Appeal No. 2007AP2742 **Cir. Ct. No. 1997CF152**

WISCONSIN COURT OF APPEALS
DISTRICT II

IN RE THE COMMITMENT OF DENNIS R. THIEL:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

DENNIS R. THIEL,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Snyder and Neubauer, JJ.

Pursuant to WIS. STAT. RULE 809.61 this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUE

Whether WIS. STAT. § 980.08(4) (2005-06),[1] which previously required the State to show by clear and convincing evidence that supervised

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise stated.

release should not be granted and was reviewed using a sufficiency of the evidence standard, has been revised such that appellate courts should now review the orders under an erroneous exercise of discretion standard.

BACKGROUND

Although the factual and procedural background of this case is extensive, the information relevant to this certification is brief and undisputed. Dennis R. Thiel has been under a WIS. STAT. ch. 980 commitment order for over a decade. Throughout the course of his commitment, he has alternately petitioned for supervised release and for discharge from his commitment. This appeal involves Thiel's petition for supervised release, which had been remanded to the circuit court for further proceedings. *See* ***State v. Thiel***, 2005AP2959, unpublished summary order (WI App. Oct. 18, 2006).

On June 21, 2007, the court held a hearing on Thiel's 1999 petition for supervised release and his 2006 petition for discharge.[2] The court heard testimony from three expert witnesses: Dr. David Thornton, the treatment director at Sand Ridge Secure Treatment Center where Thiel is institutionalized; Dr. Janet Page Hill, a licensed psychologist in private practice who frequently contracts with the State for WIS. STAT. ch. 980 examinations; and Dr. Diane Lytton, a licensed psychologist in private practice who was appointed as an independent examiner for this proceeding.

[2] The circuit court denied Thiel's petition for discharge. That order is not the subject of the appeal.

Dr. Thornton testified that he had reviewed Thiel's treatment records and had personally interviewed him twice. He explained that one particular recidivism risk assessment tool, the Static 99, indicated Thiel was a "moderate low level of risk." He also stated that other assessment tools, such as the Psychopathy Checklist-Revised (PCL-R), showed "somewhat elevated psychopathic traits" that were associated with a high risk of reoffending. Overall, Dr. Thorton concluded that Thiel was "probably just a little over the required threshold for civil commitment." He agreed with the proposition that Thiel "could be safely treated in the community as long as he's in [Sand Ridge's supervised release] program."

Dr. Hill testified that she conducted her examination based on the reports in Thiel's Sand Ridge file along with the Static 99 and RRASOR tests she conducted on him herself. She concluded that Thiel suffered from pedophilia and a nonexclusive sexual attraction to females, along with alcohol, cannabis, and cocaine abuse. Based on her review of Thiel's treatment records, she concluded that Thiel was not an appropriate candidate for supervised release. She tied her opinion to the five statutory factors in WIS. STAT. § 980.08(4)(cg); specifically concluding that Thiel had not made significant progress in treatment, was "much more likely than not" to reoffend, that appropriate treatment in the community is "simply not [available] in the State of Wisconsin," and that the level of resources that would be required to safely manage Thiel in the community would be unreasonable. She left open the question of whether Thiel could be reasonably expected to comply with his treatment regimen while on supervised release. Dr. Hill subsequently clarified that she agreed Thiel "would be secure from sexually offending while he was in treatment," but her primary concern was that his treatment in the community could continue for the rest of his life, which would be beyond the "reasonable degree of resources in the community."

Dr. Lytton testified that her record review and interview with Thiel convinced her that Thiel was an appropriate candidate for supervised release. Dr. Lytton pointed to Thiel's successful completion of several treatment programs, specifically noting that Thiel "generally got good marks" and "participated well," had "very good attendance," helped other participants with their homework, and was "insightful." Dr. Lytton believed Thiel had made significant progress in treatment. She testified that there is treatment available in the community to meet Thiel's ongoing needs and that she expected Thiel to comply with treatment requirements if placed on supervised release.

The circuit court denied Thiel's petition for supervised release on June 21, 2007. In its oral ruling, the court stated:

> [T]he overall conclusion of … [Drs.] Thornton and Hill, is that Mr. Thiel is more likely than not to reoffend; that in terms of treatment, possible release, and supervision, that some additional work needs to be done, he needs to complete Phase Two of the treatment; and that there needs to be some reasonable expectation, at least from Dr. Hill's perspective, that Mr. Thiel will be amenable to treatment. And I think, very pointedly, Dr. Thornton pointed out, what my notes indicate … a lack of ability to be amenable to treatment….
>
> But overall—I understand Dr. Lytton's opinions. I believe that given the history, given the testing that's been done, given the … state of where Mr. Thiel presently is with treatment, that the opinion of Dr. Hill that … he's likely to reoffend, that he shouldn't be discharged, and that there are not reasonable measures for supervision in the community is, to me, convincing and I deny the request for supervised release, or discharge … or any provision that he be released on some kind of conditions.

Thiel appeals, arguing that the State's evidence was insufficient to support the court's order denying supervised release.

DISCUSSION

Thiel asserts that we must review the circuit court's order using a sufficiency of the evidence standard, in accordance with ***State v. Brown***, 2005 WI 29, ¶42, 279 Wis. 2d 102, 693 N.W.2d 715. The State counters that when the legislature revised the supervised release statute, it relieved the State of the evidentiary burden to prove by clear and convincing evidence that the committed person should not be released and, as a result, the circuit court has complete discretionary authority to grant or deny supervised release.

The violent sexual offender statutes were extensively revised by 2005 Wis. Act 434 (effective August 1, 2006). Petitions for supervised release are governed by WIS. STAT. § 980.08(4). When a petition is filed, the circuit court is directed to consider several factors, including five criteria under § 980.08(4)(cg), the petitioner's "mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment." Sec. 980.08(4)(c).

When ***Brown*** was decided, the statute included the following directive:

> The court shall grant the petition [for supervised release] unless the state proves by clear and convincing evidence one of the following:
>
> 1. That it is still likely that the person will engage in acts of sexual violence if the person is not continued in institutional care.
>
> 2. That the person has not demonstrated significant progress in his or her treatment or the person has refused treatment.

WIS. STAT. § 980.08(4)(b) (2003-04). From the express language of the statute in effect at the time, the court reasoned:

> According to WIS. STAT. § 980.08(4) [2003-04], the circuit court *starts in the position of having to grant a petition for supervised release*. The circuit court does not have to grant the petition if the State proves 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…. The statute also sets forth four factors a circuit court may consider, along with other factors, in making its determination.
>
> Thus, if the circuit court decides that the State has failed to meet its burden, the circuit court does not have any option: It "shall" grant Brown's petition for supervised release. If the circuit court decides, however, that the evidence is sufficient to prove the State's case by clear and convincing evidence, then the circuit court must deny Brown's petition.

Brown, 279 Wis. 2d 102, ¶¶11-12 (emphasis added).

Under the revised statute, a circuit court starts in the position of having to *deny* a petition for supervised release. The new directive states the circuit court *may not* authorize supervised release unless the evidence shows that these five criteria are met:

> 1. The person has made significant progress in treatment and the person's progress can be sustained while on supervised release.
>
> 2. It is substantially probable that the person will not engage in an act of sexual violence while on supervised release.
>
> 3. Treatment that meets the person's needs and a qualified provider of the treatment are reasonably available.
>
> 4. The person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department.

> 5. A reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release.

WIS. STAT. § 980.08(4)(cg).

In ***Brown***, the supreme court specifically addressed whether a circuit court's denial of petition for supervised release should be classified on review as a determination of a question of law or as an exercise of circuit court discretion. ***Brown***, 279 Wis. 2d 102, ¶8. The court held that when an appeal involves a circuit court's WIS. STAT. § 980.08(4) decision, the "reviewing court undertakes independent review of the record under the sufficiency of the evidence standard of review." ***Brown***, 279 Wis. 2d 102, ¶5. In ***Brown***, the court settled on the less deferential standard of review stating that:

> Uniformity of application of facts to law, respect for circuit courts' reasoning, and recognition of circuit courts' observational advantage in evaluating evidence are desirable goals with respect to orders on [WIS. STAT. ch.] 980 petitions for supervised release. These goals are more likely to be achieved with the sufficiency of the evidence standard of review than with an erroneous exercise of discretion standard of review.

Brown, 279 Wis. 2d 102, ¶46. However, it is the precise language that the ***Brown*** court focused on, the burden of proof on the State, that has been excised from the statute by the legislature.

The State observes that the change in the statute means the circuit court no longer "starts in the position of having to grant a petition for supervised release." *See* ***id.***, ¶11. Rather, it argues that the legislature greatly expanded the circuit court's authority to deny supervised release. The State asserts, "The presumption in favor of supervised release and requirement that it be authorized unless the state met its burden of proof has been replaced by a non-exhaustive list

of factors that circuit courts may consider." Accordingly, the State argues, the new decision-making process is akin to that for sentencing, wherein appellate courts afford the circuit court's discretion great deference. *See, e.g.,* ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. It contends that in the absence of a statutory burden of proof, the new standard of appellate review applicable to WIS. STAT. § 980.08(4) should be whether the circuit court erroneously exercised its discretion.

The question presented is particularly important because the procedures for periodic review of a commitment order preserve the constitutionality of the WIS. STAT. ch. 980 commitment scheme. *See* ***State v. Post***, 197 Wis. 2d 279, 327, 541 N.W.2d 115 (1995), *cert. denied*, 521 U.S. 1118 (1997) (the opportunities to seek supervised release and discharge are sufficient to meet constitutional demands); ***State v. Carpenter***, 197 Wis. 2d 252, 268, 541 N.W.2d 105 (1995), *cert. denied*, ***Schmidt v. Wisconsin***, 521 U.S. 1118 (1997) (opportunities for supervised release and discharge "significantly detract" from arguments that ch. 980 is unconstitutional).

Following revisions by 1999 Wis. Act 9, which eliminated a circuit court's ability to order supervised release at the time of the original commitment and extended the length of time an offender had to wait to petition for supervised release, the supreme court nonetheless held the sexually violent persons commitment law constitutional. *See* ***State v. Rachel***, 2002 WI 81, ¶¶69-70, 254 Wis. 2d 215, 647 N.W.2d 762. However, Justice Bablitch wrote in his dissent that he believed the new provisions ran afoul of constitutional due process and double jeopardy protections. ***Id.***, ¶89 (Bablitch, J., dissenting). Justice Bradley wrote separately to state that the new law nearly crossed the line and that assumptions

about good faith application of the law were "wearing thin." ***Id.***, ¶¶72-75 (Bradley, J., concurring).

The latest revision to the supervised release statute reopens the question of the standard of review. The plain language suggests that the burden of proof is no longer on the State, but rather the burden now rests with the petitioner to show that the five statutory criteria are met. WIS. STAT. § 980.08(4)(cg) ("The court may not authorize supervised release unless … the court finds that all of the following criteria are met[.]") This would arguably place a sufficiency of the evidence burden on the petitioner. The legislature's decision to remove any express burden of proof, however, may signal that the decision to grant or deny supervised release is purely discretionary. The delicate constitutional balance of the commitment scheme requires a standard of review that will assure meaningful opportunities to obtain supervised release.

CONCLUSION

The legislature has revised WIS. STAT. § 980.08(4) to eliminate the State's burden of proof on a committed person's petition for supervised release. It now directs that a circuit court "may not authorize supervised release" unless it finds from all the evidence that five criteria are met. *See* § 980.08(4)(cg). The new statute omits language specifically relied upon in ***Brown*** to establish a standard of review for § 980.08(4) determinations. Whether the legislature intended to place the burden of proof on the petitioner, and therefore invite a sufficiency of the evidence standard of review, or to make the decision purely discretionary with the circuit court is unclear from the new language of the statute. Because this appeal presents a question unaddressed by existing case law, requires reconsideration of the appellate standard of review set forth in ***Brown***, and has

important constitutional implications for WIS. STAT. ch. 980, we respectfully certify the issue.