STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2024AP1333

In the matter of the mental commitment of J.S.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

J.S.,

Respondent-Appellant.

On Appeal from an Order for Extension of Commitment Entered in the Winnebago County Circuit Court, the Honorable Teresa S. Basiliere, Presiding.

BRIEF OF RESPONDENT-APPELLANT

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ISSUE PRESENTED

1. Did the circuit court make specific factual findings with reference to a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2, as required by *Langlade Cty. v. D.J.W.*, 2020 WI 41, 391 Wis. 2d 231, 942 N.W.2d 277?

   The circuit court extended the commitment.

POSITION ON ORAL ARGUMENT AND PUBLICATION

J.J.S. does not request oral argument because the briefs will fully address the issue presented. *See* Wis. Stat. § (Rule) 809.22(2)(b). This is a one-judge appeal under Wis. Stat. § 752.31(2)-(3); therefore, a request for publication is prohibited by Wis. Stat. § (Rule) 809.23(4)(b).

STATEMENT OF THE CASE AND FACTS

On June 8, 2023, the circuit court entered an order committing J.J.S. to the care and custody of Winnebago County for a period of six months. (27:2).

On November 7, 2023, Winnebago County filed a Petition for Recommitment. (43:1). An examination of J.J.S. was conducted on October 25, 2023, by Dr. Michael Vincente, MD. (45:1). This report was filed with the court on November 7, 2023. (45:1).

A hearing on the extension of commitment was held on November 30, 2023, before the Honorable Teresa S. Basiliere. (82:1; App. 6). At the hearing, the County called two witnesses: Dr. Michael Vincente and Officer Brent Wittman. (82:2; App. 7). Dr. Vincente testified that J.J.S. had been a patient at his clinic for over a year and that he conducted an evaluation on October 25. (82:6; App. 11). Dr. Vincente also reviewed notes from J.J.S.'s treatment history. (82:6-7; App. 11-12). Dr. Vincente opined that had a substantial disorder of thought and perception, namely "unspecified schizophrenia spectrum and other psychotic disorders." (82:7; App. 12). Dr. Vincente testified that this disorder caused J.J.S. to experience auditory hallucinations, paranoid thoughts, and suicidal thoughts. (82:8; App. 13). Dr. Vincente acknowledged that at the time he examined J.J.S., he did not present with recent suicidal ideation. (82:25; App. 30).

Dr. Vincente further testified that it was his opinion that J.J.S. was a danger to himself or others when not under treatment. (82:8; App. 13). Dr. Vincente believed this to be the case because J.J.S. indicated that he did not believe he had a mental illness and that J.J.S. had a recent history of discontinuing treatment when no longer under a commitment order. (82:12; App. 17). Dr. Vincente further testified that he believed J.S.S. satisfied the standard for an order for involuntary medication. (82:13; App. 18).

The County also called Officer Brent Wittman, a police officer with the City of Neenah Police Department. (82:28; App. 33). Officer Wittman testified that he was dispatched to J.J.S.'s home on July 3, 2023. (82:29; App. 34). J.J.S.'s mother called to report that J.J.S. "had a hammer and [was] out of control." (82:29; App. 34). However, J.J.S.'s mother indicated that none of J.J.S.'s behavior "threatened her, but [was] just very erratic." (82:29; App. 34). Officer Wittman also noted that he never saw J.J.S. armed with the hammer as they were talking through a window. (82:32; App. 37). The County moved Officer Wittman's report into evidence as exhibit two. (82:31; App. 36). J.J.S. objected as the report contained hearsay. (82:31; App. 36). The court admitted the report over the objection as it fell into "the public records exception to the hearsay rule." (82:31; App. 36).

Finally, J.J.S. testified. (82:35; App. 40). J.J.S. acknowledged suffering from depression and anxiety, and testified about the medications he was taking, and his willingness to keep taking them as prescribed. (82:35; App. 40). J.J.S. further testified that he had to be taken off one of the medications because of an infection due to low white blood cell count. (82:35-36; App. 40-41). Finally, J.J.S. testified that he did not tell Dr. Vincente about any suicidal thoughts. (82:36; App. 41).

At the conclusion of the hearing, the court entered an order extending J.J.S.'s commitment for one year. (82:41; App. 46). The court also entered an

order allowing J.J.S. to be medicated without consent. (82:43; App. 48). The court placed the following findings on the record:

> All right. Court finds, basically, upon the hearing that was held today and upon the Dr. Vincente's testimony, together with the officer's testimony, the [c]ourt finds that grounds for extension of the commitment have been established, that the subject here does have a mental illness as specified by the doctor, unspecified schizophrenia spectrum with psychosis.
>
> Court finds that there was testimony by the doctor, and with some substantiation of that testimony of the factors that the doctor was relying upon, indicating that [J.J.S.] was incompetent to take medication or treatment and dangerous because there was a substantial probability that he is incapable of expressing an understanding of the advantages and disadvantages of accepting medication or treatment, the alternatives and if the – and – or the alternatives to the treatment, and also incapable of applying an understanding of the advantages, disadvantages, and alternatives.
>
> Court does find that he does need treatment to prevent further disability. Again, the doctor testified of concerns if he was untreated. Also talked about decompensation when he was not treated.
>
> Court finds if untreated the subject will lack services necessary for his health, safety, and he will suffer – likely will suffer if left untreated. Severe mental, emotional, physical harm will

> result in a loss of his ability to function independently in a community or loss of volitional control over his thoughts. And, specifically, there was more testimony on the volitional control over his thoughts, which was the paranoia, delusions. There is no reasonable provision for his care or treatment in the community. And the [c]ourt finds that this is manifested both from [J.J.S.'s] treatment history and there is a substantial likelihood, based upon his treatment record, that he would be a proper subject for commitment if treatment were withdrawn.
>
> Court finds, again, he is a proper subject for treatment. He is a resident of Winnebago County.
>
> Court orders that the petition is granted. [J.J.S.] is committed for an extension from the date of this hearing for – hearing for a period of 12 months. Committed to the care and custody of Winnebago County Department, and the maximum level of treatment the [c]ourt is going to note is outpatient with conditions.

(82:40-42; App. 45-47).

The circuit court entered written orders extending J.J.S.'s commitment under Wis. Stats. §§ 51.20(1)(a)2.e. and (1)(am) and authorizing involuntary medication and treatment on December 1, 2023. (71:1; 72:1; App. 3, 5). This appeal follows.

ARGUMENT

I. The extension of commitment order should be vacated because the court failed to make specific factual findings on dangerousness with reference to a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2.

In this case, the court concluded that J.J.S. was dangerous under Wis. Stat. § 51.20(1)(a)2.e. The court indicated that this dangerousness was manifested by a substantial likelihood, based on J.J.S.'s treatment history, that J.J.S. would be a proper subject for commitment if treatment were withdrawn. The factual findings underpinning this conclusion, however, were exceedingly sparse. Because the court failed to make specific factual findings of dangerousness, J.J.S. was not provided the appropriate level of due process necessary to prevent a potentially unlawful deprivation of his liberty. The recommitment order therefore should be vacated.

A. General principles of involuntary commitment under Chapter 51 and the standard of review.

To involuntarily commit a person under Chapter 51, the County must prove that the person is mentally ill, a proper subject for treatment, and dangerous. Wis. Stat. § 51.20(1). At the impending expiration of the initial six-month commitment order, the County may seek an extension of the order for up to one year. Wis. Stat. § 51.20(13)(g). The County must prove the same

three elements in order to recommit an individual. *Waukesha Cty. v. J.W.J.*, 2017 WI 57, ¶ 20, 375 Wis. 2d 542, 895 N.W.2d 783. The County must prove these elements by clear and convincing evidence. Wis. Stat. § 51.20(13)(e).

This Court independently reviews the application of facts to the applicable statute. *Outagamie Cty. v. Melanie L.*, 2013 WI 67, ¶ 39, 349 Wis. 2d 148, 833 N.W.2d 607. To the extend the circuit court made findings of fact, those rulings will not be disturbed unless clearly erroneous. *Id.* at ¶ 38.

B. The court failed to make specific factual findings on the record as to J.J.S.'s dangerousness with reference to the subdivision paragraphs of Wis. Stat. § 51.20(1)(a).

Wisconsin law provides five different definitions for "dangerous." *See* Wis. Stat. § 51.20(1)(a)2.a.-e. Specifically, a person is dangerous if he or she does any of the following:

> a. Evidences a substantial probability of physical harm to himself or herself as manifested by evidence of recent threats or attempts at suicide or serious bodily harm.
>
> b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or 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. . . .

c. Evidences such impaired judgment, manifested by evidence of a pattern of recent acts or omissions, that there is a substantial probability of physical impairment or injury to himself or herself or other individuals. . . .

d. Evidences behavior manifested by recent acts or omissions that, due to mental illness, he or she is unable to satisfy basic needs for nourishment, medical care, shelter or safety without prompt and adequate treatment so that a substantial probability exists that death, serious physical injury, serious physical debilitation, or serious physical disease will imminently ensue unless the individual receives prompt and adequate treatment for this mental illness. . . .

e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability as demonstrated by both the individual's treatment history and his or her

> recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions. . . .

Wis. Stat. § 51.20(1)(a)2.a.-e.

In recommitment proceedings, dangerousness may also be proven in the following manner:

> If the individual has been the subject of inpatient treatment for mental illness . . . immediately prior to the commencement of the proceedings as a result of . . . a commitment or protective placement ordered by a court under this section . . . the requirements of a recent overt act, attempt or threat to act under par. (a)2.a. or b., pattern of recent acts or omissions under par. (a)2.c. or e., or recent behavior under par. (a)2.d. may be satisfied by showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn.

Wis. Stat. § 51.20(1)(am).

Regarding the different dangerousness standards set forth in Wis. Stats. §§ 51.20(1)(a)2. and 51.20(1)(am), the Wisconsin Supreme Court held in *D.J.W.* that it would henceforth require circuit courts

in recommitment proceedings "to make specific factual findings with references to the subdivision paragraph of § 51.20(1)(a)2. on which the recommitment is based." *Langlade Cty. v. D.J.W.*, 2020 WI 41, ¶ 40, 391 Wis. 2d 231, 942 N.W.2d 277.[1]

Doing so, the court stated, will serve two purposes. *Id.* at ¶ 42. First, it will provide clarity and extra protection to patients regarding the underlying basis for the recommitment. *Id.* at ¶¶ 42-43. In this respect, the court noted that the "United States Supreme Court 'repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.'" *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 425 (1979)). "Freedom from physical restraint," the court explained, "is a fundamental right that 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" *Id.* (quoting *State v. Post*, 197 Wis. 2d 279, 302, 541 N.W.2d 115 (1995)).

The Wisconsin Supreme Court further stated that, given the importance of the liberty interest at stake, the accompanying protections should mirror the serious nature of the proceedings. *Id.* at ¶ 43. According to the Wisconsin Supreme Court, circuit courts are therefore required to provide *specific factual*

[1] As this Court has explained, "*D.J.W.* requires a circuit court to provide *both* the applicable subdivision paragraph *and* specific factual findings to support a recommitment decision." *Ozaukee Cty. v. J.D.A.*, No. 2021AP1148, unpublished slip op., ¶ 25 (WI App Dec. 15, 2021) (App. 62) (emphasis in original).

findings with reference to the subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. on which the recommitment is based. *Id.* This is to provide increased protections to patients to ensure that recommitments are based on sufficient evidence. *Id.*

Second, the Wisconsin Supreme Court stated that the requirement of specific factual findings with reference to a subdivision paragraph of Wis. Stat. § 51.20(1)(a)2. will clarify issues raised on appeal of recommitment orders and thereby ensure the soundness of judicial decision-making, especially with respect to challenges based on the sufficiency of the evidence. *Id.* at ¶ 44. "A more substantial record will better equip appellate courts to do their job, further ensuring meaningful appellate review of the evidence presented in recommitment proceedings." *Id.*

Here, the circuit court found dangerousness based on Wis. Stat. § 51.20(1)(a)2.e. and (1)(am) (71:1; App. 3). The court noted that this was manifested by J.J.S.'s treatment history and his recent acts or omissions and that there was a substantial likelihood, based on J.J.S.'s treatment record, that he would be a proper subject for commitment if treatment were withdrawn. (71:1; App. 3). The court based its finding almost entirely on the testimony of Dr. Vincente. (82:40; App. 45). While the court referenced Dr. Vincente's testimony, the court did not make any factual findings based on this testimony.

Additionally, while the court noted that its finding of dangerousness was based partially on

J.J.S.'s recent acts or omissions, the court did not make any findings as to what those acts or omissions were. The court did not make *any* findings or note any recent acts or omissions by J.J.S. in making its findings. The court appeared to simply read the statutory language, occasionally substituting J.J.S.'s name for the general "he" or "the individual" in the statute.

Finally, the court indicated that dangerousness was evidenced by a substantial likelihood, based on J.J.S.'s treatment record, that J.J.S. would be a proper subject for commitment if treatment were withdrawn. (71:1; 82:41; App. 3, 46). The court made no factual findings regarding how this standard of dangerousness was evidenced. In its ruling, the court simply noted that it found "there is a substantial likelihood, based upon his treatment record, that he would be a proper subject for commitment if treatment were withdrawn." (82:41; App. 46). There were no findings of *fact* specific to J.J.S.'s substantial likelihood that he would be a proper subject for commitment if treatment were withdrawn. *See D.J.W.*, 2020 WI 41, ¶ 47 (noting that "[a] determination of dangerousness is not a factual determination, but a legal one based on underlying facts.").

At no point during the court's remarks did it "set out what it looked at and what it heard to form the basis for its opinion." *See Winnebago Cty. v. B.R.C.*,No. 2023AP1842, unpublished slip op., ¶ 18 (WI App Feb.

14, 2024) (App. 72).[2] Additionally, the court did not "summarize the testimony that supports (or does not support) a finding of mental illness, dangerousness, and treatability" nor did the court "state which witnesses it found to be credible." *See id.* (App. 72-73). While the court did state with sufficient clarity the subsection under which it found J.J.S. to be dangerous, the court did not "tie the evidence to the standard." *See id.* (App. 73).

Accordingly, because the circuit court failed to make specific factual findings regarding the standard of dangerousness it found applied, its extension of commitment order should be vacated. The extension of J.J.S.'s commitment should therefore be vacated, as should his involuntary medication and treatment order, as an order for involuntary medication and treatment can only exist during the term of a valid commitment. *See* Wis. Stat. § 51.61(1)(g)3.

Finally, outright reversal of the extension of commitment and involuntary medication orders is the appropriate remedy for the circuit court's error, rather than a remand for the court to comply with *D.J.W. Sheboygan Cty. v. M.W.*, 2022 WI 40, ¶ 38, 402 Wis. 2d 1, 974 N.W.2d 733. Though the court held a hearing on the extension of J.J.S.'s commitment prior to the expiration of the previous commitment order, the court

[2] Cited pursuant to Wis. Stat. § (Rule) 809.23(3)(b) for persuasive value. A copy of the opinion is included in the appendix to this brief pursuant to Wis. Stat. § (Rule) 809.23(3)(c).

failed to comply with its obligations under *D.J.W.* during the hearing, and thus failed to enter a valid order. At this point, the prior commitment that J.J.S. was under has long since expired and, as a result, the circuit court now lacks competency to conduct further proceedings on the County's petition for an extension of the commitment. *See id.*

CONCLUSION

For the reasons stated above, J.J.S. respectfully requests this Court vacate the circuit court's extension of commitment and involuntary medication orders.

Dated this 23rd day of September, 2024.

Respectfully submitted,

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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 2,914 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 23rd day of September, 2024.

Signed:
Electronically signed by
Olivia Garman
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