STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2023AP2018-FT

In the Matter of the Mental Commitment of C.B.:

RACINE COUNTY,

Petitioner-Respondent,

v.

C.B.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

ISSUES PRESENTED

1. Did the County present sufficient evidence to extend C.B.'s involuntary mental commitment which stems from an underlying dangerous act in 2014, that of fleeing from law enforcement?

The circuit court granted the County's petition for an extension of this involuntary mental commitment and the court of appeals affirmed.

2. Did the circuit court make sufficient findings before extending the involuntary mental commitment order?

The circuit court granted the County's petition and the court of appeals, while conceding that the comments were somewhat "inartful," nonetheless found them legally sufficient and affirmed.

3. Was the evidence sufficient to involuntarily medicate C.B?

The circuit court granted the County's petition for involuntary medication and the court of appeals affirmed.

CRITERIA FOR REVIEW

Following this Court's decision in *Langlade County v. D.J.W.,* 391 Wis. 2d 231, 942 N.W.2d 277, the Wisconsin Court of Appeals has seen an influx of cases raising two interlinked issues—(1) sufficiency of

the evidence for entering a (re)commitment order under Chapter 51 and (2) the procedural requirements that a circuit court must fulfill in ruling on a County's petition. *See Winnebago County v. C.H.,* No. 2023AP505, ¶ 11, unpublished slip op., (Wis. Ct. App. Aug. 30, 2023) (discussing the "recent and unprecedented flood of appeals in mental commitment cases."). (App. 54).

The nature of these appeals, in conjunction with Wisconsin's statute governing the publication of appellate opinions, has therefore generated at least a potentially problematic dynamic for many lower court actors. To explain: as almost every Ch. 51 appeal is resolved by a one-judge panel, Wis. Stat. § 752.31(2), the result is that *none* of the resulting authored decisions are precedential. Wis. Stat. § 809.23(3)(a). Yet, every single one-judge decision is also a citable persuasive authority. Wis. Stat. § 809.23(3)(b).

Thus, in this area of the law, the influx of appeals—in conjunction with the sometimes-idiosyncratic approaches of different individual judges on the court of appeals—means that litigants now must sift through *dozens* of potentially "persuasive" authorities, which frequently present subtle, and sometimes not-so subtle, distinctions and disagreements even when those decisions are issued by the same appellate district. *Cf. Waukesha County v. G.M.M.,* No. 2023AP1359, ¶ 33, unpublished slip op., (Wis. Ct. App. March 13, 2024)[1] (harmless error rule

[1] (App. 48).

applies to *D.J.W.* violation); *Winnebago County v. T.S.,* No. 2023AP1267, ¶ 26, unpublished slip op., (Wis. Ct. App. March 6, 2024)[2] (harmless error rule does not apply to a *D.J.W.* violation).

Clearly, litigants need more precise guidance in the form of a published decision from this Court with respect to sufficiency/*D.J.W.* claims. Accordingly, this Court should grant review pursuant to Wis. Stat. § 809.62(1r)(c)3.

In addition, as this Court's acceptance of the petition for review in *Winnebago County v. D.E.W.,* Appeal No. 2023AP215 demonstrates, there is also considerable dispute in the court of appeals as to the proper requirements for entering an involuntary medication order under Wis. Stat. § 51.61(1)(g)3. While that case may yet clarify the issue, this case presents a similar opportunity for the Court and review is therefore warranted under Wis. Stat. § 809.62(1r)(c)3.

STATEMENT OF FACTS

Circuit Court Proceedings

This case arises from a contested hearing on the County's request for recommitment and involuntary medication orders. (157). The County's expert witness, Dr. William Bjerregaard, conducted a 45-minute

[2] (App. 76).

examination of "Calvin"[3] via Zoom. (157:4). Dr. Bjerregaard testified that Calvin identified his antipsychotic medication. (157:5). Calvin was also aware of the circumstances leading up to his original commitment:

> He told me that the reason he was committed was he was found incompetent to stand trial after stealing a car and fleeing police, resulting in a somewhat high-speed situation where he was about double the speed limit. He denies that he drove into oncoming traffic but realizes that they were concerned about that.

(157:6).

Calvin also explained his previous treatment history. (157:6). Calvin was currently living with his brother, a housing situation that had been stable for at least two years (157:5). Calvin had "maintained psychiatric stability over the last year" and was "keeping appointments with his outpatient provider." (157:7; 157:12-13). Dr. Bjerregaard labeled Calvin as "somewhat compliant with treatment," as he believed Calvin was only compliant due to the court order. (157:7).

Dr. Bjerregaard diagnosed Calvin with "chronic paranoid schizophrenia." (157:7). This disease causes Calvin to lack "insight," further impairing his judgment. (157:7). As to dangerousness, the doctor testified:

[3] Pseudonym.

> Counsel: And is that because he'd be a substantial probability of physical harm to himself?
>
> The Witness: It's potential, given that he does dangerous things when he's not in treatment, such as driving a car at a high speed after stealing it.
>
> Counsel: And is there a substantial probability of physical harm to others as well?
>
> The Witness: Yes, when he drove into oncoming traffic there was concern about harm -- him harming others.

(157:8). Given that Calvin allegedly had "no interest in taking medication," Dr. Bjerregaard was concerned that his mental health symptoms would worsen and he would steal cars if not under a committment. (157:9).

Dr. Bjerregaard answered "yes" when asked if he had "explained the advantages, disadvantages, and alternatives to recommended medication or treatment[.]" (157:10). Dr. Bjerregaard opined that Calvin was incapable of applying an understanding. (157:10).

Angla[4] Townsend, the case manager, agreed that Calvin had been compliant with medication

[4] Although the court of appeals decision spells her name as "Angela" the transcript makes clear that this is the correct spelling. (157:15).

appointments. (157:16). However, she testified that Calvin also made statements that "he does not have a mental illness and that he only takes his medications because he is court-ordered to do so." (157:17). She believed Calvin would become symptomatic without treatment, leading to "taking and driving cars without permission." (157:18).

The circuit court granted the County's recommitment petition and found that Calvin's mental illness "impairs his judgment." (157:23); (App. 26). It accepted the expert's opinion that Calvin lacked "insight." (157:23); (App. 26). It also acknowledged dangerous conduct leading to the original commitment in 2015:

> As referenced by both the doctor and the case manager, with respect to some criminal offenses that he was arrested for that were dangerous in and of themselves with respect to -- described as fleeing law enforcement, such that [Calvin's] criminal case was handled in a manner that eventually his special plea of NGI was converted to apparently the Chapter 51 commitment. So the concern that the doctor and the County have at this time is that obviously [Calvin] -- their testimony is that [Calvin] continues to indicate to providers and to them, specifically the witnesses today, that he does not believe he suffers from a mental illness. Further, that he doesn't need medications and if he wasn't on a court order, he would not be taking medications.
>
> Clearly, the criminal activity that was testified about is extremely dangerous conduct. Driving a

> vehicle, fleeing from police puts not only [Calvin] in danger but also everybody in the community that happens to be on the road in the area where somebody is fleeing.

(157:24-25); (App. 27-28).

Despite a lack of recent acts or omissions, "to leave it untreated would certainly put [Calvin] in harm's way based upon his history here." (157:25); (App. 28). The court concluded that his lack of insight therefore "puts him at risk and puts him at risk based on his prior behavior with respect to harm to others as well as himself." (157:26); (App. 29).

As to medication, the court found "that he's unable to discuss and apply -- understand the pros and cons, but also then apply his judgment with respect to the risk and benefits of medications at this time." (157:26-27); (App. 29-30). The court therefore signed the County's proposed orders for recommitment and involuntary medication. (143:1; 144:1); (App. 23; App. 25).

Court of Appeals Decision

The court of appeals affirmed. As to the sufficiency of the evidence, the court of appeals concluded—despite Calvin's arguments as to the imprecision of the testimony—that the County presented sufficient evidence about Calvin's 2014 fleeing case, which, in conjunction with the circuit court's finding that Calvin did not accept his mental illness diagnosis, satisfied the statutory

dangerousness criteria in this 2023 recommitment. *Racine County v. C.B.,* 2023AP2018-FT, ¶¶ 22-23, unpublished slip op., (Wis. Ct. App. March 20, 2024). (App. 13).

As to the alleged failure to make specific findings in the oral ruling, the court of appeals held that while the circuit court's comments may have been "inartful," they were legally sufficient. *Id*., ¶ 23. (App. 13).

Finally, as to the medication order, the court of appeals accepted the evidence as legally sufficient with respect to all disputed elements. *Id*., ¶ 38. (App. 22).

ARGUMENT

I. This Court should accept review and hold that the County failed to prove dangerousness.

While past behavior is relevant, "reliance on assumptions concerning a recommitment at some unidentified point in the past, and conclusory opinions parroting the statutory language without actually discussing dangerousness, are insufficient to prove dangerousness in an extension hearing." *Winnebago County v. S.H.*, 2020 WI App 46, ¶13, 393 Wis. 2d 511, 947 N.W.2d 761.

That, however, is essentially what happened here. Like many perennially-recommitted citizens,

Calvin finds himself labeled "dangerous" based on conduct from roughly a decade ago, with only the thin connective tissue of his alleged lack of insight into his own mental health issues serving to tether that dated conduct to the recommitment standard under § 51.20(1)(am).

Mere reference to that dated conduct, in conjunction with conclusory assertions about a lack of acceptance with respect to a diagnosis, does not prove Calvin is dangerous by clear and convincing evidence. Moreover, if the 2014 conduct is to do the heavy lifting in finding him dangerous in 2023—as occurred here—then there needs to be some attempt to prove up what occurred in that situation. Here, however, the evidence reveals a crucial disputed issue—whether Calvin drove into oncoming traffic. (157:6). As argued below, not all fleeing incidents are uniformly dangerous; without more facts presented, it is problematic to infer—as the court of appeals did in this case—that mere reference to a fleeing incident categorically satisfies dangerousness criteria. *C.B.,* 2023AP2018-FT, ¶ 25. (App. 16).

Thus, it would appear that Calvin's commitment may be permanently extended given his 2014 conduct. That, however, cannot plausibly be consistent with the law. Accordingly, this Court should accept review and reverse.

II. This Court should accept review and hold that the circuit court's ruling failed to comply with *D.J.W.*

In *D.J.W.*, 2020 WI 41, ¶ 40, this Court emphasized that circuit courts must "make specific factual findings with reference to the [dangerousness] subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." "[A] circuit court can fall short of our *D.J.W.* directive by failing to make specific factual findings or by failing to state which dangerousness standard the recommitment is based on." *Sheboygan County v. M.W.*, 2022 WI 40, ¶ 41, 402 Wis. 2d 1, 974 N.W.2d 733 (Hagedorn, J., concurring).

Here, the circuit court simply did not pay close enough attention to the statutory elements nor did it make sufficiently clear factual findings. Its comments were generic and did not sufficiently echo the precise statutory elements at issue in this case, a significant failure because it is dangerousness under those specific statutes which justifies the deprivation of liberty at stake for Calvin. Moreover, as highlighted above, the available evidence about Calvin's allegedly dangerous fleeing conduct was described in the vaguest of terms, without clarification of disputed points such as whether he drove into oncoming traffic.

Thus, while the court of appeals was content to engage in a method of close reading in order to buttress the circuit court's otherwise "inartful"

comments, *C.B.*, No. 2023AP2018-FT, ¶ 23,[5] Calvin urges this Court to accept review and to hold the circuit court more fully to account by strictly emphasizing the importance of the *D.J.W.* mandate when ruling on a petition for involuntary commitment.

III. This Court should accept review and hold that the evidence was insufficient to support the medication order.

Finally, Calvin asks this Court to accept review and to analyze whether the County satisfied the statutory elements for involuntary medication in this case. While Calvin acknowledges that this case presents issues virtually identical to those at issue in the pending *D.E.W.* case, he urges this Court to at least hold the petition in abeyance pending the outcome of that case should the court announce a new rule or, alternatively, fail to generate a precedential decision.

Here, the evidence was insufficient to overcome Calvin's right of refusal. The discussion of side effects was simply too sparse and the evidence of incompetency established by merely conclusory evidence. Accordingly, this Court should accept review and reverse.

[5] (App. 14).

CONCLUSION

For the reasons set forth herein, Calvin asks this Court to accept review and reverse.

Dated this 10th day of April, 2024.

Respectfully submitted,

Electronically signed by Christopher P. August

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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 2,142 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 10th day of April, 2024.

Signed:
Electronically signed by
Christopher P. August
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