COURT OF APPEALS
DECISION
DATED AND FILED

October 22, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0921

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

IN RE THE MENTAL COMMITMENT OF LEE R. A/K/A RAVEN L.:

DANE COUNTY,

PETITIONER-APPELLANT,

V.

LEE R. A/K/A RAVEN L.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

DYKMAN, P.J.[1] Dane County appeals from an order dismissing its petition for Lee R.'s involuntary commitment. The County makes the following

[1] This appeal is decided by one judge pursuant to § 752.31(d), STATS.

claims on appeal: (1) the trial court erred in considering Lee R.'s motion to dismiss after she called Dr. Von Riotte for testimony; (2) the trial court's finding that Lee R. did not evince a substantial probability of physical harm to others is clearly erroneous; and (3) the trial court erred as a matter of law in basing its finding upon the irrelevant and unfounded testimony and report of Dr. Von Riotte. We decline to address this final issue as it was not raised at the trial court level. As for the remaining issues, we conclude: (1) the trial court could consider Dr. Von Riotte's report under § 51.20(9) STATS., because it was part of the trial record; and (2) the trial court's finding is not clearly erroneous. Accordingly, we affirm.

BACKGROUND

In July 1997, Lee R. telephoned the Verona Police Department and stated she would shoot anyone who came out of an adjacent apartment. When the police arrived at Lee R's apartment, she had a loaded revolver in her hand. The police eventually convinced Lee R. to surrender the revolver. Dane County later brought a petition for the involuntary commitment of Lee R. pursuant to § 51.20(1)(a)2.b., STATS., claiming that she was mentally ill and evinced a substantial probability of physical harm to others.

The court appointed two medical experts to examine Lee R., one of whom was Dr. Von Riotte. At the close of plaintiff's case, Lee R. moved for a directed verdict. The trial court asked for the County's consent to consider Dr. Von Riotte's report in making its ruling, and also queried whether it had the authority to consider the report *sua sponte*. Dane County objected to the court considering Dr. Von Riotte's report on a motion for directed verdict and also refused to stipulate to Dr. Von Riotte's qualifications as an expert.

Thereafter, the court and both parties agreed to call Dr. Von Riotte to testify out of order. On direct examination Dr. Von Riotte was asked about her qualifications. The court then granted respondent's motion to dismiss based in part upon Dr. Von Riotte's opinion. Dane County appeals.

DANE COUNTY'S ARGUMENTS

Dane County first claims that the trial court erred in considering the opinion of Dr. Von Riotte on Lee R.'s motion to dismiss. We disagree. Whether § 51.20(9)(a), STATS., permits a trial court to review the report of a court-appointed medical expert is a matter of statutory interpretation. Statutory interpretation is a question of law which we review *de novo*. ***Wisconsin Compensation Fund v. Continental Cas. Co.***, 122 Wis.2d 144, 150, 361 N.W.2d 666, 669 (1985). When interpreting a statute we turn first to the plain language of the statute. ***Hemberger v. Blitzer***, 216 Wis.2d 508, 516, 574 N.W.2d 656, 659 (1998). The plain language of § 51.20(9)(a) requires a court appointed expert to file a report with the court, independent of the parties. We conclude that such a report is properly considered part of the trial record.[2]

The record indicates that the court had received Dr. Von Riotte's report prior to trial, was familiar with its contents, and had marked it as an exhibit. Further, on direct examination, Dr. Von Riotte merely established her

[2] Section § 51.20(9)(a), STATS., states in relevant part:

> [T]he court … shall appoint 2 licensed physicians … to personally examine the subject individual…. A written report shall be made of all such examinations and filed with the court…. The examiners … shall make independent reports to the court…. The report and testimony, if any, by the examiners shall be based on beliefs to a reasonable degree of medical certainty ….

qualifications and gave no opinion testimony. Because Dr. Von Riotte's report was part of the trial record, we conclude that the trial court did not err in considering Dr. Von Riotte's opinion on Lee R.'s motion to dismiss.

Dane County next asserts that the trial court erred in finding that Lee R. did not evince a substantial probability of physical harm to others. The trial court is the ultimate arbiter of the credibility and the weight of the evidence. ***Milwaukee County Combined Community Serv. Bd. v. Athans***, 107 Wis.2d 331, 336, 320 N.W.2d 30, 33 (Ct. App. 1982). Under the clearly erroneous standard, where more than one inference may be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. ***Id.***

Based on the testimony of several witnesses, the trial court held that Lee R. did not evince a substantial probability of harm to others. First, the court agreed with Dr. Von Riotte's opinion that the actions of Lee R. were more indicative of a person who was attempting to get the attention of the police department than someone who intended to harm others. Second, the court noted that Dr. Olson did not have an opinion on Lee R.'s dangerousness. Third, the court disagreed with Dr. Rattan's conclusion that Lee R. evinced a substantial probability of harm to others. Although we may not have drawn the same inferences from the evidence as did the trial court, we cannot say its findings are clearly erroneous.

Finally, the County claims Dr. Von Riotte's opinion of Lee R.'s dangerousness was irrelevant and lacked foundation as a matter of law because it was premised on the belief that Lee R. was not mentally ill. This issue is raised for the first time on appeal. Failure to raise an issue at trial deprives both the adversary and the trial court of the opportunity to address the issue, and it deprives

this court of the benefit of the trial court's insight. ***Terpstra v. Soiltest, Inc.***, 63 Wis.2d 585, 593, 218 N.W.2d 129, 133 (1974). Therefore we decline to address this issue.

By the Court.—Order affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.