Some Objections and Defenses for Chapter 51 Cases

Colleen D. Ball, March 4, 2021

I. Probable cause hearing.

A. Defective statement of emergency detention.

An officer cannot take an individual into custody unless s/he has reason to believe the individual satisfies the requirements of §51.15(1)(ag), §51.15(1)(ar)1-4, and §51.15(3).

If the officer who signed the statement of emergency detention does not have personal knowledge of the conduct justifying the detention, the circuit court should dismiss the proceeding. *Milwaukee County v. Parham,* 95 Wis. 2d 21, 26, 289 N.W. 326 (1979).

B. Defective three-party petition for examination.

A petition must be drafted by corporation counsel. If someone else drafts it, the circuit court must dismiss it—even without a showing of prejudice. Wis. Stat. 51.20(4); *D.S. v. Racine Cty*., 142 Wis. 2d 129, 416 N.W.2d 102 (Ct. App. 1990); *State v. S.P.B*., 159 Wis. 2d 393, 464 N.W.2d 102 (Ct. App. 1990).

A three-party petition must be signed by three people, one of whom has personal knowledge of the events alleged. Wis. Stat. §51.20(1)(b). If it fails this requirement, move to dismiss.

A petition must allege all of the information listed in §51.20(1)(c). In particular, 14th Amendment due process requires the petition to allege the legal standard and factual basis for the commitment. *Lessard v. Schmidt*, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972)(rev'd on other grounds). If the petition fails these requirements, move to dismiss based on both the statute and the 14th Amendment.

C. Defective service.

The county must personally serve the individual with all of the information listed in §51.20(2). Many counties use forms that do not meet this requirement. Move to dismiss based on the statute and 14th Amendment due process. *See Lessard*.

D. Lack of circuit court competency.

The circuit court must hold a probable cause hearing within 72 hours of the individual's detention (excluding Saturdays, Sundays, and legal holidays). Wis. Stat. §51.20(7)(a). Failure to do so requires dismissal of the proceeding. *Dodge County v. Ryan E.M*., 2002 WI App 71, 252 Wis. 2d 490, 642 N.W.2d 592.

Caution: Ryan E.M. states that the 72-hour clock is triggered when the individual arrives at a facility. In 2013, the legislature amended the law. Now the 72-hour clock is triggered when the officer takes the individual into custody.

II. Examination of the individual and examiners' reports.

A. "Personal observation" of the individual.

The examiner must receive access to the individual's treatment records and "personally observe and examine" the individual at any suitable place. Wis. Stat. 51.20(9)(a)5.

Due to the pandemic, some doctors are conducting examinations by video. Consider objecting and making a record: Has the doctor ever physically examined the individual in person before? Physical exams might reveal causes of a mental health problem or health conditions (obesity or side effects like tremors) that may affect treatment recommendations. The camera angle might prevent the examiner from observing matters that go to the weight and admissibility of the doctor's opinion. Explore these limitations.

B. Individual refuses to meet with examiner(s).

The individual may refuse to be examined. Wis. Stat. §51.20(9)(a)4.

If the individual refuses to be examined, the examiner might prepare a report based on the individual's records.

If the examiner relies on the opinions of other psychologists and psychiatrists, object and argue that due process requires the examiner to independently confirm the facts on which those opinions are based. *Walworth Cty. v. Therese B.*, 2003 WI App 223, ¶ 16, 267 Wis. 2d 310, 671 N.W.2d 377.

C. Failure to file examiners reports 48 hours before the final hearing.

SCOW just granted review on the issue of whether the failure to files examiners reports 48 hours before the final hearing deprives the circuit court of competency to decide the case.

If this happens, object and note that this issue is pending in *Fond du Lac Cty. v. S.N.W.*, 2020 WI App 47, 393 Wis. 2d 596, 947 N.W.2d 655 (unpublished, but citable opinion) (review granted).

III. Hearing objections.

A. Lack of circuit court competency to adjudicate the case.

If the circuit court fails to hold a final initial commitment hearing within the mandatory time limit in §51.20(7)(c), it must dismiss the petition. *State ex rel. Lockman v. Gerhardstein*, 107 Wis. 2d 325, 328–29, 320 N.W.2d 27 (Ct. App. 1982).

If the circuit court fails to hold a recommitment hearing before the existing commitment expires, it loses competency to adjudicate the petition and must dismiss it. *G.O.T. v. Rock Cty.,* 151 Wis. 2d 629, 631, 445 N.W.2d 697 (Ct. App. 1989).

B. Right to due process.

The individual has the statutory right to appear at the hearing in person, present documentary evidence, present the testimony of witnesses, and confront and cross-examine the government's witnesses. Wis. Stat. §§ 885.60(1), (2)(a) (statutory right to be physically present), §51.20(5) (statutory right to present and cross-examine witnesses)

These are not just statutory rights; they are 14th Amendment due process rights. *Addington v. Texas*, 441 U.S. 418 (1979); *Vitek v. Jones*, 445 U.S. 480, 494–95 (1980). When objecting to violations of these rights cite both the statute and the 14th Amendment.

Caution: Wisconsin cases holds that the individual may not have these due process rights. *Price County DHS v. Sondra F.*, 2014 WI App 71, 354 Wis. 2d 625, 848 N.W.2d 905 (unpublished but citable opinion). *W.J.C. v. County of Vilas*, 124 Wis. 2d 238, 369 N.W.2d 162 (Ct. App. 1985). These cases did not address (and in fact conflict with) the SCOTUS decision in *Vitek*. Argue that SCOTUS precedent (i.e. *Vitek*) controls.

The law is unsettled regarding the procedure for waiving the individual's right to be present. A court must conduct a colloquy to determine whether an individual is competent to waive the right to counsel. Argue that the court must likewise conduct a colloquy to establish a knowing and voluntary waiver of the right to be present. *S.Y. v. Eau Claire Cty.*, 156 Wis. 2d 317, 336–37, 457 N.W.2d 326 (Ct. App. 1990), *aff'd*, 162 Wis. 2d 320, 469 N.W.2d 836; *Pickens v. State*, 96 Wis. 2d 549, 292 N.W.2d 601 (1980), *overruled on other grounds* by *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997).

C. Hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Wis. Stat. § 908.01(3). Because the rules of evidence apply to ch. 51 proceedings, so does the hearsay rule. Wis. Stat. §§ 51.20(10)(c), 908.02, 908.03.

Counties offers lots of hearsay at commitment proceedings. Object to all of it.

Example: An examiner may rely on hearsay evidence of dangerous acts in treatment records to form his or her opinion, but the hearsay itself is inadmissible. The proponent must establish its truth with admissible evidence; otherwise the factfinder cannot rely upon it. *S.Y.,* 156 Wis. 2d 317, 327–28.

Example: An examiner may not be a conduit for the hearsay opinion of another expert who examined the individual. *Walworth Cty. v. Therese B.*, 2003 WI App 223, ¶ 9, 267 Wis. 2d 310, 671 N.W.2d 377.

Example: An examiner's report is hearsay and cannot be admitted into evidence without testimony by the examiner and cross-examination by the defense. *R.S. v. Milwaukee Cty.*, 162 Wis. 2d 197, 205, 209–10, 470 N.W.2d 260 (1991).

Example: Hospital records are admissible. Wis. Stat. § 908.03(6m). However, entries within the records may be inadmissible hearsay.

D. The 5th standard.

Prior to the final hearing, a county seeking to commit and individual under the 5th standard "shall furnish to the court and the subject individual an initial recommended, written treatment plan that contains the goals of the treatment, the type of treatment to be provided, and the expected providers." Wis. Stat. §51.20(10)(cm).

Ask the county to provide the treatment plan so the individual knows what to expect.

The county's failure to file the treatment plan is grounds for dismissal only if done in bad faith. *Id*.

IV. Objections specific to recommitments.

A. Defective petition.

Corporation counsel must draft the petition for recommitment. If a social worker or someone else drafts it, the court must dismiss it. Wis. Stat. §51.20(4); *State v. S.P.B.*, 159 Wis. 2d 393, 464 N.W.2d 102 (Ct. App. 1990).

B. Personal service of the petition for recommitment.

SCOW recently held that the county need not serve the individual with a copy of the petition for recommitment. It only has to serve the individual's attorney. *Waukesha Cty. v. S.L.L.*, 2019 WI 66, ¶ 27, 387 Wis. 2d 333, 929 N.W.2d 140.

A pending appeal argues that, due to *S.L.L.*, Chapter 51 violates 14th Amendment due process and equal protection. *See Rusk County v. A.A.*, Appeal Nos. 2019AP839 and 2020AP1580. Preserve this issue for your client.

C. The "factual findings" requirement.

If the circuit court recommits the individual, it must make specific factual findings with reference to the standard of dangerousness in §51.20(1)(a)2. on which it is relying. *Langlade Cty. v. D.J.W.*, 2020 WI 41, ¶¶ 3, 40, 391 Wis. 2d 231, 942 N.W.2d 277.

Also, the individual has a due process right to a written statement by the factfinder specifying the evidence relied upon for the commitment. *Vitek v. Jones*, 445 U.S. 480, 495 (1980). The mandatory circuit court for order for recommitment violates this requirement. It does not require the court to specify the evidence relied upon. Object to its use.

D. Insufficient evidence of dangerousness.

Several recent decisions have vacated recommitments due to the county's failure to offer sufficient evidence. Depending on the facts of your case, they may support denial of recommitment.

Example: Evidence that an individual believes she does not need treatment and previously became acutely "psychotic" while untreated is insufficient to establish dangerousness under §51.20(1)(am). *Winnebago Cty. v. L.F.-G.*, 392 Wis. 2d 909, 945 N.W.2d 909 (Ct. App. 2020) (unpublished but citable opinion).

Example: Evidence that, during commitment, an individual complied with treatment, refrained from dangerous behavior, yet was heard saying he wants to "snap people's necks," was insufficient to establish dangerousness under §51.20(1)(am) and the 2nd standard of dangerousness. *Portage County v. E.R.R.*, 2020 WI App 76, __Wis. 2d__, __N.W.2d__(unpublished but citable opinion).

Example: A diagnosis of schizophrenia and the general risks of suicide associated with schizophrenia are insufficient evidence to recommit someone under the 3rd standard of dangerousness. *D.J.W.*, 2020 WI 41, ¶¶ 53, 57.

Example: Evidence that an individual was unable to care for himself, unable to maintain a job, received disability benefits, and risked homelessness without the support of family is insufficient to recommit him under the 4th standard of dangerousness. *D.J.W.*, 2020 WI 41, ¶¶ 48, 53, 55, 56.

Example: Evidence that the individual sought treatment before he was committed and would remain at his group home, and continue treatment after the commitment's expiration, coupled with the county's failure to prove his treatment history precluded recommitment under §51.20(1)(am) and the 5th standard of dangerousness. *Jackson Cty. v. W.G.*, 2021 WI App 1, __Wis. 2d__, __N.W.2d__ (unpublished but citable opinion).

V. Involuntary medication.

A. For commitments under the first 4 standards of dangerousness and recommitments.

Courts typically order involuntary medication or treatment after finding that the individual: (1) meets the requirements of one or more of the 5 standards of dangerousness for an initial commitment or the standard for a recommitment; and (2) is not competent to refuse medication or treatment. *See* §51.61(1)(g)(3).

SCOW recently clarified that a finding that the individual is incompetent to make medication or treatment decisions is insufficient to support a medication or treatment order. *Winnebago County v. C.S.*, 2020 WI 33, ¶31, 391 Wis. 2d 35, 940 N.W.2d 875

A court cannot subject an individual to involuntary medication or treatment unless it makes the findings required 14th Amendment due process and §51.61(1)(g).

The 14th Amendment requires the State to prove that the individual is (1) dangerous to himself or others and (2) the treatment is in the individual's medical interest. *C.S.*, ¶23 (quoting *Washington v. Harper*, 494 U.S. 210, 227 (1990)).

Section 51.61(1)(g)(3) imposes a more stringent dangerousness standard than the 14th Amendment. The patient may refuse all medication and treatment unless "a situation exists" where they are necessary to prevent serious physical harm to the patient or others."

If the examiner merely testifies that that the individual is incompetent to make medication or treatment decisions, argue that the evidence is insufficient under both the 14th Amendment and §51.61(1)(g)(1) and (3).

B. For 5th standard commitments.

The 5th standard authorizes involuntary medication or treatment based on incompetence alone. *See* §51.20(1)(a)2.e, §51.20(13)(dm) §51.61(1)(g)3m. Argue that any order for involuntary medication or treatment under this standard violates the 14th Amendment "on its face" and "as applied" to your case under *C.S.*

VI. Advising the client on the right to appeal.

A. Mootness.

A commitment might expire before the court of appeals can review the matter. That does not necessarily make the appeal moot. SCOW is about to address this issue.

B. Collateral Effects.

Expired commitment (and recommitment orders) may be used against the individual in future commitment proceedings, TPR proceedings, criminal proceedings and so forth.

Expired commitment (and recommitment) orders have collateral effects. They may result in a loss of gun rights. The county might seek financial reimbursement for the cost of the individual's hospitalization or care. Individuals employed in certain professions may be required to report that they were adjudicated mentally ill or committed.

Questions? Email ballc@opd.wi.gov