STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP1195

In the matter of the mental commitment of N.A.L.:
SHEBOYGAN COUNTY,

Petitioner-Respondent,

v.

N.A.L.,

Respondent-Appellant.

On Appeal from an Order of Commitment and an Order Denying a Postdisposition Motion Entered in the Sheboygan County Circuit Court, the Honorable Rebecca Persick, Presiding.

BRIEF OF RESPONDENT-APPELLANT

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS

ISSUES PRESENTED

1. N.A.L. appeared by phone at his final hearing. His counsel stated that he would stipulate to commitment, but during the hearing N.A.L. asked what a stipulation was, stated he thought the court hearing was to determine when he would be discharged from Winnebago, and, after the court accepted the stipulation, asked what he had just agreed to.

   Did the trial court violate N.A.L.'s due process rights by accepting the stipulation for commitment and issuing an order for involuntary medication without conducting a colloquy to ensure the stipulation was knowing, intelligent, and voluntary?

   The trial court answered "no."

2. Whether this appeal is moot.

   The trial court was not asked this question.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This appeal presents an open question. The Wisconsin Supreme Court has previously granted review of the question of whether a colloquy is constitutionally required before a court can accept a stipulation for commitment, but the petition was

ultimately dismissed as improvidently granted. *In re Mental Commitment of Aaron J.J.*, 2005 WI 162, 286 Wis. 2d 378, 706 N.W.2d 659. Since then, the question has only been addressed in two unpublished opinions. *In re Mental Commitment of L.A.T.*, 2023 WI App 11, 986 N.W.2d 575; *In re Mental Commitment of N.W.*, 2019 WI App 54, 388 Wis. 2d 623, 935 N.W.2d 562. This is an important issue of law which will affect a large number of civil commitment cases. A published decision is therefore requested. Respondent-Appellant has already filed a motion requesting a three-judge panel.

Oral argument is not necessary because the parties' briefs can fully present the issues for review.

STATEMENT OF THE CASE AND FACTS

On November 25, 2023, N.A.L. went to Aurora Hospital to seek treatment. (1:1). N.A.L. told hospital staff that he was hearing voices which told him to harm himself but that he did not want to be voluntarily committed. *Id.* When N.A.L. attempted to leave the emergency room, N.A.L. was handcuffed to the bed and eventually placed in emergency detention. *Id.* A probable cause hearing was held on November 29, 2023. (39). N.A.L. did not dispute that probable cause existed and the court found probable cause as well as grounds for a final hearing. (39:4).

At the final hearing, both N.A.L. and his counsel appeared by phone. (40:1; App. 3) N.A.L.'s counsel reported that N.A.L. was willing to stipulate to the

county's request for a civil commitment under Chapter 51. (40:2; App. 4). N.A.L. then interrupted to ask, "What's a stipulation?" *Id.* The court explained that a stipulation meant that N.A.L. was agreeing that he could be committed. (40:3; App. 5). When the court asked N.A.L. if he was indeed agreeing to this, he responded, "I suppose." *Id.*

Later in the hearing, N.A.L. asked how long he would have to wait to be discharged from Winnebago. (40:4; App. 6). When the court explained that his discharge date would be up to the doctor, N.A.L. responded, "Well, I thought we were evaluating that today on the court date." *Id.* The court then asked N.A.L.'s counsel if he wanted a chance to speak to his client but counsel declined the opportunity. (40:5; App. 7). Eventually, N.A.L. said he understood that it would be up to the doctors when he would leave Winnebago, but when asked if he was "also agreeing that there can be a commitment order," he replied, "[o]nly if I'm able to be discharged in the next, you know, agreeable period of time." *Id.* The court then said, "it's unclear to me whether this is an actual stipulation to commitment or not." (40:6; App. 8).

One of the psychiatrists who had examined N.A.L., Dr. Marshall Bales, then spoke up and said that while he didn't "want to speculate" he estimated that N.A.L. would likely be out of Winnebago in a day or two. (40:7; App. 9). N.A.L. said that this estimate helped, and that he was willing to agree to the commitment. *Id.* However, after the court accepted the stipulation, N.A.L. asked, "[s]o then I'm supposed to be

released in a few days of my commitment, or what does this mean?" *Id.* The court advised N.A.L. to contact his counsel, who had already left the hearing, to find out what he had agreed to. *Id.* The court did not conduct a colloquy to determine whether the stipulation and its attendant waiver of rights was knowing, intelligent, and voluntary.

On December 7, 2023, the court entered an order of commitment based on the stipulation. (23; App. 12). On December 15, 2023, N.A.L. timely filed a notice of intent to pursue post-disposition relief. (27). On May 7, 2024, N.A.L. filed a post-disposition motion arguing that the trial court had erred by not conducting a colloquy in order to ensure his stipulation was knowing, intelligent, and voluntary. (53). The trial court denied the post-disposition motion, adopting the reasoning of the County's brief. (67; App. 14). This appeal follows.

ARGUMENT

I. The trial court erred by failing to conduct a colloquy to ensure that N.A.L.'s stipulation to commitment and attendant waiver of rights was knowing, intelligent, and voluntary.

A. Colloquies are necessary when an individual waives a fundamental right.

The United States Supreme Court has recognized the importance of colloquies since at least 1969 when it decided *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709 (1969). In *Boykin*, the Court reversed a defendant's conviction because the record did not affirmatively demonstrate that he voluntarily and intelligently entered his pleas of guilty and that this lack of an affirmative showing violated his due process rights. *Id.* at 240. The Court observed, "So far as the record shows, the judge asked no questions of the petitioner concerning his plea, and petitioner did not address the court." *Id.* at 239. Later, the Court explained:

> What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may be later sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

Id. at 243-44 (internal citations omitted). *Boykin* explained that colloquies were necessary, in part, because of the importance of the rights being waived: "First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment… Second, is the right to trial by jury. Third, is the right to confront one's accusers. We cannot presume a waiver of these three important federal rights from a silent record." *Id.* at 243 (internal citations omitted). In sum, *Boykin* held that the colloquies are required to protect important rights and create a record which makes clear whether the waiver of rights is knowing, intelligent, and voluntary.

Wisconsin courts have followed the reasoning of *Boykin* and extended the colloquy requirement to waivers of rights outside of the context of a criminal plea. In doing so, they have recognized "the important role such colloquies play in protecting fundamental constitutional rights." *State v. Francis*, 2005 WI App 161, ¶ 15, 285 Wis. 2d 451, 701 N.W.2d 632. Generally, Wisconsin courts have held that an on-the-record colloquy is necessary when an individual waives a *fundamental* right.

For instance, in *State v. Weed*, 2003 WI 85, ¶ 2, 262 Wis. 2d 434, 66 N.W.2d 485, the Wisconsin Supreme concluded that a defendant's right to testify in his or her own defense was a fundamental constitutional right that required the protection of an on-the-record colloquy. Similarly, in *State v. Anderson*, 2002 WI 7, ¶ 23, 246 Wis. 2d 586, the Wisconsin Supreme Court concluded that a waiver of the right to

a jury trial required a colloquy because "without a personal colloquy, we are unable to determine that Anderson's jury trial waiver is knowing, intelligent, and voluntary. The right to a jury trial is a fundamental right." (footnote omitted). Colloquies are also required in termination of parental rights cases when the respondent enters a plea and, in fact, courts apply the same framework as they do in criminal cases to determine whether a plea should have been accepted. *See In re B.W.*, 2024 WI 28, ¶ 47, 412 Wis. 2d 364, 8 N.W.3d 22.

Personal colloquies are also required in the context of civil commitments: when a respondent waives the right to counsel in either Wis. Stat. ch. 980 or 51 proceedings, the court must conduct a colloquy that meets the same standards imposed in criminal cases. *In re Commitment of Thiel*, 2001 WI App 32, ¶ 17, 241 Wis. 2d 465, 626 N.W.2d 26 ("in ch. 51 proceedings, the *Klessig* standards apply to waivers of the right to counsel.") In fact, the importance of an on-the-record showing that the right is being waived knowing, intentionally, and voluntarily has been required since 1991. *In re Condition of S.Y.*, 162 Wis. 2d 320, 336, 469 N.W.2d 836 (1991).

B. A stipulation to a civil commitment involves the waiver of fundamental rights and requires a colloquy

A stipulation to a commitment waives two separate but related fundamental rights. The first is an individual's right to freedom from physical

restraint. *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S.Ct. 1780 (1992). Freedom from physical restraint is a fundamental right. *Id.*

The second is a respondent's due process right to a fair hearing where the petitioner must prove by clear and convincing evidence that he is both mentally ill and dangerousness. *Matter of D.K.*, 2020 WI 8, ¶ 29, 937 N.W.2d 901. The importance of these due process rights was recognized in *Lessard v. Schmidt*, 346 F.Supp. 1078, *vacated on other grounds*, 414 U.S. 473 (1974), in which the federal court found that the predecessor to the current Wis. Stat. Ch. 51 was unconstitutional in several ways. Although no court has specifically found that the due process right requiring the county to prove dangerousness and mental illness by clear and convincing evidence is "fundamental," its waiver automatically waives the fundamental right to be free from restraint. Accordingly, it should be granted the same protections and courts should conduct a colloquy to insure is knowing, intelligent, and voluntary. As in *Boykin*, the protection of these rights requires a colloquy to ensure that that any waiver is knowing, intelligent, and voluntary. It is not enough to presume a waiver of such important rights from a silent record.

Conducting a colloquy to confirm the respondent understands his rights would drive home the seriousness of the rights he seeks to waive as well as the consequences of waiving them. Just as importantly, by clearly explaining the right to hold the county to its proof, it would insure the respondent

understands he may exercise this right to protect the fundamental right of being free from restraint. And doing so would result in a record which clearly demonstrates whether the waiver is knowing, intelligent, and voluntary. Accordingly, this court should find that that both the right to be free from physical restraint and the right to have the county prove by clear and convincing evidence that the respondent is mentally ill and dangerous are fundamental rights which must not be waived without a personal colloquy.

This is especially true because a colloquy is already necessary when Chapter 51 respondents waive the relatively less important right to counsel. *See S.Y.*, 162 Wis. 2d at 336. The right to counsel is an important procedural safeguard in Chapter 51 commitments, and accordingly its waiver requires a colloquy and a record sufficient to show that the waiver is knowing, intelligent, and voluntary; it follows, then, that waiver of the more important and more fundamental rights to be free from restraint and to put the county to its proof require at least as much protection. Accordingly, this court should reverse the order of commitment.

II. This appeal is not moot.

Although N.A.L.'s initial commitment order has expired, this appeal is not moot because of the enduring collateral consequences of the order, namely the resultant firearms ban and the potential liability for the cost of care. "It is now well established under

Wisconsin law that an appeal of an expired commitment order—whether an initial commitment order or a recommitment order—is not moot due to continuing collateral consequences of the firearms ban required under a commitment order, as well as liability for the cost of care." *In re Commitment of L.X.D.-O.*, 2023 WI 17, ¶ 12, 407 Wis. 2d 441, 991 N.W.2d 518.

CONCLUSION

For the reasons stated above, the order of commitment should be reversed.

Dated this 20th day of September, 2024.

Respectfully submitted,

Electronically signed by William Straube

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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 1,830 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 20th day of September, 2024.

Signed:
Electronically signed by
Will Straube
WILL STRAUBE
Assistant State Public Defender