COURT OF APPEALS
DECISION
DATED AND FILED

April 2, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0537 **Cir. Ct. No. 95CF950508**

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

IN RE THE COMMITMENT OF
ALLAN LLOYD WALDO:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALLAN LLOYD WALDO,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. Allan Lloyd Waldo appeals from a judgment and an order committing him to the custody of the Department of Health and Social Services (DHSS) for treatment until he is no longer a sexually violent person.

Waldo argues that the WIS. STAT. ch. 980 (1995-96) petition was not timely filed. Because the State did timely file the ch. 980 petition within ninety days of Waldo's "discharge or release," we affirm.

I. BACKGROUND

¶2 On April 12, 1994, Waldo was released from prison, but remained on probation. On August 28, 1994, he violated probation when it was alleged that he committed three counts of fourth-degree sexual assault. When Waldo appeared at his probation agent's office on September 27, 1994, he was taken into custody as the decision had been made to revoke his probation.

¶3 Waldo waived his revocation hearing and, on January 3, 1995, the final revocation order and warrant were signed by Department of Corrections (DOC) employee William Ridgely. In the order, Ridgely marked that the thirty-two days between the offense and September 27, 1994, would not be tolled. When Waldo was transferred to the Oshkosh Correction Institution, the registrar of OCI calculated his maximum discharge date. During the calculation, the registrar determined that Ridgely's decision not to toll the thirty-two days was incorrect. The registrar tolled the thirty-two days and determined that Waldo would be released from custody on April 4, 1995.

¶4 On March 31, 1995, the State filed a ch. 980 petition seeking an order to detain Waldo as a sexually violent person pursuant to the sexual predator law. A jury trial was scheduled for June 2, 1997. Before trial, the trial court conducted hearings on two motions: (1) whether the petition was filed within ninety days of Waldo's discharge or release; and (2) whether the underlying predicate offense qualified as a sexually violent offense under ch. 980. The trial court resolved each issue in favor of the State.

¶5 On June 5, 1997, the jury found that Waldo had been convicted of a sexually violent offense, that he was suffering from a requisite mental disorder, and that the mental disorder made it substantially probable that he would engage in acts of sexual violence. After the final dispositional hearing, the trial court found that Waldo had to be committed to the custody of the DHSS until he was no longer a sexually violent person. Postjudgment motions were denied. Waldo now appeals.

II. DISCUSSION

¶6 Waldo contends that the State failed to timely file the ch. 980 petition. His argument is divided into two sub-parts: (1) he claims that the registrar erred in overruling Ridgely's decision not to toll the thirty-two days, and that if the thirty-two days had not been tolled, his maximum discharge date would have occurred on March 4, 1995, long before the ch. 980 petition was filed; and (2) based on WIS. STAT. § 53.11(8) (1979-80), which stated "releases from the prisons … shall be on the Tuesday or the Wednesday preceding the release date," he should have been released the Tuesday or Wednesday before April 4, 1995—which would have been March 28, 1995 or March 29, 1995, also days before the ch. 980 petition was filed. We reject both contentions in turn.

A. Tolling Issue.

¶7 Waldo's first claim is that the thirty-two days between the time he violated probation and the time he was taken into custody was erroneously tolled. He asserts that if that time had not been tolled, the ch. 980 petition filed on March 31, 1995, would have been untimely. We reject this argument.

¶8 First, the DOC calculated Waldo's maximum discharge date as April 4, 1995. The State has a right to rely on the release dates calculated by the department. ***State v. Carpenter***, 197 Wis. 2d 252, 275, 541 N.W.2d 105 (1995). Moreover, a ch. 980 commitment proceeding is not the proper forum to assert a collateral attack on the department's sentence computations. Rather, such a challenge properly occurs with the filing of a petition for writ of habeas corpus naming the department as the respondent. ***State v. Johnson***, 101 Wis. 2d 698, 703, 305 N.W.2d 188 (Ct. App. 1981).

¶9 Second, we cannot conclude that the registrar's decision to toll the thirty-two days in question here was incorrect. Whether WIS. STAT. § 57.072 (1979-80) mandated the tolling of Waldo's sentence from the date of his parole violation to the date he was taken into custody is a question of statutory construction, which we review independently. ***State ex rel. Ludtke v. DOC***, 215 Wis. 2d 1, 6, 572 N.W.2d 864 (Ct. App. 1997).

¶10 WISCONSIN STAT. § 57.072 (1979-80) provides: "(1) The period of probation or parole ceases running upon the date the offender absconds, commits a crime or otherwise violates the terms of his or her probation or parole which is sufficient, as determined by the department, to warrant revocation of probation or parole." Waldo argues that because he did not "abscond," the thirty-two days should not be tolled. That statute, however, is not so limiting. Although there is no evidence that Waldo absconded during the pertinent time period, there is evidence showing that Waldo committed a crime or otherwise violated his probation. It is also clear that as a result of such conduct, a determination was made that his probation must be revoked. Accordingly, the registrar was acting in accordance with the statute when he determined that the time must be tolled.

¶11 Relying on ***Locklear v. State***, 87 Wis. 2d 392, 274 N.W.2d 898 (Ct. App. 1978), Waldo argues that his due process rights were violated because the department's decision to toll his parole time occurred without notice and without a hearing. His reliance is misplaced. In ***Locklear***, this court held that an offender has the right to a hearing to determine whether his or her violation was sufficiently serious to warrant revocation, unless the offender waives his or her right to a hearing. ***Id.*** at 404. Waldo waived his right to a revocation hearing and, thus, cannot complain about it on appeal.

¶12 Waldo also asserts that the registrar did not have the right to overrule Ridgely's decision with respect to the tolling question. Again, Waldo is incorrect. Under the Wisconsin Administrative Code, it is the obligation of the registrar to compute mandatory release and maximum discharge dates for an inmate upon his or her arrival at the institution following revocation. There was testimony at the pretrial motion hearing that it is the registrar's function, at any time in a particular case, to determine whether WIS. STAT. § 57.072 requires tolling. The registrar has been assigned this duty as a designee of the secretary. WIS. ADMIN. CODE § DOC 328.03(33) (2001).

B. Tuesday/Wednesday Release.

¶13 Waldo's alternative argument is that even if the tolling decision was correct, the petition filed in this case was still untimely because, pursuant to WIS. STAT. § 53.11(8) (1979-80), which he claims required that he be released on the Tuesday or Wednesday preceding his maximum discharge date, which would have been March 28, 1995 or March 29, 1995. Hence, because the petition was not filed until March 31, 1995, it was untimely. We cannot agree.

¶14 This issue involves the interpretation of statutes and, thus, our review is *de novo*. ***State v. Sostre***, 198 Wis. 2d 409, 414, 542 N.W.2d 774 (1996). Waldo tries to construe WIS. STAT. § 53.11(8) (1979-80) to affect the ninety-day time requirement in WIS. STAT. § 980.02(2) (1995-96). A plain reading of the language in the statutes demonstrates the error in Waldo's argument. Section 980.02(2) (1995-96) provides that a petition under ch. 980 "shall allege that … (ag) The person is within 90 days of *discharge or release* … from a sentence that was imposed for a conviction for a sexually violent offense, from a secured correctional facility …." (Emphasis added). This language requires the petition for detention to be filed within ninety days of the subject's discharge or release. The record demonstrates that Waldo's maximum discharge date was April 4, 1995, and the petition in this case was filed March 31, 1995. At the time the petition was filed, Waldo had not yet been released or discharged. Accordingly, the plain meaning of the statute compels us to conclude that the petition was timely filed.

¶15 In addition, the State asserts in its brief that the department interprets the Tuesday/Wednesday release rule of WIS. STAT. § 53.11 (1979-80), to apply only to inmates released on mandatory release parole, and does not apply to inmates being released on maximum discharge dates. The basis for the interpretation relates to control of the released inmate. In the former, the department retains control over the individual, whereas in the latter, the department no longer has control over the individual. Thus, it would be unreasonable to release an inmate like Waldo a week before his sentence has been completed. Waldo does not reply to this argument and, therefore, concedes it. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are taken as confessed).

¶16 Based on the foregoing, we conclude that the State timely filed the ch. 980 petition in this case.

By the Court.—Judgment and order affirmed.

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