COURT OF APPEALS
DECISION
DATED AND FILED

January 17, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2379

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

IN RE THE COMMITMENT OF
ALAN MICHAEL WIEDENHOEFT:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALAN MICHAEL WIEDENHOEFT,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

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

¶1 PER CURIAM. Alan Michael Wiedenhoeft appeals from an order of commitment in a WIS. STAT. ch. 980 case. He contends that: (1) the trial court

lacked competence because the petition was filed too late; (2) WIS. STAT. ch. 980 is unconstitutional as applied to him because he has completed all treatment available, thus making his commitment a punishment; (3) the trial court engaged in improper fact-finding; and (4) the State failed to prove that the petition was timely filed. Because the trial court did not lose competency to handle the matter, because ch. 980 is not being unconstitutionally applied to Wiedenhoeft, because the trial court's findings were not clearly erroneous, and because the record reflects that the petition was timely filed, we affirm the order.

I. BACKGROUND

¶2 Wiedenhoeft was serving a prison sentence for sexual assault offenses committed in 1974. His mandatory release date was February 10, 1995. On February 9, 1995, the State filed a petition for detention alleging that Wiedenhoeft was a sexually violent person. After some additional proceedings regarding the constitutionality of the sexual predator law, which was resolved by our supreme court in ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995), Wiedenhoeft's case was set for a court trial in June and July 1998.

¶3 After hearing substantial testimony from three psychologists, Dr. Dennis Doren, Dr. Kristen Carlson, and Dr. Victor J. Broekema, the trial court concluded that Wiedenhoeft had a mental disorder, which created a substantial probability that he would re-offend if released. The trial court ordered Wiedenhoeft to be committed to institutional care. Wiedenhoeft appeals from that order.

II. DISCUSSION

A. Did the trial court lose competence to exercise jurisdiction in this matter?

¶4 Wiedenhoeft's first argument is that the trial court was not competent to handle this matter. His argument is based on the interplay between WIS. STAT. § 980.02(2), which requires the petition for detention to allege that the "person is within 90 days of discharge or release," and WIS. STAT. § 302.11(6), which provides that "releases from prison shall be on the Tuesday or Wednesday preceding the release date." Wiedenhoeft contends that filing the petition on February 9 was too late, because he should have been released the Tuesday or Wednesday before February 9. We disagree.

¶5 Failure to comply with the ninety-day time limit contained in WIS. STAT. § 980.02(2)(ag) will affect the trial court's competency to proceed. *See* ***State v. Zanelli***, 212 Wis. 2d 358, 365, 569 N.W.2d 301 (Ct. App. 1997). A court's competency to proceed is a question of law, which we review *de novo*. ***State v. Bollig***, 222 Wis. 2d 558, 563, 587 N.W.2d 908 (Ct. App. 1998). The interpretation of the two statutes involved also presents a question of law. ***State v. Sostre***, 198 Wis. 2d 409, 414, 542 N.W.2d 774 (1996). The primary goal of statutory construction is to ascertain the legislature's intent, and our first step in the process is to look at the plain language of the statute. ***Id.*** Where the import of that language is clear and unambiguous, we go no further; we simply apply the statute to the facts of the case. ***Cary v. City of Madison***, 203 Wis. 2d 261, 264, 551 N.W.2d 596 (Ct. App. 1996).

¶6 Wiedenhoeft tries to construe WIS. STAT. § 302.11(6) to affect the ninety-day time requirement in WIS. STAT. § 980.02(2). A plain reading of the language of the statutes demonstrates the error in Wiedenhoeft's construction.

Section 980.02(2) provides that a petition under WIS. STAT. ch. 980 "shall allege that … (ag) The person is within 90 days of *discharge or release* … from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility." (Emphasis added.) This language requires the petition for detention to be filed within ninety days of the subject's discharge or release. The record demonstrates that Wiedenhoeft's mandatory release date was February 10, and the petition for detention was filed one day before, on February 9. The plain meaning of the statute compels us to conclude that the petition was timely filed because Wiedenhoeft was in custody on the day the petition was filed, and he had not yet been discharged. Accordingly, the trial court did not lose competency to handle this case.

B. Constitutional issues.

¶7 Wiedenhoeft next argues that WIS. STAT. ch. 980 is being unconstitutionally applied to him. He suggests that because he has completed all the treatment available to him, refusal to release him constitutes punishment. We do not agree.

¶8 We defer to the trial court's findings of historical facts as they relate to constitutional challenges unless they are clearly erroneous. ***State v. McMorris***, 213 Wis. 2d 156, 165, 570 N.W.2d 384 (1997). However, we apply those facts to the constitutional standard independent of the trial court's decision. ***Id.***

¶9 Here, a review of the trial court's decision demonstrates that it properly found that Wiedenhoeft suffers from a mental disorder within the meaning of WIS. STAT. ch. 980, that he is dangerous because this mental disorder makes it substantially probable that he will re-offend and that, as a result, he should be placed in institutional care to protect the public from further sexual

violence. Wiedenhoeft argues that once all available treatment is completed, he cannot be detained indefinitely, even if he continues to be dangerous. He claims that keeping him confined under these circumstances results in a punitive purpose in violation of his due process rights. We do not agree.

¶10 Although we agree that the dual purpose of the sexual predator law is to protect the community from sexual predators, and to care for and provide treatment to sexual predators, *see* ***Post***, 197 Wis. 2d at 302-03, this does not mean that a sexually violent person cannot be held, even if there is no effective treatment, *see* ***Kansas v. Hendricks***, 521 U.S. 346, 365-66 (1997). Likewise, detaining a sexually violent person in the absence of currently effective treatment does not render the detention unconstitutional. *See* ***id.*** "To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions." ***Id.*** at 366.

¶11 Wiedenhoeft attempts to distinguish ***Kansas*** because it discusses individuals who cannot be helped by treatment. He argues that because he has engaged in all treatment available, and shown some progress, that the ruling in ***Kansas*** is not controlling here. This is a distinction without a difference. Treatment is not a constitutional prerequisite to commitment. *See* ***Post***, 197 Wis. 2d at 308. Optimistically speaking, the State's interests would be served if all sexual offenders could be "cured" with treatment. Nonetheless, the standards set forth in our statute control whether a sexual offender should be released. Neither the statutes nor current case law require Wiedenhoeft's release where the evidence shows that he is still dangerous and, much more likely than not, to re-offend. Therefore, he may be detained.

¶12 We are further not persuaded by Wiedenhoeft's claim that he may never be released, which renders the statute impermissibly punitive and therefore unconstitutional. We disagree. Whether Wiedenhoeft remains confined depends on the individual circumstances of his case. The statutes provide for a mechanism of review in these matters to determine whether detained individuals may be released, or whether the degree of confinement may be less restrictive. However, such review is dependent on the standards set forth in the statute, which our supreme court has found to be constitutional. *See* ***Post***, 197 Wis. 2d at 294.

C. Fact-finding.

¶13 Wiedenhoeft next argues that the trial court made improper findings of fact based on the evidence. This is essentially an argument that there was insufficient evidence to support the trial court's ruling. Our review of the record demonstrates that the trial court's findings were not clearly erroneous, and that the evidence is sufficient to support the trial court's decision.

¶14 "[W]e reverse only if the evidence, viewed in the light most favorable to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Kienitz***, 221 Wis. 2d 275, 301, 585 N.W.2d 609 (Ct. App. 1998), *aff'd,* 227 Wis. 2d 423, 597 N.W.2d 712 (1999).

¶15 Here, Wiedenhoeft elected to have a bench trial. Therefore, the trial court was the finder of fact. It assessed the credibility of the witnesses. There was sufficient testimony by the three psychologists to reach the conclusion that Wiedenhoeft suffered from a mental illness, and that there was a substantial probability that he would re-offend if released. The trial court made extensive findings of fact and stayed within the parameters of the statutes and the facts that

must be considered. *See* WIS. STAT. 980.06(2)(b). Its findings of fact are supported by the record and its conclusions are reasonable.

¶16 Wiedenhoeft also contends that the trial court's reliance on his history of sexually violent conduct, his mental history, and his present mental condition was erroneous. We disagree. WISCONSIN STAT. § 980.06(2)(b) provides:

> An order for commitment under this section shall specify either institutional care or supervised release. In determining whether commitment shall be for institutional care or for supervised release, the court may consider, without limitation … *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.

(Emphasis added.) Therefore, the trial court's reliance on these factors was not erroneous.

D. Proof of timely filed petition.

¶17 Wiedenhoeft's last claim is that the State failed to satisfy its burden of proving beyond a reasonable doubt that the petition for detention was filed within the ninety-day time requirement of WIS. STAT. § 980.02(2). We reject this claim.

¶18 In ***State v. Thiel***, 2000 WI 67, 235 Wis. 2d 823, 612 N.W.2d 94, our supreme court held that WIS. STAT. § 980.02(2) requires that "the State must prove beyond a reasonable doubt that it filed its [commitment] petition within 90 days of the subject's release or discharge." ***Id.*** at ¶26. The court found that the statute's

plain language led it to the "inescapable conclusion that the legislature intended the State to prove its fulfillment of the 90-day requirement beyond a reasonable doubt before a person may be adjudged sexually violent." ***Id.*** at ¶19.

¶19 The record demonstrates that the State satisfied this element. On the first day of the trial to the court, the State offered into evidence a certified affidavit from the registrar of Mendota Mental Health Institute, which indicated that Wiedenhoeft's mandatory release date was February 10, 1999. The State offered this document as proof that the petition, filed on February 9, 1999, was filed within ninety days of Wiedenhoeft's mandatory release date. The document was accepted without objection and used for that purpose. Accordingly, Wiedenhoeft cannot now object to this evidence.

By the Court.—Order affirmed.

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