

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 26, 2002

Cornelia G. Clark
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. 01-0588
STATE OF WISCONSIN

Cir. Ct. No. 97-CI-1

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF THOMAS H. BUSH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS H. BUSH,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: WILLIAM M. GABLER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Wedemeyer, J.

¶1 PER CURIAM. Thomas H. Bush appeals a judgment committing him as a sexually violent person under ch. 980. He argues that: (1) WIS. STAT.

§ 51.37(8)(b)¹ compels disqualification of the State’s expert witnesses and if that statute does not apply, his due process and equal protection rights were violated; (2) the State failed to present sufficient evidence that he suffered from a mental disorder that rendered him unable to control his behavior such that it is much more likely than not that he will engage in future acts of sexual violence; and (3) the State failed to establish that the petition was filed within ninety days of Bush’s release date. The State concedes that it did not prove that he was within ninety days of release and requests a remand for fact-finding on that issue. We conclude that a remand is necessary for fact-finding on that issue and reject Bush’s other arguments.²

¶2 WISCONSIN STAT. § 51.37(8)(b) delineates procedures for prisoners held in State treatment facilities pursuant to concurrent mental health commitments who are approaching their release date but need additional psychiatric care. The procedures for civil commitment set out in WIS. STAT. § 51.20 are utilized except that “no physician or psychologist who is connected with a state prison, Winnebago or Mendota Mental Health Institute or any county jail or house of correction may be appointed as an examiner.” Bush argues that § 51.37(8)(b) disqualifies the State’s expert witnesses because they are associated with the Wisconsin Resource Center or Mendota Mental Health Institute. He also

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

² In his initial brief, Bush also argued that amendments to WIS. STAT. ch. 980 enacted in 1999 Wis. Act 9, § 9223(2)(ag) constituted an *ex post facto* law and violated Bush’s due process and equal protection rights. He also argued that ch. 980 is unconstitutional because lack of volitional control is not an element. After Bush filed his brief-in-chief, the Wisconsin Supreme Court and this court released decisions that reject those arguments. See *State v. Laxton*, 2002 WI 82 ¶2, 254 Wis. 2d 185, 647 N.W.2d 784; *State v. Rachel*, 2002 WI 81 ¶¶60, 66-68, 254 Wis. 2d 215, 647 N.W.2d 762; *State v. Williams*, 2001 WI App 263 ¶20, 249 Wis. 2d 1, 637 N.W.2d 791. We are bound by that precedent and will not individually address those issues.

argues that § 51.61, patients rights, applies to prisoners' initial ch. 980 proceedings.

¶3 Bush's arguments fail for two reasons. First, WIS. STAT. ch. 980 directs the Department of Health and Family Services to have close connections with the experts who conduct evaluations. WISCONSIN STAT. § 980.04(4) directs the department to promulgate rules that provide qualifications for these experts and § 980.12(1) directs the department to pay for the cost of evaluations. The legislature did not intend that the evaluators would have no connection with State institutions as would be required if WIS. STAT. § 51.37(8)(b) applied. Second, WIS. STAT. § 51.61 enumerates specific patient rights without directly or indirectly referring to § 51.37(8)(b). The right to examination by experts who are not associated with the department is not included in that list of enumerated rights, evidencing the legislature's intent to exclude that right. *See C.A.K. v. State*, 154 Wis. 2d 612, 621, 453 N.W.2d 897 (1990).

¶4 Failure to apply WIS. STAT. § 51.37(8)(b) to sexual predators does not violate their due process rights. There is no constitutional right to a court appointed independent evaluator. Due process is synonymous with fundamental fairness. *See State v. Sorenson*, 2002 WI 78, ¶25, 254 Wis. 2d 54, 646 N.W.2d 354. Bush procured the services of two expert witnesses who testified on his behalf and challenged the State's experts' analyses. Fundamental fairness does not demand further examination by an expert who has no affiliation with the State, nor does it compel disqualification of the State's experts.

¶5 Bush's equal protection rights were not violated by allowing the State to call experts who are affiliated with State treatment facilities. Although there are some similarities between prisoners who are subject to commitment

under WIS. STAT. § ch. 980 and those who are subject to commitment under WIS. STAT. ch. 51, substantial differences justify the legislature's decision to allow examination by experts who are affiliated with state institutions. Evaluation of prisoners alleged to be sexual predators is a specialized inquiry with a smaller pool of experts from which to choose. The difficulty of locating qualified experts and the expense of independent evaluation justify using experts that have some connection with state institutions that treat sexual predators. The legislature's decision not to apply all of the procedures of ch. 51 to cases under ch. 980 is justified by sexual predators' unique treatment needs and the highly specialized qualifications of the small group of therapists qualified to perform the evaluations. *See State v. Williams*, 2001 WI App 263, ¶16, 249 Wis. 2d 1, 637 N.W.2d 791.

¶6 The State presented sufficient evidence to support the jury's finding that Bush suffers from a mental disorder that creates a substantial probability that he will engage in acts of sexual violence. The State's experts testified that Bush suffers from numerous mental disorders, pedophilia, voyeurism, sexual sadism, exhibitionism, paraphilia NOS (not otherwise specified) and alcoholism. Each of the State's five evaluators concluded that Bush presented a high risk to reoffend.

¶7 Bush's experts attacked the State's experts' actuarial data, arguing that the State's experts' instruments could not be used to predict whether a specific individual had a certain percentage for reoffending, but rather whether he fit into a category of individuals whose risk of reoffending was high. Bush complains that the State's experts' tests lacked national standards for their use, allowable error rates and a comparable population base, and that the actuarials are based upon static rather than dynamic factors. The State's experts testified to the validity of their methods. It is the jury's function to weigh the credibility of the witnesses

and the weight to be accorded their testimony. *See State v. Curiel*, 227 Wis. 2d 389, 421, 597 N.W.2d 697 (1999).

¶8 In addition to the experts' opinions, the State presented sufficient evidence that Bush was highly likely to reoffend. *See State v. Kienitz*, 221 Wis. 2d 275, 304, 585 N.W.2d 609 (Ct. App. 1998). Bush repeatedly engaged in sexually violent offenses over several decades. He was convicted of at least nine such offenses. Each time he was released from prison or a treatment facility, he reoffended. He has been offered sex offender treatment on at least nine occasions and completed one of the programs, but continued to attempt to acquire deviant materials while incarcerated. Several of his violations occurred while he was under court supervision or in treatment programs. Bush's personal history and the failure of various treatment programs supports the verdict.

¶9 Finally, Bush is entitled to remand for a trial to determine whether he was within ninety days of release or discharge when this action was commenced. *See In re Commitment of Thiel*, 2001 WI App 52, ¶31, 241 Wis. 2d 439, 625 N.W.2d 321. We reverse the judgment on that basis alone.

By the Court.—Judgment reversed and cause remanded with directions.

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

