COURT OF APPEALS
DECISION
DATED AND FILED

July 21, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2005AP707-FT **Cir. Ct. No. 2004ME280**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF RICHARD L.P.:

ROCK COUNTY,

PETITIONER-RESPONDENT,

V.

RICHARD L.P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed*.

¶1 DYKMAN, J.[1] Richard L.P. (Richard) appeals from an order following a final WIS. STAT. § 51.20 civil commitment hearing committing him to a secure treatment facility for a period of six months. Richard asserts that the court's factual finding that he presented a substantial probability of physical harm to others was not supported by clear and convincing evidence, and that his statements did not rise to the level of true threats but were rather mere hyperbole. Because we conclude that the record shows clear and convincing evidence of a substantial probability of physical harm and that Richard's threats were true threats and thus unprotected speech under the First Amendment, we affirm.

Background

¶2 Richard was detained pursuant to an emergency detention order following statements he made to two of state Senator Judy Robson's aides. Richard called Senator Robson's office three times to address grievances directed at Judge James Daley. Legislative aide Kelley Flury answered the initial call. In that call, Richard addressed his legal problems, specifically the loss of custody of his son, and alleged Judge Daley had entered a secret judicial order that included directives to tap Richard's phone line and spy on him in Florida.

¶3 Flury also answered Richard's next call to Senator Robson's office. During the call, Richard expressed feelings of frustration because Robson was unable to help him with his legal problems and with what he felt were injustices inflicted upon him. During this call, he made a comment directed toward Judge

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(d) (2003-04), and expedited under WIS. STAT. RULE 809.17 (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Daley that asserted that noncompliant judges could be executed. Legislative aide Justin Sargent answered Richard's third phone call. Richard again threatened Judge Daley during this call; he threatened to shoot Judge Daley "or one of his people" as a means of last resort.

¶4 Two psychiatrists evaluated Richard and both concluded that he suffered from a delusional disorder. During his psychiatric evaluations, Richard insisted that his behavior was justified by a constitutional right to violence rooted in the Second Amendment of the United States Constitution. The trial court ordered involuntary commitment for a period of six months. Richard appeals.

Standard of Review

¶5 Involuntary commitment is only permitted when the record indicates clear and convincing evidence of dangerousness. WIS. STAT. §§51.20(1)(a)2, 51.20(13)(e). Richard does not contest the facts on appeal, thus we determine de novo whether the facts satisfy the statutory requirement of § 51.20(1)(a)2.b. ***Green Scapular Crusade v. Town of Palmyra,*** 118 Wis. 2d 135, 138-39, 345 N.W. 2d 523 (Ct. App. 1984). Additionally, because Richard also asserts an infringement of his First Amendment constitutional rights, our review is de novo. ***Jantzen v. Hawkins,*** 188 F.3d 1247, 1251 (10th Cir. 1999).

Analysis

¶6 Richard first argues that the record does not show clear and convincing evidence of dangerousness. The trial court found that based on the evidence presented at Richard's probable cause and final commitment hearing that Richard was "suffering from a mental illness and particularly a delusional disorder." The trial court also found that "there [was] a high probability of

imminent harm to others because of the probability that he may act under those delusions." Richard claims that these findings were not supported by clear and convincing evidence because the threats he made were not specific, and because he has no history of violent behavior. We disagree. Because legislative aide Flury testified that Richard was referring to Judge Daley when he commented that "the judge can be executed …" and Sargent testified that Richard threatened to shoot Judge Daley as a means of last resort, the record indicates that Richard's threats were fact specific and directed at Judge Daley. That he had no history of violent behavior is irrelevant. Richard is not entitled to one free attack on Judge Daley.

¶7 Deciding whether the proper standard was met requires us to apply the facts of the case to WIS. STAT. § 51.20(1)(a)2.b, which provides in pertinent part:

> **(1) Petition for examination.** (a) … [E]very written petition for examination shall allege that all of the following apply to the subject individual to be examined:
>
> ....
>
> 2. The individual is dangerous because he or she does any of the following:
>
> ....
>
> b. Evidences a substantial probability of physical harm to other individuals as manifested by evidence of recent homicidal or other violent behavior, or by evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a recent overt act, attempt or threat to do serious physical harm.

Therefore, evidence of a substantial probability of physical harm is a disjunctive requirement that may be satisfied by either "evidence of recent homicidal or other violent behavior," an overt act that places others in reasonable fear of violent behavior, or "evidence that others are placed in reasonable fear of violent behavior and serious physical harm to them, as evidenced by a … threat to do serious

physical harm." Section 51.20(1)(a)2.b. Thus, the only question we answer on appeal is whether the record contains sufficient evidence that others could reasonably fear violent behavior by Richard as evidenced by a prior threat to do harm. We conclude that it does.

¶8 The record reveals the following: At Richard's final commitment hearing, a psychiatrist testified that Richard believed Judge Daley was responsible for multiple injustices inflicted upon him, and that if Judge Daley did not give him justice, he might exercise what he felt was his "constitutional right to violence." The record also indicates that Richard felt this point had been reached: Richard testified that he believed he had exhausted every avenue of justice. Therefore, based on his psychiatric evaluations and testimony, Richard believed the right to commit acts of violence on Judge Daley was warranted and at hand.

¶9 Additionally, the psychiatrist who evaluated Richard at the Mendota Mental Health Institute also testified that there was a substantial probability of physical harm as demonstrated by a threat to do serious physical harm. The psychiatrist testified that Richard had paranoid and delusional thoughts about the Wisconsin Court System, that it had been following him, keeping surveillance on him, and causing him to come under physical harm by having gangs beat him. The psychiatrist also testified that Richard was on the verge of violence.

¶10 The testimony at the preliminary probable cause hearing by Robson's two aides also evinces clear and convincing evidence of a substantial probability that Richard may cause physical harm to others as indicated by a serious threat to do physical harm. For instance, Flury testified that Richard threatened Judge Daley, and when he asked Richard whether his comment was actually a threat, Richard responded that "the law says the judge can be executed

…." Additionally, Sargent testified that Richard spoke of shooting Judge Daley or "one of his people" as his means of last resort, and that such a right was guaranteed to him under the Second Amendment of the Constitution. Richard's testimony revealed that he believed he had such a right. Thus, because the record indicates multiple instances of a substantial probability of physical harm to others as demonstrated by a serious threat from Richard to do serious physical harm, clear and convincing evidence of Richard's dangerousness was present in the record.

¶11 Richard's argument that he has no history of violent behavior is misplaced because a history of violent behavior does not necessarily factor into an analysis of whether clear and convincing evidence of a substantial probability of harm to others exists. WISCONSIN STAT. § 5.20(1)(a)2.b requires either an overt act, attempt, or threat. This statutory requirement was satisfied by Richard's threats, and therefore past acts of violent behavior were not required.

¶12 Richard next argues that he was deprived of liberty on the basis of speech alone in violation of his First Amendment rights. He equates his speech with mere hyperbole, and thus asserts that his statements were not "true threats," analogous to the situation presented in ***Watts v. U.S.,*** 394 U.S. 705, 39 S. Ct. 1399 (1969). We do not find this argument persuasive. The First Amendment, via incorporation through the Fourteenth Amendment, permits States to ban "true threats." ***Virginia v. Black,*** 538 U.S. 343, 359, 123 S. Ct. 1536 (2003). True threats are those statements where the speaker communicates a serious expression of an intent to commit an act of unlawful violence to a particular individual. ***Id.*** The speaker need not actually intend to carry out the threat because the prohibition on true threats also protects individuals from the fear and possibility that the violence will occur. ***Id.*** at 359-360.

¶13 The question of whether particular conduct constitutes a true threat is an issue of fact, typically best left for the finder of fact. ***State v. Douglas D.***, 2001 WI 47, ¶33, 243 Wis. 2d 204, 626 N.W.2d 725. However, if the conduct is protected under the First Amendment, a court may dismiss the charge as a matter of law. ***Id.*** The test we use for determining whether conduct is a true threat is an objective reasonable person standard from the perspective of both the speaker and the listener. ***State v. Perkins***, 2001 WI 46, ¶29, 243 Wis. 2d 141, 626 N.W.2d 762. "A true threat is a statement that a speaker would reasonably foresee that a listener would reasonably interpret as a serious expression of a purpose to inflict harm, as distinguished from hyperbole, jest, innocuous talk, expressions of political views, or other similarly protected speech." ***Id.*** In determining whether a statement is a true threat, we consider the totality of the circumstances. ***Id.*** The full context of the statement must also be considered, including all relevant factors that may affect how the statement is interpreted. ***Id.***, ¶31. These factors include how the recipient and other listeners reacted to the alleged threat, whether the threat was conditional, whether it was communicated directly to its victim, whether the speaker of the threat had made similar statements to the victim on other occasions, and whether the victim had reason to believe that the speaker had a propensity to engage in violence. ***Id.*** (citations omitted).

¶14 Richard's statements to Robson's aides constitute true threats under this standard. From the viewpoint of the reasonable listener, Richard's threats to shoot Judge Daley or court employees could reasonably be interpreted as a serious expression of a purpose to inflict harm. David Esser, a crisis worker at Rock County Human Services, took the threat so seriously that he warned Judge Daley's office. (R. at 21:17, line 25.) Esser's reaction was reasonable. Additionally, a reasonable speaker could foresee that such a threat would be interpreted as an

expression of a purpose to commit violence. The threat specifically stated an intent to commit violence when all avenues of justice were exhausted. The threat may have been ambiguous as to when violence might occur, but Richard's threat of violence was very real.

By the Court.—Order Affirmed.

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