

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 1, 2003**

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. 02-1643  
STATE OF WISCONSIN**

**Cir. Ct. No. 96-CF-345**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE COMMITMENT OF ROBERT B. FRIER:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**ROBERT B. FRIER,**

**RESPONDENT-APPELLANT.**

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APPEAL from an order of the circuit court for Sauk County:  
GUY D. REYNOLDS, Judge. *Affirmed.*

Before Roggensack, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Robert Frier appeals an order denying his supervised release from a WIS. STAT. ch. 980 commitment. Frier has been committed under ch. 980 since 1997. The circuit court entered the order denying

release in April 2002. The issues are whether the circuit court erred by considering outdated information, and whether Frier should receive a new trial in the interest of justice. We affirm on both issues.

¶2 In 1991, Frier was convicted of two counts of first-degree sexual assault of a child. In June 1997, after serving his prison term, Frier was committed to a secure mental health facility as a sexually violent person. In July 2001, having remained in a secure facility for more than four years, Frier petitioned for supervised release into the community.

¶3 Just before Frier filed his petition, a state-employed psychologist, Dr. Kenneth Sherry, conducted the State's annual review of Frier's commitment. However, Frier chose not to submit to an interview, and Dr. Sherry completed his review without speaking to Frier. Upon review of Frier's records, Dr. Sherry concluded that Frier remained a significant risk for reoffending because Frier had only minimally participated in treatment during his commitment, and had not appreciably benefited from his minimal efforts.

¶4 Frier was also evaluated for potential release by an expert the court appointed at Frier's request. Unlike Dr. Sherry, this expert, Dr. Patricia Coffey, was able to interview and test Frier. She concluded, with some reservations, that Frier did not meet the criteria for continued commitment because it was only moderately probable, rather than substantially probable, that he would engage in future acts of sexual violence. In short, Dr. Sherry took as a given the original diagnostic basis for commitment and looked only to whether Frier had taken meaningful steps to treat his condition. Dr. Coffey, on the other hand, challenged the accuracy of the original grounds for commitment, and did not concern herself with Frier's failure to progress in treatment in the ensuing years.

¶5 The circuit court denied the petition. The court gave primary weight to Dr. Sherry’s opinions, including the 1997 finding that Frier was a sexually violent person and Frier’s failure to benefit from subsequent treatment, some of Dr. Coffey’s less favorable test results, the fact that Dr. Coffey’s opinion was “a close call,” and the fact that she reached her conclusion without a penile plethysmograph test, which Dr. Coffey herself conceded would have been helpful.

¶6 WISCONSIN STAT. § 980.08(4) (2001-02)<sup>1</sup> provides that the court shall grant a petition for supervised release unless the State proves by clear and convincing evidence that the person remains sexually violent, and a substantial probability remains that the person will engage in acts of sexual violence if not continued in institutional care. The court may consider, among other things, the person’s mental history and present mental condition. *Id.* “Substantially probable” means “much more likely than not.” *State v. Curiel*, 227 Wis. 2d 389, 422, 597 N.W.2d 697 (1999).

¶7 The circuit court’s decision to grant supervised release under WIS. STAT. § 980.08(4) is discretionary. *State v. Seibert*, 220 Wis. 2d 308, 314, 582 N.W.2d 745 (Ct. App. 1998). We affirm discretionary decisions if the circuit court reaches a reasonable, articulated decision based on the facts of record and proper application of the law. *State v. Keding*, 2002 WI 86, ¶13, 254 Wis. 2d 334, 646 N.W.2d 375.

¶8 Frier first contends that the circuit court erred by considering the jury’s 1997 verdict that Frier was a sexually violent person. According to Frier,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

that 1997 verdict was simply not relevant to assessing Frier's current mental status, and the court's use of it served to create a presumption in favor of continued institutionalization. We disagree. Frier's status, as determined in 1997, was highly relevant to whether that status had changed or, as Frier argues, whether the evidence that helped determine the 1997 finding was in error. The circuit court properly placed the burden on the State to prove that Frier's status had not changed. Nothing in WIS. STAT. § 980.08(4) required the court to decide Frier's eligibility for supervised release without regard to why he was committed in the first place.

¶9 Frier next contends that this court should grant him a rehearing in the interest of justice because the circuit court's decision may have been improperly influenced ("tainted") by Frier's refusal to cooperate with Dr. Sherry. Prompting that argument is the following exchange that occurred while the circuit court was announcing its decision from the bench.

[THE COURT:] Now, the Court also finds significant here ... that Mr. Frier ... also was not, according to Dr. Sherry, willing to be evaluated.

... And I hold it against Mr. Frier that there was not this evaluation, an interview by Dr. Sherry.

MR. CALKINS: Your Honor, ... I believe under 980.03(2) Mr. Frier does have the right to remain silent, and I don't think the Court can hold it against him, so if the Court is considering that a significant factor, I would ask the Court to reconsider.

THE COURT: Thank you, Mr. Calkins, for pointing that out, and I will review my notes some here. The Court will not take that fact into account and will give it no weight.

¶10 Frier's argument is unavailing. There is no basis to conclude that the circuit court did, in fact, give weight to Frier's refusal to submit to an evaluation

by Dr. Sherry. The court expressly stated that it gave no weight to that fact, and we accept that statement on its face. Accordingly, we need not address whether the circuit court could have properly considered Frier's refusal to cooperate.

*By the Court.*—Order affirmed.

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

