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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2023AP001747-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KYLE A. SCHAEFER,

Defendant-Appellant.

On Appeal from an Order Entered in the
Marathon County Circuit Court, the
Honorable Michael K. Moran, Presiding

SUPPLEMENTAL BRIEF OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

In its order dated January 21, 2025, this court asked:

May the DHS's initial failure to comply with WIS. STAT. § 971.17(3)(e) 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 seventy-two 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 for more than seventy-two 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 Department of Health Services cannot remedy its failure to comply with the time limits in § 971.17(3)(e) by refiling an identical petition when the committed individual remains confined at all times before the second petition is filed. Under such circumstances, the second petition cannot be deemed compliant with the statute because the committed individual remained confined for more than 72 hours without access to counsel and without the petition being submitted to the court.

ARGUMENT

The circuit court lacked competency to decide the refiled petition to revoke Mr. Schaefer's conditional release.

Mr. Schaefer was taken into custody and detained at the Marathon County Jail on September 1, 2022. (185:2). The following day, the department filed a petition to revoke Mr. Schaefer's conditional release.¹ (180; 182). The department, however, failed to submit the petition to the regional office of the state public defender as required by § 971.17(3)(e). As a result, the circuit court dismissed the petition, finding that it lacked competency to decide it. (208:8).

At that point, Mr. Schaefer's detention should have ended and he should have been returned to community supervision. Instead, he remained confined and the department filed the same petition to revoke conditional release, changing only the date the order was signed and filed with the court. (190). Because the second petition was not submitted to the circuit court or the public defender within 72 hours of Mr. Schaefer's detention on September 1, 2022, the department again failed to comply with the mandatory time limits. As a result, the circuit court again lacked competency to hear the petition and it should have

¹ Notably, the petition for revocation of conditional release was signed on September 1, 2022, but incorrectly states that Mr. Schaefer was placed in custody on September 2, 2022—the date the petition was filed. (180).

been dismissed. Mr. Schaefer must be conditionally released.

- A. Wis. Stat. § 971.17(3)(e) requires the department to file a petition to revoke conditional release with the circuit court and regional office of the state public defender within 72 hours of the individual's detention. *Olson* requires dismissal of the petition for lack of competency if that requirement is not met.

The applicable statutory language is clear and undisputed. In relevant part, § 971.17(3)(e) states:

If the department of health services 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. **The department of health services shall submit a statement showing probable cause of the detention and a petition to revoke the order for conditional release to the committing court and the regional office of the state public defender responsible for handling cases in the county where the committing court is located within 72 hours after the detention, excluding Saturdays, Sundays, and legal holidays. The court shall hear the petition within 30 days, unless the hearing or time deadline is waived by the detained person. Pending the revocation hearing, the department of health services may detain the person in a jail or in a hospital, center or facility specified by s. 51.15 (2) (d). The state has the burden of proving by clear and convincing evidence that any rule or condition of release has**

been violated, or that the safety of the person or others requires that conditional release be revoked.

Wis. Stat. § 971.17(3)(e)(emphasis added). Thus, by its plain language, the statute requires that the department submit a statement of probable cause and petition to revoke conditional release to the circuit court and public defender within 72 hours after the individual is taken into custody and detained.

In *State v. Olson*, 2019 WI App 61, 389 Wis. 2d 257, 936 N.W.2d 178, this court ruled that the 72-hour time limit in § 971.17(3)(e) is mandatory. As a result, it held that the department's failure to comply with that time limit deprives the circuit court of competency and requires dismissal of the petition to revoke conditional release. *Olson*, 2019 WI App 61, ¶¶2, 34.

Finally, the statute provides that the department may detain the person in a jail or institution pending the revocation hearing. Wis. Stat. § 971.17(3)(e). It follows, therefore, that if the revocation proceedings are dismissed for lack of competency or otherwise, the authority to detain the individual ceases and the department must release the person from confinement. This necessary outcome also results from the fact that any subsequent petition could not be timely filed if the individual is not released from confinement.

B. The second petition to revoke Mr. Schaefer's conditional release was not filed with the circuit court or public defender within 72 hours of Mr. Schaefer's detention. Consequently, it did not comply with § 971.17(3)(e) and the court lacked competency to hear it.

Mr. Schaefer has remained confined since he was taken into custody and detained pending revocation on September 1, 2022. As a result, the second petition to revoke his conditional release, filed on September 29, 2022, was not submitted to the court or the public defender within 72 hours of his detention and could not comply with the mandatory time limit in § 971.17(3)(e).

The state wants this court to ignore the statutory requirements and case law set forth above and find that the second petition was complaint. In support, it creates a fictional break in the proceedings and Mr. Schaefer's detention. The state argues that Mr. Schaefer's detention associated with the first petition to revoke ended when the petition was dismissed, and that the time limit for filing a petition with the court and public defender somehow started anew when the second petition was filed. This argument falls flat from the start.

The statute requires the petition to be submitted within 72 hours of the individual's detention. A person cannot be taken into custody and detained if he has never been released from confinement. When the court

dismissed the petition to revoke, the department's statutory authority to detain Mr. Schaefer pending the revocation hearing ended and it was required to release him. It failed to do so. Because Mr. Schaefer was never physically released from the detention which began on September 1, 2022, he could not be "re-detained," and the second petition could not conform to the statutory requirements.

1. Mr. Schaefer was never released from confinement.

With complete disregard to the record, the state asserts that Mr. Schaefer was "released" following dismissal of the first petition, and therefore, its second petition to revoke conditional release was timely. The state's arguments on this point stretch the limits of credibility.

First, the state points to the fact that Mr. Schaefer personally appeared at hearings in this case and argues that this "does not square with" the "assertion that Schaefer 'remain[ed] confined at all times.'" (Supp. Br. 9-10). The state, however, does not point to anything in the record that would suggest Mr. Schaefer was not handcuffed or otherwise restrained during the hearings. In fact, the state itself acknowledged Mr. Schaefer's confinement status at one hearing, and he appeared from the jail for the other.² (208:3; 209:1). The simple fact that the circuit

² "The defendant appears in person, in custody, with Attorney Kat Yanke." (208:3). The court also acknowledged Mr. Schaefer's status, "I will take a look at the notice issue and

court complied with Mr. Schaefer's right to be personally present at his hearings does not equate to a finding that he was no longer confined or being detained.

Second, the state faults Mr. Schaefer for not alleging what happened, or what should have happened, during the 44 minutes between the first petition being dismissed and the second petition being filed. (Supp. Br. 10). Mr. Schaefer, however, has clearly argued both. He should have been released from physical custody.³ The jail/institution needed to process his release and let him walk out the door. The record, however, establishes that didn't happen, Mr. Schaefer was never physically released from custody.

Mr. Schaefer argued that the second petition must be dismissed because he was never released from confinement in writing and at the motion hearing. (194:2,4; 209:6). Neither the court, nor the state, contested Mr. Schaefer's assertions at that time. If the state wanted to argue that Mr. Schaefer had been released and re-detained, that argument needed to be made at the circuit court level. It was not. Instead, the state acknowledged Mr. Schaefer's continuing detention and specifically argued that it was not

make a determination at that time, but he is not being released..." (207:10).

³ Mr. Schaefer's counsel was not required to argue for release, but to the extent she was required to, she did. Counsel specifically asked "that Mr. Schaeffer [sic] be released and that his conditional release not be revoked." (207:4).

required to allow Mr. Schaefer to “walk out the door” before initiating another revocation proceeding. (209:5).

Next, the state makes a somewhat tortured and confused argument about what was required after the circuit court dismissed the first petition. Oddly, the state asserts that “the court’s decision had to have released Schaefer from his detention tied to [the] dismissed petition.” (Supp. Br. 10). Contrary to that assertion, it then states that “Neither *Olson* nor section 971.17(3)(e) identifies release as a remedy for procedural violations of the 72-hour rule.” (Supp. Br. 10). But it then again refers to release as the remedy by arguing that “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.” (Supp. Br. 10-11)(emphasis added).

The state’s position is either internally inconsistent, or it has a different definition of release than that commonly used. Mr. Schaefer was never “effectively back on conditional release,” though he should have been. (Supp. Br. 11). When the court dismissed the petition to revoke conditional release, Mr. Schaefer should have been returned to his pre-detention status, he should have been released from confinement. The state seems to acknowledge this at some points, but disputes it at others. It again relies on some fictional break in Mr. Schaefer’s detention to

state that its second petition complied with the statute.

The state argues that the circuit court is not deprived 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...and filing a second petition within 72 hours of its re-detaining the committee.” (Supp. Br. 11). Mr. Schaefer doesn’t necessary disagree with that, but the state fails to acknowledge that you cannot “re-detain” a person who has not been released. If the person remains in physical custody, they have remained detained throughout. Simply saying that their detention is now related to a second petition does not alter the reality of the situation. Mr. Schaefer was detained on September 1, 2022, he remained detained throughout the proceedings. He was never released and therefore, he was never “re-detained.”

Putting that practical reality aside, the state’s argument suffers another fatal flaw. The second petition to revoke Mr. Schaefer’s conditional release was identical to the first. The alleged violation was exactly the same and contained the exact same violation date. (180; 190). The only difference in the two petitions is the date that they were signed by the department and the date the department believed triggered the hearing deadline. There is nothing in the petition to suggest that Mr. Schaefer was “re-detained” or that the department engaged in any new analysis regarding the need to revoke Mr. Schaefer’s

conditional release. Instead, it is apparent that the department simply filed a new petition in an effort to “paper over” its failure to comply with the mandatory time limits.

2. Mr. Schaefer’s case cannot be meaningfully distinguished from the civil commitment cases on which he relies.

The law is clear. As previously argued, the department cannot restore the circuit court’s competency to decide its petition to revoke Mr. Schaefer’s conditional release by filing a substantially identical petition after the first was dismissed for failure to comply with the mandatory time limits. *See Dane County v. Stevenson L.J.*, 2009 WI App 84, ¶13, 320 Wis. 2d 194, 768 N.W.2d 223 (citing *State ex rel Sandra D. v. Getto*, 175 Wis. 2d 490, 500-501, 498 N.W.2d 892 (Ct. App. 1993) and *Kindcare v. Judith G.*, 2002 WI App 36, ¶19, 250 Wis. 2d 817, 640 N.W.2d 839).

The state’s supplemental brief renews the arguments in its response brief—that the civil commitment cases cited by Mr. Schaefer are inapplicable because Mr. Schaefer “has no liberty interest ‘in living where and under what conditions’ he chooses,” and involve time limits for holding probable cause hearings as opposed to the filing of a probable cause statement. (Supp. Br. 13). As argued in the reply brief, these are distinctions without meaning.

(See Reply Br. 10-13). Mr. Schaefer will not repeat his previous arguments here.

To reiterate, however, NGI committees have due process rights. The fact that they are on supervision does not mean the state is free to detain them indefinitely without court review or access to counsel. See *State v. Jefferson*, 163 Wis. 2d 332, 337, 471 N.W.2d 274 (Ct. App. 1991); *Olson*, 2019 WI App 61. That is why this court found that the 72-hour time limit is mandatory and noted that the department's failure to comply with it results in "grave injury" to the detained person, including the possibility of "indefinite detention without due process or access to counsel." *Olson*, 2019 WI App 61, ¶¶31, 34.

Finally, the state directs the court to *State ex rel. B.S.L. v. Lee*, 115 Wis. 2d 615, 340 N.W.2d 568 (Ct. App. 1983) for support of its position that the second petition in this case was statutorily compliant. (Supp. Br. 14). The state's reliance on that case is misplaced. As was the case in *Judith G.*, the facts of *B.S.L.* are easily distinguishable from those now before the court. See *Judith G.*, 2002 WI App 36, ¶18.

In *B.S.L.* this court rejected B.S.L.'s claims that his due process rights were violated by the filing of a second petition because, "[a]ll time limits required by statute were met during the first proceeding for continued detention." *B.S.L.*, 115 Wis. 2d at 621. Further, "[c]ompliance with all of the statutory time limits for probable cause and a final hearing" were met with the second proceedings. *Id.* Just as it was in

Judith G., the opposite is true in this case. *See Judith G.*, 2002 WI App 36, ¶18.

It is undisputed that the department did not comply with the mandatory 72-hour requirement when it filed the first petition to revoke Mr. Schaefer's conditional release. Rather, as in *Judith G.*, "a successive petition was filed here *only to avoid* the time limits." *Id.* But because the statute requires that the petition be submitted to the circuit court and state public defender within 72 hours of detention, "filing of the successive petition was a nullity" because Mr. Schaefer had been detained for more than 72 hours by the time the second petition was submitted to the required entities. *See Id.* The department did not comply with the mandatory time limits during either the first or second proceedings.

3. The department was required to release Mr. Schaefer from confinement when the court dismissed the petition to revoke.

Mr. Schaefer's arguments regarding release are not "vague." It appears that the state may believe that there is more than one definition of the word release under the circumstances, but it is unclear what it thinks the alternate definition may be. According to Merriam-Webster, "release" means "to set free from restraint, confinement, or servitude." *Available online* at: <https://www.merriam-webster.com/dictionary/release>. Mr. Schaefer clearly

argues that he needed to be released from confinement and returned to community supervision.⁴

Moreover, it is not Mr. Schaefer's duty to tell the department how to do its job. Mr. Schaefer need not explain how long he should have been released for, or how far away from the courthouse or jail he needed to get before he was taken back into physical custody. Those questions are not before the court in this case, as Mr. Schaefer was never released at all. As for who would be responsible for creating a record that Mr. Schaefer was released, that answer is clear—the department, as the petitioning party, has the burden of establishing that it has complied with the mandatory time limits in the statute.

Nor was it practically impossible for Mr. Schaefer to be returned to community supervision. Mr. Schaefer was not "unhoused." Mr. Schaefer proposed living with his father, who agreed to the arrangement, but the department declined that option because the home was "too rural." (197:2; 209:16, 19, 24-27). Mr. Schaefer's father was also willing to help pay Mr. Schaefer's rent at different residences in the area. (209:27-29). He proposed alternatives to revocation. But, if those options weren't feasible, the department was free to re-detain Mr. Schaefer and file a new petition to revoke his conditional release if/when it determined that Mr. Schaefer did not have an

⁴ Mr. Schaefer does not know how one would specify the manner in which he is to be physically released from confinement. (*See* Supp. Br. 18).

appropriate place to live after being returned to community supervision.

That just isn't what happened in this case. Instead, Mr. Schaefer was continuously detained. As a result, the second petition to revoke could not be submitted to the court and public defender within 72 hours of his detention. Because that statutory time limit is mandatory, *Olson* required the petition to be dismissed for lack of competency.

Approving the department's actions in this case would render the mandatory time limit meaningless and do nothing to alleviate the concerns raised in *Olson*. A ruling "recognizing that dismissal of an untimely petition resets the clock for a subsequent petition" would be contrary to the plain language of the statute and previous holdings of this court. It would sanction the state's failure to comply with mandatory time limits and allow the state to indefinitely detain an individual without access to counsel by allowing for the repeated re-filing of petitions after dismissal. While it only took the department two tries to notify the public defender in this case, the state's proposed outcome would allow three, five, or even ten subsequent filings as, according to the state, each dismissal would "reset the clock."

Nor would that outcome be limited to service upon the state public defender—if adopted, the state's argument would allow the department to unilaterally detain an individual for an indefinite amount of time before filing a petition to revoke with the court, and

upon dismissal of the petition for the lack of compliance, simply state it was “re-detaining” the individual and wait as long as it wanted to file again, repeatedly, until or unless it finally decided to file the petition within 72 hours of the “re-detention.” This is the exact outcome this court sought to avoid when holding that the time limit was mandatory.

While the state is correct that the “law already protects people subject to Wis. Stat § 971.17(3)(e) from indefinite detentions resulting from repeated faulty filings,” its reliance on § 805.03 misses the mark. (Supp. Br. 16). Mr. Schaefer need not show a failure to prosecute, or rely on a discretionary determination that dismissal is warranted. Instead, he need only point out that the department failed to comply with the mandatory time limits in § 971.17(3)(e). If the department cannot prove that it has complied with those requirements, dismissal is required.

CONCLUSION

For the reasons state above, as well as those set forth in the previous briefs, Mr. Schaefer respectfully requests that this court reverse the circuit court’s order terminating his conditional release and order that he be placed on supervision in the community.

Dated this 3rd day of April, 2025.

Respectfully submitted,

Electronically signed by

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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, as well as the Court's order for supplemental briefing dated January 21, 2025. The length of this brief is 3,253 words.

Dated this 3rd day of April, 2025.

Signed:

Electronically signed by

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