COURT OF APPEALS
DECISION
DATED AND RELEASED

October 12, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2684-W

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN EX REL.
GEORGE H.,

Petitioner,

v.

NANCY FENNEMA, ACTING DIRECTOR
OF ROCK COUNTY HUMAN SERVICES,
HER AGENTS, EMPLOYEES, OR THOSE
ACTING BY HER DIRECTION, OR ON HER BEHALF,

Respondents.

HABEAS CORPUS original proceeding. *Writ denied*.

GARTZKE, P.J. George H., by his attorneys, petitioned this court for a writ of habeas corpus to require the director of the Rock County Health Center to release him. He alleged he was taken into custody on the morning of September 21, 1995, and held under an emergency detention, § 51.15, STATS., for a probable cause hearing to be held September 26, 1995. At the hearing on the morning of September 26, he objected on grounds of lack of personal jurisdiction for the court's failure to hold the hearing within the statutory time.

Section 51.20(7)(a), STATS., provides that after the filing of a petition for involuntary commitment for treatment, if the individual is detained under § 51.15, the court shall hold a hearing to determine whether there is probable cause to believe the allegations within seventy-two hours after the individual arrives at the facility, excluding Saturdays, Sundays and legal holidays. George asserts that at the hearing neither he nor his attorney requested a postponement. The trial court denied his motion to dismiss and found probable cause.

George asserts that §§ 51.15(5) and 51.20(7)(a), STATS., are unconstitutional in that they deny him due process and equal protection. On October 2, 1995, this court denied his petition for habeas corpus and stated that an opinion would follow.[1]

We first discuss George's claim that the statutes deny him equal protection of the law. The hearing was timely held, if the Saturday, Sunday and legal holidays (Labor Day) exclusions are applied. He asserts in substance that the disparity in the periods persons may be held, depending on the day they are taken into custody, causes denial of equal protection. We disagree.

A party challenging a statute on constitutional grounds must show beyond a reasonable doubt that the statute is unconstitutional. ***State v. McManus***, 152 Wis.2d 113, 129, 447 N.W.2d 654, 660 (1989). George has failed to carry his burden.

As a threshold matter, we determine the classes created by the statutes. One class consists of persons taken into custody sufficiently early in a week so that staff at the facility can determine within seventy-two consecutive hours that grounds for detention no longer exist or hold the probable cause hearing. The second class consists of persons taken into custody at a time in the week such that the facility cannot determine within seventy-two hours that the grounds for detention no longer exist or hold the probable cause hearing, unless Saturdays, Sundays and legal holidays are excluded. We refer to the members of the two classes as "early" and "late" detainees. George is a "late" detainee.

[1] George's application for a writ of habeas corpus is decided by one-judge of the court of appeals. Section 752.31(2)(d), STATS.

George argues that the seventy-two hour provision is ambiguous. We see nothing ambiguous about it. Seventy-two hours is certainly precise. We see no room for argument that it covers only business hours. Seventy-two hours means actual hours. *Compare* ***State ex rel. Lockman v. Gerhardstein***, 107 Wis.2d 325, 326, 320 N.W.2d 27, 28 (Ct. App. 1982) (reference in § 51.20(7)(c), STATS., to "fourteen days" refers to fourteen calendar days rather than business days).

Because George's liberty is infringed, the "early" and the "late" detainee classification must be necessary to achieve or promote a compelling state interest, the means chosen must be carefully tailored, and no less drastic means may be available. ***San Antonio Independent School Dist. v. Rodriguez***, 411 U.S. 1, 16-17 (1973).

In view of the serious private and societal interests involved, the times for holding the probable cause hearing as to early and late detainees do not work unequal protection. The statutory bases for emergency detention are set forth in § 51.15(1), STATS. We need not quote them. It is only under circumstances most dire to the individual or society or both, that a person may be detained under the emergency provisions of § 51.15. The circumstances involve substantial risks to health, even to the point of the life or death of the detainee and others.

Those circumstances give rise to a compelling state interest in determining whether the State has probable cause to go forward with commitment proceedings. That interest cannot be protected except by excluding Saturdays, Sundays and legal holidays. To protect the interest, the State must have the opinion of a health professional. It is common knowledge that health professionals do not necessarily work on weekends or on legal holidays. Excluding Saturdays, Sundays and legal holidays is necessary to provide adequate assessment of late detainees by health professionals.

Unless the State hires additional health professionals to work Saturdays, Sundays and legal holidays, the result could well be an even greater disparity between early and late detainees than now exists. Late detainees would have less access to professional staff than early detainees. A late detainee taken into custody on a Friday morning would have to be examined that day, if

Saturdays, Sundays and legal holidays are not excluded from the seventy-two hour period. Detainees taken into custody on Saturday or Sunday would have to be assessed on Monday or Tuesday. Inadequate assessments could result. The exclusions from the seventy-two hour period remove that potential inadequacy as between early and late detainees.

If the State hired professional staff for Saturdays, Sundays and legal holidays, there would be no need to exclude those days from the seventy-two hour period. However, George does not contend that to satisfy equal protection, the State must indeed provide professional staff on those days.

Because we hold that the statutes involved do not deny George equal protection, and because George's equal protection and due process claims are essentially the same, we need not provide a separate due process analysis. *See* ***Jones v. United States***, 463 U.S. 354, 362 n.10 (1983); *see also* ***State v. McManus***, 152 Wis.2d 113, 130-32, 447 N.W.2d 654, 660-61 (1989).

For the reasons stated, this court denied George's petition for habeas corpus.

By the Court.—Writ denied.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.