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COURT OF APPEALS

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2024AP000440 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

A.M.N.,

Defendant-Appellant.

On Appeal from an Order for Commitment and
Treatment, Entered in the Marinette County Circuit
Court, the Honorable Jane M. Sequin, Presiding

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

In response to Austin's straight-forward claim that his statutory right to be present was violated, the state nevertheless argues that he is entitled to no relief for two reasons. First, the state argues that the violation of Austin's statutory right to be present did not amount to a violation of his constitutional right to be present. *See* State's br. at 7-10. Second, the state argues that Austin's appeal is moot because he was subsequently found competent to proceed and thereafter resolved the charges in this case through a deferred prosecution agreement. *See* State's br. at 11-13. This Court should reject the state's position that there is no available remedy for the violation of Austin's statutory right to be present.

First, the state concedes that Austin's statutory right to be present was violated when the circuit court denied his request to appear in person under Wis. Stat. § 971.04(1)(d). *See* State's Br. at 8. After conceding the violation of Austin's statutory right to be present, the state confusingly argues that no constitutional violation occurred. *See* State's Br. at 8-10.

Austin is entitled to a remedy for the violation of his *statutory* right to be present and he never claimed his constitutional right to be present was independently violated. In *State v. Koopmans*, the Wisconsin Supreme Court held that a defendant's *statutory* right to be present at sentencing was violated when the circuit court sentenced the

defendant in absentia. 210 Wis. 2d 670, 679-80, 563 N.W.2d 528 (1997). As a result of the violation of the statutory right to be present under § 971.04(1), the supreme court remanded the case for a new sentencing hearing. *Id.*

Likewise, in *State v. Anderson*, the court of appeals held that the defendant's statutory right to be present was violated when the defendant entered a guilty plea by telephone from prison. 2017 WI App 17, ¶2, 374 Wis. 2d 372, 896 N.W.2d 364. While the court of appeals rejected the defendant's claim that his constitutional right to counsel was also violated, the court held that the violation of the statutory right to be present would entitle the defendant to plea withdrawal. *Id.*¹

Simply put, Austin is entitled to a remedy for the violation of his statutory right to be present. The lack of a constitutional violation does not insulate the circuit court's error from a remedy. The cases cited by the state, including *State v. Peters*, 2000 WI App 154, 237 Wis. 2d 741, 615 N.W.2d 655, *reversed on other grounds*; *May v. State*, 97 Wis. 2d 175, 293 N.W.2d 478

¹ Because *Anderson* involved a claim for plea withdrawal based on the circuit court's failure to comply with its mandatory duties, the court remanded for an evidentiary hearing to determine whether the defendant did in fact understand he had a right to appear in person. *State v. Anderson*, 374 Wis. 2d 372, ¶¶50-59. Unlike *Anderson*, Austin affirmatively asserted his right to be present and objected to appearing for his competency hearing by Zoom. Therefore, there is no waiver issue to be resolved by this Court or by the circuit court.

(1980); and *State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 133, have no bearing on the clear violation of Austin's statutory right to be present and Austin's right to a remedy.

Second, Austin's appeal is not moot. While Austin was found competent to proceed, after roughly three months of commitment for treatment (47:2), that change in circumstances does not change the fact that Austin's commitment from December 19, 2023, through March 26, 2024, was invalid.

"An issue is moot when its resolution will have no practical impact on the underlying controversy." *Portage County v. J.W.K.*, 2019 WI 54, ¶11, 386 Wis. 2d 672, 927 N.W.2d 509. In *Sauk County v. S.A.M.*, 2022 WI 46, ¶¶2-3, 402 Wis. 2d 379, 975 N.W.2d 162, the Wisconsin Supreme Court held that two consequences of an expired commitment order render an appeal not moot: "(1) the restriction of one's constitutional right to bear arms; and (2) the liability for the costs of one's care."

As in *S.A.M.*, Austin is statutorily liable for the cost of his care while under a now-expired commitment order. Under Wis. Stat. § 46.10(2), Austin "shall be liable for the cost of the care, maintenance, services, and supplies" as a person committed under Wis. Stat. § 971.14. "Should the order finding [Austin] incompetent be vacated, [Austin] would no longer be responsible for those costs." See *State v. Ford*,

Nos. 2022AP187-188, unpublished slip op. ¶18 (Oct. 31, 2023). (Reply App. 9).²

Moreover, to the extent the state questions what the appropriate remedy would be at this point, *see* State's br. at 12-13, Austin can clarify the relief he seeks. He simply requests that this Court reverse and remand this case to the circuit court with directions to vacate the order of commitment for treatment signed and filed by the circuit court on December 20, 2023. (17; App. 49-51).

On December 19, 2023, Austin's position was that he was competent to proceed and he contested Dr. Reintjes' opinion to the contrary. (19; App. 10-48). Austin was subsequently found competent to proceed and resolved this case through a deferred prosecution agreement in May 2024. (47; 48; 45; Resp. App. 3-21). Nothing that occurred after December 19, 2023, negates the violation of Austin's statutory right to be present and the expiration of the commitment order and the resolution of this case does not prevent this Court from issuing a decision that offers a meaningful remedy to Austin.

² Cited for its persuasive value under Wis. Stat. § (Rule) 809.23(3)(b) and included in the appendix to this brief at 3-13.

CONCLUSION

For the reasons argued above and as previously argued in his brief-in-chief, Austin respectfully requests that this Court reverse and remand this case to the circuit court with directions to vacate the December 20, 2023, order of commitment for treatment.

Dated this 26th day of June, 2024.

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. The length of this brief is 984 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief 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 26th day of June, 2024.

Signed:

Electronically signed by

Jeremy A. Newman

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