



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 12, 2021

Sheila T. Reiff
Clerk, Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, Wisconsin 53701-1688

Re: *State of Wisconsin v. Joseph G. Green*
Case No. 2020AP298-CR
District IV

Dear Ms. Reiff:

This Court asks the parties in the above-captioned case to provide answers to the Court's follow-up questions to Mr. Green's remand petition filed on April 14, 2021, and the State's response.

First, the Court asks: "Whether WIS. STAT. RULE 809.26(1) or 809.62(5) prevent this court from remanding the record while the State's petition for review remains pending"? (Order 2, Apr. 28, 2021.)

Answer: Section (Rule) 809.62(5) "stays further proceedings in the court of appeals" while a petition for review is pending. This Court should therefore deny the remand petition pending the supreme court's decision on the State's petition for review. If the State's petition for review is granted, Mr. Green should renew his remand petition in that court.

Analysis: Section (Rule) 809.26(1) provides that the clerk "shall" remit the record to the circuit court court "31 days after the filing of the decision or order of the court, or as soon thereafter as practicable. If a petition for review is filed pursuant to s. 809.62, the transmittal is stayed until the supreme court rules on the petition." The filing of a petition for review "stays further proceedings in the court of appeals." Wis.

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Stat. § (Rule) 809.62(5). The State has been unable to find any case authority interpreting these provisions. In addition, “any party may petition the appellate court for remand to the circuit court for action upon specific issues.” Wis. Stat. § 808.075(5). There is published case law about this provision, but nothing that matches the procedural posture of the present case.

Although the State was aware of these provisions, it did not discuss them in its response to the remand petition, which, in retrospect, it probably should have. The State assumed that the remand petition was authorized by section 808.075(5), and that the Court would determine whether the remand request under the circumstances of this case—where the State has filed a petition for review of one of the issues decided by this Court—was appropriate. Given the lack of published authority on this question, the State does not know whether this Court or the supreme court has ever ordered a remand in these or similar circumstances.

In responding to the remand petition, the State’s principal concern was to persuade the Court that it should not instruct the circuit court to take the actions on remand advocated by Mr. Green. Therefore, the State focused on explaining to this Court why it should not order the circuit court, on remand, to vacate the December 21, 2020 involuntary medication order. (State’s Pet. Resp. ¶ 11.) Meanwhile, the circuit court has refused to go forward with certain proceedings in this case until remittitur has been accomplished. Combining the uncertainty of the interplay between sections (Rule) 809.26(1), (Rule) 809.62(5), and 808.075(5), and the circuit court’s refusal to go forward with various proceedings, the State decided not to oppose the remand petition.

On further consideration, the State concludes that this Court should not grant the remand petition because of section (Rule) 809.62(5). If that Rule “stays further proceedings in the court of appeals,” it must stay this Court’s ability to grant a remand request. Besides, if the supreme court denies the State’s petition for review, the case will be remitted in accordance with the Rule. And, if the supreme court grants the State’s petition, Mr. Green can renew his request before that court, which will have clear jurisdiction over the case and will be in a better position to determine whether early remand is appropriate or permissible. Thus, the State now concludes that the most appropriate resolution is for this Court to deny the remand petition and for Mr. Green to renew it in the supreme court if it accepts the State’s petition for review.

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Second, the Court asks: “Whether the circuit court has authority under WIS. STAT. §§ 808.075(1) and 806.07 to vacate or otherwise reconsider its December 21, 2020 order without remand of the record”? (Order 2, Apr. 28, 2021.)

Answer: Yes, the circuit court in this case has the authority to hear Mr. Green’s motion to vacate the December 21, 2020 order.

Analysis: Section 806.07(1) provides that a party may move the circuit court to relieve it from an order for one of eight specified reasons. Section 808.075(1) provides that a circuit court may act under section 806.07(1) while an appeal is pending. Assuming that Green’s motion for relief comes within one of section 806.07(1)’s paragraphs, the circuit court can hear the motion while the appeal is pending. Indeed, in this case, the circuit court did not question its authority to enter the December 21, 2020 order during the appeal. Just as it was able to enter that order, it is able to hear a motion to vacate it.

But the circuit court has the authority to review the December 21, 2020 order without remand for a more fundamental reason. That order has never been part of this appeal and has never been before this Court. This appeal was only and exclusively about the involuntary medication order entered on May 20, 2020. And, as explained in the State’s response to the remand petition, the May and December orders are independent, separate, and based on different statutes.¹ (State’s Pet. Resp. ¶¶ 4–6.) The State believes that the circuit court must deny Mr. Green’s motion on procedural grounds, because he did not timely appeal from that order or seek reconsideration. Regardless, the State does not believe that the circuit court must wait until remittitur to resolve the motion. Therefore, a remand prior to the supreme court’s ruling on the State’s partial petition for review is not necessary to the circuit court’s ability to review the December order.

Meanwhile, in addition to refusing to rule on Mr. Green’s motion to vacate the December 21, 2020 order, the circuit court has refused to hold an evidentiary hearing. While the December 21, 2020 order still stands, the State is nevertheless prepared to back that order up with new evidence to support the continued involuntary medication of Mr. Green under Wis. Stat. § 971.14(5)(d) that comports with *Sell*² and this Court’s opinion in the present case. The circuit court scheduled but then cancelled an evidentiary hearing on that topic because it believes it cannot act until

¹ The May 20 order was based on Wis. Stat. § 971.14(4)(b). The December 21 order was based on Wis. Stat. § 971.14(5)(d).

² *Sell v. United States*, 539 U.S. 166 (2003).

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remittitur. Again, the State disagrees. Just as the court was authorized to enter the December 21, 2020 order in the first place, and is authorized to hear Mr. Green's belated challenge to that order, it is authorized to conduct an evidentiary hearing to ensure that the current involuntary medication order comports with *Sell* and this Court's decision in the present case.

In conclusion, the pendency of the State's petition for review does not prevent the circuit court from deciding Mr. Green's challenge to the December 21, 2020 order or from holding an evidentiary hearing as to whether Mr. Green's involuntary medication under Wis. Stat. § 971.14(5)(d) should continue.

Sincerely,



Maura F. Whelan
Assistant Attorney General

MFW:ln

cc: Kathilynne Grotelueschen
Counsel for Defendant-Appellant