COURT OF APPEALS
DECISION
DATED AND FILED

February 28, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0655

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

IN RE THE COMMITMENT OF BRYAN S. CAMPBELL:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

BRYAN S. CAMPBELL,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County: WILLIAM H. CARVER, Judge. *Affirmed.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Bryan S. Campbell appeals from the order of commitment under WIS. STAT. ch. 980 (1999-2000).[1] He raises twelve issues on appeal: (1) The district attorney did not have the authority to file the ch. 980 petition; (2) his trial was not held within the statutory time limit; (3) there was insufficient evidence to establish probable cause; (4) the trial court erroneously exercised its discretion when it ordered release of the presentence investigation report; (5) the PSI was improperly used at trial; (6) the circuit court allowed hearsay testimony; (7) certain testimony violated Campbell's plea agreement in a previous case; (8) the testimony of a social worker violated a privilege; (9) statements made to a probation officer were involuntary and improperly admitted at trial; (10) Campbell was entitled to six peremptory challenges; (11) the trial court did not excuse or remove certain jurors; and (12) Campbell was entitled to a dispositional hearing. We affirm.

¶2 In May 1998, the Winnebago County District Attorney filed a petition under WIS. STAT. ch. 980 against Campbell. After several continuances at the request of Campbell's attorney, a trial was held. The jury found Campbell to be a sexually violent person and he was ordered committed. Campbell appeals.

¶3 The first issue Campbell raises in this appeal is that the WIS. STAT. ch. 980 petition was not properly filed. He argues that WIS. STAT. § 980.02 gives the Wisconsin Department of Justice authority to file a ch. 980 petition at the request of the Department of Corrections. The statute further provides that a local district attorney may file the petition if the Department of Justice does not. Section 980.02(1)(b).

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 Campbell argues that there is no evidence in the record that the matter was referred by the Department of Corrections. We disagree. The record establishes that the Department of Corrections asked the Department of Justice to proceed and that the Department of Justice declined and asked the Winnebago County District Attorney to file the petition. This complied with the statutory requirements.

¶5 The second issue Campbell raises is that his trial was held beyond the forty-five day time limit found in WIS. STAT. § 980.05(1). The record establishes, however, that Campbell's attorney asked for the continuances which resulted in the trial being postponed. Since defense counsel requested the continuances, any objection to the timeliness of the trial has been waived. Campbell now argues that the waiver should have come from him personally and not from his counsel. Again, we disagree. The waiver of a time limit such as this is a strategic decision which a lawyer is entitled to make. It does not require a personal colloquy with the defendant. *See* ***State v. Brunette***, 220 Wis. 2d 431, 443-44, 583 N.W.2d 174 (Ct. App. 1998).

¶6 Campbell next argues that the evidence introduced at his probable cause hearing was insufficient as a matter of law. Specifically, he argues that there was not sufficient evidence because the State's expert witness testified that he defined the term "substantially probable" to reoffend, as used in WIS. STAT. § 980.01(7), to mean "more likely than not." Campbell goes on to argue that the supreme court has defined "substantially probable" to mean "much more likely than not." ***State v. Curiel***, 227 Wis. 2d 389, 405-06, 597 N.W.2d 697 (1999). Since the State's expert used the wrong standard, he argues, there was not sufficient evidence to establish probable cause.

¶7 Campbell ignores, however, the other evidence which was offered. Campbell had multiple convictions for second-degree and fourth-degree sexual assault. In addition, he had admitted to the State's expert to molesting forty-eight children from 1988 through 1991. He had told the State's expert that these acts were planned and that it felt he was addicted to it. The other evidence showed that he had not successfully completed sexual offender treatment and that he had committed some acts while on probation for a conviction. The evidence offered supported the court's conclusion that there was probable cause.

¶8 Campbell next argues that the circuit court erroneously exercised its discretion when it released the presentence investigation report to the State's experts. In ***State v. Zanelli***, 212 Wis. 2d 358, 378, 569 N.W.2d 301 (Ct. App. 1997), this court held that a PSI may be made available "upon specific authorization of the court" to the State's experts. The circuit court was directed to consider the countervailing factors in reaching this determination. ***Id.*** "It may decide whether the PSI in fact contains relevant evidence, whether that evidence is available from other sources, weigh its probative value against the potential for unfair prejudice and consider all other relevant factors of a particular case." ***Id.***

¶9 In this case, however, the record on appeal does not contain the PSI. Since the record does not contain the PSI, this court must assume that the facts support the trial court's exercise of discretion, particularly as to whether the PSI contained relevant evidence. *See* ***Austin v. Ford Motor Co.***, 86 Wis. 2d 628, 641, 273 N.W.2d 233 (1979). The record does establish that the circuit court considered "the other sources" factor by noting that there were approximately forty additional victims who would have to be sought out, and that some of the offenses were nine years old. As to the prejudice factor, Campbell does not claim that the report contained any prejudicial information. Moreover, ***State v. Watson***,

227 Wis. 2d 167, 194, 595 N.W.2d 403 (1999), recognizes that "professionals in corrections, including clinical psychologists, routinely and reasonably rely on presentence investigations to evaluate persons in the corrections system and to form opinions." The circuit court did not erroneously exercise its discretion when it allowed the PSI to be released to the State's experts.

¶10 Campbell also argues that the PSI was used improperly by the experts who testified at trial, and that they were allowed to testify as to inadmissible hearsay. Campbell asserts that two of the experts testified extensively about information which they obtained from the PSI. Campbell does not, however, cite to any specific testimony which he alleges to be objectionable. The cites he does give do not mention the PSI. Without the benefit of the PSI in the record, this court cannot conclude that the PSI was improperly used by these witnesses, or that they testified as to inadmissible hearsay.

¶11 Campbell next argues that the use of his admissions of previous sexual assaults were used in the WIS. STAT. ch. 980 proceeding in violation of the plea agreement in his previous criminal conviction. Campbell asserts that the plea agreement provided that he would not be prosecuted for any other sexual assaults which occurred prior to the conviction. He asserts that the extensive use of his admissions in the ch. 980 proceeding violated this agreement.

¶12 Although the State raises a number of responses to this claim, the simplest response is that this is not a criminal proceeding. *See* ***State v. Thiel***, No. 99-0316, slip op. at ¶9 (Wis. Ct. App. Jan. 24, 2001). The State has not charged Campbell with a new crime, and consequently, the State did not breach the plea agreement.

¶13 Campbell next argues that the testimony by a social worker was barred by the patient/client privilege. The record, however, supports the State's response that Campbell did not object to this testimony at trial. Prior to the start of trial, defense counsel filed a motion in limine to exclude the social worker's testimony about her communications with Campbell. At the start of trial, defense counsel told the court that he did not think the social worker's testimony would be privileged, but reserved the right to object. Defense counsel did not object and did not move for a mistrial after the testimony was given. Campbell has waived his right to object to this testimony. *See* ***State v. Waites***, 158 Wis. 2d 376, 390, 462 N.W.2d 206 (1990).

¶14 Campbell also argues that it was error for the court to allow the testimony of his probation agent about statements Campbell made to her. As with the testimony of the social worker, however, Campbell did not object to this testimony during trial. Again, Campbell had made a pretrial motion to exclude the testimony of the probation agent. At the start of trial, Campbell's counsel told the court that he did not object to the probation agent testifying to the statements Campbell made to her while she was preparing the PSI. Because Campbell acquiesced in the testimony and did not object at trial, he has waived any objections. *See* ***id.***

¶15 Campbell next argues that he was entitled to six peremptory strikes during jury selection. We again disagree. In ***State v. Brown***, 215 Wis. 2d 716, 718-19, 573 N.W.2d 884 (Ct. App. 1997), this court said that the provisions of WIS. STAT. chs. 807 to 847, the rules of civil procedure, apply to a WIS. STAT. ch. 980 proceeding unless a different procedure is prescribed by statute or rule. As Campbell himself states, the statutes do not provide for a different rule. He argues, however, that a ch. 980 commitment proceeding is analogous to a criminal

proceeding and therefore, he should be entitled to six peremptory challenges. A ch. 980 proceeding, as discussed previously, is not a criminal proceeding. Since the statutes do not provide for a different rule, the rules governing civil proceedings control. Campbell was not entitled to six peremptory challenges.

¶16 Campbell also argues that he is entitled to a new trial because of three jurors. Campbell argues that three jurors were inattentive because one fell asleep during a portion of the testimony, a second stated that she suffered from narcolepsy, and a third helped the second stay awake. The circuit court addressed the issue of the sleeping juror. The court noted that the juror had fallen asleep during the reading of a supplemental report. The court also found that the juror had not been asleep for long, had previously taken notes, and the court had the supplemental report reread. The court, consequently, determined that the juror was able to continue on the jury.

¶17 Campbell also asserts that the court erred by allowing two other jurors to remain on the panel. One juror suffered from narcolepsy. The other juror was sitting next to her and apparently helped her to stay awake. Campbell argues that these facts establish that these jurors were inattentive. We disagree. The juror who suffered from narcolepsy stated that her condition did not affect her ability to pay attention. There was no showing whatsoever that the assistance the other juror offered her in any way affected his ability to pay attention.

¶18 Further, Campbell never moved for a mistrial or asked the court to take any remedial action. No issue of claimed error by the trial court may be reviewed on appeal unless it was raised first before the trial court. ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980). Unless the defendant moves for a mistrial, all the court of appeals can assume is that "the defendant was satisfied

with the court's ruling and curative measure, and that he had no further objections." ***Neely v. State***, 97 Wis. 2d 38, 54-55, 292 N.W.2d 859 (1980) (citation omitted). We conclude that since Campbell did not move for a mistrial or request any different remedial action, he has waived his right to raise the issue on appeal. He is not entitled to a new trial on this basis.

¶19 The final issue Campbell raises is whether he was improperly denied a dispositional hearing under WIS. STAT. § 980.06(2)(a) (1997-98). This statute, however, was repealed after the petition was filed but before the trial was held in this matter. Section 9323(ag) of 1999 Wis. Act 9 provides that: "The treatment of sections 980.06(1) and (2)(a), (b) and (c) and 980.065(1m) of the statutes first applies to initial commitment orders in cases in which judgment is entered under section 980.05(5) of the statutes on the effective date of this paragraph." Judgment in this case was not entered until after the effective date. Consequently, Campbell was not entitled to a dispositional hearing.

¶20 For the reasons discussed, the order of the circuit court is affirmed.

By the Court.—Order affirmed.

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