

**COURT OF APPEALS  
DECISION**

**DATED AND FILED**

**September 7, 2005**

Cornelia G. Clark  
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. 2004AP2411**

**Cir. Ct. No. 2000CI1**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE COMMITMENT OF MORRIS F. CLEMENT:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**V.**

**MORRIS F. CLEMENT,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Forest County:  
ROBERT A. KENNEDY, JR., Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Morris Clement appeals an order of the circuit court denying his petition for supervised release. Clement argues: (1) the real controversy has not been fully tried because the trial court incorrectly assigned the burden of proof, and a new trial is warranted in the interest of justice; and (2) the

circuit court incorrectly applied the risk assessment results. We disagree and affirm the order.

## BACKGROUND

¶2 The sole issue at the proceeding was whether Clement qualified for supervised release from his commitment. The court reviewed Clement’s petition for supervised relief under WIS. STAT. § 980.08(4) (2001-02), which stated in relevant 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 sum, the statute placed the burden on the State to demonstrate Clement was currently sexually violent and there was a substantial probability of recidivism. *See id.*

¶3 At the commencement of the evidentiary portion of the proceeding, the court acknowledged the State’s burden through a question to the special prosecutor.

THE COURT: [D]oes the state have the burden of proof in this case?

[SPECIAL PROSECUTOR]: Yes. The State has to show by a clear and convincing evidence that this respondent still is a sexually violent person.

¶4 However, subsequent comments throughout the trial suggest that the court may have confused the burden of proof. During Dr. Sheila Fields’s testimony, Clement’s expert witness who had concluded that Clement was unlikely to reoffend due to his advanced age, the court asked: “[Are] there some

studies that you have that you relied on in this diagnosis that says that and that's part of the reason why you feel that *age is a way to refute their presumption* that the April of 2002 determination is still valid today?" [Emphasis added.] The court was referring to the April 2002 WIS. STAT. Ch. 980 proceeding that resulted in Clement's commitment.

¶5 Later when questioning Dr. Fields, the court again referenced a presumption that Clement's condition remained unaltered from the original commitment proceeding. The court stated, "[Q]uite frankly, *there's a presumption that a condition proven continues* that can be mitigated by the passage of time. In this situation, the defense is saying because of his age, *the presumption no longer applies.*" (Emphasis added.) Finally, in the court's oral ruling denying Clement's petition, the court again seemed to imply that Clement must demonstrate that his condition has changed since the original commitment; the court concluded, "I am not satisfied that ... the determination made back in 2002 [is] no longer relevant today." This appeal follows the order denying Clement's petition.

#### STANDARD OF REVIEW

¶6 WISCONSIN STAT. § 752.35<sup>1</sup> permits this court to provide relief in the interest of justice if we are convinced "that the real controversy has not been fully tried ...." *Id.* If a party demonstrates that the real controversy was not fully tried, we may exercise our power of discretionary reversal, even if we conclude that it is not probable that the result would be different at a new trial. *See id.*; *Vollmer v. Luety*, 156 Wis. 2d 1, 19, 456 N.W.2d 797 (1990). Our power of

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

discretionary reversal should only be exercised in exceptional cases. *See Vollmer*, 156 Wis. 2d at 11.

## DISCUSSION

¶7 Clement argues that the court's comments show that it erroneously placed the burden of proof upon Clement instead of the State, and therefore Clement is entitled to a new trial because the real controversy was not fully tried. Although we agree that the court's choice of words was inappropriate, we do not agree that the real controversy was not fully tried. We are satisfied that the court placed the burden of proof upon the State.

¶8 Admittedly, the court's wording was confusing, but we conclude that it did not improperly shift the burden. Notably, the court established the burden was with the State in its question to the special prosecutor at the commencement of the proceeding. Further, the applicable statutory provision acknowledges that whether to grant a petition for supervised release focuses on change in condition since commitment. *See* WIS. STAT. § 980.08(4); *State v. Pocan*, 2003 WI App 233, ¶11, 267 Wis. 2d 953, 671 N.W.2d 860. Specifically, the State must prove "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." WIS. STAT. § 980.04(4).

¶9 The court's language in response to the expert witnesses recognized that the State must demonstrate that there has been no meaningful change in Clement's condition since the initial commitment proceeding. The court's wording was its recognition of the original determination in the commitment proceeding, not a reassignment of the burden of proof. Essentially, the court was

attempting to determine whether Clement's increased age reduced his likelihood of reoffending. Further, the State presented sufficient evidence that Clement was still a sexually violent person, and it was substantially probable he would reoffend. We reject Clement's argument because the record indicates the issue was fully tried.

¶10 Clement next argues that the court incorrectly considered Clement's risk assessment results. The court commented that a 37% chance of recidivism in a risk assessment meets the substantial probability of reoffense standard set forth in WIS. STAT. § 980.04(4). Clement argues that this does not meet the standard, and presumably the court misapplied the results of Clement's risk assessment. *See id.* We disagree. As stated by the experts that testified, the risk assessment results are not intended to precisely predict the risk of any one individual to reoffend, but instead place an individual in a particular statistical group, according to their history, where the recidivism rate is already calculated. Further, the risk assessment pertains to rates of reconviction over a specific period of time that are inherently lower than the reoffense rate. Finally, all three experts that testified at the trial stated Clement was at a high risk to reoffend, which the court considered. We are satisfied the court properly considered the results of the risk assessment along with the other evidence presented. For these reasons, we affirm the circuit court's order.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

