

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 12, 2007

David R. Schanker
Clerk of Court of Appeals

NOTICE

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Appeal No. 2004AP2372

Cir. Ct. No. 1999CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF SHELDON K. MILLER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SHELDON K. MILLER,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
MICHAEL J. MULROY, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. Sheldon K. Miller appeals a circuit court order denying his petition for supervised release under WIS. STAT. § 980.08(4)(b)

(2003-04).¹ Miller contests what he views as the retroactive application of amendments to § 980.08(4) enacted in 2003; § 980.08 is the statute governing supervised release of persons committed under WIS. STAT. ch. 980 as sexual offenders. Miller also raises due process and equal protection challenges to the amendments, as well as a separate vagueness challenge. We conclude § 980.08(4)(b)2. was not retroactively applied to Miller. Because we conclude § 980.08(4)(b)2. was not retroactively applied to Miller, we reject his substantive due process challenge on this issue. We also do not reach the merits of Miller's other constitutional challenges because the circuit court applied the first ground under § 980.08(4)(b) in denying Miller's petition and because Miller's facial constitutional challenges are moot. We therefore affirm the circuit court's order.

BACKGROUND

¶2 On May 17, 2000, Sheldon K. Miller was committed to the Wisconsin Resource Center as a sexually violent person, pursuant to WIS. STAT. § 980.06 (1999-2000). On March 15, 2004, Miller filed a petition for supervised release under WIS. STAT. § 980.08 (2001-02).

¶3 On April 22, 2004, before a hearing was held on Miller's petition, the legislature enacted several amendments to WIS. STAT. § 980.08, as part of 2003 Wis. Act 187. Specifically, subsection (4)(b) of the newly amended § 980.08 changed the grounds the State must prove exist before a court can deny a subject's petition for supervised release. Prior to the hearing, the State moved the circuit court to apply the new statutory amendments. Miller objected, arguing that

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

the amendments did not apply to his petition, because he filed his petition prior to the effective date of 2003 Wis. Act 187.

¶4 The circuit court concluded that the amendments in 2003 Wis. Act 187 relating to WIS. STAT. § 980.08 applied to Miller. After finding that the State proved under the requisite legal standard that both grounds existed under § 980.08(4)(b) 1. and 2. for denying Miller's petition, the court denied Miller's petition for supervised release. Specifically, the court found that Miller was still a sexually violent person and that it was more likely than not that he would engage in sexual violence if not confined. The court also found that Miller had not made significant progress while in treatment. Miller appeals the court's order.

¶5 Since the filing of Miller's appeal, the legislature amended WIS. STAT. § 980.08(4) yet again, by enacting 2005 Wis. Act 434. The Act became effective in 2006, and repealed § 980.08(4)(b).²

DISCUSSION

A. Retroactive Application of WIS. STAT. § 980.08(4)(b)2.

¶6 Miller argues that the amendments to WIS. STAT. § 980.08(4) (2001-02) made by 2003 Wis. Act 187 do not apply to him, and therefore the circuit court improperly applied the wrong legal standard to determine whether to grant his petition for supervised release. Specifically, he asserts that the grounds for denial provided in § 980.08(4) (2001-02) should have been applied to him in determining whether he was entitled to supervised release because he filed his

² The new amendments to WIS. STAT. § 980.08(4) (2005-06) are not before us on this appeal.

petition for supervised release prior to the effective date of the 2003 amendments. Miller contends the court's retroactive application of the amendments was improper. We disagree.

¶7 The resolution of this case turns on our interpretation and application of the newly enacted amendments to WIS. STAT. § 980.08(4) to a particular set of facts. We review questions of statutory interpretation de novo. *State v. Stenklyft*, 2005 WI 71, ¶7, 281 Wis. 2d 484, 697 N.W.2d 769. Statutory interpretation begins with the statute's text; we give the text its common, ordinary, and accepted meaning, except that we give technical or specially defined words their technical or special definitions. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 681 N.W.2d 110.

¶8 Whether a statute has a retroactive effect upon a claim is a question of law, which we review de novo. *Mathies v. Positive Safety Mfg. Co.*, 2001 WI 82, ¶15, 244 Wis. 2d 720, 628 N.W.2d 842. We will presume that legislation operates prospectively, not retroactively, unless the statutory language reveals a retroactive intent. *Id.*

¶9 At the time Miller filed his petition for supervised release in March 2004, WIS. STAT. § 980.08(4) (2001-02) provided the basis on which a circuit court determined whether to grant a subject's petition for supervised release. Section 980.08(4) (2001-02) provided in relevant part:

The court shall grant the petition unless the state proves by clear and convincing evidence that the person is still a sexual 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.

¶10 By enacting 2003 Wis. Act 187, the legislature created new subsection (4)(b)2. Subsection (4)(b) of the newly amended statute provided:

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.

(Emphasis added.)³ The effective date of the newly amended statute was April 22, 2004.

¶11 We conclude that WIS. STAT. § 980.08(4)(b)2. was not retroactively applied to Miller. Miller filed his petition seeking supervised release in March 2004. This was before the April 22, 2004 effective date of § 980.08(4)(b)2. His hearing, however, had not yet been held. 2003 Wis. Act 187 contained the following language concerning the initial applicability of its provisions:

Section 8. Initial applicability.

(1) The treatment of section 980.01(1m) and (7) of the statutes, the renumbering and amendment of section 980.08(4) of the statutes, and the creation of section 980.08(4)(b)2. of the statutes first apply to *hearings*, trials, and proceedings that are commenced on the effective date of this subsection.

(Emphasis added.)

³ These amendments also revised the language of WIS. STAT. § 980.08(4)(b)1. to correspond with parallel amendments to WIS. STAT. § 980.01(7)'s definition of a "sexually violent person."

¶12 It is plain by the unambiguous language of Section 8 of 2003 Wis. Act 187 that WIS. STAT. § 980.08(4)(b)2. applies to “hearings ... commenced on the effective date” of the subsection. Because Miller’s hearing on his petition had not commenced until after the effective date of the amendments, the new law was not retroactively applied to him.

¶13 *State v. Williams*, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791, supports our conclusion. In *Williams*, the WIS. STAT. ch. 980 subjects argued that changes made to WIS. STAT. § 980.06 (1997-98) by 1999 Wis. Act 9 were impermissibly applied to them because the amended version of the statute took effect after their ch. 980 commitment petitions were filed. *Id.*, ¶¶2, 21. We explained in *Williams* that the amendments to the statute were not retroactively applied, because the subjects’ commitment trials took place well after the date the amendments went into effect. *Id.*, ¶23. Applying this logic to the facts of this case, it is plain that the circuit court did not retroactively apply WIS. STAT. § 980.08(4)(b)2. to Miller.⁴

B. Constitutional Claims

¶14 Miller raises four constitutional claims: (1) that his right to substantive due process under the United States and Wisconsin constitutions was violated because of the retroactive application of WIS. STAT. § 980.08(4)(b)2.; (2) that his substantive due process rights were further violated because subsection (4)(b)2. permits a court to confine a subject “based solely on his treatment

⁴ Because we conclude that the court did not retroactively apply WIS. STAT. § 980.08(4)(b)2. to Miller, we do not address the issue Miller raises here, which is whether § 980.08(4)(b)2. *could* be applied retroactively.

progress” without a specific finding of continuing dangerousness; (3) that his equal protection rights were violated because a court may deny a subject’s petition for supervised release under subsection (4)(b)2. without a finding of dangerousness, in contrast to similar hearings held under WIS. STAT. chs. 51 and 55, commitments under WIS. STAT. § 975.09(3), and NGI commitments under WIS. STAT. § 971.17, where a finding of dangerousness is necessary to keep a person committed; and (4) that subsection (4)(b)2. is unconstitutionally vague, in violation of his due process rights.⁵

¶15 We consider first Miller’s argument that WIS. STAT. § 980.08(4)(b)2. violates his right to substantive due process because it was retroactively applied to him. As we have concluded, the statute was not retroactively applied to Miller. Accordingly, we reject this due process challenge.

¶16 Turning to Miller’s other constitutional challenges, we conclude that it is not necessary to decide the constitutional issues Miller advances because the circuit court’s application of WIS. STAT. § 980.08(4)(b)1. was sufficient to deny Miller’s petition for supervised release. *See State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (Cases should be decided on the narrowest possible ground. In addition, the court will not reach constitutional issues when the resolution of other issues disposes of the appeal.), *overruled on other grounds by State v. Morford*, 2004 WI 5, ¶5, 268 Wis. 2d 300, 674 N.W.2d 349.

¶17 WISCONSIN STAT. § 980.08(4)(b) permits a circuit court to deny a subject’s petition for supervised release on alternative grounds: (1) “[t]hat it is still

⁵ Miller does not challenge the constitutionality of WIS. STAT. § 980.08(4)(b)1.

likely that the person will engage in acts of sexual violence if the person is not continued in institutional care” (subsection (4)(b)1.); or (2) “[t]hat the person has not demonstrated significant progress in his or her treatment or the person has refused treatment” (subsection (4)(b)2.). The circuit court rejected Miller’s petition for supervised release on both grounds. Specifically, the court, applying § 980.08(4)(b)1., found that Miller was still a sexually violent person and was more likely than not to engage in future acts of sexual violence if not retained in the institution. The court also found, applying § 980.08(4)(b)2., that significant progress in treatment had not been made. Thus, because the court relied on § 980.08(4)(b)1. to deny Miller’s petition, the application of which Miller does not challenge, we need not reach the constitutional argument Miller makes regarding subsection (4)(b)2. See *Castillo*, 213 Wis. 2d at 492.

¶18 To the extent Miller raises facial constitutional challenges to WIS. STAT. § 980.08(4)(b)2., those challenges are moot. A matter is moot if a determination is sought that cannot have a practical effect on an existing controversy. *State ex rel. Olson v. Litscher*, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. A facial challenge to the statute rests on the possible future unconstitutional application of that statute. Section 980.08(4)(b)2. will not be applied to Miller in the future. Since the time Miller filed this appeal, § 980.08(4)(b)2. has been repealed. Thus, the harm he alleges he faces from any possible future application of the statute will not come to pass. We will not render a statutory provision void on its face when it has already been rendered void by legislative repeal. See, e.g., *Massachusetts v. Oakes*, 491 U.S. 576, 583-84 (1989); *Kremens v. Bartley*, 431 U.S. 119, 126-27 (1977); *Cudahy v. WDOT*, 261 Wis. 126, 138-39, 52 N.W.2d 467 (1952).

CONCLUSION

¶19 Based on the foregoing reasons, we affirm the circuit court's order denying Miller's petition for supervised release.

By the Court.—Order affirmed.

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