COURT OF APPEALS
DECISION
DATED AND FILED

August 10, 2010

A. John Voelker
Acting 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. 2009AP1579 **Cir. Ct. No. 1997CI970001**

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

IN RE THE COMMITMENT OF EDWIN C. WEST:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

EDWIN CLARENCE WEST,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: M. JOSEPH DONALD, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Edwin Clarence West was committed as a sexually violent person in 1997. On April 18, 2008, West filed a petition for supervised

release. The circuit court denied West's petition. On appeal, West contends that the circuit court incorrectly assigned the burden of proof under WIS. STAT. § 980.08(4)(cg) and that by doing so, the circuit court violated West's Due Process and Equal Protection rights. Because we rejected identical arguments in ***State v. Rachel***, 2010 WI App 60, 324 Wis. 2d 465, 782 N.W.2d 443, we affirm.

¶2 Prior to August 1, 2006, when faced with a petition for supervised release, the circuit court was required to "grant the petition unless the state proves by clear and convincing evidence" either "[t]hat it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care" or "[t]hat the person has not demonstrated significant progress in his or her treatment or the person has refused treatment." WIS. STAT. § 980.08(4)(b). Under that statute, the State bore the burden of proof, "by clear and convincing evidence that the person is still a sexually violent person and that it is substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care." ***State v. Brown***, 2005 WI 29, ¶11, 279 Wis. 2d 102, 109, 693 N.W.2d 715, 718.

¶3 2005 Wis. Act 434 extensively revised WIS. STAT. ch. 980, and a circuit court is now guided by WIS. STAT. § 980.08(4)(cg) when deciding a

petition for supervised release.[1] Under that statute, the court "may not authorize supervised release unless, based on all of the reports, trial records, and evidence presented, the court finds that all" of the five enumerated criteria are met. *See* ***Rachel***, 2010 WI App 60, ¶9, 324 Wis. 2d at 471–472, 782 N.W.2d at 446 (emphasis omitted).

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[1] In ***State v. Arends***, 2010 WI 46, __ Wis. 2d __, __ N.W.2d __, the supreme court considered how the revisions to WIS. STAT. ch. 980 affected the procedures when a committed person filed a petition for discharge under WIS. STAT. § 980.09. In that case, the supreme court held that under § 980.09(1), the circuit court first "engages in a paper review of the petition only, including its attachments, to determine whether it alleges facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person." ***Arends***, 2010 WI 46, ¶4, __ Wis. 2d at __, __ N.W.2d at __. "The clear purpose of [this] review is to weed out meritless and unsupported petitions." ***Id.***, 2010 WI 46, ¶28, __ Wis. 2d at __, __ N.W.2d at __.

If the petition alleges sufficient facts, the circuit court then conducts the review called for by WIS. STAT. § 980.09(2). That review is a "limited review of the sufficiency of the evidence." ***Id.***, 2010 WI 46, ¶43, __ Wis. 2d at __, __ N.W.2d at __.

> The [circuit] court is required to review the items specifically enumerated [in § 980.09(2)] if available, and may order those items to be produced and/or conduct a hearing at its discretion. The circuit court must determine whether the enumerated items contain any facts from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person. If any facts support a finding in favor of the petitioner, the [circuit] court must order a discharge hearing on the petition; if no such facts exist, the court must deny the petition.

Ibid. The supreme court further held that "[t]he petitioner does not need to prove a change in status in order to be entitled to a discharge hearing; the petitioner need only provide evidence that he or she does not meet the requirements for commitment." ***Id.***, 2010 WI 46, ¶41, __ Wis. 2d at __, __ N.W.2d at __.

A person committed under ch. 980 who wishes to secure his or her release may either file a petition for supervised release under WIS. STAT. § 980.08 or file a petition for discharge under WIS. STAT. § 980.09. ***Arends***, 2010 WI 46, ¶17, __ Wis. 2d at __, __ N.W.2d at __. West chose to file a petition for supervised release, and, therefore, this court's opinion in ***Rachel***, addressing § 980.08, is applicable.

¶4 West argues that the change in the statutory language did not shift the burden of proof from the State. He further argues that WIS. STAT. § 980.08(4)(cg) would violate Due Process and Equal Protection if the burden of proof rested with the person seeking a supervised release. Both of West's arguments were rejected by this court in ***Rachel***.

¶5 In that case, we noted that WIS. STAT. § 980.08(4)(cg) "begins by directing the court to deny supervised release unless certain criteria are present" and "sets forth five criteria that must be demonstrated to overcome the presumption of institutionalization." ***Rachel***, 2010 WI App 60, ¶11, 324 Wis. 2d at 473, 782 N.W.2d at 447. Thus, while the statute is silent as to which party bears the burden of proof, "[i]t would be impractical, if not absurd, to place the burden on the State to demonstrate factors weighing in favor of release because the State has no incentive to do so." ***Id.***, 2010 WI App 60, ¶12, 324 Wis. 2d at 473–474, 782 N.W.2d at 447. We held that "the plain language employed by the legislature convinces us that the burden of proof now rests on the petitioner to show that the five statutory criteria are met." ***Id.***, 2010 WI App 60, ¶16, 324 Wis. 2d at 476, 782 N.W.2d at 448.

¶6 We also rejected the argument that the statutory change rendered WIS. STAT. ch. 980 unconstitutional. We observed that "the constitutionality of [ch. 980] relies on procedures for periodic review of a commitment order," and that "nothing in the revised statute has changed the requirement for periodic review." ***Rachel***, 2010 WI App 60, ¶¶15, 16, 324 Wis. 2d at 475–476, 782 N.W.2d at 447, 448. Therefore, we held that "the constitutionality of the commitment scheme [wa]s not disturbed" by the amendment of WIS. STAT. § 980.08(4). ***Rachel***, 2010 WI App 60, ¶16, 324 Wis. 2d at 476 782 N.W.2d at 448.

¶7 Our opinion in ***Rachel*** controls this appeal, and, therefore, we affirm the circuit court order denying West's petition for supervised release.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.