COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP2387-FT **Cir. Ct. No. 2007ME24**

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

IN THE MATTER OF THE MENTAL COMMITMENT OF RUSSELL H. M.:

IOWA COUNTY,

PETITIONER-RESPONDENT,

V.

RUSSELL H. M.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Iowa County: WILLIAM D. DYKE, Judge. *Affirmed*.

¶1 LUNDSTEN, J.[1] Russell H.M. appeals an order for commitment and an order for involuntary medication under WIS. STAT. ch. 51. We affirm the orders.

¶2 After a jury trial, Russell was committed under the so-called "fifth standard," WIS. STAT. § 51.20(1)(a)2.e., which "permits commitment only when a mentally ill person needs care or treatment to prevent deterioration but is unable to make an informed choice to accept it." ***State v. Dennis H.***, 2002 WI 104, ¶39, 255 Wis. 2d 359, 647 N.W.2d 851.

¶3 In a special verdict, the jury found that Russell was mentally ill, was dangerous to himself or others, and was a proper subject for treatment. After making additional findings, the circuit court determined that Russell lacked competency to refuse psychotropic medication.

¶4 On appeal, Russell makes two arguments. First, he argues that the evidence was insufficient for the jury to find that he was dangerous to himself. Second, he argues that the evidence was insufficient for the circuit court to find that he lacked competency to refuse medication. We address and reject each argument in turn.

Dangerousness

¶5 Russell's argument that the evidence was insufficient for the jury to find that he was dangerous to himself implicates two of the five elements that are

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (2005-06), decided by one judge pursuant to WIS. STAT. § 752.31(2)(d) (2005-06). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

required for commitment under WIS. STAT. § 51.20(1)(a)2.e. *See* ***Dennis H.***, 255 Wis. 2d 359, ¶¶14-24 (quoting the statute and construing it as identifying five elements). Those two elements are:

> [1] [T]he person must evidence a "substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety."
>
> … [2] [T]he person must evidence "a substantial probability that he or she will, if left untreated, … suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his or her thoughts or actions."

Id., ¶¶23-24 (quoting § 51.20(1)(a)2.e.).[2]

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[2] The relevant statutory language reads, in pertinent part, as follows:

> 2. The individual is dangerous because he or she does any of the following:
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> ….
>
> e. For an individual, other than an individual who is alleged to be drug dependent or developmentally disabled, after the advantages and disadvantages of and alternatives to accepting a particular medication or treatment have been explained to him or her and because of mental illness, evidences either incapability of expressing an understanding of the advantages and disadvantages of accepting medication or treatment and the alternatives, or substantial incapability of applying an understanding of the advantages, disadvantages, and alternatives to his or her mental illness in order to make an informed choice as to whether to accept or refuse medication or treatment; and evidences a substantial probability, as demonstrated by both the individual's treatment history and his or her recent acts or omissions, that the individual needs care or treatment to prevent further disability or deterioration and a substantial probability that he or she will, if left untreated, lack services necessary for his or her health or safety and suffer severe mental, emotional, or physical harm that will result in the loss of the individual's ability to function independently in the community or the loss of cognitive or volitional control over his

(continued)

¶6 Russell's argument as to why the evidence was insufficient to satisfy these elements is not well developed. It reads, in its entirety:

> While Dr. Berney [the psychologist who evaluated Russell] testified that [Russell] thought drug company representative[s] were "out to get him" and that he became sterile as a result of clergy sexual abuse while he was a child (24:92-93), he did not point out any specific instances where [Russell] could not take care of his own needs or of harm to himself or others. The worst [Russell]'s sister could testify was that [Russell] was stranded in South Dakota and called her asking for money (24:96). However, she later admitted that he had Social Security checks waiting for him at his mother's residence in Wisconsin (24:97-99).
>
> Therefore, because the petitioner failed to prove that "if left untreated the subject will lack the services necessary for his or her health or safety" and failed to prove treatment is necessary "to prevent the subject from suffering severe mental, emotional, or physical harm" this court must vacate [Russell's] commitment order.

¶7 As the County points out, however, the County elicited expert opinion testimony from the psychologist demonstrating that the above two elements were satisfied. More specifically, the psychologist testified that, if Russell was left untreated, there was a substantial probability that Russell would continue to "decompensate" and, as a result, would lose volitional control of his emotional process and behavior as well as his thoughts. The psychologist further

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> or her thoughts or actions. The probability of suffering severe mental, emotional, or physical harm is not substantial under this subd. 2.e. if reasonable provision for the individual's care or treatment is available in the community and there is a reasonable probability that the individual will avail himself or herself of these services or if the individual may be provided protective placement or protective services under ch. 55.

WIS. STAT. § 51.20(1)(a)2.e.

testified that Russell would need treatment, but Russell did not believe he needed treatment and therefore would not voluntarily avail himself of services available in the community. The psychologist concluded that, without treatment, Russell would "have a substantial compromise in his ability to live independently in the community" and would have substantial difficulty in adequately maintaining his daily living skills.

¶8 Russell does not respond to the County's argument that this expert opinion testimony was sufficient to support findings of a substantial probability that Russell would, if left untreated, (1) lack services necessary for his health or safety, and (2) suffer severe mental, emotional, or physical harm, resulting in loss of the ability to function independently in the community or loss of cognitive or volitional control over his thoughts or actions. Moreover, nowhere does Russell assert that the psychologist's expert opinions lacked foundation or were otherwise unsupported.[3] Accordingly, we reject Russell's argument that the evidence was insufficient for the jury to find that Russell was dangerous to himself.

Competency To Refuse Medication

¶9 Russell's second argument is that the evidence was insufficient for the circuit court to find that Russell lacked competency to refuse medication. The thrust of Russell's argument is difficult to discern. He begins by asserting that the psychologist failed to explain the advantages, disadvantages, and alternatives to specific treatments or medications. Russell further argues that the circuit court erred by emphasizing Russell's lack of insight into his disorder, rather than

[3] Russell did not submit a reply brief.

Russell's capacity to express an understanding of the advantages, disadvantages, and alternatives to medication. He asserts that ***Virgil D. v. Rock County***, 189 Wis. 2d 1, 524 N.W.2d 894 (1994), requires that the court's "focus must be upon whether the patient understands the implications of the recommended medication or treatment and is making an informed choice." ***Id.*** at 15. Russell concludes, therefore, that the "record lacks clear and convincing evidentiary support for the court's finding that the standard specified by the statute, and the procedure for determining [Russell]'s competence to make his own treatment decision, was followed."

¶10 We first observe that, under ***K.S. v. Winnebago County***, 147 Wis. 2d 575, 433 N.W.2d 291 (Ct. App. 1988), it is not always necessary that there be express testimony that the advantages, disadvantages, and alternatives of a specific medication were explained to the patient. *See* ***id.*** at 577-79. Russell does not address why, under ***K.S.***, the evidence in this regard was insufficient here; therefore, we address this aspect of his argument no further.

¶11 In addition, as explained further below, we disagree with Russell's characterization of the circuit court's decision and, therefore, with his argument that the circuit court erred in finding that he lacked competency to refuse medication.

¶12 The circuit court had before it not only the psychologist's testimony but also the psychologist's extensive report. It is plain from the court's decision that the court reviewed the report carefully.

¶13 The testimony and the report show that Russell had been the subject of repeated emergency detentions and hospitalizations, and that he had cycled on and off his medications in the past. The psychologist testified that Russell

indicated that he believed that he did not need medication or have a mental illness, and that Russell indicated that he believed that his psychiatric difficulties were a result of taking psychotropic medications. The report stated, among other things, that Russell had a "lack of insight and understanding relative to his need for treatment and the historical benefits that treatment has resulted in." Moreover, the psychologist testified that Russell exhibited delusional thoughts, giving as an example Russell's delusional belief that a drug representative was trying to "pass off [inappropriate] medications on [him]."

¶14 The circuit court properly concluded: "I'm satisfied that the report does provide the information necessary to allow the evaluation to be made. The advantages and disadvantages in [Russell]'s mind [are] made up. He has determined that he is disadvantaged by taking those medications. I believe the doctor's report is to the contrary …."

¶15 We are satisfied that the circuit court recognized the central inquiry under ***Virgil D.*** In other words, the circuit court recognized that the question was whether Russell was capable of understanding the implications of treatment, not simply whether the psychologist believed Russell was making the "wrong choice" in refusing medication. The circuit court reasonably inferred that Russell lacked this capability and simply made the reasonable inference from the evidence before it.

¶16 For the reasons stated, we reject Russell's argument that the evidence was insufficient to show that he lacked competency to refuse medication.

By the Court.—Orders affirmed.

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