COURT OF APPEALS
DECISION
DATED AND FILED

October 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3349 **Cir. Ct. No. 03ME000080**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF AARON J.J.:

SAUK COUNTY,

PETITIONER-RESPONDENT,

V.

AARON J.J.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 DEININGER, P.J.[1] Aaron J. appeals an order denying his motion to vacate an order that committed him for treatment under WIS. STAT. ch. 51. He

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

contends that before accepting a stipulation that grounds exist for a mental commitment under ch. 51, a court must conduct a colloquy with the subject of the proceedings to ensure that he or she knowingly, intelligently and voluntarily agrees to the entry of a commitment order. Because the trial court conducted no colloquy with Aaron similar to those required in criminal and termination of parental rights cases, he claims that the court's acceptance of the stipulation and entry of the commitment order based on it violated his constitutional right to due process. We disagree and affirm the appealed order.

BACKGROUND

¶2 Police placed Aaron on an emergency detention under WIS. STAT. § 51.15(1) because he reportedly engaged in erratic behavior, physically assaulted his mother and resisted the attempts of the police officers to take him into custody. The trial court found after hearing evidence that there was probable cause to believe that Aaron was mentally ill and a danger to himself or to others. The court, proceeding under WIS. STAT. § 51.20, directed that Aaron be detained at the Mendota Mental Health Institute, that he be examined by a psychiatrist and a psychologist, and that medication could be administered to Aaron, regardless of his consent, pending a final hearing on his commitment.

¶3 At the time of the final commitment hearing, Aaron and his attorney stipulated with the county that grounds for a commitment order existed but contested the entry of an order for involuntary medication. The examining psychiatrist testified that Aaron did not understand the advantages and disadvantages of refusing to take the medications prescribed for his condition. Based on the stipulation, the trial court entered an order for a six-month

commitment and, based on the testimony, an order that medication could be administered to Aaron without his consent.

¶4 Aaron later moved to vacate the commitment order, asserting that the trial court violated his right to due process by accepting his stipulation for a commitment order without first conducting a colloquy to ascertain whether his decision to stipulate was knowing, intelligent and voluntary. The trial court, concluding there is no requirement under WIS. STAT. ch. 51 or applicable case law that a court must conduct such a colloquy, denied the motion. Aaron appeals.

ANALYSIS

¶5 Individuals placed on emergency detention under WIS. STAT. § 51.15 may become the subject of mental commitment proceedings under WIS. STAT. § 51.20. The due process standards for ch. 51 proceedings are spelled out in § 51.20(5), which provides, in part:

> The hearings which are required to be held under this chapter shall conform to the essentials of due process and fair treatment including the right to an open hearing, the right to request a closed hearing, the right to counsel, the right to present and cross-examine witnesses, the right to remain silent and the right to a jury trial if requested ….

In addition, the supreme court has held that, in addition to the right to be represented by "adversary counsel" as provided in § 51.20(3), a person facing mental commitment has the right to represent him- or herself, if a court determines that the person has knowingly and voluntarily waived counsel. ***S.Y. v. Eau Claire County***, 162 Wis. 2d 320, 332-36, 469 N.W.2d 836 (1991).

¶6 Conspicuously absent from the due process rights enumerated in WIS. STAT. § 51.20 or discussed in ***S.Y.*** is any procedure akin to those set forth in

WIS. STAT. §§ 48.422(7) and 971.08(1), which require a court, prior to accepting an admission in a parental right termination proceeding or a guilty plea in a criminal case, to ascertain that the parent or defendant knows and understands certain things and is proceeding voluntarily. *See also* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). Aaron argues, however, that persons subject to mental commitment proceedings under WIS. STAT. § 51.20 have a similar right to a colloquy before stipulating to the grounds for commitment as he did in this case. The nature and extent of a party's due process rights when facing governmental action to restrict a person's liberty is a question of constitutional law which we decide de novo. *See* ***State v. Knapp***, 2003 WI 121, ¶29, 265 Wis. 2d 278, 666 N.W.2d 881. We conclude that a court need not conduct a ***Bangert***-like colloquy before accepting a stipulation such as the one Aaron entered in this case.

¶7 We agree with Aaron that, under both Wisconsin and federal law, because an involuntary commitment for mental health treatment constitutes a deprivation of a person's liberty, the subject of a commitment proceeding is constitutionally entitled to certain due process protections. *See* ***Lessard v. Schmidt***, 349 F. Supp. 1078 (E.D. Wis. 1972). The nature and extent of the process that is due, however, is not necessarily identical to that afforded criminal defendants or parents facing a termination of the their rights. Rather, the "requirements of due process are not static; they vary depending upon the importance of the interests involved and the nature of subsequent proceedings." ***Id***. at 1086; *see also* ***Milwaukee County v. Parham***, 95 Wis. 2d 21, 25-26, 289 N.W.2d 326 (Ct. App. 1979) (noting "that the due process standard to be applied in involuntary commitment cases at the hearing stage is to be a flexible one, and need not be as strictly construed as that applied in criminal proceedings").

¶8 Although resulting in a temporary loss of personal liberty, the effects of a civil commitment proceeding under WIS. STAT. § 51.20 are neither as enduring nor potentially life-altering as a criminal conviction or the loss of one's parental rights. Persons who are involuntarily committed may obtain a re-examination and rehearing regarding their need for commitment. *See* § 51.20(16). Commitments cannot be extended beyond the initial six-month order without further proceedings before the trial court, at which the subject is again entitled to adversary counsel in order to contest the extension. *See* § 51.20(13)(g)1. & 3. The fact of the commitment and all records pertaining to it must remain confidential and are sealed from public access. *See* § 51.30. Finally, the purpose of ch. 51 proceedings is not punitive. Rather, it is to provide an individual with treatment and services that will restore his or her mental health as quickly as possible and in "the least restrictive manner consistent with" his or her needs. *See* § 51.20(13)(c)2.

¶9 In short, the differences between ch. 51 commitments and criminal prosecutions or actions to terminate parental rights are significant. We conclude that the constitution does not require that subjects of ch. 51 proceedings be accorded all of the procedural rights granted to criminal defendants or to parents whose rights the state seeks to terminate.

¶10 Aaron maintains, however, that, before accepting a "no contest" stipulation for a commitment order, a trial court must, at a minimum, determine that the subject is competent to waive the right to a hearing on whether grounds exist for the commitment, just as a judicial finding of competency for self representation is required for a valid waiver of counsel. *See* ***S.Y.***, 162 Wis. 2d at 333. Aaron notes that, at both the probable cause and final hearings in this case, the trial court found Aaron to be incompetent to refuse medications because his

mental illness rendered him unable to understand the advantages and disadvantages of taking prescribed medications. Aaron thus suggests that, had the court conducted a colloquy with him prior to accepting his stipulation to the entry of a commitment order, the court would likely have also found him unable to understand the advantages and disadvantages of waiving a final hearing on his commitment.

¶11 We agree that the trial court may well have reached such a conclusion in this case. It is probably also true that in many, if not most, ch. 51 proceedings, if courts were to inquire into a subject's competence prior to a final commitment hearing, the subject's ability to understand the court proceedings and engage in rational decision-making would be found lacking to some degree. We disagree, however, that this means that a court must make such an inquiry prior to accepting a stipulation such as the one in this case.

¶12 We first note that persons who are subject to commitment proceedings under WIS. STAT. ch. 51 are statutorily presumed to be competent to, among other things, manage their own affairs and enter into contracts. *See* § 51.59(1); ***S.Y.***, 162 Wis. 2d at 334. This presumption, together with the requirement that a subject have representation by "adversary counsel" as opposed to a guardian ad litem, reflects a determination that persons subject to ch. 51 proceedings must be allowed to participate in directing the course of the litigation and to have their wishes heard, irrespective of another's estimation of whether what they want is in their best interest. *See* ***Lessard***, 349 F. Supp. at 1098-1100 (concluding that the right to "representative counsel" is not satisfied by the appointment of a guardian ad litem). Requiring a court to decide whether a subject is able to knowingly and intelligently stipulate to one or more issues in a

ch. 51 proceeding would be contrary to the legislative presumption in favor of respecting and preserving a subject's autonomy during commitment proceedings.

¶13 We acknowledge that, notwithstanding the statutory presumption of competence for certain purposes, the legislature also seemingly recognizes that not all persons who are the subject of commitment proceedings under WIS. STAT. ch. 51 will have the capacity to understand the court proceedings and communicate intelligently with their counsel. For example, if, during a criminal prosecution, a court concludes that a defendant is unable to understand the criminal proceedings or to assist counsel in his or her own defense, the defendant must be committed for mental health treatment aimed at rendering the defendant competent to proceed with the defense or disposition of the charges. *See* WIS. STAT. §§ 971.13(1) and 971.14(5). However, if the criminal court concludes that the defendant is "unlikely" to "become competent" within a specified time period, the court may order the defendant held for civil commitment proceedings pursuant to WIS. STAT. §§ 51.15 and 51.20. *See* WIS. STAT. § 971.14(6). Thus, these statutes plainly contemplate that at least some subjects of ch. 51 proceedings will be unable to understand the proceedings or to give knowing and intelligent direction to their counsel.

¶14 The recognition that decisions made by subjects during ch. 51 proceedings will often not be able to be shown to be fully rational creates "a logical tension" with the statutory presumption of competence. *Cf.* ***S.Y.***, 162 Wis. 2d at 333. As a result of this inherent tension, we conclude that colloquies aimed at ascertaining whether a subject is knowingly and intelligently electing to forgo a possible defense to commitment would serve little purpose. Even if a subject gave the "right" answers to the court's questions during a colloquy, the subject could plausibly later maintain that he or she was not thinking clearly at the

time, a claim that would likely find support in the contemporaneous reports regarding the subject's mental status. Thus, if due process requires that a subject of proceedings under WIS. STAT. § 51.20 may not stipulate to a commitment order unless the subject satisfies the court that he or she does so knowingly and intelligently, a better rule would be to simply direct that no such stipulations be permitted, thereby requiring the county be put to its proof in every case.

¶15 We conclude, however, that such a rule would also be inappropriate because it would undermine the goal of ensuring that the expressed wishes of ch. 51 subjects be forcefully advocated, and to the extent possible, accommodated. The due process requirements of notice, the opportunity to be heard and the right to be represented by adversary counsel, all contribute to that end, but a requirement that "no contest" stipulations be knowing and intelligent would not.

¶16 Not all subjects of commitment proceedings will necessarily choose to oppose undergoing treatment, a fact which the legislature has expressly recognized in WIS. STAT. § 51.20. The subject, or his or her counsel "with the individual's consent," may enter into a "settlement agreement" under which the commitment proceedings are suspended for up to ninety days conditioned upon the subject's compliance with a treatment plan. *See* § 51.20(8)(bg). The court must approve the agreement, ***id.***, but there is no requirement that it do so only if it first finds the subject competent to enter into the settlement agreement, or that he or she did so knowingly and intelligently.

¶17 A ninety-day settlement agreement may not be appropriate in all cases, however, and a petitioning county might not agree to a ninety-day suspension of the proceedings in lieu of obtaining a six-month, extendable commitment order. We see no reason that the entry of a commitment order must

be contested when a subject is willing to undergo treatment within the context of a commitment order. In this case, Aaron testified that he was indeed willing to do so, even though he did not want to take medications, saying that he preferred a longer inpatient stay to taking medication.[2]

¶18 For these reasons, we conclude that the Constitution should not be read to require that a person may not consent to the entry of a commitment order unless the person can first show that he or she is doing so "knowingly and intelligently." As we have explained, the purpose of a ch. 51 commitment is not punitive but benign—the restoration of the subject's mental health in "the least restrictive manner consistent with" the subject's treatment needs. *See* § 51.20(13)(c)2. A ch. 51 commitment is also of relatively short duration, with opportunities provided to challenge its continuation or extension. The guaranteed availability of representation by adversary counsel, together with the due process requirements set forth in § 51.20(5), provide adequate protections to meet the constitutional concern that a person not be ordered into a mental institution against his or her will absent proper grounds for a mental commitment. The constitutional mandate of due process, however, does not also require that impediments be

[2] Aaron testified that he had prayed to "receive in my heart an understanding of what would be best for me." He said he did not want to be medicated because of a rash that had developed from a since-discontinued medication. When he was told that he would likely be an inpatient longer if not medicated, he responded that that was "okay" with him.

placed in the way of a person's agreement to treatment under a commitment order, if that is his or her expressed desire.[3]

CONCLUSION

¶19 For the reasons discussed above, we affirm the appealed order.

By the Court.—Order affirmed.

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

[3] We note that Aaron makes no claim that his counsel did not properly inform him of his right to contest the county's allegations, or that his attorney did not advise him regarding the potential benefits of contesting the entry of a commitment order and the likelihood of success in doing so. Neither does Aaron assert that he did not, in fact, consent to the stipulation that he and his counsel signed and presented to the court. We therefore assume, in the absence of any claim or evidence to the contrary, that Aaron's adversary counsel properly pursued a litigation position that accorded with Aaron's expressed wishes.