COURT OF APPEALS
DECISION
DATED AND FILED

February 24, 2009

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. 2006AP1782

Cir. Ct. No. 2001CI1

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

IN RE THE COMMITMENT OF SHERMELL G. TABOR:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

SHERMELL G. TABOR,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and PATRICIA D. MCMAHON, Judges. *Affirmed*.

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

¶1 KESSLER, J. Shermell G. Tabor appeals from a judgment and an order finding him to be a sexually violent person under WIS. STAT. ch. 980 (2001-02),[1] and committing him to the custody of the Department of Health and Family Services (DHFS) for treatment.[2] He also seeks reversal of a post-commitment order denying his post-commitment motion for dismissal or a new trial.[3] Tabor argues that the commitment order should be dismissed because the trial court lost jurisdiction when the DHFS transferred custody of Tabor to the Juneau County Jail and the Department of Corrections (DOC) so that he could serve a criminal sentence while the ch. 980 case was pending. In the alternative, he argues that he is entitled to a new trial because he never personally waived his previously demanded jury trial before proceeding with a court trial.

¶2 We decline to address the merits of Tabor's first argument—that the trial court lost jurisdiction—because the issue is inadequately briefed. With respect to the second argument, we conclude that Tabor properly requested and

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[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Department of Health and Family Services (DHFS) has since been renamed the Department of Health Services. *See* 2007 Wis. Act 20, § 9121(6)(a). However, because the events in this case took place while the previous name was in effect, we will refer to the DHFS.

[3] The original notice of appeal in this case was filed in July 2006. Acting pursuant to WIS. STAT. § 808.075(5), we granted Tabor's subsequent motion to remand the case to the trial court for an evidentiary hearing concerning ineffective assistance of counsel. Although no amended notice of appeal was filed, we elect to review the order that the court entered after remand. *See* § 808.075(8) ("If an appellate court remands the record to the circuit court for additional proceedings under sub. (5) or (6), the appellate court, in the pending appeal, may review the judgment or order that the circuit court enters following remand.").

The Honorable Mel Flanagan presided over the trial and the Honorable Patricia D. McMahon presided over the post-commitment hearing. Throughout the five-year pendency of this case, seven different circuit court judges were assigned to the case due to judicial rotation. In addition, a number of different attorneys represented Tabor and the State.

then waived his right to a jury trial, pursuant to WIS. STAT. § 980.05(2) (2001-02). Accordingly, we affirm.

BACKGROUND

¶3 In 1995, Tabor was convicted of aiding and abetting a second-degree sexual assault, contrary to WIS. STAT. § 940.225(2)(f) (1993-94), and sentenced to six years in prison. On January 9, 2001, shortly before Tabor was scheduled to be released, the State filed a petition alleging that Tabor was a sexually violent person and should be committed to the custody of the DHFS upon his release from prison.

¶4 A probable cause hearing was held on January 12, 2001, at which Tabor and his counsel appeared. The trial court found probable cause to believe that Tabor was a sexually violent person. The court ordered that Tabor be transferred to the Wisconsin Resource Center or a similar institution for evaluation. After the parties and the court discussed scheduling matters, trial counsel told the court: "I would like to reserve the right for a jury trial. We're to do that within 10 days, and I think we can do that on the record." The court replied: "Right. Your right to a jury trial is reserved."

¶5 For nearly three years, there were numerous appearances for scheduling matters while reports were prepared. Generally, Tabor's appearance was waived and he did not appear in court. According to the transcripts and minutes of those hearings, the parties and the court indicated on numerous occasions that the case was scheduled for a jury trial. At one point in October 2001, Tabor's counsel indicated that although the case was set for a jury trial, "we're reconsidering that." However, the case remained scheduled for a jury trial until November 20, 2003, when the State and trial counsel—but not Tabor—appeared for a status conference. After the court and the parties discussed

delaying the scheduled jury trial, the State told the trial court: "Well, I just spoke with [trial counsel] off the record. It was my understanding this was going to be a jury, but I think [Tabor is] going to want to waive that." Trial counsel did not disagree, and the parties then proceeded to schedule the matter as if it were going to be a trial to the court. When asked, trial counsel said she would tell Tabor the dates of the final pretrial and trial.

¶6 At subsequent hearings, the trial court and the parties referenced the upcoming court trial, and there was no further discussion of a jury trial. Ultimately, the court never asked Tabor about his decision to proceed with a trial to the court.

¶7 In 2004, Tabor challenged the potential applicability of 2003 Wis. Act 187 to his case. The trial court ruled against him and he filed a petition for interlocutory appeal, which was granted by the court of appeals on August 12, 2004. On April 26, 2005, this court affirmed the trial court's order. *See* ***State v. Tabor***, 2005 WI App 107, 282 Wis. 2d 768, 699 N.W.2d 663. Tabor's petition for review to the supreme court was denied on July 28, 2005, and the case was remanded to the trial court for further proceedings.

¶8 While Tabor's case was pending in the court of appeals, he was charged with, and convicted of, two counts of misdemeanor battery as a repeater, based on an incident that occurred while he was in DHFS custody at the Sand Ridge Secure Treatment Center in Juneau County. At sentencing in January 2005, he was placed on probation, with jail time as a condition of that probation.[4]

[4] The record does not indicate precisely when or how long Tabor served time in the Juneau County Jail as a condition of probation.

Tabor's probation was later revoked, resulting in Tabor being incarcerated at Dodge Correctional Institution from November 2005 through December 2006.[5]

¶9 The court trial in Tabor's WIS. STAT. ch. 980 case was held in April 2006, when Tabor was in the custody of the DOC. At trial, Tabor provided testimony concerning the admissibility of statements he made to a doctor, but he did not otherwise testify on his own behalf. The court found that Tabor was a sexually violent person under ch. 980 (2001-02), and committed him to the custody of the DHFS for treatment.

¶10 Tabor sought post-commitment relief, arguing that he was entitled to dismissal because he never "personally withdrew his demand for a jury trial," and because the trial court lost jurisdiction when it permitted Tabor to be incarcerated in the Juneau County Jail and in prison during the pendency of this case.[6] He also alleged that his trial counsel provided ineffective assistance for failing to raise these issues.

¶11 The post-commitment court conducted a hearing on Tabor's motion that included testimony from trial counsel. In a written decision, the post-commitment court denied Tabor's motion. It concluded that the trial court did not lose jurisdiction when Tabor was incarcerated during the pendency of his WIS.

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[5] Neither party specified when Tabor was incarcerated, but according to Consolidated Courts Automation Project (CCAP) records and treatment reports in this case, Tabor was transferred to Dodge Correctional Institution on November 1, 2005, and remained there until December 26, 2006.

[6] Tabor also argued that his trial counsel was ineffective because counsel failed to call witnesses on Tabor's behalf. This argument is not raised on appeal and will not be addressed.

STAT. ch. 980 case, and that trial counsel was not deficient for failing to raise that issue. With respect to the jury trial waiver, it held:

> On this record, there is no evidence that [Tabor] ever expressly demanded a jury trial in accordance with [WIS. STAT. §] 980.05(2). However, if [trial counsel's in-court statement] were to be considered a proper demand, the record subsequent to that request supports the finding that the jury trial was properly waived. In any event, there is no basis to conclude that trial counsel was constitutionally ineffective for failure to obtain a personal waiver from Respondent Tabor.

This appeal follows.

DISCUSSION

¶12 Tabor raises two issues on appeal: whether the trial court lost jurisdiction over the WIS. STAT. ch. 980 case when Tabor was incarcerated for other crimes during the pendency of the case, and whether he waived his previously requested jury trial. Although Tabor raised these issues in the context of an ineffective assistance of counsel claim at the post-commitment hearing, on appeal he makes only a passing reference to the ineffective assistance of counsel. We conclude that both issues present questions of law that can be resolved without consideration of whether trial counsel should have raised the issues at the trial court.

¶13 Specifically, whether the trial court lacks subject matter jurisdiction or personal jurisdiction is a question of law subject to our *de novo* review. *See* ***State v. Schroeder***, 224 Wis. 2d 706, 711, 593 N.W.2d 76 (Ct. App. 1999) (subject matter jurisdiction); ***Brown v. LaChance***, 165 Wis. 2d 52, 65, 477 N.W.2d 296 (Ct. App. 1991) (personal jurisdiction). With respect to Tabor's motion for a new trial, he alleges that he is entitled to a new trial due to the lack of

a personal colloquy between the trial court and Tabor to ascertain that Tabor wanted to waive his previously requested jury trial. Whether a personal colloquy was required presents a question of law we review *de novo*. *See* ***State v. Denman***, 2001 WI App 96, ¶¶4, 7, 243 Wis. 2d 14, 626 N.W.2d 296 (court applied *de novo* review to issue of whether trial court must advise subject of WIS. STAT. ch. 980 commitment proceeding of the court's inability to accept a non-unanimous jury verdict before court can accept the subject's waiver of previously requested jury trial); *see also* ***Hutson v. Wisconsin Pers. Comm'n***, 2003 WI 97, ¶31, 263 Wis. 2d 612, 665 N.W.2d 212 (statutory interpretation is a question of law this court reviews *de novo*).

I. Loss of jurisdiction.

¶14 Tabor argues that the trial court lost jurisdiction over him when he was no longer detained by the DHFS as a potential WIS. STAT. ch. 980 subject and, instead, was transferred to the custody of the Juneau County Jail and the DOC. He argues that transferring custody to the jail and the DOC so that Tabor could serve his criminal sentence somehow invalidated the ch. 980 petition, and that the State was required to file a new petition after Tabor completed his criminal sentence. He adds: "Tabor was in DOC custody at the time of his trial so there was no jurisdiction over him at that time." He candidly admits that he can cite no authority that supports his arguments, but he suggests that the State bears the burden of persuasion and has failed to provide any authority in support of its claim of continued jurisdiction.

¶15 While we appreciate Tabor's candid admission that he has not identified any authority that supports his argument, we are troubled by the inadequate explanation of his legal theory. He provides no references to the

applicable statutes to explain why he believes that a new WIS. STAT. ch. 980 petition would be required simply because he served time in jail and prison while the ch. 980 case was pending. Tabor does not adequately explain or support the reasons why the trial court would have lost jurisdiction in this case, or even specify whether he is speaking of subject matter jurisdiction, personal jurisdiction or both. We decline to develop Tabor's argument for him and, therefore, will not consider it further. *See* ***Clean Wis., Inc. v. Public Serv. Comm'n***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 (undeveloped arguments need not be addressed).

II. Waiver of the jury trial.

¶16 Tabor contends he is entitled to a new trial because, acting through counsel, he requested a jury trial pursuant to WIS. STAT. § 980.05(2), and did not later personally waive his right to a jury trial. To address his argument, we must consider two issues: (1) whether his request for a jury trial was effective; and (2) whether his waiver of a jury trial was effective.

A. Request for jury trial.

¶17 A respondent's right to a jury trial in a WIS. STAT. ch 980 case is defined by WIS. STAT. § 980.05(2), which at all times relevant to this case[7] provided:

[7] WISCONSIN STAT. § 980.05(2) was amended in May 2006. *See* 2005 Wis. Act 434, § 102 (eff. Aug. 1, 2006). The revised version of the statute provides:

(continued)

> The person who is the subject of the petition, the person's attorney, the department of justice or the district attorney may request that a trial under this section be to a jury of 12. A request for a jury trial under this subsection shall be made within 10 days after the probable cause hearing under s. 980.04. If no request is made, the trial shall be to the court. The person, the person's attorney or the district attorney or department of justice, whichever is applicable, may withdraw his, her or its request for a jury trial if the 2 persons who did not make the request consent to the withdrawal.

Sec. 980.05(2) (2001-02). "Under the plain language of this statute, either the respondent, the respondent's attorney, or the State must request a jury trial within ten days after the probable cause hearing; otherwise the trial is to the court." ***Denman***, 243 Wis. 2d 14, ¶11.

¶18 In this case, the post-commitment court found, without elaboration, that there was "no evidence that [Tabor] ever expressly demanded a jury trial in accordance with [WIS. STAT. §] 980.05(2)." The State indicates that it agrees with the court's decision, but does not offer any specific argument as to why trial counsel's request for a jury trial at the probable cause hearing failed to satisfy § 980.05(2) (2001-02). We conclude, based on the undisputed record, that Tabor's counsel's on-the-record request for a jury trial was effective. *See* ***Badger State***

> The person who is the subject of the petition, the person's attorney, *or* the ~~department of justice or the district attorney~~ *petitioner* may request that a trial under this section be to a jury of 12. A request for a jury trial under this subsection shall be made within 10 days after the probable cause hearing under s. 980.04 *(2) (a)*. If no request is made, the trial shall be to the court. The person, the person's attorney*,* or the ~~district attorney or department of justice, whichever is applicable,~~ *petitioner* may withdraw his, her*,* or its request for a jury trial if the 2 persons who did not make the request consent to the withdrawal.

Sec. 980.05(2) (italics indicate new language; strikeouts indicate deleted language).

Bank v. Taylor, 2004 WI 128, ¶13, 276 Wis. 2d 312, 688 N.W.2d 439 (interpretation of statute and the application of statute to undisputed facts are ordinarily questions of law court reviews *de novo*).

¶19 WISCONSIN STAT. § 980.05(2) (2001-02) explicitly allows an attorney for a person subject to a WIS. STAT. ch. 980 petition to request a jury trial, and the statute does not specify that the request must be made in writing. *See* § 980.05(2) ("The person who is the subject of the petition, *the person's attorney*, the department of justice or the district attorney may request that a trial under this section be to a jury of 12.") (emphasis added). In contrast, the legislature has specified in other types of cases that requests for jury trials must be made in writing. *See*, *e.g.*, WIS. STAT. § 799.21(3)(a) (providing that the right to trial by jury is "waived forever" if no party files a "written demand for trial by jury"). The State provides no explanation why trial counsel's on-the-record request for a jury trial was ineffective, and we can identify none. The trial court accepted the request, and for nearly three years the case remained scheduled for a jury trial. We reject the post-commitment court's conclusion and the State's assertion that Tabor's request for a jury trial was ineffective.

B. Waiver of the jury trial.

¶20 Having concluded that Tabor effectively requested a jury trial in accordance with WIS. STAT. § 980.05(2) (2001-02), we must next examine whether that request was effectively withdrawn two years later pursuant to § 980.05(2) (2003-04), which contained the same statutory language. At the outset, we note the record indicates that Tabor has never testified or filed an affidavit stating that at the time of the court trial he actually wanted a jury trial, or that he told anyone he wanted a jury trial. Rather, his argument on appeal is that

because he did not personally waive his right to a jury trial on the record, with a personal colloquy between him and the trial court, the waiver was not legally effective and he is therefore entitled to a new trial before a jury.

¶21 We addressed a similar argument in ***Denman***, where a person committed pursuant to WIS. STAT. ch. 980 argued that his waiver of his right to a jury trial was invalid because the trial court did not advise him that it could not accept a jury verdict unless it was unanimous. ***Denman***, 243 Wis. 2d 14, ¶4. We concluded that WIS. STAT. § 980.05(2) (1999-2000) did "not require that a respondent be advised by the court that a jury verdict must be unanimous in order for the withdrawal of his or her request for a jury trial to be valid." ***Denman***, 243 Wis. 2d 14, ¶12. In support of this conclusion we explained:

> [T]he provision in WIS. STAT. § 980.05(2) allowing the requesting party to withdraw the request does not impose any requirement other than the consent of the other two persons: it does not require the court to engage in any particular procedure to make sure that, when the requesting party informs the court he or she wishes to withdraw the request, it is truly the wish of the party. The absence of express requirements for such a procedure are an indication the legislature did not intend to impose any.

Denman, 243 Wis. 2d 14, ¶12.

¶22 In ***Denman***, we also discussed our prior decision in ***State v. Bernstein***, 231 Wis. 2d 392, 605 N.W.2d 555 (Ct. App. 1999), where we rejected a WIS. STAT. ch. 980 respondent's argument that the same rules governing jury trial waivers in criminal cases applied in ch. 980 cases. *See* ***Denman***, 243 Wis. 2d 14, ¶9 (citing ***Bernstein***, 231 Wis. 2d at 399-400). ***Bernstein*** held that the general statute, WIS. STAT. § 980.05(1m) (1997-98),[8] which provided that "[a]ll

[8] WISCONSIN STAT. § 980.05(1m) (1997-98) provided:

(continued)

constitutional rights available to a defendant in a criminal proceeding are available" to a respondent in a ch. 980 case, was trumped by the "specific provision for the circumstance in which a person wished to withdraw a request for a jury trial" found in § 980.05(2) (1997-98). ***Denman***, 243 Wis. 2d 14, ¶9 (citing ***Bernstein***, 231 Wis. 2d at 399-400). Thus, ***Denman*** recognized, "[f]ollowing ***Bernstein***, we look to … § 980.05(2), rather than the case law governing the waiver of the constitutional right to a jury trial in criminal cases, to determine whether [a respondent's] waiver was valid." ***Denman***, 243 Wis. 2d 14, ¶11.

¶23 Tabor does not dispute ***Denman***'s holding, but asserts that ***Denman*** was overruled by ***State v. Anderson***, 2002 WI 7, 249 Wis. 2d 586, 638 N.W.2d 301, where the supreme court held that a personal colloquy was required for waiver of a jury trial in a criminal case. *See* ***id.***, ¶3. We disagree with Tabor. ***Anderson*** did not state that its holding would apply in WIS. STAT. ch. 980 cases, and no subsequent case has held that it does. Moreover, as we explained in ***Denman***, the specific provisions for requesting a jury trial found in WIS. STAT. § 980.05(2) govern a ch. 980 respondent's right to a jury trial, rather than the general provision found in § 980.05(1m) (1999-2000). *See* ***Denman***, 243 Wis. 2d 14, ¶9. For these reasons, we reject Tabor's argument that ***Anderson*** overruled ***Denman*** and that ***Anderson*** requires a personal colloquy between a ch. 980 respondent and the trial court concerning the waiver of a jury trial.

> At the trial to determine whether the person who is the subject of a petition under s. 980.02 is a sexually violent person, all rules of evidence in criminal actions apply. All constitutional rights available to a defendant in a criminal proceeding are available to the person.

This statute was repealed by 2005 Wis. Act 434, § 101, effective August 1, 2006, which was after the court trial in Tabor's case.

¶24 Consistent with ***Denman***, we conclude that the trial court was not required to engage in a colloquy with Tabor concerning his decision, which was communicated to the court by his trial counsel,[9] to proceed with a court trial. *See **id.***, 243 Wis. 2d 14, ¶12. Thus, there is no basis for Tabor's argument that he is automatically entitled to a new trial based on the lack of a colloquy.[10] The issue then becomes whether, under the facts presented, the post-commitment court's finding that Tabor consented to waive his right to a jury trial was clearly erroneous.

¶25 The post-commitment court made the following findings consistent with trial counsel's testimony concerning Tabor's decision to have a court trial:

> It was [trial counsel's] regular practice to discuss the difference between a court trial and a jury trial with all of his Chapter 980 clients. His notes reflect that such a discussion took place in this case. He could not recall the specific details of such a discussion but he recalled that Tabor did not want a jury trial. Trial counsel testified that it was Tabor's clear wish throughout his representation that the case [be] tried to a court not a jury. Moreover, the record contains representations by prior counsel of Tabor's desire to have a court trial, not a jury trial. On the day of trial, no objection was raised and Tabor testified in his own behalf.[[11]]

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[9] As we noted in ***State v. Bernstein***, 231 Wis. 2d 392, 400, 605 N.W.2d 555 (Ct. App. 1999), "it is generally accepted that an attorney acts on behalf of his or her client." Moreover, WIS. STAT. § 980.05(2) (2003-04) explicitly provides that a person's attorney can withdraw the request. *See **id.*** ("The person, *the person's attorney* or the district attorney or department of justice, whichever is applicable, *may withdraw his, her or its request for a jury trial* if the 2 persons who did not make the request consent to the withdrawal.") (emphasis added).

[10] Nonetheless, to avoid challenges concerning the waiver of a previously requested jury trial, the better practice is for courts to ask the defendant, trial counsel and the State to confirm their consent on the record.

[11] As noted, Tabor testified concerning the admissibility of statements he made to a doctor, but did not otherwise testify on his own behalf.

Tabor does not dispute these findings, or assert that he actually wanted a jury trial at the time the case was tried. The post-commitment court's findings are not clearly erroneous. *See* ***State v. Milanes***, 2006 WI App 259, ¶16 n.3, 297 Wis. 2d 684, 727 N.W.2d 94 (when trial court implicitly accepts trial counsel's version of events, based on the court's credibility determination, reviewing court will uphold findings unless they are clearly erroneous). The record supports the court's finding that Tabor consented to the waiver of his previously requested jury trial.

CONCLUSION

¶26 We decline to address the merits of Tabor's jurisdictional argument because the issue is inadequately briefed. With respect to Tabor's argument concerning the jury trial waiver, we conclude that Tabor properly requested and then waived his right to a jury trial, pursuant to WIS. STAT. § 980.05(2) (2001-02, 2003-04). For these reasons, we affirm the judgment and post-commitment order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.