Constitutional Issues - Probable Cause Hearings Under Chapter 51
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Wisconsin's commitment law was found unconstitutional as it allowed, inter alia, a person to be detained more than 48 hours without a probable cause hearing. *Lessard,* 349 F.Supp. 1078, 1091-92 (E.D.Wis.1972). The substantive and procedural due process safeguards mandated by *Lessard* are in 51.20(7) "an emergency detention can be justified only for the length of time necessary to arrange for a hearing before a neutral judge at which probable cause for the detention must be established".

Lessard expressly rejected the notion that due process safeguards do not apply when the state is acting in the role of parens *patriae,* not to punish but to treat the subject.

Our state courts affirmed this: "Although protecting people from harm is important, so is due process, which the 72 hour time limit is intended to provide". These time limits were designed "to protect the liberty interests of individuals" facing commitment under ch. 51 and the statute "cannot be construed to allow practices that would defeat that end". *Stevenson L.J.,* 2009 WI App 84.

The U.S. Supreme Court has held "a civil commitment constitutes a significant deprivation of liberty that requires due process protection" (*Addington v. Texas*, 441 U.S. 418, 425 (1979)) and commitment to a mental hospital produces a "massive curtailment of liberty" that "can have a very significant impact on the individual" (*Vitek v. Jones*, 445 U.S. 480, 491-92 (1980)).

Wisconsin courts have followed the holdings in *Lessard, Addington and Vitek*:

1. "Sandra D's interest in freedom from involuntary detention is plainly an interest protected by the right to due process of law". *Sandra D.,* 175 Wis.2d 490, 499 (Ct. App. 1993).

2. In *Ryan E.M.*, 252 Wis.2d 490, 497 (Ct. App. 2002): The County argued in computing the 72 hours the first day of detention should be excluded as that would be consistent with the "the intent of chapter 51 to try to protect people from themselves and protect the public from harm as well. But the general intent of the statute has little to do with the **intent behind the 72 hour time limit**. Referring back to this general purpose could justify any extension of time in the name of protecting the individual and the public. The purpose of the 72 hour limit is to prevent individuals from being **detained** any longer than necessary before holding a hearing to determine probable cause. Although protecting people from harm is important, so is due process, which the time limit is intended to provide. In addressing this issue, the court in Lessard stated:

   > Those who argue … a hearing at this time may be harmful to the patient ignore the fact that there has been no finding that the person is in need of hospitalization. The argument also ignores the fact that even a short detention in a mental facility may have long lasting effects on the individual's ability to function in the outside world due to the stigma attached to mental illness".

3. "It may be, as the court ultimately found, that Sandra D. was and remains a fit subject for protective placement. But the next respondent in a commitment or protective proceeding who is similarly deprived of their liberty for twice – or three or four times – the thirty day limit may not be. Either the law is applied to every one or to no one". *Sandra D.* at 499.

4. Restraining an individual's freedom awaiting a final Chapter 55 hearing inflicts a "substantial injury". Guardianship of N.N., 140 Wis.2d 64, 69 (Ct. App. 1987).

5. These narrow time limits (72 hour rule) were designed "to limit significantly the time the subject of a protective placement petition must spend in involuntary detention without court approval. *Kindcare, Inc. v. Judith G.*, 250 Wis.2d 817, 829 (Ct. App. 2002).

In 1991 the U.S. Supreme Court held that constitutionally when an agent of the state detains a citizen a probable cause determination must be made within 48 hours of detention, regardless of intervening weekends. *Riverside v. McLaughlin*, 500 U.S. 44. The court struck down the practice that persons arrested by the City of Riverside on a Thursday would not have a probable cause hearing until Monday, even longer if there were an intervening holiday.

What the Delores M. Case Holds

Though the case was moot the court heard it because "it presents important liberty-interest issues that would defy appellate review unless we retained jurisdiction. 217 Wis.2d 69, 71 (Ct. App. 1998).

Issue Presented: Whether the time limits in 51.15 are triggered when a person taken into custody is transported to a facility other than one designated by the County for that purpose. The answer to this question is "yes" as long as the facility is one of those specified in sec. 51.15(2).

The "facility" at issue was under 51.15(2)(d): An **approved** private treatment facility, if the facility **agrees to detain** the individual.

The trial court found the facility did not agree to detain & though it was an approved *treatment* facility, it was not an approved *detention* facility even though 51.15 says a detention facility can be an approved treatment facility. The appellate court held it was bound by the "clearly erroneous" standard of review & affirmed the trial court, but then wrote an opinion with a contrary result: "Ordinarily, our conclusion that the trial court correctly decided the case would end our analysis…Nevertheless, the question of whether the time limits established by 51.15 are triggered when a person taken into custody under that section is transported to a facility other than one specifically designated ("approved") by a County is a recurring one that will escape review unless we address it now.

Milwaukee argued that the 72 hour time limit was triggered only when the person arrived at BHD or was detained at a facility it approved of. The appellate court disagreed with both positions saying nothing in 51.15 gives even colorable support to this position. Moreover, the County's interpretation would trample on significant liberty interests by permitting open-ended involuntary confinement citing *Zinerman v. Burch*, 494 US. 113 (1990) (there is a substantial liberty interest in avoiding confinement in a mental hospital) and *Vitek*, supra (persons have a due-process protected liberty interest in avoiding involuntary mental commitment).

Holding: In sum, we conclude that the time limits established by 51.15 are triggered when a person taken into custody under that provision is transported to any of the facilities designated by 51.15(2), irrespective of whether the facility to which the person has been brought is one specifically chosen by the county for the receipt of persons taken into custody under 51.15.