SUPREME COURT CHALLENGE TO THE RECOMMITMENT PROCESS BOARD RULES

Waupaca County v. K.E.K. Joint BRIEF OF Amicus Curiae

–Andrew T. Phillips & Bennett J. Conard, von Briesen & Roper, s.c.

The Supreme Court of Wisconsin recently granted a petition for review regarding a challenge to the constitutionality of Wis. Stat. § 51.20(1)(am). The Petitioner, K.E.K., was initially involuntarily committed for treatment pursuant to Wis. Stat. § 51.20 for a period of six months after a jury found that the factual elements existed for commitment under Wis. Stat. § 51.20(1)(a)2.e. At issue in this case, however, was Waupaca County's subsequent petition for recommitment. Based upon expert testimony presented at the recommitment trial, the court entered an order recommitting K.E.K. for twelve months on an outpatient basis as well as an order for involuntary medication. The recommitment proceeded under Wis. Stat. § 51.20(1)(am), which allows the court to find current dangerousness without proof of recent overt acts of dangerousness if expert medical testimony establishes that the individual still presents a danger to himself or herself and/or to others unless he or she continues with an effective treatment protocol.

K.E.K. appealed the court's orders on the basis that Wis. Stat. § 51.20(1)(am) is unconstitutional because it violates substantive due process or, alternatively, the privileges and immunities clause. According to K.E.K., the statute is constitutionally infirm in its failure to impose a "right now" standard on a court's finding of an individual's dangerousness when ordering a recommitment, notwithstanding the practical inability to make such a "right now" determination when an individual subject to a recommitment petition is already under a court-ordered treatment plan and, as a result, has not displayed recent overt acts of dangerousness.

This case raised issues of concern to all counties, county corporation counsel, and hospitals throughout the State of Wisconsin as adding duplicative procedural burdens to a system already replete with due process guarantees. For this reason, the Wisconsin Counties Association (WCA), the Wisconsin Association of County Corporation Counsels, and the Wisconsin Hospital Association worked together to file a joint brief of *amicus curiae* in support of Waupaca County. The joint brief addressed key legal issues in the case and also the practical effects that an adverse ruling against Waupaca County would have on the *amicus curiae*, summarized as follows.

From a legal standpoint, Wis. Stat. ch. 51 provides robust due process protections. Never ending commitment is not the goal and is, in fact, impermissible under Wis. Stat. § 51.20, but Chapter 51 also recognizes an individual's liberty interest must be balanced with the State's interest in preventing harm to the individual and others in society. This necessary balancing is specifically reflected in the statutory recommitment process.

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Indeed, K.E.K.'s situation is the exact scenario that the recommitment process and Wis. Stat. § 51.20(1)(am) is designed to address, and, contrary to K.E.K.'s assertions, Wis. Stat. § 51.20(1)(am) requires a finding of current dangerousness for a court to order a recommitment. However, the court is permitted to make this finding based on medical expert testimony rather than recent over acts.

As indicated in the record in this case, at the time of the recommitment hearing, medical evidence established that K.E.K. still presented a danger to herself and/or others unless she continued with an effective treatment protocol. There is substantial medical evidence contained in the record that K.E.K. would have discontinued her treatment, suffered decompensation in her mental illness and her symptoms would recur were she to be released from the treatment plan before the treatment was allowed to fully work to enhance her safety and the safety of others.

Contrary to K.E.K.'s assertions, Wis. Stat. § 51.20(1)(am) contains robust due process protections in order to ensure the least restrictive means necessary are used to effectively treat mentally ill individuals who are unable (or unwilling) to obtain proper care and treatment on their own. While K.E.K.'s case focused on Wis. Stat. § 51.20(1)(am) specifically, the statute does not exist in a vacuum. Instead, the entire body of procedures and protections throughout Chap. 51 must be considered when evaluating the merits of K.E.K.'s attack on the constitutionality of Wis. Stat. § 51.20(1)(am).

Throughout the Wis. Stat. § 51.20 process, individuals undergo continuous medical observation and examinations and have multiple opportunities for hearings at which the court carefully evaluates and weighs the medical evaluations and other evidence. In the commitment process, the medical findings that form the basis for an order emanate from independent sources. Neither county employees nor appointees perform the required medical evaluations. Wis. Stat. § 51.20(9). Rather, the court appoints independent medical professionals to conduct the examination (the subject individual also has the option of selecting one of the two independent examiners.) Wis. Stat. §§ 51.20(9)(a)1. and 2. Additionally, the individual subject to potential commitment may retain a third-party examiner of their choosing to perform another evaluation. Wis. Stat. § 51.20(9)(a)3. Committed individuals also have the opportunity to petition for a reexamination under the same examination process as the initial commitment at any time during a court-ordered treatment program. Wis. Stat. § 51.20(16).

Importantly, the burden of proof is at all times on the county to establish by clear and convincing evidence that the individual is in need of continued commitment and court-ordered involuntary treatment during the recommitment process. Wis. Stat. § 51.20(13)(g)3. This means that the county carries the burden to establish each element needed to continue a commitment, including that the individual is currently a danger to himself or herself or to others. While K.E.K. argued that it was unconstitutional to establish current dangerous without a showing of recent overt acts of dangerousness, it is important to note that neither the Wisconsin Supreme Court nor the Supreme Court of the United States have held that proof of imminent physical harm is constitutionally required to sustain an involuntary commitment. A person may still be found to be a danger to himself or herself if for physical or other reasons he or she is helpless to avoided the hazards of freedom.

IN PRACTICAL TERMS, INVALIDATING WIS. STAT. § 51.20(1)(AM) WOULD PROVE DISASTROUS.

The association will continue to monitor this case and endeavor to provide updates.

Under the Wis. Stat. § 51.20(1)(am) process, this finding must be established by expert medical testimony.

In practical terms, invalidating Wis. Stat. § 51.20(1)(am) would prove disastrous. If a court is prohibited from allowing medical professionals to provide an opinion, to a reasonable degree of medical certainty, concerning whether a person presents a danger to himself or herself or others if a treatment plan is discontinued, it will result in the end of court-ordered involuntary treatment for that individual before his or her treatment plan is given the opportunity to fully manage his or her mental illness. It is at this point that the "revolving-door" often at issue with mental health commitments begins to spin because despite medical probability of decompensation and return of symptoms, a mentally ill individual is removed from the court-ordered treatment plan. If released because there has been, unsurprisingly, no evidence of recent acts or omissions exhibiting dangerousness, such persons will likely be committed again to the State's care, then released again after receiving appropriate treatment, and then committed again after his or her treatment lapses, and so on, creating the "revolving door." Confining a person against his or her wishes in order to stabilize symptoms on an inpatient basis (*e.g.*, the initial detention in the commitment process) undoubtedly intrudes far more on an individual's liberty than does continuing a person on an established treatment plan (particularly an outpatient plan.)

Moreover, there is ample medical support for continuing a treatment regimen that is producing beneficial results. Medical studies have shown that starting and stopping psychiatric medications can lead to treatment resistance in patients. Medications can become ineffective or take longer to yield their intended benefits as a person continues to start and stop taking the medications. It is illogical under any circumstance to withdraw a person's medication in a scenario when it is known that his or her condition will likely decompensate with a return of symptoms previously ameliorated by the medication and treatment plan.

K.E.K.'s argument failed to appropriately balance the State's interest in protecting mentally ill persons and society as a whole and an individual's liberty interest. Indeed, the process K.E.K. advocated disregards the State's interests altogether.

The association will continue to monitor this case and endeavor to provide updates. The association appreciates the opportunity to partner with corporation counsel and the Hospital Association on these critically important issues. If you have any questions about the WCA's joint brief of *amicus curiae*, or the case in general, please contact the association or any member of the von Briesen & Roper Government Law Group (*www.vonbriesen.com*). ◆