COURT OF APPEALS DECISION DATED AND FILED

September 10, 2013

Diane M. Fremgen
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. 2013AP808

Cir. Ct. No. 2008ME100

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

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

OUTAGAMIE COUNTY,

PETITIONER-RESPONDENT,

V.

AARON V.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Outagamie County: MITCHELL J. METROPULOS, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Aaron V. appeals an order extending his mental health commitment and an order for involuntary medication. He argues the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

evidence was insufficient to prove his mental health commitment should be extended and the circuit court erroneously placed the burden of proving competence to refuse medication on him. We reject Aaron's arguments, and affirm.

BACKGROUND

¶2 Aaron has been under a mental health commitment since 2008. Each year, Outagamie County has petitioned for an extension of the commitment. The most recent petition is the subject of this appeal. Specifically, in October 2012, the County petitioned for an extension of Aaron's mental health commitment and an order for involuntary medication and treatment. Aaron contested the petitions, and the circuit court scheduled an extension hearing. The court appointed Dr. Indu Dave, a psychiatrist, to evaluate Aaron before the extension hearing.

¶3 Dave met with Aaron on October 19, 2012 in the Outagamie County Jail.[2] In her report filed with the court, Dave noted that Aaron told her: he does not have a mental illness and has been diagnosed incorrectly; he has been prescribed the wrong medications and does not need psychotropic medications; and he intends to sue all the doctors and social workers involved in his case. Aaron also reported that he "smokes weed and used Crystal [methamphetamine] in order to get healthy."

¶4 Ultimately, Dave's report concluded Aaron was a proper subject for an extension of a WIS. STAT. ch. 51 commitment and he was not competent to

[2] Aaron had been incarcerated since December 12, 2011 for selling crystal methamphetamine to a police officer.

refuse medication. Her report stated Aaron "is suffering from [a] major mental illness as well as chemical dependency. This is characterized by substantial impairment in the areas of mood, behavior, judgment, and insight."[3] Dave noted, "per history, [Aaron] is substantially dangerous to others when noncompliant with recommended treatment." Dave opined, "If treatment is to be withdrawn, he is likely to become a proper subject for Commitment again due to his lack of insight, noncompliance and he himself making [a] statement that he does not need any psychotropic medication." Dave also recommended the court extend the involuntary medication order. She noted that while Aaron was able to engage in a discussion regarding the risks and benefits of the prescribed medications, he "does not have the ability to comprehend or apply this knowledge to himself." She explained Aaron repeatedly stated "he does not have a mental illness and does not need any psychotropic medication."

¶5 At the hearing on the County's petitions, the County presented Aaron's case manager, Chad Christofferson, and Dr. Dave as witnesses. Christofferson testified he has been Aaron's case manager since 2009. Christofferson recommended Aaron's commitment be extended because of Aaron's "lack of follow-through for treatment, missing of scheduled injections that were Court ordered, along with numerous doctor appointments with Doctor Patil, his treating psychiatrist, just lack of insight into his illness." Christofferson testified Aaron has been incarcerated for the last eleven months, and Christofferson has, for the most part, received "good reports" from the mental

[3] Specifically, Dave noted Aaron suffered from "Mood Disorder NOS, bipolar disorder per history; Intermittent explosive disorder; Personality Change secondary to traumatic brain injury, Cannabis Abuse vs. Dependence and Crystal Meth Abuse."

health staff treating Aaron at the jail. However, Christofferson explained that recently the mental health staff "have noticed an uptake in some behaviors," which they attributed to Aaron's disappointment in not getting into "Mental Health court." Aaron has also been in fights while incarcerated, but Christofferson believed they were "not Aaron's fault, he ended up on the wrong side of some of those."

¶6 Doctor Dave testified that, during her interview with Aaron, Aaron was "cooperative, but he had been quite paranoid because he believes everybody's treating him wrong and nobody's understanding him so basically he was more preoccupied about wanting to sue everybody." Dave explained, Aaron wanted to sue everybody because "he doesn't believe he's mentally ill." Dave opined Aaron is suffering from a treatable mental illness—specifically mood disorder not otherwise specified and intermittent explosive disorder.[4] As for whether Aaron would be a proper subject for commitment if treatment were withdrawn, the following exchange occurred between the County and Dave:

> Q: Doctor, do you have an opinion to a reasonable degree of medical certainty that if treatment were withdrawn whether [Aaron] would be a proper subject for commitment?
>
> A: Yes, he has been coming in in the past, and he has a history of non-compliance, missing appointments. He is not taking his shots, he's taking some oral medication, but he has refused his shot.
>
> Q: So is it your opinion to a reasonable degree of medical certainty that if treatment were withdrawn[,] he'd be a proper subject for commitment.

[4] Aaron also has a brain injury from an accident, and Dave testified "there is no treatment" for the injury.

> A: Yes, he has been hospitalized in the past as well as he has been on a commitment.

¶7 Dave also testified she discussed the advantages, disadvantages, and alternatives to treatment with Aaron. She opined Aaron does not have an understanding of the advantages, disadvantages, and alternatives to treatment, and, "because of lack of insight and denial of mental illness," he cannot apply an understanding to his mental illnesses to make an informed choice as to whether or not to take psychotropic medication.

¶8 Finally, Dave testified Aaron is taking Haldol, which helps him stay calm, think more clearly, and prevents him from becoming agitated or aggressive. However, on cross-examination, Dave conceded that, in her report, she stated Aaron was taking Risperdal and Trazodone. She therefore clarified Aaron is not taking Haldol, but is taking Risperdal and Trazodone. She stated the Trazodone is simply to help Aaron sleep. Dave also conceded Aaron has been compliant with his oral medication in the supervised setting.

¶9 Aaron also testified. When asked if he suffers from a mental illness, Aaron replied:

> Yes … I know I have a brain injury, but, like I can't sleep … and I do admit that my moods are a little screwed up, but I haven't … ever since my accident, I haven't been sleeping good, so I figure if I had sleeping medications – you know what I'm saying? – would help me out with my moods, too.

Aaron testified Dave lied when she stated he told her he denied having a mental illness. Aaron explained he only disagreed with her diagnosis that he was psychotic.

¶10 Aaron agreed Risperdal and Trazodone were beneficial to him. He explained the sole purpose of those medications was to help him sleep. Aaron stated he did not want to take Haldol because it prevented him from walking, caused cramping in his leg, and made him "freak out easier" toward people. Aaron testified he was only against the recommitment because he did not want to take Haldol.

¶11 The circuit court found Aaron suffered from treatable mental illnesses and would "decompensate if he is not subject to the commitment." The court also found "he would be a danger to himself or to others if he was not subject to that continuation of treatment and continuation of the medications." As for the medication order, the court stated:

> With respect to the issue of administering medications, I would note that [Aaron] appears to have some insight into the medications that he's now receiving, understands they help him sleep; however, he has limited insight into his mental illness; and given his history, given his chemical dependency, the nature of his mental illnesses, this Court is not convinced that he meets the threshold where he can be declared competent to refuse medications; I do adopt the recommendation by both Doctor Dave and Mr. Christofferson that there should be a finding today that he's not competent to appreciate the advantages and disadvantages of those medications, and I will authorize the involuntary administration of those medications.

The court expressed hope Aaron would "cooperate with his medications" so it would not be necessary for the medications to be administered involuntarily.

DISCUSSION

I. Extension of Commitment

¶12 Aaron first objects to the extension of his mental health commitment. To place an individual under a WIS. STAT. ch. 51 commitment, the County must prove by clear and convincing evidence that an individual has a mental illness, is a proper subject for treatment, and is dangerous. *See* WIS. STAT. § 51.20(1)(a), 51.20(13)(e). At an extension hearing, the dangerousness element may be satisfied by "a showing that there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." WIS. STAT. § 51.20(1)(am).

¶13 Aaron concedes he has a mental illness and is a proper subject for treatment. He asserts there was insufficient evidence showing he would be a proper subject for commitment if treatment were withdrawn.

¶14 Specifically, Aaron contends "the record is utterly devoid of any evidence that he would meet one of the five criteria for dangerousness if treatment were withdrawn."[5] He emphasizes no one specifically testified he would "'decompensate' or become dangerous to himself or others if treatment were withdrawn." Aaron also asserts that, although Dr. Dave opined Aaron would be a proper subject for commitment if treatment were withdrawn, Dave's reasoning in support of her opinion made her opinion insufficient. He notes that, in support of her opinion, Dave testified that Aaron was likely to be noncompliant with treatment, had been hospitalized in the past, and had been previously committed.

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[5] At an original commitment hearing, the County must prove the individual is "dangerous" in one of five ways. *See* WIS. STAT. § 51.20(1)(a)2.

He argues Dave's belief he would be noncompliant has no link to dangerousness, and the fact he has been previously committed and hospitalized does not mean the commitment should be extended.

¶15 As previously stated, to prove the dangerousness element at an extension hearing, the County is required to show "there is a substantial likelihood, based on the subject individual's treatment record, that the individual would be a proper subject for commitment if treatment were withdrawn." WIS. STAT. § 51.20(1)(am). Here, Dave rendered an uncontroverted expert medical opinion that Aaron would be a proper subject for commitment if treatment were withdrawn. The circuit court was permitted to rely on Dave's opinion when determining whether Aaron's commitment should be extended.

¶16 Although Aaron objects to Dave's reasons in support of her opinion, his argument is more properly framed as an assertion that the opinion lacked a proper foundation. However, as the County asserts, Aaron did not object to the opinion, or purported lack of foundation, at the extension hearing. Consequently, Aaron has not preserved this issue for appeal. *See* ***State v. Corey J.G.***, 215 Wis. 2d 395, 405, 572 N.W.2d 845 (1998). Nevertheless, we observe that, in addition to her opinion, Dave testified that Aaron has been noncompliant with his medication, "does better when he's on medication," and does not believe he has a mental illness. In the report filed with the court, Dave wrote Aaron told her he "gets threatening or aggressive if somebody pushes his buttons" and Dave explained that "per history, [Aaron] is substantially dangerous to others when noncompliant with recommended treatment." The record supports the circuit court's determination to extend Aaron's mental health commitment.

II. Involuntary Medication

¶17 Aaron next objects to the involuntary medication order. An individual placed under a mental health commitment is not automatically deemed incompetent to refuse medication. ***Virgil D. v. Rock Cnty.***, 189 Wis. 2d 1, 12, 524 N.W.2d 894 (1994). "[U]nder WIS. STAT. § 51.61, a person has the right to refuse medication unless a court determines that the person is incompetent to make such a decision." ***Outagamie Cnty. v. Melanie L.***, 2013 WI 67, ¶53, 833 N.W.2d 607. The County has the burden of proving by clear and convincing evidence that an individual is not competent to refuse medication. ***Id.***, ¶37. Pursuant to WIS. STAT. § 51.61(1)(g)4.:

> [A]n individual is not competent to refuse medication or treatment if, because of mental illness … and after the advantages and disadvantages of and alternatives to accepting the particular medication or treatment have been explained to the individual, one of the following is true:
>
> ….
>
> b. The individual is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse medication or treatment.

¶18 Aaron argues the circuit court erroneously placed the burden of proving competence to refuse medication on him. He emphasizes that, when the court rendered its decision, it stated it was "not convinced" Aaron met the "threshold where he can be declared competent to refuse medications." Incorporated within this argument, Aaron also asserts the County did not meet its burden of proving he was not competent to refuse medication because: (1) "the county proved only that Aaron was unwilling to take one specific drug [Haldol] with negative side effects, but that he was willing to take alternative medications";

and (2) Dave did not testify that she discussed the advantages, disadvantages, and alternatives to taking Haldol with Aaron.

¶19 We reject Aaron's arguments. First, the court did not shift the burden of proving competence to Aaron. Taken in context, it is clear the court made the challenged statement while it was explaining that it would not disregard Dave's and Christofferson's recommendations. The court stated that, although Aaron had some insight into the medications, the court found he had limited insight into his mental illnesses and "given his chemical dependency, the nature of his mental illnesses, this Court is not convinced [Aaron] meets the threshold where he can be declared competent to refuse medications." The court then returned to the County's burden of proof and noted it agreed with the "recommendation by both Doctor Dave and Mr. Christofferson that there should be a finding today that he's not competent to appreciate the advantages and disadvantages of the medications."

¶20 Second, the County met its burden of proving, by clear and convincing evidence, Aaron was not competent to refuse medication because he was substantially incapable of applying an understanding of the medication to his mental illness in order to make an informed choice as to whether to accept or refuse medication. *See* WIS. STAT. § 51.61(1)(g)4.b. Dave's testimony that she discussed the advantages, disadvantages, and alternatives to medication with Aaron was uncontroverted. If Aaron believed Dave failed to engage Aaron in a proper discussion, he should have challenged Dave on her testimony and allowed the circuit court to make a credibility determination.

¶21 Further, in ***Melanie L.***, 2013 WI 67, ¶71, our supreme court stated, "'applying an understanding' requires a person to *make a connection between* an

expressed understanding of the benefits and risks of medication and the person's own mental illness." The court rejected the proposition that the ability to recognize one's own mental illness would be sufficient to show that an individual can apply an understanding of the medication to his or her mental illness. ***Id.***, ¶72. Rather, the court specifically noted that "if a person cannot recognize that he or she has a mental illness, logically the person cannot establish a connection between his or her expressed understanding of the benefits and risks of medication and the person's own illness." ***Id.***

¶22 Here, Dave opined Aaron cannot apply an understanding of the advantages, disadvantages, and alternatives of medication to his mental illnesses "because of lack of insight and denial of mental illness." Although Aaron emphasizes he testified he has a mental illness and articulated a valid reason for not wanting to take one of the psychotropic medications, the circuit court, as finder of fact, was free to accept Dave's testimony that Aaron did not believe he had a mental illness and therefore could not apply an understanding of the medication to his illness. *See* WIS. STAT. § 805.17(2) (credibility determinations are for fact finder). We conclude the County met its burden of proving, by clear and convincing evidence, that Aaron was not competent to refuse medication.

By the Court.—Orders affirmed.

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