

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 12, 2008

David R. Schanker
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. 2006AP262

Cir. Ct. No. 2005CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE COMMITMENT OF MICHAEL R. SCHAAR:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MICHAEL R. SCHAAR,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Green County: JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, Vergeront and Bridge, JJ.

¶1 PER CURIAM. Michael Schaar appeals his commitment as a sexually violent person under WIS. STAT. ch. 980. Schaar also appeals an order denying his motion for post-commitment relief. Schaar challenges the timeliness

of the petition seeking his commitment as a sexually violent person. We reject Schaar's arguments and affirm the judgment and order.

BACKGROUND

¶2 On February 27, 1996, Schaar was sentenced to five years in prison following his conviction for a sexually motivated burglary in Green County circuit court case no. 1995CF53. On May 3, 1996, the circuit court imposed a concurrent five-year sentence on Schaar's conviction for third-degree sexual assault arising from Lafayette County circuit court case no. 1995CF15. Finally, on May 21, 1996, Schaar was sentenced to three and one-half years in prison on his conviction for false imprisonment in Green County circuit court case no. 1996CF24. The sentence was "[t]o be consecutive with any other prison term now being served."

¶3 On December 25, 2001, Schaar was paroled on all three cases. His parole was revoked on June 9, 2003, and he was reincarcerated on all three cases. On April 7, 2004, Schaar was convicted in Lafayette County circuit court case no. 2003CF24 of an aggravated battery that took place while he was on parole. The circuit court imposed a concurrent seven-year sentence consisting of two-years' initial confinement and five-years' extended supervision, with 310-days' sentence credit. Schaar was scheduled for release to extended supervision on the aggravated battery charge on May 27, 2005. The petition seeking Schaar's commitment as a sexually violent person was filed on May 23, 2005. After a trial, the jury found Schaar to be a sexually violent person and the court ordered his commitment. Schaar's motion for post-commitment relief was denied and this appeal follows.

DISCUSSION

¶4 Schaar argues that the State failed to file its WIS. STAT. ch. 980 petition within ninety days of his release from a sentence for a sexually violent offense. A ch. 980 petition must be filed within ninety days of the subject's release from a sentence for a sexually violent offense, *see* WIS. STAT. § 980.02(2)(ag) (2003-04), or “from a continuous term of incarceration, any part of which was imposed for a sexually violent offense.” *State v. Keith*, 216 Wis. 2d 61, 71, 573 N.W.2d 888 (Ct. App. 1997). Failure to comply with this time limit affects the court's competency to proceed. *State v. Pharm*, 2000 WI App 167, ¶11, 238 Wis. 2d 97, 617 N.W.2d 163. A court's competency to proceed is a question of law we review de novo. *Id.*

¶5 It is undisputed that Schaar's conviction for the sexually motivated burglary in Green County circuit court case no. 1995CF53 is the only predicate offense upon which the WIS. STAT. ch. 980 petition could properly be based.¹ Schaar argues that the continuous term of incarceration culminating in what would have been his May 27, 2005 release does not include the sentence imposed on the predicate offense. Conceding that his five-year sentences on the burglary conviction and the third-degree sexual assault conviction were concurrent, Schaar emphasizes that his sentence for the non-predicate offense did not commence until approximately two months after that of the predicate offense. Schaar thus argues that, although the three and one-half year sentence on his false imprisonment conviction was to be imposed consecutive to “any other prison term now being

¹ At the time the petition in this case was filed, Schaar's conviction for third-degree sexual assault was not a sexually violent offense. *See* WIS. STAT. § 980.01(6) (2003-04); 2005 Wis. Act 434, §§ 65, 131(1) enacted May 22, 2006.

served,” the consecutive sentence necessarily attached only to the latter of the concurrent five-year sentences. Schaar consequently describes the interaction of these sentences as a five-year sentence for burglary that was running concurrently with an aggregate eight and one-half year sentence for the third-degree sexual assault and false imprisonment. Based on this description, Schaar posits that the continuous term of incarceration began with the third-degree sexual assault conviction, not the sexually motivated burglary. We are not persuaded.

¶6 Schaar contends that attaching the consecutive sentence arising from his false imprisonment conviction to both the burglary and third-degree sexual assault sentences “is inconsistent with the judgment of conviction’s directive that the false imprisonment sentence be consecutive to ‘any other prison term’ being served.” On the contrary, the plain language of the judgment provides that the false imprisonment sentence was “[t]o be consecutive with any other prison term *now* being served.” (Emphasis added.) As noted above, at the time the false imprisonment sentence was imposed, Schaar was serving concurrent sentences for the burglary and third-degree sexual assault convictions. The fact that those concurrent sentences had different starting dates does not undermine the judgment’s mandate that the new sentence be consecutive to both of the concurrent sentences.

¶7 Citing *State v. Upchurch*, 101 Wis. 2d 329, 305 N.W.2d 57 (1981), Schaar nevertheless argues that application of the consecutive sentence to both of the concurrent sentences violates double jeopardy. Specifically, Schaar contends that applying the consecutive sentence to both of the concurrent sentences creates two sentences and, therefore, two punishments for one crime. We disagree. In *Upchurch*, the defendant was sentenced to one year in prison for possession of a controlled substance and a consecutive one-year prison term for being a repeat

offender for the same criminal act. *Id.* at 331-32. The court held that it violated a defendant's double jeopardy protection to impose two sentences consecutive to each other for a single offense. *Id.* at 334. Here, the court did not impose two consecutive sentences for the same criminal act. It imposed one sentence for one criminal act consecutive to two previously imposed sentences for two other criminal acts. We discern no error.

¶8 Even were we to conclude that the consecutive sentence attached only to the sentence arising from third-degree sexual assault, there is still an unbroken string of sentences from the first day of Schaar's sentence on the predicate offense until what would have been his release to extended supervision on the subsequent aggravated battery conviction. See *State v. Treadway*, 2002 WI App 195, 257 Wis. 2d 467, 651 N.W.2d 334. There, this court acknowledged:

[I]f the State were required to file its WIS. STAT. ch. 980 petition within ninety days of the conclusion of a sentence for a sexually violent offense, despite the fact that the subject of the petition still could be serving additional time in an unbroken string of sentences, the petition could not accurately address the defendant's circumstances, mental condition, and treatment needs at the time of scheduled release. Discharge or release could be many months or ... many years away.

Moreover, in some cases, concurrent sentences, or concurrent and consecutive sentences, interlace, and some are further complicated by sentences after revocation. In such circumstances, the State easily could miscalculate the discharge or release date for the last sexually violent offense among the offenses not deemed sexually violent and miss the opportunity to seek WIS. STAT. ch. 980 commitment. Under such circumstances, both of ch. 980's "twin objectives"—the protection of the public and the treatment needs of the offender—would be disserved by precluding a court's consideration of commitment.

Id., ¶¶17-18.

¶9 To the extent Schaar claims that his December 2001 release on parole broke the “continuous term of incarceration,” the record provides otherwise. Schaar contends that his reimprisonment after revocation on the predicate offense was illegal because he should have been discharged from that sentence in February 2001. The revocation order and warrant, however, indicate that Schaar was revoked on all three crimes, including the predicate offense. The order further indicated that the period of reincarceration remaining on the predicate offense at the time of revocation was eleven months and six days. Any challenge to the validity of Schaar’s detention should have been raised by a petition for writ of habeas corpus. *See State v. Johnson*, 101 Wis. 2d 698, 305, 705 N.W.2d 188 (Ct. App. 1981). Moreover, whether a WIS. STAT. ch. 980 petition is timely filed is determined by a person’s actual release date, regardless of errors or recalculations. *See State v. Virlee*, 2003 WI App 4, ¶¶17-18, 259 Wis. 2d 718, 657 N.W.2d 106.

¶10 Because the record supports the conclusion that there was an unbroken string of sentences from the first day of Schaar’s sentence on the predicate offense until what would have been his release to extended supervision on the subsequent aggravated battery conviction, we conclude the State’s petition was timely filed.

By the Court.—Judgment and order affirmed.

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