COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2004AP1874 **Cir. Ct. No. 2002CI1**

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

IN RE THE COMMITMENT OF RANDY PURIFOY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RANDY PURIFOY,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: RICHARD J. SANKOVITZ, Judge. *Affirmed.*

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

¶1 PER CURIAM. Randy Purifoy appeals a judgment finding him to be a sexually violent person and committing him to institutional care pursuant to

WIS. STAT. § 980.01(7) (2003–04). On appeal, Purifoy challenges the timeliness of the petition seeking his committal as a sexually violent person, the sufficiency of evidence to support the circuit court's factual findings, and the constitutionality of WIS. STAT. ch. 980. We affirm.

Background

¶2 In 1976, Purifoy, then sixteen-years-old, raped and murdered Nola Mae R. After his arrest, Purifoy confessed to several other violent sexual assaults and attempted sexual assaults, and to two armed robberies. Purifoy pled guilty to one count of rape and second-degree murder. *See* WIS. STAT. §§ 944.01(1), 940.02 (1973).[1] Purifoy was committed under WIS. STAT. § 975.06 (1975) for an indeterminate amount of time for the rape. Purifoy was sentenced to a consecutive prison term of five to twenty–five years for the murder charge, to commence upon discharge from the WIS. STAT. ch. 975 commitment. Purifoy was hospitalized until mid–1990, when he was discharged from the commitment. He then was transferred to the custody of the Department of Corrections. On May 1, 2002, the State filed a petition alleging that Purifoy was a sexually violent person within the meaning of WIS. STAT. § 980.01(7) (2001–02). The petition further alleged that, "[u]pon information and belief," Purifoy "will be released from the sentence … within 90 days."

[1] The underlying crimes were committed on January 31, 1976. WISCONSIN STAT. § 944.01(1) (1973) was repealed and substantially recreated as WIS. STAT. § 940.225 (1975). *See* 1975 Wis. Laws, ch. 184, § 7, § 5. The statutory changes took effect on March 27, 1976. *See* WIS. STAT. § 990.05 (1975) ("Every law or act which does not expressly prescribe the time when it takes effect shall take effect on the day after its publication.").

Timeliness of the Petition

¶3 In a pretrial motion to dismiss, Purifoy argued that the petition was not timely filed. In February 2002, Purifoy had filed a *habeas corpus* petition in Winnebago County circuit court in which he challenged the calculation of the mandatory release date under his 1976 sentence. Purifoy was successful, and the circuit court granted Purifoy fifteen months of additional "good time" credit. *See* WIS. STAT. § 53.11 (1975). After recalculation, Purifoy's mandatory release date became September 26, 2001. The *habeas* court ordered Purifoy's release by May 22, 2002.

¶4 Purifoy correctly states that the WIS. STAT. ch. 980 petition must allege, and the State must prove, that he was within ninety days of discharge or release. WIS. STAT. § 980.02(2)(ag) (2001–02); *see also* ***State v. Thiel***, 2000 WI 67, ¶38, 235 Wis. 2d 823, 837, 612 N.W.2d 94, 100 ("[I]n a trial on a commitment petition filed under WIS. STAT. § 980.02(2), the State bears the burden to prove beyond a reasonable doubt that the petition was filed within 90 days of the subject's release or discharge from a sentence based on a sexually violent offense."). That requirement was satisfied in this case. The *habeas* court ordered that Purifoy be released by May 22, 2002. Thus, the petition, filed on May 1, 2002, correctly alleged that Purifoy was within ninety days of release.[2]

¶5 Purifoy argues that the petition was untimely because it was not filed within ninety days of September 26, 2001. The recalculation of Purifoy's mandatory release date does not render the petition untimely. *See* ***State v.***

[2] The State went on to prove the allegations at trial, and Purifoy does not argue otherwise.

Carpenter, 197 Wis. 2d 252, 274–275, 541 N.W.2d 105, 114 (1995) (The State may rely on the release date calculated when the petition is filed; a subsequent recalculation does not render the petition untimely.); *see also* ***State v. Virlee***, 2003 WI App 4, ¶¶17–18, 259 Wis. 2d 718, 727–728, 657 N.W.2d 106, 111.

Sufficiency of the Evidence

¶6 Purifoy first contends that the evidence does not establish that it is substantially probable that he will commit acts of sexual violence.[3] According to Purifoy, the State did not prove that he was any different "from any other person who can be said to pose a risk based on past convictions." Purifoy points to the passage of time since he committed a sex-related crime (over twenty-eight years) or committed any crime (over twenty years).[4] Purifoy claims that the required nexus between his mental disorder and dangerousness is absent from this case. *See* ***State v. Laxton***, 2002 WI 82, ¶22, 254 Wis. 2d 185, 202–203, 647 N.W.2d 784, 793 (A nexus is required "between the mental disorder and the individual's dangerousness. Proof of this nexus necessarily and implicitly involves proof that the person's mental disorder involves serious difficulty for the person to control his or her behavior."). Purifoy discounts the expert testimony cited by the circuit court because it was premised on crimes committed long ago and there was no showing of "any actual deviant behavior in many, many years." According to

[3] Substantial probability was the standard in effect when this petition was filed. *See* WIS. STAT. § 980.02(2)(c) (2001–02) (The State must prove that "[t]he person is dangerous to others because the person's mental disorder creates a substantial probability that he or she will engage in acts of sexual violence."). WISCONSIN STAT. § 980.02(2)(c) (2005–06) now requires the State to prove that "[t]he person is dangerous to others because the person's mental disorder makes it likely that he or she will engage in acts of sexual violence."

[4] In 1983, Purifoy was convicted of escape while hospitalized at Mendota Mental Health Institute. The WIS. STAT. ch. 980 trial took place in January 2004.

Purifoy, the absence of any conduct since 1976 that shows a desire to engage in sexually violent conduct renders the evidence insufficient as a matter of law. Further, because Purifoy "controlled his behavior sufficiently to avoid sexually any violent behavior from 1976 until the present … no fact finder could reasonably find beyond a reasonable doubt that he presently lacks control over 'sexually dangerous behavior.'"

¶7 Purifoy's contentions boil down to a "recent overt act" argument, and we reject it. In one of the first WIS. STAT. ch. 980 cases, the supreme court held that the State need not establish an overt act in order to establish probable cause of dangerousness when the offender is incarcerated when the petition is filed. *See* ***Carpenter***, 197 Wis. 2d at 275–276, 541 N.W.2d at 114. More recently, the supreme court rejected a constitutional challenge to ch. 980 because "it fails to require a showing of a recent overt act to prove current dangerousness when there has been a break in the offender's incarceration and the offender has been reincarcerated for nonsexual behavior." ***State v. Bush***, 2005 WI 103, ¶21, 283 Wis. 2d 90, 106, 699 N.W.2d 80, 88. In both instances, the Wisconsin supreme court expressly rejected the reasoning used by the Washington supreme court. *See* ***Carpenter***, 197 Wis. 2d at 275–276, 541 N.W.2d at 114 (rejecting the holding of ***In re Young***, 857 P.2d 989 (Wash. 1993)); ***Bush***, 2005 WI 103, ¶¶22–23, 283 Wis. 2d at 106–107, 699 N.W.2d at 88–89 (rejecting the holding of ***In re Albrecht***, 51 P.3d 73 (Wash. 2002)). Purifoy cites to both ***Young*** and ***Albrecht***, and like the supreme court, we reject their rationales. The fact that Purifoy had not committed a sexually violent offense since his conviction in 1976 does not preclude a finding of dangerousness within the meaning of WIS. STAT. § 980.02(2)(c) (2001–02).

¶8 We review the sufficiency of the evidence in a WIS. STAT. ch. 980 case under the same standard applicable to criminal convictions—that is, whether the evidence viewed most favorably to the State "'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 [a substantial probability that the person would commit future sexually violent offenses] beyond a reasonable doubt.'" ***State v. Curiel***, 227 Wis. 2d 389, 416–417, 597 N.W.2d 697, 709 (1999) (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752, 755 (1990)). The standard of review is identical whether a jury or the circuit court acts as the fact finder. *See* ***State v. Kienitz***, 221 Wis. 2d 275, 301–302, 585 N.W.2d 609, 619–620 (Ct. App. 1998). We will not reverse a WIS. STAT. ch. 980 commitment unless the evidence, viewed most favorably to the State and the commitment, 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 the defendant to be a "sexually violent person" beyond a reasonable doubt. *See* ***State v. Marberry***, 231 Wis. 2d 581, 593, 605 N.W.2d 612, 619 (Ct. App. 1999).

¶9 With those principles in mind, we turn to the Record and the circuit court's findings. In its decision, the circuit court reviewed the nature of the underlying crimes, including Purifoy's confession to several additional violent sexual assaults of strangers for which he was not convicted. The circuit court discussed Purifoy's institutional record, both while committed under WIS. STAT. ch. 975 and while incarcerated. The circuit court found that while in the Mendota Mental Health Institute, Purifoy "struck up a sexual relationship with a night shift aide," leading to the aide's resignation, their eventual marriage, and the birth of a child, despite an official ban on conjugal relations. The circuit court found that

prison conduct reports showed that Purifoy had a "short temper and a sharp tongue."

¶10 The circuit court acknowledged "considerable debate" at trial about whether Purifoy had completed sex offender treatment. It was undisputed that Purifoy refused sex offender treatment in prison, because he claimed to have completed treatment while committed. The circuit court found, however, that the "programming" that Purifoy received while committed "is not the equivalent of … 'sex offender treatment.'" The circuit court noted that Purifoy's expert concluded that the programs offered during the WIS. STAT. ch. 975 commitment "were not comprehensive sexual offender treatment programs … that would be consistent with today's standards in terms of treatment content and structure." The circuit court further noted that treatment notes from those programs showed that Purifoy "did not meaningfully participate" and that Purifoy's belief that his mental disorder was under control was "naïve."

¶11 All three experts testified that Purifoy currently had a mental disorder, namely, unspecified paraphilia, with an Antisocial Personality Disorder. Each expert described Purifoy as psychopathic. The experts further agreed that Purifoy's mental disorder predisposed him to future acts of sexual violence. The experts disagreed, however, on whether Purifoy's mental disorder rendered him dangerous to others because it created a substantial probability that he will engage in future acts of sexual violence.

¶12 After reviewing the bases for each expert's opinion, the circuit court stated that it was "persuaded" by the two experts who opined that Purifoy was sexually deviant and posed a substantial probability of reoffense. The circuit court stated that:

> Their evaluations establish that Mr. Purifoy was aroused by deviant sexual preferences at the time he committed the string of offenses that led up to his conviction. The repeated nature of the offenses, the arousal to anger, the particular [*modus operandi*] he used in most of the incidents—total strangers intercepted on the street and forced with a weapon to submit to penis–vagina intercourse—deviates substantially from normal sexual arousal, or even what might be called normative for sex offenders.

¶13 The circuit court concluded that Purifoy was "a sexually violent person because at the time he was regularly committing sexual assaults he was highly psychopathic and also sexually deviant." The circuit court noted that "sexually deviant psychopaths present a much higher risk of sexual violence than is presented by other sex offenders." Further, the circuit court found that "despite the passage of time since his offenses," Purifoy's character had not changed "materially." In this regard, the circuit court referred to Purifoy's high scores on an instrument designed to measure current, not past psychopathology, "his lack of remorse for his victims, his teeming anger, his manipulation of the truth and the rules in order to avoid sex offender treatment and to carry on an illicit sexual relationship in a state mental health facility."

¶14 The circuit court's factual findings are supported by sufficient evidence in the Record. Therefore, Purifoy's appellate challenge fails.

Constitutional Challenge

¶15 Lastly, Purifoy argues that WIS. STAT. ch. 980 is unconstitutional because it "lacks a temporal context for predicting future dangerousness." Purifoy contends that the statute "has no requirement that the dangerousness be imminent" and "[t]his lack of a temporal context violates due process." We rejected this

argument in ***State v. Olson***, 2006 WI App 32, ¶1, 290 Wis. 2d 202, 204–205, 712 N.W.2d 61, 63.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).