

Appeal No. 04-1208

Cir. Ct. No. 98CV000137

**WISCONSIN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF DERYL B. BEYER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

DERYL B. BEYER,

RESPONDENT-APPELLANT.

FILED

JAN 27, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Dykman, Vergeront and Lundsten, JJ.

We certify this appeal to the Supreme Court to determine the scope of due process and statutory rights and remedies available to a person committed under WIS. STAT. ch. 980, who is unable to obtain a prompt probable cause hearing under WIS. STAT. § 980.09(2) (2003-04).¹

At issue are the procedures set forth in WIS. STAT. §§ 980.07(1) and 980.09(2). The former section provides that for each person committed under WIS. STAT. ch. 980, the Department of Health and Family Services (DHFS) shall conduct a periodic examination of the person's mental condition within six months

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

after the initial ch. 980 confinement, and thereafter at least once each twelve months “for the purpose of determining whether the person has made sufficient progress for the court to consider whether the person should be placed on supervised release or discharged.” The section also provides that the committed person may retain or seek court appointment of an independent psychological examiner. Once an examination is complete, the examiner must prepare a written periodic examination report and send a copy of it to the committing court. Section 980.07(2).

After receiving the periodic examination report, DHFS may authorize the committed person to petition for discharge. WIS. STAT. § 980.09(1)(a). In such cases the court must conduct a hearing on the petition within forty-five days after receipt of the petition. *Id.* If DHFS determines that discharge is not appropriate, § 980.09(2)(a) requires it to give the committed person written notice of the person’s right to petition the court for discharge without its approval. The notice shall contain a waiver of rights, which is then filed in the trial court with or without the committed person’s signature. *Id.* Then,

If the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the person is still a sexually violent person. The committed person has a right to have an attorney represent him or her at the probable cause hearing *Id.*

However, unlike § 980.09(1), § 980.09(2) does not impose any express deadline for holding the mandatory hearing on the petition.

In this case, the appellant, Deryl Beyer, was committed under WIS. STAT. ch. 980 by the Green County Circuit Court in November 1999. In January 2001, DHFS filed its first periodic examination report. In March 2002, DHFS sent

the Green County Circuit Court the second periodic examination report on Beyer. Because DHFS did not authorize a discharge petition, WIS. STAT. § 980.09(2) became applicable. Consequently, DHFS also filed Beyer's waiver form, which he had not signed. As noted, that triggered the court's obligation to schedule a probable cause hearing. However, the court took no action for several months.

Meanwhile, Beyer filed a petition for a writ of habeas corpus in Green County, in which he demanded release based on the untimely preparation and filing of his first periodic examination report in January 2001. Shortly thereafter, the circuit court appointed counsel to represent Beyer in the habeas corpus proceeding. On June 6, 2002, the circuit court dismissed the petition because the proper venue was Juneau County where DHFS had Beyer confined.

On August 26, 2002, Beyer wrote the court asking for appointment of counsel to represent him with regard to the second periodic examination report, and for appointment of an independent examiner as well. Two weeks later the court forwarded the letter to the assistant attorney general representing the State, and to Beyer's habeas corpus counsel, who was not representing him in this matter. In response, counsel for the State suggested a status conference, which the court held on October 23, 2002. As of result of that conference, the court contacted the public defender's office, which appointed counsel for Beyer on November 26, 2002. In December 2002, the court appointed an independent psychologist to examine Beyer.

In February 2003, DHFS filed its third periodic examination report on Beyer. Beyer subsequently moved to discharge counsel appointed in November because counsel had apparently done nothing on his case. On April 9, 2003, the court granted Beyer's motion when counsel failed to appear at the

motion hearing and appointed replacement counsel the same day. Because the independent examiner appointed in December 2002 had not yet examined Beyer, the court replaced him in August 2003. The replacement examiner subsequently died, resulting in the appointment of a third examiner. She filed a report on January 6, 2004, and on January 9, 2004, twenty-two months after DHFS filed its second periodic examination report, Beyer finally received his probable cause hearing. The court concluded at the hearing that probable cause to conduct a release hearing did not exist. Beyer appealed the resulting order denying a trial on the petition for discharge, although he does not seek review of the probable cause determination itself.

Beyer contends that “the extraordinary delay in conducting the probable cause hearing following the 2002 exam effectively nullified Mr. Beyer’s statutory and due process right to periodic review of the continued validity of a civil commitment.” While acknowledging that problems with his first attorney and with the appointed psychological examiners extended the delay, he argues that the more substantial part was due to the circuit court’s failure in its “responsibility to expeditiously implement the periodic judicial review process guaranteed to the committed person under WIS. STAT. § 980.09(2).” As Beyer notes, by the time the court appointed counsel and an independent examiner, it was no longer possible to hold the probable cause hearing before twelve months had passed and an updated periodic examination report had been filed. The remedy he seeks for this lengthy delay is discharge from his commitment.

In *State ex rel. Marberry v. Macht*, 2003 WI 79, 262 Wis. 2d 720, 665 N.W.2d 155, the supreme court concluded that under WIS. STAT. § 980.07 DHFS’s duty to file a timely periodic examination report was mandatory, noting that:

In this regard, the failure to comply with the time limits for periodic reexamination has substantial consequences for the committed person. The initial and periodic reexaminations determine the committed person's appropriateness for continued institutional care, supervised release, or discharge. As the court of appeals observed, the "committed person's liberty hinges upon this initial reexamination."

Id., ¶20. More precisely, the committed person's liberty hinges on the court proceeding that follows the re-examination. Logic therefore suggests that the proceeding must promptly follow to avoid defeating the purpose of the re-examination process, as well as the committed person's due process rights. WISCONSIN STAT. § 980.09(1) expressly requires this promptness, but § 980.09(2) does not.

Assuming that a right to a prompt hearing exists under WIS. STAT. § 980.09(2), which we believe to be the case, the question remains as to the remedy when the committed person does not receive a prompt hearing. In *Marberry*, the supreme court unanimously rejected Marberry's discharge or his supervised release as a remedy for the re-examination delay, and it is unlikely that the supreme court would approve release as Beyer's remedy for the delay in this case. Three members of the *Marberry* court concluded that adequate remedies existed in the committed person's right to petition for supervised release under WIS. STAT. § 980.08, or to petition for mandamus. *Marberry*, 262 Wis. 2d 720, ¶33. Three concurring members found those remedies inadequate, and essentially concluded that there should be institutional responsibility for insuring protection of the rights accorded those committed under WIS. STAT. ch. 980. *See id.*, ¶56 (J. Bradley concurring).

We believe the supreme court is the appropriate forum to decide whether there is a constitutional or statutory right, or both, to a reasonably prompt

WIS. STAT. § 980.09(2) probable cause hearing. If there is, we believe the supreme court is the appropriate forum to determine what remedies are necessary to adequately protect it.

