

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

July 11, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

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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.

**No. 99-1180**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE COMMITMENT OF DEREK A. MILLER:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**DEREK A. MILLER,**

**RESPONDENT-APPELLANT.**

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APPEAL from orders of the circuit court for Milwaukee County:  
MEL FLANAGAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Derek A. Miller, currently under a chapter 980 commitment as a sexually violent person, appeals from the orders denying his petition for supervised release, motion for reconsideration, and request for

remedial sanctions for contempt, respectively. On appeal, Miller argues that the trial court erroneously exercised its discretion when it: (1) denied his petition for supervised release because the Department of Health and Family Services (Department) has failed to provide him with treatment; and (2) denied his motion to hold the Department in contempt for failing to provide him with treatment as required under chapter 980. We reject Miller's arguments and affirm.

### I. BACKGROUND.<sup>1</sup>

¶2 On September 30, 1997, Miller was adjudged to be a sexually violent person and was committed to the custody of the Department of Health and Family Services until such time as he is no longer sexually violent. The trial court further ordered that Miller be committed to a secure mental health unit or facility for "control, care and treatment" of his mental disorder. Pursuant to the trial court's order, Miller was committed to the Wisconsin Resource Center (WRC), a secure mental health facility, for control, care and treatment. Whether Miller received treatment for his mental disorder is the central issue in this appeal.

¶3 WISCONSIN STAT. § 980.07<sup>2</sup> requires the Department to periodically reexamine an individual who has been committed under chapter 980 to determine whether he or she "has made sufficient progress to be entitled to transfer to a less restrictive facility, to supervised release or to discharge." On March 9, 1998, the Department filed a report of a periodic reexamination of Miller. The

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<sup>1</sup> We have already provided a thorough recitation of the factual and procedural history of this case, see *State v. Miller*, 229 Wis. 2d 567, 600 N.W.2d 224 (Ct. App. 1999); therefore, we will not repeat that information here. However, we shall set forth the facts relevant to this proceeding.

<sup>2</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Department's report concluded that Miller was still a sexually violent person as defined in chapter 980 and that he should remain at WRC because "effective treatment [for his mental condition] can only be provided within a secure mental health facility at this time." On March 10, 1998, Miller, acting *pro se*, filed a request with the circuit court to assert his "legal right to 'Least Restrictive Placement' as defined in Chapter 980.06." The circuit court construed his request as a petition for supervised release under WIS. STAT. § 980.08.

¶4 Pursuant to Miller's motion, the circuit court appointed Robert Fox, a psychotherapist, to examine Miller and file a written report. Mr. Fox first met with Miller at WRC and then filed a written report, in which he diagnosed Miller as suffering from pedophilia, conduct disorder, and possibly post-traumatic stress disorder. Mr. Fox concluded that Miller is a twenty-year-old whose mental development remains frozen between the ages of eleven and thirteen. In Mr. Fox's opinion Miller "is at risk ... to act out if he were released directly back into the community." Mr. Fox asserted that Miller requires the structure of a secure facility, but that with continued treatment he may eventually develop the ability to function in a less restrictive placement.

¶5 The circuit court also reviewed the reexamination report filed by Dr. Erica Schedel, a psychologist at WRC, as well as a report filed by Dr. Dennis Doren during Miller's commitment proceedings. The circuit court held a hearing at which Dr. Schedel testified. Dr. Schedel agreed with Mr. Fox's assessment that Miller was developmentally frozen at about age thirteen. Dr. Schedel also agreed with Dr. Doren's diagnosis that Miller suffered from pedophilia and antisocial personality disorder. Dr. Schedel concluded that Miller continued to suffer from a mental disorder, which predisposes him to commit sexually violent acts, and that the treatment he had received had not reduced the substantial probability that he

would commit sexually violent acts in the future. Following the hearing, the circuit court denied Miller's petition for supervised release, finding that the State had "proven by clear and convincing evidence that Derek Miller is still a sexually violent person and that it is substantially probable that he will engage in acts of sexual violence" if he does not remain in a secure mental health unit or facility.

¶6 Miller filed a motion to reconsider the denial of his petition for supervised release. Miller also requested that the circuit court order the Department to show cause why it should not be held in contempt of court for failing to follow the court's order committing him to the Department's custody for control, care and treatment. Miller sought a monetary forfeiture for what he alleged to be the Department's continued failure to provide him with treatment. In two separate orders, the circuit court denied Miller's motion for reconsideration and remedial sanctions. Miller now appeals from the circuit court's orders denying his petition for supervised release, his motion for reconsideration, and his request for remedial sanctions.

#### Standard of Review

¶7 Whether to grant a petition for supervised release is a discretionary decision for the circuit court. *See State v. Seibert*, 220 Wis. 2d 308, 314, 582 N.W.2d 745 (Ct. App. 1998). Further, whether to hold the subject of a court order in contempt for violating that order is also a discretionary decision for the circuit court. *See, e.g., State ex rel. N.A. v. G.S.*, 156 Wis. 2d 338, 341, 456 N.W.2d 867 (Ct. App. 1990); *see also* WIS. STAT. ch. 785. We review the circuit court's discretionary decision to determine whether the circuit court examined the relevant facts, applied the proper legal standard and, using a rational process, reached a reasonable conclusion. *See Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320

N.W.2d 175 (1982). The circuit court should set forth the basis for its exercise of discretion as evidence for this court that discretion was actually exercised. *See State v. Pharr*, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). However, even if the circuit court fails to set forth the reasoning behind its exercise of discretion, we need not reverse if an independent review of the record reveals a basis for sustaining the trial court's discretion. *See State v. Pittman*, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993).

## II. ANALYSIS.

¶8 Miller argues that the trial court erroneously exercised its discretion when it: (1) denied his petition for supervised release; and (2) denied his motion for remedial sanctions against the Department. Miller claims that the circuit court erroneously exercised its discretion when it denied his petition for supervised release because during his WRC commitment, the Department has continuously failed to provide him with treatment for his mental disorder. Miller posits that, because treatment was not only mandated by the circuit court's original commitment order, but also is central to the very purpose of chapter 980 commitments, the trial court erroneously exercised its discretion in failing to consider the lack of treatment available to him at WRC when it denied his petition for supervised release. Miller also argues that by failing to provide treatment, the Department is in contempt of the circuit court's order committing him to the Department's custody for control, care and treatment. Therefore, Miller concludes that the circuit court erroneously exercised its discretion when it denied his petition for supervised release and his motion for remedial sanctions against the Department, and when it refused to order the Department to show cause why it should not be held in contempt for failing to provide him with the treatment

required by the court's commitment order and chapter 980. We reject Miller's arguments.

¶9 Under chapter 980, Miller is clearly entitled to treatment, which must be undertaken in the least restrictive manner available. *See, e.g., State v. Post*, 197 Wis. 2d 279, 313, 541 N.W.2d 115 (1995) (citing WIS. STAT. § 980.06(1) & (2)(b)). Wisconsin courts have unequivocally held that the central purposes of chapter 980 are to protect the public, and *provide treatment* for those individuals committed under the statute. *See, e.g., State v. Sprosty*, 227 Wis. 2d 316, 330, 595 N.W.2d 692 (1999) (“The principal purposes of ch. 980 are the protection of the community and the treatment of sexually violent persons.”); *see also Post*, 197 Wis. 2d at 308 (“We conclude that treatment is a bona fide goal of [chapter 980]....”); *State v. Carpenter*, 197 Wis. 2d 252, 271, 541 N.W.2d 105 (1995) (“We conclude that the principal purposes of ch. 980 are the protection of the public and the treatment of convicted sex offenders who are at a high risk to reoffend....”). Treatment must be provided in “the least restrictive manner consistent with the requirements of the person and in accordance with the court’s commitment order.” WIS. STAT. § 980.06(2)(b).

¶10 The record demonstrates that Miller is not entitled to supervised release and that the Department has not failed to provide him with treatment. WISCONSIN STAT. § 980.08 governs petitions for supervised release. Specifically, § 980.08(4) provides, in pertinent part:

The court shall grant the petition unless the State proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care. In making a decision under this subsection, the court may consider, without limitation because of enumeration, the

nature and circumstances of the behavior that was the basis of the allegation in the petition ... the person'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....

Here, the trial court considered the reports filed by Mr. Fox, Dr. Schedel and Dr. Doren indicating that Miller continued to suffer from a mental condition that rendered it substantially probable that he would engage in acts of sexual violence in the future. The circuit court also considered Miller's history of sexual offenses and the risk factors associated with his behavior. Finally, the circuit court considered Miller's treatment record, including his failure or refusal to complete treatment groups. In particular, this last factor, Miller's treatment record, refutes his claims.

¶11 The record indicates that, following his commitment as a sexually violent person, Miller entered treatment at WRC in January of 1998. Miller was referred to three groups for treatment – the Offense Description Group, the Autobiography Group, and Process Oriented Group Therapy. However, of these three groups, Miller successfully completed only one – Process Oriented Group Therapy. Despite passing this group, Miller received numerous negative comments regarding his behavior.

¶12 Miller failed to satisfactorily complete the remaining two groups. Miller failed the Autobiography Group for multiple reasons: unexcused absences; sleeping through class; lack of veracity in his accounts of his past behavior; and his inability to describe his feelings or thoughts, which is a core feature of the treatment for sex offenders. Miller also failed the Offense Description group because, in his written and verbal descriptions of the assaults he had committed,

he placed some of the blame on his victims and minimized his responsibility. Miller was given another chance to participate in the Offense Description Group, but he failed to attend the next meeting. Miller was then referred to the Denier's Group, where he continued to perform poorly because he denied using force against his victims.

¶13 Miller has remained in the "High Management Unit" at WRC since his initial placement at the facility. The High Management Unit is the most structured and supervised unit at WRC. While in the High Management Unit, Miller continued to resist staff orders in an argumentative manner and failed to show motivation for treatment. Dr. Schedel and Mr. Fox both agreed that because Miller was having such difficulty controlling his behavior in a highly restrictive unit at WRC, he would continue to have difficulty behaving in a less restrictive unit. Dr. Schedel and Mr. Fox also agreed that Miller should remain in a secure facility because, based on his behavior, he remained at risk to act out if he was released into the community, even under supervision.

¶14 Thus, the record clearly indicates that Miller continues to suffer from a mental condition which creates a substantial probability that he would engage in acts of sexual violence in the future if he did not remain in a secure facility. Further, Miller has either refused to participate in treatment, or failed to satisfactorily complete his treatment programs. Consequently, Miller cannot now be heard to complain that he has not been provided treatment according to the original commitment order and the requirements of chapter 980. For these reasons, we are satisfied that Miller is not entitled to supervised release, nor is the Department in contempt of the trial court's commitment order for failing to treat him and, therefore, we conclude that the trial court properly exercised its



discretion when it denied both Miller's petition for supervised release as well as his motion for remedial sanctions.<sup>3</sup>

*By the Court.*—Orders affirmed.

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

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<sup>3</sup> Miller also argues that the trial court erroneously exercised its discretion in denying his motion for reconsideration of the order denying his request for supervised release. However, in his motion for reconsideration, Miller did not provide the circuit court with any new information, did not raise any new issues, and did not make any new arguments. Because we have rejected these arguments and determined that the circuit court properly exercised its discretion in denying Miller's request for supervised release, we conclude that the trial court also properly denied Miller's motion for reconsideration.



