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You are hereby notified that the Court has entered the following opinion and order:

2018AP1214-W

State of Wisconsin ex rel. Raytrell K. Fitzgerald v. Circuit Court
for Milwaukee Co. (L.C. # 2016CF4475)

Before Kessler, P.J., Brash and Dugan, JJ.

Raytrell K. Fitzgerald, by Attorney Colleen D. Ball, petitions this court for a supervisory writ against the circuit court, the Honorable Dennis R. Cimpl, presiding. The issues at hand relate to an order for involuntary medication, appeal and automatic stay of such an order under *State v. Scott*, 2018 WI 74, and the process by which the State can seek to lift the automatic stay.

Fitzgerald additionally seeks a temporary stay, pursuant to WIS. STAT. RULE 809.52 (2015-16),¹ of the involuntary medication order and further circuit court proceedings.

For the reasons that follow, we conclude that no additional briefing is necessary from Fitzgerald, and the petition for a supervisory writ should be denied *ex parte*. See WIS. STAT. RULE 809.51(2); *State ex rel. LeFebvre v. Abrahamson*, 103 Wis. 2d 197, 202, 307 N.W.2d 186 (1981) (per curiam). *Scott* provides ample guidance for the issues that Fitzgerald identifies in his original petition and response to this court's July 3, 2018 order. Because we deny the petition, Fitzgerald's requests for temporary relief under WIS. STAT. RULE 809.52 are moot.

BACKGROUND

Fitzgerald is charged with one count of possession of a firearm contrary to a harassment injunction. On June 18, 2018, the circuit court determined he was incompetent to stand trial and entered an order committing Fitzgerald for treatment to competency. The order authorized the administration of involuntary medication.

On June 20, 2018, the supreme court issued a decision in *Scott*. It concluded that an order determining incompetency and mandating involuntary medication or treatment to restore competency is appealable as a matter of right rather than by interlocutory appeal and that involuntary medication orders are subject to an automatic stay pending appeal. See *id.*, 2018 WI 74, ¶¶34, 43. Fitzgerald filed a notice of intent to pursue postconviction relief, see WIS. STAT. RULE 809.30(2)(b), on June 26, 2018.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

After a hearing on June 27, 2018, the circuit court signed and entered an order, automatically staying the involuntary medication order pursuant to *Scott*. During the hearing, however, the circuit court invited the State to make an oral motion to lift the automatic stay. The State did, and the circuit court signaled an intent to grant the request. It directed the State to prepare an order for signature by the end of the day.

The State drafted an order, but the circuit court did not sign it. Another hearing was held on June 28, 2018, the results of which are unclear. Counsel says the circuit court set the matter for a further hearing on July 12, 2018, to determine the status of the appeal and to consider whether to lift the automatic stay. The electronic docket entries for the June 28 hearing, however, indicated that the circuit court “will issue a stay as of” that date. We requested clarification of the June 28 proceedings in an order dated July 3, 2018. Counsel indicates only that temporary relief was not requested from the circuit court; there is no further clarification of the stay mentioned in the docket entries, as the attorney who filed the writ petition for Fitzgerald does not represent him in the circuit court proceedings.

Also on June 28, 2018, Fitzgerald filed his petition in this court, seeking a supervisory writ. He asserts that there is a plain duty under *Scott* for an automatic stay pending appeal of involuntary medication orders. *See id.*, 2018 WI 74, ¶43. Fitzgerald acknowledges that the State may move to lift the stay. He asserts, however, that “[t]he circuit court violated its plain duty when, after being notified of the *Scott* decision, it directed the State to orally move to lift the stay and then immediately orally lifted the stay without requiring the State to make the showing required by *Scott*. Fitzgerald further contends that appeal will be an inadequate remedy because *Scott* does not explain how a defendant should obtain appellate review of an order lifting an automatic stay of involuntary medication.

Fitzgerald also requests a stay of the involuntary medication order and of further proceedings in the circuit court pending disposition of the writ petition. See WIS. STAT. RULE 809.52.

DISCUSSION

“A supervisory writ is a blending of the writ of mandamus and prohibition.” *State ex rel. Kenneth S. v. Cir. Ct. for Dane Cty.*, 2008 WI App 120, ¶8, 313 Wis. 2d 508, 756 N.W.2d 573. “Because such a writ invokes our supervisory authority, it ‘is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency.’” *Id.* (citation omitted). A supervisory writ will not issue unless an appeal is an utterly inadequate remedy, the duty of the circuit court is plain, its refusal to act within the line of such duty or its intent to act in violation of such duty is clear, the results of the circuit court’s action must not only be prejudicial but must involve extraordinary hardship, and the request for relief was made promptly and speedily. See *id.*

Whether to issue a supervisory writ is a discretionary matter. See *id.*, ¶9. “The exercise of that discretion often involves, as it does in this case, resolving questions of law in order to determine whether the circuit court’s duty is plain.”² *Id.* A supervisory writ is not a substitute for appeal. See *State ex rel. Dressler v. Cir. Ct. for Racine Cty.*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

² For this reason, we do not see the need for further briefing from Fitzgerald in support of his petition: resolution of the petition hinges on our interpretation of *State v. Scott*, 2018 WI 74, which is a question of law.

Fitzgerald was not entitled to an automatic stay until he actually had a pending appeal, and that did not happen until he filed the notice of appeal on July 9, 2018. A notice of intent did not suffice. In *Scott*, the supreme court explained that “[a]n appeal of an involuntary medication order is best classified as a final order from a special proceeding.” *See id.*, 2018 WI 74, ¶31. “The competency proceeding is not part of the defendant’s underlying criminal proceeding; it is ‘merely connected’ to it.” *Id.*, ¶33. Thus, WIS. STAT. RULE 809.30, which governs appeals in NGI proceedings, criminal cases, and certain other case types not applicable here, does not govern commencement of an appeal from the involuntary medication order. Rather, WIS. STAT. RULE 809.10 applies.³

The only order presently signed and filed in the circuit court grants the automatic stay of the involuntary medication order pursuant to *Scott*. Thus, to the extent *Scott* establishes the automatic stay as a plain duty, the circuit court has complied.

As noted, *Scott* authorizes the State to seek an order lifting the involuntary stay of the medication order if it so chooses. *See id.*, 2018 WI 74, ¶45. The merits of a State’s motion to lift the stay are governed by the criteria for a stay pending appeal in *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), as modified by *Scott*.

On a motion to lift an automatic stay pending appeal of an involuntary medication order, the State must:

³ We therefore reject Fitzgerald’s contention that the circuit court lost the power to hold any further proceedings once the notice of appeal was filed; in an appeal not commenced under WIS. STAT. RULE 809.30, the circuit court retains the power to act on all matters until the record on appeal is transmitted to this court. *See* WIS. STAT. § 808.075(3).

- (1) make a strong showing that it is likely to succeed on the merits of the appeal;
- (2) show that the defendant will not suffer irreparable harm if the stay is lifted;
- (3) show that no substantial harm will come to other interested parties if the stay is lifted; and
- (4) show that lifting the stay will do no harm to the public interest.

Scott, 2018 WI 74, ¶45. *Scott* goes on to say that “[w]hether to grant the State’s motion is a discretionary decision, and as we explained above, the court of appeals must explain its discretionary decision to grant or deny the State’s motion.” Fitzgerald takes this to mean that the State’s motion must be brought only to the court of appeals for review, and that the circuit court will be violating a duty if it considers the State’s motion to lift the stay.

As part of the discussion in *Scott*, the supreme court considered our order denying Scott’s motion to stay the involuntary medication order pending appeal. *See id.*, ¶35. But it also noted that our power to grant relief pending appeal derives from WIS. STAT. § 808.07 and WIS. STAT. RULE 809.12, and that we review a circuit court’s order on a motion for stay for an erroneous exercise of discretion. *See id.*, ¶¶35 n.22, 36.

WISCONSIN STAT. RULE 809.12 states, in part, that “A person seeking relief under s. 808.07 shall file a motion in the trial court unless it is impractical to seek relief in the trial court.” Because the supreme court acknowledged that our authority to grant relief pending appeal comes from RULE 809.12, we read *Scott* to say that the State’s request to lift the stay of the involuntary medication order should, like any other motion for relief pending appeal, be directed to the circuit court first unless impractical to do so.

First, *Scott's* statement that this court should explain its discretionary decision appears to come, in part, because of the procedural posture of the case, not as a requirement of where the State's motion to lift the automatic stay of a medication order must begin.

Second, the circuit court that made the competency determination and medication order is, as the fact-finding court, arguably in a superior position to evaluate the possibility of irreparable harm to the defendant, substantial harm to other parties, and harm to the public interest than this court.

Third, by seeking relief pending appeal from the circuit court first, the aggrieved party has the opportunity to seek review from this court by motion: "A person aggrieved by an order of the trial court granting the relief requested may file a motion for relief from the order with the court.... A motion filed in the court under this section must be filed in accordance with s. 809.14." WIS. STAT. RULE 809.12. If the State's motion has to originate in the court of appeals, then the only avenue of appellate review is a petition for review to the supreme court, which is far less expeditious than a motion to this court.

We do not read *Scott* to establish a "plain duty" of the circuit court to avoid ruling on the request. Further, the determination on a motion for relief pending appeal is, as the supreme court recognized, discretionary.

Based on the foregoing, there is no plain duty that the circuit court has or will be refusing to perform. It imposed the automatic stay pending appeal required by *Scott*. It may entertain the State's motion to lift the automatic stay, in accordance with the criteria specified in *Scott*, as WIS. STAT. RULE 809.12 provides that motion for relief pending appeal must first be addressed to the circuit court unless impractical to do so. A party aggrieved by the circuit court's

determination on the State's motion to lift the stay may seek review in this court, under WIS. STAT. RULE 809.12, within the context of a pending appeal. A supervisory writ, however, is not warranted.

The requests under WIS. STAT. RULE 809.52 for relief pending disposition of the petition are now moot.

Upon the foregoing, therefore,

IT IS ORDERED that the petition for a supervisory writ is denied *ex parte*. No costs.

IT IS FURTHER ORDERED that the motions for stays pending disposition of the petition for a supervisory writ are denied as moot.

Shella T. Reiff
Clerk of Court of Appeals