confinement of an NGI committee who is the subject of a petition to revoke their conditional release.

One last undisputed point: The remainder of Wis. Stat. § 971.17(3)(e) only addresses procedures for when the circuit court grants a revocation petition. Wis. Stat. § 971.17(3)(e). It is silent on procedures for when a court dismisses a petition for violating the 72-hour rule; it is also silent on procedures for situations when the circuit court denies the revocation petition on its merits.

B. Neither *Olson* nor Wis. Stat. § 971.17(3)(e) require "release" before the Department files a second petition.

1. *Olson* does not provide guidance on this question.

Schaefer argues that *Olson* required his release from detention before the Department could file another revocation petition, because when the Department filed the second petition on September 29, he had been detained continuously since September 1. (Reply Br. 9, 13–14.) The question this Court requests supplemental briefing on seems to focus on that assertion and argument.

Olson provides no more guidance on this question than section 971.17(3)(e) does. *Olson* holds that a circuit court loses competency to consider a revocation petition that does not comply with the 72-hour rule. *Olson*, 389 Wis. 2d 257, ¶ 34. The remedy is dismissal of the petition. *Id.* In *Olson*, the issue involved a situation where the circuit court treated the 72-

hour rule as directory, considered the stale petition, and revoked Olson's conditional release. *Id.* ¶ 8. Therefore, Olson's revocation based on the stale petition was void, and the circuit court was ordered to dismiss that petition. *Id.* ¶ 34.

Because *Olson* does not direct the result Schaefer requests, the question is ultimately one of statutory construction of Wis. Stat. § 971.17(3)(e). Its language authorizes the Department to file a second petition after a first is dismissed on procedural grounds.

2. Wisconsin Stat. § 971.17(3)(e) does not require any form of "release" of an NGI committee before the circuit court has competency to consider a second petition.

Based on the legislative purpose in section 971.17(3)(e) and Schaefer's limited due process rights, this Court should hold that the circuit court's dismissal of the first petition ended that proceeding and Schaefer's detention associated with that proceeding. Accordingly, the Department's subsequent revocation petition and notice of Schaefer's detention as of September 29 initiated new proceedings, for which a new 72-hour period commenced, and which the circuit court had competency to adjudicate.

a. The circuit court's dismissal of the first petition functioned as "release" or a break in Schaefer's detention.

As for this Court's observation in its stated question that Schaefer "remain[ed] confined at all times" before the Department filed the second petition, this premise is inaccurate for two reasons.

First, Schaefer personally appeared at the hearings on September 26 and 29. (R. 207; 208.) To be sure, he was detained at Mendota from September 2 until those hearings.

And the State is not arguing that Schaefer's personal appearances in court were "releases" such that he was free to leave the courtroom. He was still, after all, in the "custody and control" of the Department at those hearings, and as an NGI committee, he had no right to be released from that custody and control. At a minimum, though, the assertion that Schaefer "remain[ed] confined at all times" does not square with the fact that he was present and unconfined at the hearings.

Second, and more importantly, Schaefer has made no allegations as to what happened—or what should have happened—in the time between when the court dismissed the first petition and the Department filed the second petition. That hearing ended at 3:07 p.m. (R. 208:9.) According to the public defender's office, it received notice of the Department's second petition at 3:51 p.m. that day. (R. 194:2.) Assuming that the Department filed the second petition with the court at around the same time it notified the public defender, there were 44 minutes in which there is no evidence that Schaefer was confined or detained (or anything beyond being in the Department's custody and control).

Absent statutory language to the contrary, the court's decision had to have released Schaefer from his detention tied to that dismissed petition.

In that time, Schaefer's counsel did not request or advocate for a different form of release on Schaefer's behalf. Nor is there any information about whether Schaefer was actually confined or detained at that time or merely under the Department's custody and control. That's likely because counsel had no legal or practical basis to ask for those things. Neither *Olson* nor section 971.17(3)(e) identifies release as a remedy for procedural violations of the 72-hour rule.

Rather, the only reasonable interpretation of Wis. Stat. § 971.17(3)(e) is that dismissal of a petition for violating the

72-hour rule ends those proceedings and functions as a break in the released person's detention tied to those proceedings. It does not deprive a circuit court of competency to consider a new petition in new proceedings, which the Department may initiate by re-detaining the individual if it still alleges that revocation of conditional release is warranted, Wis. Stat. § 971.17(3)(e), and filing a second petition within 72 hours of its re-detaining the committee.[1]

In other words, at the moment that the court dismissed the petition (because Schaefer's prior temporary detention occurred without timely notice to the public defender), Schaefer was effectively back on conditional release. To be sure, based on the Department's subsequent actions, that status lasted no more than 44 minutes, but it was a break in his detention.

The court's dismissal of the first petition also placed the Department back to the fourth sentence in Wis. Stat. § 971.17(3)(e): "If the [D]epartment . . . alleges that a released person has violated any condition or rule, or that the safety of the person or others requires that conditional release be revoked, he or she may be taken into custody under the rules of the department." Here, the Department had such allegations based on Schaefer's failure to comply with the conditions of his release, causing himself to become unhoused.

---

[1] Schaefer argues that his release should have occurred automatically when the circuit court dismissed the first petition. He does not explain whether counsel had any obligations to ensure that Schaefer was released. If counsel was so obliged, she only asked the court to dismiss of the petition; she did not request an order requiring Schaefer's release. Hence, if Schaefer is now challenging the circuit court's or the Department's failure to release him (in whatever way he thinks was required) following the dismissal of the first petition, that claim is waived.

Following that hearing, it appeared to detain Schaefer again.[2] That new detention restarted the 72-hour clock for the Department to file a new petition and notify the public defender's office, which the Department did within about 44 minutes.

This result also comports with *Olson*, which recognizes that the Department retains its ability to seek revocation even if its first filing is dismissed as untimely: "[E]ven if the particular violation that caused the Department to initially detain the person was not timely pursued, Wis. Stat. § 971.17(3)(e) explicitly authorizes the Department to initiate revocation proceedings if the Department believes 'that the safety of the person or others requires that conditional release be revoked.'" *Olson*, 389 Wis. 2d 257, ¶ 23.[3]

b. The civil commitment cases Schaefer cites do not compel a different result.

Schaefer relies heavily on civil commitment cases assessing situations in which courts have barred successive petitions involving the emergency detention provisions of chapters 51 and 55. (Reply Br. 10–13.) As argued, those cases (or at least the cases he highlights) do not compel a different interpretation of Wis. Stat. § 971.17(3)(e).

Sandra D., *Judith G.*, and *Stevenson L.J.* all involved individuals who were involuntarily detained under provisions of chapter 51 and 55, and whose continuous detentions

---

[2] The State assumes, based on Schaefer's assertions, that he was temporarily detained following the hearing. Again, we don't have a factual record reflecting what Schaefer or the Department did with respect to his custody and control in the 44 minutes between the dismissal of the first petition and the filing of the second.

[3] Contrary to Schaefer's argument (Reply Br. 9), Olson's statements in his appellate brief are not the law.

violated strict time limits in those statutes. Those time limits were strict, however, because those individuals had a "significant liberty interest . . . in living where and under what conditions" they chose. *In re Mental Commitment of Stevenson L.J.*, 2009 WI App 84, ¶ 11, 320 Wis. 2d 194, 768 N.W.2d 223 (citing *Kindcare, Inc. v. Judith G.*, 2002 WI App 36, ¶ 12, 250 Wis. 2d 817, 640 N.W.2d 839); *see also State ex rel. Sandra D. v. Getto*, 175 Wis. 2d 490, 499, 498 N.W.2d 892 (Ct. App. 1993). Unlike a citizen detained for possible civil commitment, Schaefer is continuously under the custody and control of the Department. Thus, he has no liberty interest "in living where and under what conditions" he chooses.

These civil commitment cases are distinguishable in other ways. For example, in *Stevenson L.J.* and *Judith G.*, release was required for the court to regain competency because the violation involved the failure under chapters 51 and 55 to hold a probable cause hearing within 72 hours of the individual's detention. *Stevenson L.J.*, 320 Wis. 2d 194, ¶ 9; *Judith G.*, 250 Wis. 2d 817, ¶ 19. In contrast, the 72-hour rule for NGI committees requires only a probable cause statement—not a hearing—within 72 hours. The only contemplated hearing on the petition is recommended to occur within 30 days after the detention. Wis. Stat. § 971.17(3)(e); *State v. Schertz*, 2002 WI App 289, ¶ 13, 258 Wis. 2d 351, 655 N.W.2d 175. Thus, cases involving a failure to hold a required probable cause hearing within 72 hours are not persuasive to interpreting section 971.17(3)(e), and its language reflecting that NGI committees may be detained beyond 30 days without an adjudication of probable cause for that detention.

And in *Sandra D.*, both the court of appeals and circuit court noted that it was the *third* filing by the custodian, not the second, that caused Sandra D.'s confinement to cross the line into an abuse of process and a due process violation. *Sandra D.*, 175 Wis. 2d at 499–500. *Sandra D.* does not support an argument that a court lacks competency to

consider a second petition when the first violates statutorily mandated procedures.

If this Court is to take guidance from a civil commitment case, *State ex rel. B.S.L. v. Lee*, 115 Wis. 2d 615, 619, 340 N.W.2d 568 (Ct. App. 1983), offers a closer corollary to Schaefer's situation. There, B.S.L. sought a discharge from his commitment when examinations required on an emergency detention affidavit did not occur in time for the statutorily required final hearing within 30 days. *Id.* After the circuit court dismissed the affidavit on that basis, B.S.L.'s custodians immediately commenced a second proceeding with a new affidavit "alleging essentially the same facts" as were in the dismissed affidavit. *Id.*

This Court held that the second affidavit, which ultimately satisfied all of the required procedures in chapter 55, was not barred by the dismissal of the first affidavit. *Id.* at 620–622. Specifically, it rejected B.S.L.'s assertions that his non-release from his detention between the two affidavits violated due process, because there was "no language in ch. 51 prohibiting the initiation of a second commitment proceeding if the first proceeding is dismissed" and no legislative intent "giving B.S.L. a liberty interest [of release from detention] upon dismissal of the first proceeding." *Id.* The court said that B.S.L.'s detention between the first and second filing was "no more a liberty interest violation than [in] a criminal proceeding where a court, upon finding a defect in an indictment, information or complaint, may order the defendant to be held for a maximum of [72] hours while the defect is corrected." *Id.* at 621–22 (citing Wis. Stat. § 971.31(6)).

Similarly, here, Wis. Stat. § 971.17(3)(e) does not preclude the Department from filing a second petition when the first fails the 72-hour rule, and the statute likewise reflects no legislative intent that an NGI committee must be

released from detention in any manner between the dismissal of a non-compliant petition and a subsequent one.

c. Schaefer failed to advocate for release or explain how he should have been released.

Schaefer's arguments regarding release are vague. He clearly thinks that "release" means something different than what happened here. But he never explains what that different thing is. The closest Schaefer comes is to say that he had to be returned to community supervision, and that result should have happened when the circuit court dismissed the first non-compliant petition. (Reply Br. 14.)

Yet, he does not explain how he could be returned to community supervision when—due to his violations—he was unhoused. Nor does he identify any practical parameters of the release. Should he have been able to walk out of the courthouse doors before he was re-detained? A hundred yards down the block? Until the authorities got tired of following him? How long did the Department have to wait after that release to reassert allegations that Schaefer's conditional release should be revoked and to re-detain him based on a second petition? Was release supposed to be automatic upon dismissal of the petition, or did the court need to order release? Who is responsible for creating a record that Schaefer was satisfactorily "released" before he was re-detained on a new petition?

Schaefer does not address those basic questions. Nor can he: nothing in the language of section 971.17(3)(e) or *Olson* requires any more than what happened here for the court to have competency to consider a second petition. In fact, recognizing that the court's dismissal of the first petition functioned as a break in Schaefer's detention here comports with the rationale in *Olson*. The main concern in *Olson* was that the Department filed the petition and probable cause

statement outside the 72 hours required, which delayed both notice to the court and "timely initiation of the proceedings," meaning that Olson was "unilaterally" detained by the Department. *Olson*, 389 Wis. 2d 257, ¶¶ 21–22. Relatedly, the *Olson* court's holding was based on the concern that allowing a court to proceed on such a petition without enforcing any deadlines could result in a person's unilateral and "indefinite detention without due process or access to counsel." *Id.* ¶ 31.

Schaefer argues that that consequence is at play here, but that point is unpersuasive. (Reply Br. 11.) Schaefer was not indefinitely detained without due process or access to counsel. The Department's timely filing of the first petition alerted the court to set a revocation hearing within 30 days of September 1. Though its notice to the public defender was untimely, that office received notice before the scheduled hearing, which gave Schaefer access to counsel beginning September 21. Further, the Department correctly notified everyone of the second petition connected to Schaefer's detention starting September 29. So, while the Department made a mistake in timely notifying the public defender of the first petition, nothing else about the Department's actions reflected that it was unilaterally detaining Schaefer or stalling his day in court when it filed the second petition.

Moreover, the law already protects people subject to Wis. Stat. § 971.17(3)(e) from indefinite detentions resulting from repeated faulty filings. Wisconsin Stat. § 805.03 authorizes circuit courts to dismiss proceedings with prejudice for an abuse of process based on a petitioner's negligence in complying with procedural rules. This relief is seemingly available in NGI commitment proceedings just as it is in civil commitment cases. *See, e.g.*, *Sandra D.*, 175 Wis. 2d at 500–01 (reversing commitment based on circuit court's finding that subjecting Sandra D. to a third detention was "an abuse of process"); *B.S.L.*, 115 Wis. 2d at 622.

At bottom, this was not a situation where Schaefer was secretly and indefinitely detained without access to counsel. Nor would this Court's recognizing that dismissal of an untimely petition resets the clock for a subsequent petition endorse the notion that the Department court unilaterally or indefinitely detain an NGI committee. Section 805.03 provides a remedy for that kind of abuse.

C. The second petition can be substantively identical to the first petition dismissed for violating the 72-hour rule.

This Court also asks whether the Department could "refil[e] an identical petition (save for a date change)" following dismissal of a non-compliant first petition.

Wisconsin Stat. § 971.17(3)(e) clearly provides that the Department may detain and file a revocation petition any time it "alleges that a released person has violated any condition or rule, or that the safety of the person or others require that conditional release be revoked." Wis. Stat. § 971.17(3)(e); *Olson*, 389 Wis. 2d 257, ¶ 23. Here, as of the September 29 petition, the Department had active allegations that revocation was necessary: Schaefer had nowhere to live due to his violations of his conditions of release, and as a result, he posed a safety risk to himself and the public. Nothing in the statute or in case law precludes the Department from filing a second petition stating identical facts as a procedurally dismissed first petition. Dismissal of the first petition based on violation of the 72-hour rule is not a merits adjudication or dismissal with prejudice, especially given that section 971.17 does not require the Department to wait until it has new facts to file a second petition when the first is dismissed for lack of competency.

Further, the State disagrees with characterizing the difference between the first and the second petition as a mere "date change." In the second petition, Schaefer's agent,

Timothy Quinn, stated that as of September 29, Schaefer would be detained at Marathon County Jail or Mendota pending further proceedings. (R. 190.) That statement is notice of a new period of detention. Further, Quinn signed the new petition on September 29. (R. 190.) That signing reflected that he recertified the petition and probable cause statement and continued to believe that revocation of Schaefer's conditional release was warranted.

Finally, it bears noting that Schaefer had some power to avoid the second petition by either taking steps to comply with the conditions of his supervision or proposing feasible alternatives to revocation. As it was, however, Schaefer's violations and safety issues were still grounds for revocation as of the September 29 petition and for as long as he prevented himself from living in the location his release into the community was conditioned upon.

As the State understands Schaefer's reply, he does not dispute that the statute and *Olson* permit the Department to file a second petition on the same facts after the first petition was dismissed. Rather, his argument rests on the idea that he had to be physically released in some unspecified way before the Department could file a second petition. (Reply Br. 9 (stating that under *Olson*, once the court dismisses a petition for violating the 72-hour rule, the Department has to "release the individual and learn of new violations, *or file a petition alleging that the safety of the individual or others required revocation*"). As argued, dismissal of the first petition effectively ended Schaefer's first detention and the related proceedings, thus resetting the clock and restoring competency over a second petition.

CONCLUSION

This Court should affirm.

Dated this 19th day of March 2025.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General
State Bar #1071646

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-8118
(608) 294-2907 (Fax)
burgundysl@doj.state.wi.us

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,835 words.

Dated this 19th day of March 2025.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 19th day of March 2025.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General