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STATE OF WISCONSIN
SUPREME COURT
Appeal Case No. 2024AP1315
Circuit Court Case No. 2023ME217

In the Matter of the Mental Commitment of M.D.S., Jr.

WAUKESHA COUNTY,
Petitioner-Respondent,

v.

M.D.S., Jr.,
Respondent-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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ISSUE PRESENTED

1. Did Waukesha County prove by clear and convincing evidence Martin Smith¹ is a danger to others under Wis. Stat. § 51.20(1)(a)2.b.²?

The circuit court answered yes. (R.47:35-36). The court of appeals affirmed. *Waukesha County v. M.D.S., Jr.*, No. 2024AP001315, unpublished slip. op., (WI. App Nov. 6, 2024).

CRITERIA FOR REVIEW

This court should decline review when, as here, the criteria under Wis. Stat. § 809.62(1r) are not satisfied. Smith argues review is warranted under Wis. Stat. § 809.62(1r)(a), asserting the case poses a significant federal constitutional question. Pet. for Review at 3. The circuit court and court of appeals correctly applied controlling legal precedent. Neither party requests this Court to revise controlling precedent. Simply put, Mr. Smith wants an additional sufficiency test—a test applied by two, independent lower courts to well-settled principles of law. This Court should decline review on those grounds.

¹ In its opinion, the court of appeals referred to M.D.S., Jr., by the pseudonym “Martin Smith”. For ease of reading, pursuant to Wis. Stat. § 809.19(1)(g), the County refers to M.D.S., Jr. by the same pseudonym.

² Generally referred to as the second standard.

STATEMENT OF THE CASE AND FACTS

On June 14³, New Berlin police emergently detained Martin Smith under Wis. Stat. § 51.15. (R.2). An uncontested probable cause hearing was held on June 19. (R.48). The court found probable cause and ordered a final hearing for June 27 before the Honorable Laura F. Lau. (R.48;9). Pursuant to Wis. Stat. § 51.20(9)(a)1., Judge Lau appointed Dr. Michael Lace, psychologist, and Dr. Charles Rainey, psychiatrist, to examine Smith. (R.10). Dr. Lace filed a Report of Examination on June 22, and Dr. Rainey filed a Report of Examination on June 23. (R.12;13). Both doctors opined Smith was a danger to others under the second standard. (R.12;5;13:3).

The Honorable Paul Reilly⁴ concurrently held two hearings on June 27, a final commitment hearing and a medication hearing. (R.25;26). At the hearings, the parties stipulated Smith was mentally ill and a proper subject for treatment. (R.47:3). Martin Smith only contested dangerousness and asserted he would not object to an involuntary medication order if commitment was ordered. (R.47:3,35).

Testimony

Alec Weitzer

Alec Weitzer testified about events that led to detention. (R.47:9-19). Smith “approached” Weitzer as Weitzer moved furniture into his family’s

³ All dates refer to 2023.

⁴ Judge Reilly presided as a reserve judge for Judge Lau. (R.47:1).

apartment.⁵ (R.47:10). Smith got in Weitzer's "personal space", "bugging" and "bothering" Weitzer. (R.47:11). Smith then attempted to follow Weitzer into the apartment. (R.47:11,13). Weitzer "blocked" Smith from entering the apartment. (R.47:13). Smith remained in Weitzer's "personal space". (R.47:11). Smith tried to put his "hands and arms" on Weitzer and "growl[ed]" while he made "weird noises". *Id.* Despite repeated attempts to stop his advances, Smith continued "following" Weitzer. *Id.* As this continued, Weitzer told Smith to "back up". *Id.* Smith did not. (R.47:11-12). At one point, Weitzer feared Smith "was going to charge at" him. (R.47:12). Smith "pushed" Weitzer and Weitzer "pushed" Smith away. (R.47:12,16). When Smith "started making gun signs with his hands"⁶, Weitzer called police. (R.47:13). Smith knew Weitzer called police. (R.47:14). Smith threatened a "showdown" with police, "kept making these gun signs", and made "biblical references" about a "demise". (R.47:14,17). Weitzer then "ma[de] sure [Smith] didn't go inside of his house and go to grab a weapon as he clearly stated". (R.47:17). The events lasted "fifteen to twenty minutes". (R.47:13).

Officer Lisette Ceballos

Officer Lisette Ceballos⁷, a patrol officer, testified about Smith's behavior at Waukesha Memorial Hospital during medical clearance. (R.47:5-

⁵ Smith did not know Weitzer who did not reside at the apartment; however, Smith did reside at that apartment complex. (R.47:10-11,17).

⁶ Smith "had his index finger and middle finger pointed out with his thumb in the air and was also pulling his thumb down in the process". (R.47:14).

⁷ Officer Ceballos authored the Statement of Emergency Detention by Law Enforcement Officer. (R.2).

8). Smith yelled, “fold[ed] out of his bed” with “clinch[ed] fists” and threatened nonexistent “biblical individuals”. (R.47:6-7). He then threatened to harm the Pope or a biblical prophet with a rifle. (R.47:7).

Dr. Darryl Kabins, M.D.

Dr. Darryl Kabins, the Medical Director⁸ at the Waukesha County Mental Health Center, also testified. (R.47:21-29). Smith is schizophrenic. (R.47:23). He has thought disorganization, paranoid delusions, and insufficient goal orientation. (R.47:22-23). His delusions are evidenced by his belief that police are harassing him. (R.47:22). While he cannot show how police are harassing him, he continues to monitor police, record police, and attempt to build a case against police harassment. (R.47:24). Smith feels the need to continue monitoring police and is “reluctant to come up with a plan to stay away from the police to avoid an altercation”. *Id.* He created a YouTube channel called Wisconsin Operation Blue All. (R.47:28). His posts confirm his paranoid delusions about police. *Id.* Smith’s delusions are also evidenced by his battle among unknown religious figures. (R.47:24).

Smith is “definitely” at an increased risk to harm others. (R.47:25). He will “continue the behaviors that ultimately led to his detainment”. (R.47:24). “[H]is paranoid delusions have put himself in altercations with others that have led to reports of him pushing somebody and making statements about

⁸ Dr. Kabins is licensed to practice medicine in the State of Wisconsin and a board-certified psychiatrist. (R.47:21).

potentially dangerous things like standoffs”.
(R.47:22).

Smith did not present evidence. (R.47:2).

Ruling

The circuit court concluded “by clear and convincing evidence”, and with “no question whatsoever”, Smith is dangerous to others based on reasonable fear under the second standard. (R.47:36). It found the following:

[I]f you look at the gun signals and the references, and I took Mr. Weitzer’s testimony a little bit differently than how Attorney Ostrowski indicated that after [Smith] tried to enter the apartment that apparently did not belong to him, and Mr. Weitzer was concerned about safety, it was at that point that [Smith] started making gun signs with his hands and pointing the gun signs at Mr. Weitzer, making some biblical references and then saying ‘it’s going to be a showdown’.

(R.47:35-36). Subsequently, the circuit court committed Smith for a period of six (6) months.
(R.25).

Case on Appeal

On July 1, 2024, Smith, via appellate counsel, filed a notice of appeal. (R.53). The appellate court examined the sufficiency of the evidence under Wis. Stat. § 51.20(1)(a)2.b. to determine if Smith

[e]vidence[d] a substantial probability of physical harm to other individuals as manifested [(1)] by evidence of recent homicidal or other violent behavior, or [(2)] by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

Waukesha County v. M.D.S., Jr., at ¶16, (quoting Wis. Stat. § 51.20(1)(a)2.b.).

The court of appeals separately examined the testimonies of Alec Weitzer, Officer Lisette Ceballos, and Dr. Darryl Kabins, M.D.

The court of appeals ultimately rejected the arguments made by Smith, finding:

Absent involuntary commitment and medication and treatment, Smith is at high risk to not comply with antipsychotic medications that could control his dangerous condition.

...

[Smith's] statements and actions indicated a willingness to use firearms to kill.

...

Alec [Weitzer's] concern of violent behavior and serious physical harm by Smith was objectively reasonable in light of all Smith's words and actions.

Waukesha County v. M.D.S., Jr., at ¶ 22-23. The court concluded Mr. Smith failed to show the circuit court overlooked relevant facts, or arrived at a conclusion that no reasonable judge would have made and affirmed the circuit court's decision.

Smith now petitions this Court for review.

ARGUMENT

Martin Smith's Petition for Review does not present a real and significant question of federal constitutional law.

I. This Court should deny the petition for review as review is not warranted under the criteria prescribed by Wis. Stat. § 809.62(1r).

Mr. Smith alleges that he has been deprived of his freedom based upon insufficient facts presented by Waukesha County. The U.S. Supreme Court has recognized that an untreated mentally ill person is not free; they are prisoners of their own mind. *Addington v. Texas*, 441 U.S. 418, 99 S. Ct. 1804, 60 L.Ed.2d 323 (1979). Furthermore, Mr. Smith has disguised his request for a third review of the sufficiency of the evidence in the form of a Petition for Review. The circuit court and court of appeals have already applied well-settled legal principles to the facts of this case.

Martin Smith solely challenged the finding of dangerousness. The County addressed whether it proved Smith a danger to others based on reasonable fear under the second standard. To meet its burden,

the County showed Smith was dangerous because he evidenced

a substantial probability of physical harm to other individuals as manifested by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

Wis. Stat. § 51.20(1)(a)2.b.

The court of appeals concluded that “in light of the totality of the evidence presented”, the circuit court had not erred in its determination that Martin Smith was dangerous under Wis. Stat. § 51.20(1)(a)2.b. *Waukesha County v. M.D.S., Jr.*, at ¶ 22.

II. The County proved by clear and convincing evidence that Martin Smith is dangerous to others as defined in Wis. Stat. § 51.20(1)(a)2.b.

When considering the sufficiency of the evidence, appellate courts apply a “highly differential standard of review”. *Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 389, 588 N.W.2d 67 (Ct. App. 1998). A circuit court’s findings of fact are not disturbed unless clearly erroneous. *Waukesha County v. J.W.J.*, 2017 WI 57, ¶15, 375 Wis. 2d 542, 895 N.W.2d 783. Appellate courts accept all reasonable inferences from those facts. *Winnebago County v. Christopher S.*, 2016 WI 1, ¶50, 366 Wis. 2d 1, 878 N.W.2d 109. Whether the facts satisfy the statutory

standard is a question of law appellate courts review independently. *J.W.J.*, 2017 WI 57, at ¶15.

A. Martin Smith is dangerous to others based upon reasonable fear under the second standard.

The circuit court correctly concluded that Smith is dangerous based on “others being placed in reasonable fear” under the second standard. (R.47:36). The court of appeals agreed. *Waukesha County v. M.D.S., Jr.*, at ¶23.

1. Smith threatened to do serious physical harm to Weitzer and the police.

Smith made legitimate threats. He threatened to shoot Weitzer “making gun signs with his hands” that were pointed toward Weitzer, he “pull[ed] a fake trigger” time and time again at Weitzer, and he stated “multiple times” there “was going to be a showdown when the cops” arrived. (R.47:13-14,17). The legitimacy of each threat is bolstered by Smith’s acts of aggression. Smith attempted to follow Weitzer into Weitzer’s family’s apartment. (R.47:11,13). At one point, Smith put his “hands and arms” on Weitzer and at another point, Smith “pushed” Weitzer and “put his hands on” Weitzer. (R.47:11,16).

2. The test for reasonable fear is objective.

Smith argues “commitment could be sustained only if [Smith] placed Weitzer in ‘reasonable fear of violent behavior and serious physical harm’” to him.

(Pet. For Review at 15). The County disputes this, asserting that the test for reasonable fear is objective and focuses on the mental state and objective acts, attempts, or threats of Smith. This standard was highlighted in *R.J. v. Winnebago County*, where the court held that the statute's purpose would be "manifestly defeat[ed]" if it focused on the subjective feelings of the threatened individual rather than the objective acts of the disturbed person.⁹ 146 Wis. 2d 516, 522, 431 N.W.2d 708 (Ct. App. 1988). Additionally, the court noted that threats need not be made directly to the threatened person; threats to a third party are also considered: "We conclude that a showing can be made that others are placed in a

⁹ R.J. attempted to persuade the court that the legislature is equally concerned about the mental state of those who are not the subject individual. *Id.* at 521. The court emphatically rejected, stating:

To construe the statute as R.J. requests would lead to an absurd result. It would place the focus not upon the disturbed person's acts but upon the effects of the acts. The evidence required would focus upon the subjective feelings of the threatened individual, not upon the objective acts of the disturbed person. R.J.'s reading would inevitably defeat the statute's purpose. No commitment could result from threats directed at those too young, too emotionally underdeveloped or too foolish to reasonably fear another. Nor could commitment result from menacing gestures made behind the back of a blind man, or from threats hurled into the wind. *We reject a statutory interpretation that leads to absurd results and manifestly defeats the purpose of the statute: adequate treatment for those who are mentally ill and who pose a danger.*

Id. at 522 (emphasis added).

fearsome position by a disturbed person's actions even if the person placed in that position has no subjective awareness of it". *Id.* at 523.

The test for reasonable fear in commitment proceedings is objective, as established in *Marathon County v. D.K.*, 2020 WI 8, ¶¶31-38, 390 Wis. 2d 50, 937 N.W.2d 90. This means that the fear experienced by the victim must be one that a reasonable person in the same circumstances would experience. The Supreme Court of Wisconsin in *Marathon County v. D.K.*, tackled reasonable fear under the second standard for the first time and upheld *R.J.*, noting the holding "is consistent with the plain language of" the statute. The Court emphasized that the standard is not based on the subjective feelings of the victim but rather on whether a reasonable person would have felt the same fear under similar circumstances. Here, Alec Weitzer's fear is objectively validated through Smith's actions—making gun signs and threats of a "showdown" with police, attempting to enter Weitzer's apartment, physical aggression—all illustrating a substantial probability of harm. This adheres to the requirements under Wis. Stat. § 51.20(1)(a)2.b.

Furthermore, testimonies from Weitzer, Officer Lisette Ceballos, and Dr. Darryl Kabins bolster this claim. Weitzer detailed Smith's threatening gestures and statements. Officer Ceballos corroborated the aggressive behavior. Dr. Kabins' expert testimony confirmed Smith's actions indicated a substantial harm risk if untreated.

Considering the objective standard for reasonable fear and comprehensive evidence of Smith's threats, the court's determination of Smith's

danger to others under the second standard is correctly substantiated by statutory and case law. The precedent affirms that Alec's fear of Smith is objectively reasonable.

3. Fear is objectively reasonable based on Smith's acts and threats.

Smith explains why Weitzer's responses did not show fear. (Pet. For Review at 16). His offering misrepresents the law, mischaracterizes the responses, and focuses in large part on Weitzer's responses prior to the threats. Initially, Weitzer— “a 300-pound guy”— “felt comfortable enough handling [his] own” when Smith attempted to enter Weitzer's family's apartment. (R.47:13). However, the dynamic shifted when Smith threatened to shoot Weitzer. *Id.* Weitzer immediately called police and became intensely concerned about his safety. *Id.* He attempted to “gauge” if Smith had weapons on him, he became “apprehensive” to get close to Smith, and he “ma[de] sure [Smith] didn't go inside of his house and go grab a weapon as he clearly stated”. (R.47:13-14,17). Throughout this encounter, Weitzer repeatedly instructed Smith to “keep his distance from [him]”. (R.47:18). As previously offered, the test for reasonable fear is objective and the court focuses on the mental state and objective acts, attempts, or threats of Smith. *R.J.*, 146 Wis. 2d, at 522.

4. Smith is “definitely” at increased risk of harm to others based on his acts and threats.

The County offered uncontroverted expert testimony from Dr. Darryl Kabins, the Medical

Director at the Waukesha County Mental Health Center. He opined Smith is “at definitely increased risk of harm” to others. (R.47:25). He then explained his conclusion. Dr. Kabins opined that Smith’s “paranoid delusions have put himself in altercations with others that have led to reports of him pushing somebody and making statements about potentially dangerous things like standoffs”. (R.47:22). Dr. Kabins testified that Smith “keeps escalating” his attempts to monitor police and, of more concern, Smith “continues to make statements that he’ll continue the behaviors that ultimately led to his detainment”. (R.47:24-25). Those concerns intensified after review of Smith’s YouTube channel called “Wisconsin Operation Blue All”. Dr. Kabins testified,

I haven't watched every video he has put on there, but I've watched several videos that he's placed on the past year where he's showing things that he is commenting on the videos that are proof of his beliefs.

And when I watched the videos, I'm not seeing any of what he's reporting. He put a couple videos on of interactions with police officers, confronting them, and on the videos the police officers are calm and saying they don't really know what he's talking about. Which unfortunately then leads to him taking that as confirmation that they're part of the system, and, like, is ongoing proof to his paranoid beliefs. So, it does show signs based on his videos that go back over a year ago of his paranoid beliefs.

(R.47:28). In other words, Smith’s paranoic police monitoring goes back over a year ago. Moreover, even

after treatment since his detention, Smith is “reluctant to come up with a plan to stay away from the police to avoid an altercation as he feels like *he needs to keep doing that*”. (emphasis added) (R.47:24).

Smith faults the County because Dr. Kabins did not regurgitate statutory language when offered. (Pet. For Review at 17). Importantly, though, as the court noted in *D.K.*, “we have never required a mental illness expert to be clairvoyant”. *D.K.*, at ¶52. Additionally, the statute does not require certainty, but rather a “substantial probability”. Wis. Stat. § 51.20(1)(a)2.b. Dr. Kabins’ testimony supports a “legal” conclusion that it is much more likely than not that Smith will cause harm to others. Smith admitted as much: he needs to keep having altercations with police. (R.47:24). Summarily, Dr. Kabins testified Smith continued to escalate, stated he will continue the behaviors that led to the emergency detention, and he would not comply with a safety plan. (R.47:24-25).

B. While reasonable fear does not establish a substantial probability of physical harm to others, the court of appeals affirmed that Smith evidenced a clear risk of causing such harm.

As Smith correctly notes, even if the County showed reasonable fear as evidenced by a recent act or threat, it must also prove “that it is much more likely than not that the individual will cause physical harm to other individuals”.¹⁰ (Pet. For Review at 17);

¹⁰ *D.K.* held that a substantial probability means much more likely than not. 2020 WI 8, at ¶35.

D.K., 2020 WI 8, at ¶42. “In other words, evidence of a ‘reasonable fear’ is necessary but not automatically sufficient alone to conclude there is a ‘substantial probability of harm’ under” the statute. *Id.*, at ¶43. Even so, a “‘reasonable fear’ may, and perhaps often will, establish a ‘substantial probability’”. *Id.*, at ¶42.

The court of appeals found

[a]bsent involuntary commitment and medication and treatment, Smith is at high risk to not comply with antipsychotic medications that could control his dangerous condition. In this case, he approached and laid hands on a stranger, Alec, and attempted to enter into a residence he was not permitted in. Once police were called, he indicated his intent and indeed desire for a ‘showdown’ with the police, making the threatening gesture of repeatedly pulling the trigger on a ‘gun’. He made statements indicating a willingness to shoot at law enforcement officers and at other times made statements suggesting he had access to firearms. His statements and actions indicated a willingness to use firearms to kill.

Waukesha County v. M.D.S., Jr., at ¶ 22.

On the basis of its findings, the court of appeals held “Smith ‘evidence[d] a substantial probability of physical harm to other[s]’.” *Waukesha County v. M.D.S., Jr.*, at ¶ 23.

CONCLUSION

Based on the record from the circuit court, decision of the court of appeals, and aforementioned arguments, Waukesha County respectfully requests this Court deny Martin Smith's petition for review.

Dated this 19th day of December, 2024.

Respectfully submitted,

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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,360 words.

CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 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 Wis. Stat. §§ 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings 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 of 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 19th day of December, 2024.

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