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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2024AP1601

In the matter of the mental commitment of J.D.M.:

WINNEBAGO COUNTY,

Petitioner-Respondent,

v.

J.D.M.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

1. Whether evidence is sufficient to support a finding of proof of current dangerousness for a recommitment order, where the evidence presented related to behavior displayed prior to an initial commitment and medication order?

2. Whether courts need clarification of the ruling in *Virgil D.*,[1] that mere disagreement with a doctor does not mean that individuals should lose the right to refuse medication?

CRITERIA FOR REVIEW

Following an order of commitment, "[e]ach extension hearing requires proof of *current* dangerousness..." *Portage County v. J.W.K.*, 2019 WI 54, ¶24, 386 Wis. 2d 672, 927 N.W.2d 509. Review is needed to clarify that proof of current dangerousness cannot rely on stale information, because this issue will recur unless it is resolved by this Court. Wis. Stat. § 809.62(1r)(c)3.

STATEMENT OF FACTS

Winnebago County sought a civil commitment and an involuntary medication order for J.D.M.

[1] *Virgil D. v. Rock County*, 189 Wis. 2d 1, 524 N.W.2d 894 (1994).

(hereinafter, "Josh")[2], pursuant to Wis. Stat. § 51.20(1)(a). (3). Following a probable cause hearing and a one-day jury trial, the Winnebago County Circuit Court entered an order, committing Josh for involuntary medication and treatment. (18), (19), (42). Josh, an inmate of a Wisconsin State Prison, was ordered committed for a six-month term. (42:1-2).

A petition for recommitment was filed on September 7, 2023. (70). The petition alleged a substantial likelihood of dangerousness and referenced the examiner's report. (70). Josh was appointed counsel and demanded a jury trial, pursuant to Wis. Stat. § 51.20(11). (74), (76). A jury trial commenced on October 9, 2023. (125).

At trial, the County proceeded on all five standards of commitment, pursuant to Wis. Stat. §§ 51.20(2)(b)2.a. through 2.e. (125:216).

At trial, the County called four witnesses. (125:2-3). The first witness, Dr. Jenna Nelson, was a licensed psychologist at the Wisconsin Resource Center (WRC). (125:49). Dr. Nelson explained her role as a psychologist and her interactions with Josh. (125:49-52). Josh came to the WRC in a decompensated state; he was treated and, for a time voluntarily accepted treatment, but then demonstrated decompensation. (125:52). Dr. Nelson had observed Josh in both medicated and unmedicated states. (125:76-77).

[2] Pursuant to Wis. Stat. (Rule) 809.19(1)(g), J.D.M. will be referred to by the pseudonym "Josh".

Dr. Nelson's diagnoses of Josh included major depression, multiple episodes, with psychotic features, described as distortions in thought, or "his thoughts are separating from reality." (125:82-83). She described his condition as treatable, with psychoeducation and prescription medications. (125:84). Dr. Nelson opined that Josh was demonstrating some depression, but did not want to take medication. (125:87-88).

Dr. Nelson described a particular encounter with Josh in which he was unwilling to discuss some of the concerns that WRC staff has raised about him. (125:59). Dr. Nelson identified the staff's concerns as warning signs of potential decompensation. (125:59). Dr. Nelson explained that staff had observed Josh in unassigned areas of the prison; he had been observed with his hands in his pants; and he had not maintained his fitness schedule, an identified coping skill for him. (125:68). When Dr. Nelson asked Josh about these concerns, he stated that the staff were "nitpicking him." (125:69). Josh further declined to provide definitive answers to Dr. Nelson's questions, answered in a louder-than-usual tone, and appeared irritable. (125:71, 73).

Dr. Nelson also explained there was a concern that Josh was not eating all of his food, but was instead throwing it at the wall. (125:72-73). The unconsumed food, which was accumulating, resulted in a rotting smell in his room. (125:73). Josh had explained to Dr. Nelson that he was being fed "prison food," and he wasn't eating it and wasn't concerned

about it. (125:78). However, Josh had asked if his food was contaminated, specifically with feces. (125:84).

Based upon Dr. Nelson's review of Josh's history, his change in presentation and uncooperative answers to her questions during this encounter, she stated she was concerned for his safety and the safety of others. (125:71). Dr. Nelson noted Josh had never before raised his voice to her. (125:73). Dr. Nelson felt fearful for her safety, based upon her knowledge of Josh's history. (125:73).

When Dr. Nelson met with Josh again, two months later, Josh did not appear to have insight into needing mental health treatment. (125:79). Dr. Nelson explained that Josh does understand his diagnosis, but that he disagrees with the warning signs. (125:80-81). She explained Josh's warning signs were that he would stop eating, would not sleep at night, would isolate in his room, withdrawing, and start pacing. (125:81).

While Josh was aware of his diagnosis, he wanted to take care of himself, without medication. (125:88-89, 95). But, he struggled to recognize his warning signs and to reach out for help. (125:89). In discussing his medications with Dr. Nelson, Josh had expressed that he liked his current medication better than his previous medication. (125:93). He also discussed the side effects of his medications. (125:93). However, Josh did express to Dr. Nelson that "he didn't want to be a guinea pig to the medication." (125:94).

While Josh was participating in group classes, Dr. Nelson opined that he was only benefitting from the classes as a result of being medicated. (125:96-101).

The County's second witness, Brett VandeWalle, was a unit supervisor at the WRC. (125:103, 112-13). Mr. VandeWalle had known Josh for about two years. (125:103). Josh had lived on the most acute psychiatric unit at the WRC, supervised by Mr. VandeWalle. (125:103-104). While his office is on the unit, Mr. VandeWalle does not have an open-door policy. (125:106-107). According to Mr. VandeWalle, one day Josh walked into his office, looked at him, and in a loud voice asked if he "would feel disrespected if someone was shitting in [his] food." (125:107). Mr. VandeWalle reassured Josh that the WRC was not messing with his food. (125:107). Josh then followed up with another question, about someone spitting in his food, and again Mr. VandeWalle tried to reassure him the WRC wasn't doing anything to his food. (125:107-108).

Mr. VandeWalle also described another incident, in which he observed Josh and other residents returning from lunch. (125:110). Instead of proceeding directly to his own room, Josh walked to the threshold of another resident's room. (125:110). The other resident was inside the room. (125:110). Having observed the body language of Josh and the other resident, Mr. VandeWalle thought that the two might fight, so he and another staffer approached to diffuse the situation. (125:110). While Josh did not immediately comply with orders to step aside, he

eventually did. (125:110). When asked if he was alright, Josh answered "this dude is inside my body." (125:111). This comment seemed "strange" and "bizarre." (125:115-16). This second incident occurred within about two weeks of the first, and at the time, Josh was not medicated. (125:112).

Mr. VandeWalle testified that he had observed Josh both while he was medicated and while he was unmedicated. Mr. VandeWalle explained that Josh's hygiene and cleanliness of his room were better when he was medicated. (125:113). Further, his mood and communication were better when Josh was medicated. (125:113). When unmedicated, Josh would frequently pace, and when spoken to by staff, Josh would look at them, and then look away, without responding. (125:2113).

Mr. VandeWalle described Josh's room when he was unmedicated as having "a mixture of saliva and food… almost like… a mural smeared all over the white wall." (125:114-15). While on medication, Josh kept his room clean and maintained his hygiene. (125:113, 115).

The County's third witness, Dr. George Monese, was the psychiatrist who treated Josh from the time of his admission at the WRC in late 2021, until March of 2023, when a new psychiatrist, Dr. Mikheyev took over. (125:123). Dr. Monese had examined Josh multiple times and prescribed him with a long-acting injectable psychotropic or mood disorder medication,

paliperidone, also called Invega, as well as an antidepressant. (125:124, 140, 146).

Dr. Monese was familiar with Josh's medical history and collaborated with other team members regarding Josh's care. (125:124). Dr. Monese explained that in early 2022, while unmedicated, Josh could and would "throw[] his throat from left to right for about a centimeter diversion from the midline." (125:128-131). Josh had explained to Dr. Monese that he had a sensation of something in his throat and was trying to get rid of that sensation. (125:128). Josh would physically manipulate his throat with his hands. (125:130). Dr. Monese testified that this manipulation could have damaged vital organs, such as arteries, and caused significant damage or even death. (125:130).

Dr. Monese also stated that upon arriving at the WRC in late 2021 and into early 2022, Josh suffered a progressive, substantial weight loss, occurring over months, as Josh restricted his food intake. (125:131). The weight loss was enough to put Josh at a high risk of "refeeding syndrome" – a condition in which, upon consuming normal food again, can result in death. (125:131-32).

Dr. Monese's observations of Josh prompted him to seek a medication order from the court, to address Josh's physical condition surrounding his weight loss. (125:132, 134). This temporary guardianship enabled Dr. Monese to obtain lab work from Josh, some of which was abnormal, possibly due to Josh's weight loss. (125:134-35, 137).

Dr. Monese diagnosed Josh with major mood disorder, conceptualized as psychotic depression; that is, "when he's severely depressed, he becomes psychotic." (125:138). Dr. Monese discussed with Josh the advantages of psychotropic medication. (125:138-39). They also discussed the disadvantages, which included weight gain, stiffness or other unknown allergic reactions. (125:140). Josh was prescribed the long-acting injectable paliperidone. (125:140-141, 146) Dr. Monese testified that, while other medications could treat Josh's condition, they are administered orally, and Josh was unwilling to take them, preferring to stop all medication. (124:141, 145-46). Ultimately, Dr. Monese opined, Josh lacked insight into his mental illness and need for treatment. (125:145-46).

The County's final witness, Dr. Konstantin Mikheyev, was an attending psychiatrist at WRC, where he treated Josh. (125:155-56). Dr. Mikheyev testified regarding Josh's diagnosis of a major depressive disorder, and opined that the appropriate treatment would be either mood therapy or a combination of therapy and paliperidone and an antidepressant medication. (125:159, 161-162). Dr. Mikheyev explained that Josh was currently stable, accepting recommended treatment with the exception of starting an antidepressant. (125:157-158).

Josh's psychologist had approached Dr. Mikheyev with concerns that Josh was displaying depression. (125:158, 171). Dr. Mikheyev discussed with Josh some of his symptoms and determined the

"remedy" to be mirtazapine, an antidepressant. (125:159). Josh's response was not to expressly refuse to take the medication. (125:162-63). Instead, "[h]e keeps telling [Dr. Mikheyev] he doesn't want to be on it." (125:160, 174). Josh also expressed concern that his past conduct was being used against him. (125:172-73). Josh asked Dr. Mikheyev, hypothetically, whether he could stop the medication, see how he does, and if he needs help, he would ask for treatment and medication. (125:173).

Dr. Mikheyev stated that Josh did not believe he was mentally ill, and that he lacked the insight to remain at baseline in his daily functioning. (125:160). According to Dr. Mikheyev, the risk of not remaining at baseline is that, should Josh go off treatment or decompensate, it would be more difficult to bring him back to baseline, and fewer medications would be available for doing so. (125:161). When there is a setback, often the remedy is to increase the dose, which increases the risks of side effects. (125:161).

The paliperidone that Josh receives is an antipsychotic and mood stabilizing medication. (125:164). Dr. Mikheyev discussed the advantages, disadvantages, and alternatives of taking this medication with Josh. (125:164). However, Dr. Mikheyev stated Josh is not capable of applying an understanding of the advantages, disadvantages, and alternatives of that medication to his own condition. (125:164). Instead, Josh lacks judgment and appropriate insight. (125:165).

Dr. Mikeheyev testified that he believed the least restrictive setting for Josh is the WRC, where Josh is presently placed through the Department of Corrections. (125:167). His care should involve taking his monthly medication and follow up in the community with his treatment team. (125:167).

When asked whether his condition was treatable, Dr. Mikheyev answered that Josh's condition "could be affected in the therapeutic way" and that "[i]t's not curative, but it could be affected to the point where he can function appropriately." (125:155).

Following testimony, the County argued it had satisfied its burden of proof. (125:203-209). In regards to dangerousness, the County asserted the evidence proved dangerousness under all five standards. (125:216).

The jury returned a verdict, finding Josh was mentally ill and was a proper subject for treatment. (125:234), (105:1). The jury further found Josh was a danger to himself or others, and found he would be dangerous under standards (c), (d), and (e) if treatment were withdrawn. (125:234), (105:1-2).

The circuit court entered judgment on the special verdicts and found that the County had met its burden to involuntarily commit Josh, and to

administer psychotropic drugs against his will.[3] (125:235-236). The court executed an extension order for 12 months, and further entered an order for involuntary medication and treatment. (125:236), (92), (93), (94). As the reasons or basis support the court's decision to enter the medication order (pursuant to § 51.61(1)(g)3), the court simply and without elaboration stated that "there was testimony satisfactory to meet that element." (125:240).

Josh timely appealed the recommitment order, and on April 16, 2025, the court of appeals affirmed the recommitment and involuntary medication orders. *Winnebago County v. J.D.M.*, 2024AP1601 (April 16, 2025). Specifically, the court of appeals relied upon the evidence presented of Josh's "dangerous self-harming conduct, including starving himself and also manually manipulating/pulling/"very grotesquely deviating his throat" in such a way that it causes great danger to himself." *Id*., ¶¶27-28. The court of appeals found that the evidence of Josh's throat manipulation and starvation were "unquestionably sufficient evidence to support the jury's verdict" and showed a pattern of

[3] Pursuant to Wis. Stat. § 51.61(1)(g)3m, upon the commitment order under § 51.20(1)(a)2.e., the court was required to enter a medication and/or treatment order. Pursuant to Wis. Stat. § 51.61(1)(g)3, upon the commitment orders pursuant to §§ 51.20(1)(a)2.c. and 2.d., the court was permitting to enter a medication and/or treatment order, upon finding that Josh was not competent to refuse medication or treatment or the medication or treatment was necessary to prevent a serious physical harm to Josh or others.

conduct of dangerousness under the third standard. *Id.*, ¶29.

ARGUMENT

I. Proof of a committee's dangerousness at a recommitment hearing must be established by current evidence of dangerousness, and should not incorporate stale information used at an initial commitment hearing.

At a recommitment hearing, the government must show that a patient is currently dangerous. *Portage County v. J.W.K.*, 2019 WI 54, ¶24, 386 Wis. 2d 672, 927 N.W.2d 509 (*citing* Wis. Stat. § 51.20(1)(2) and 13(g)3.). "It is not enough that the individual was at one point a proper subject for commitment." *Id.* Rather, the "County must prove the individual 'is dangerous.'" *Id.*

The relevant definition of dangerousness here is provided in Wis. Stat. § 51.20(1)(a)2.c. That subsection of the statute provides that a person is "dangerous" if he"

> 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. The probability of physical impairment or injury is not substantial… if reasonable provision for the subject individual's protection is available in the

> community and there is a reasonable probability that the individual will avail himself or herself of these services…

Wis. Stat. § 51.20(1)(a)2.c. (emphasis added).

A "substantial probability" as used in Chapter 51 means "much more likely than not." *State v. Curiel*, 227 Wis. 2d 289, 414, 597 N.W.2d 697 (1999) ("We held that the term 'substantially probable' as used in ch. 980 means 'much more likely than not.' As the terms are to be used in a consistent manner between the chapters, we can conceive of no reason why the term as used in ch. 51 should be construed any differently than it is under ch. 980").

At trial, the County elicited testimony that Josh had concerns regarding contaminated food. (125:107, 78). The government also presented testimony of an isolated incident with another resident, during which Josh made a bizarre comment. (125:110-112, 116). But these singular incidents fall far below the statutory bar. Neither incident presents as a "pattern of recent acts or omissions[] that there is a substantial probability of physical impairment or injury" to Josh or another.

Moreover, the County elicited testimony of Dr. Monese, who testified that Josh would manually manipulate his throat by "throwing his throat from left to right for about a centimeter diversion from the midline." (125:128-131). However, this conduct occurred prior to Josh's initial commitment, while unmedicated, and prompted the doctor to seek the

initial commitment. (125:128-32, 134). However, following Josh's medication, and even while unmedicated, he did not exhibit the same behavior, and certainly there was no evidence a pattern of this behavior. See Wis. Stat. § 51.20(1)(a)2.c.

The County bore the burden of proving a substantial probability of impairment or injury. Wis. Stat. § 51.20(1)(a)2.c. The phrase "substantial probability" means "much more likely than not." *D.K.*, 390 Wis. 2d 50, ¶35. Although certainty is not required, "mere possibility and conjecture" are insufficient. *Id.*, ¶52. Here, Dr. Monese's testimony regarding Josh's throat manipulation was the evidence the Court of Appeals cited to find a pattern of conduct of dangerousness.

But, the single instance of throat manipulation Josh demonstrated prior to the first commitment order, and prior to medication, falls far short from a pattern of conduct.

Therefore, the finding that Josh was dangerous, and should have been subjected to involuntary commitment, was based upon irrelevant and stale evidence, which did not support a finding of a pattern of conduct of dangerousness. Accordingly, Josh's involuntary commitment is invalid, and must be vacated along with the corresponding order for involuntary treatment and medication.

II. This Court should grant review to clarify that *Virgil D.* does *not* permit involuntarily medicating a well-informed person based solely on disagreement with medical opinions as to a mental illness diagnosis.

The Fourteenth Amendment protects a person's liberty interests in refusing unwanted medical treatment and in avoiding forcible medication with psychotropic drugs. *Outagamie County v. Melanie L.*, 2013 WI 67, ¶¶43-44, 349 Wis. 148, 833 N.W.2d 607. Likewise, Wis. Stat. § 51.61(1)(g)3 recognizes a person's right, through informed consent, to make decisions about treatment which affect their body. Doctors advise individuals on the available alternative courses of treatment, but the individual decides whether to consent to the treatment, if the person is competent to do so. *State ex rel. Jones v. Gerhardstein*, 141 Wis. 2d 710, 739-40, 416 N.W.2d 883 (1987).

Even if a person is mentally ill, dangerous and under a commitment, they retain the right to consent to the administration of psychotropic drugs. *Id.*, 141 Wis. 2d at 742. "An individual may be psychotic, yet nevertheless capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision." *Melanie L.*, 2013 WI 67, ¶45 *quoting Jones*, 141 Wis. 2d at 728). Furthermore, the fact that a person disagrees with the doctor's recommendation does not prove that they are incompetent to make medication decisions.

Here, Josh demonstrated his understanding of the implications of taking medication, and was able to discuss the side effects of his medications. (125:80-81). Moreover, Josh expressed a reluctance to wards accepting medications, because he did not want to be a "guinea pig" for those medications. (125:88-89, 93-95, 160, 174). Josh expressed his desire to not be medicated, but instead to be able to seek assistance from his treatment team if appropriate and necessary. (125:173). Thus, Josh disagreed with the recommendations of his treatment team, specifically with respect to his medications. He simply did not want to be medicated. The record here does not support a finding that Josh was not capable of evaluating the advantages and disadvantages of taking psychotropic drugs and making an informed decision.

The court of appeals recited the conclusions of the doctors, that Josh does not understand his mental illness. But the doctors' conclusions were based upon the premise that Josh did not agree, and therefore did not understand. This overlooks the holding of *Virgil D*, that disagreement with a doctor does not mean that Josh should lose his right to refuse medication. *Virgil D. v. Rock County*, 189 Wis. 2d 1, 15-16, 524 N.W.2d 894 (1994) (*citing Jones*, 141 Wis. 2d at 728). The focus should not be on the disagreement, but rather, on whether Josh understands the implications of his decision(s).

CONCLUSION

For the reasons stated above, J.D.M asks this Court to grant review, reverse the decision of the court of appeals, and remand to the circuit court with instructions to reverse the orders of commitment entered in this matter.

Dated this 15th day of May, 2025.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in s. s. 809.19(8)(b), (bm) and 809.62(4). The length of this brief is 3,475 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 15th day of May, 2025.

Signed:

Electronically signed by
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