COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 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. 02-2969 **Cir. Ct. No. 97-CI-1**

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

IN RE THE COMMITMENT OF JERRY L. BUSH:

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JERRY L. BUSH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Jerry L. Bush appeals from an order committing him under WIS. STAT. ch. 980 (2001-02),[1] as a sexually violent person. He raises seven issues which we address seriatim. We affirm the commitment order.

¶2 Bush first argues that he was denied due process because the State failed to timely proceed with an amended commitment petition. The relevant dates and proceedings follow.

¶3 In 1980, upon conviction of two counts of second-degree sexual assault, Bush commenced a sentence totaling thirty-five years. He was scheduled for release from prison on January 8, 1997. On January 3, 1997, a petition for his commitment under WIS. STAT. ch. 980 was filed. A probable cause determination followed and Bush was not released.

¶4 In February 1998, the parties started to litigate whether the petition and probable cause determination were tainted because the State's expert had been allowed access to Bush's presentence investigation reports (PSI) without prior authorization from the court. *See* ***State v. Zanelli***, 212 Wis. 2d 358, 377-78, 569 N.W.2d 301(Ct. App. 1997) (PSI may not be utilized by psychologists who are called upon to evaluate whether a person is a sexually violent person under the exception in WIS. STAT. § 972.15(5), but the circuit court may authorize use by its discretionary authority under § 972.15(4)). The State moved for authorization to use the PSI. Bush moved to set aside the probable cause determination and for a new hearing on the ground that it was supported by unauthorized use of the PSI. At a hearing held on April 23, 1998, the circuit court decided the safest course was

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

to conduct a new probable cause hearing. The State was directed to file a motion if it sought permission for use of the PSI at the probable cause hearing. The new hearing was set for July 30, 1998, but not convened until September 3, 1998.

¶5 At the September 3 hearing Bush moved to dismiss the original petition alleging that it too relied on unauthorized use of the PSI. Although the circuit court strongly urged the State to moot any possible jurisdictional infirmities by filing a new petition, the motion to dismiss remained pending. On February 8, 1999, the State completed the filing of an amended petition.[2] After further motions,[3] the probable cause hearing commenced on March 2, 2000, and concluded with a finding of probable cause on July 24, 2000.

¶6 Bush contends that delays in filing the amended petition and convening the second probable cause hearing were unreasonable. We assume without deciding that because the subject of a WIS. STAT. ch. 980 petition is confined, due process prevents indefinite and unreasonable delay when the filing of an amended petition is judicially required. *See* ***State v. Beyer***, 2001 WI App 167, ¶14, 247 Wis. 2d 13, 633 N.W.2d 627, *review denied*, 2002 WI 121, 257 Wis. 2d 116, 653 N.W.2d 888 (Wis. Sept. 26, 2002) (No. 00-0036), *cert. denied*, 123 S. Ct. 1296 (2003). In ***Beyer***, ¶16, the court cautioned that the slightly more than sixty-day delay Beyer experienced with respect to his probable cause hearing

[2] An amended petition was filed on February 4, 1999. The circuit court gave the State five days to correct a perceived inadequacy in the amended petition regarding the absence of an allegation that the Department of Justice refused to file the petition.

[3] Bush moved to dismiss for the State's failure to earlier file the amended petition and because the amended petition still relied on unauthorized use of the PSI. Subsequent hearings resolved the question of whether the PSI could be utilized by experts and at trial. The probable cause hearing was twice adjourned and then continued because of witness unavailability.

"will not necessarily be reasonable in all WIS. STAT. ch. 980 cases." Bush contends that over four months passed from the time a new probable cause hearing was ordered and the filing of his motion to dismiss the petition, that the amended petition was not filed until ten months later, and that the record reflects no reasonable basis for a delay of nearly two years before the new probable cause hearing commenced. The State suggests that his claim is based on "an appalling mischaracterization of the record." We agree.

¶7 First, we note that at the hearing held on April 23, 1998, the day Bush contends triggered the State's obligation to timely file an amended petition, the court never actually set aside the original probable cause determination and never actually required the filing of an amended petition.[4] Bush was never held in confinement without a valid probable cause determination. The court merely determined that the safest course of action was to conduct a new probable cause hearing. There was a suggestion that if Bush filed a motion to dismiss, the filing of an amended petition might be appropriate and might avoid further proceedings.

¶8 Second, delay was attributable to Bush, with his consent, and at times, at his request. At the April 23, 1998 hearing, the circuit court questioned Bush's counsel about the potential disadvantage to Bush by the additional delay in essentially starting over. Bush's counsel indicated that Bush was really in no hurry to conduct the hearing. On September 3, 1998, the court required Bush to put his oral motion to dismiss in writing, but Bush did not file anything until December 7, 1998, the morning of the next scheduled hearing. The written motion

[4] The circuit court commented, "I'm not really ruling, I am asking we do this by stipulation …." When pressed as to whether Bush's motion for a new probable cause hearing was granted, the court said, "I am only granting it for practical purposes."

was a triggering event for the State to exercise leave to file an amended petition. The State filed the amended petition the day of the hearing set on Bush's written motion, within fifty-eight days of the filing of the written motion. After the amended petition was filed, at the February 8, 1999 status hearing Bush asked for ten days to file motions and waived time limits for the probable cause hearing. The use of the PSI was then litigated with Bush requesting time to prepare. On July 1, 1999, Bush stated, "We are in no hurry." Again on October 22, 1999, when the use of the PSI was finally resolved and the court addressed scheduling the new probable cause hearing, Bush had no objection to waiving any time requirements. Even when the probable cause hearing had to be adjourned on February 18, 2000, Bush requested that it be scheduled further out than the court originally proposed. At a brief status hearing on June 16, 2000, Bush expressed no interest in an expedited hearing date. In this light, the delay was not unreasonable and not without cause.

¶9 Further, Bush cannot be heard to now complain of delay. Despite his motion to dismiss for unreasonable delay, he led the circuit court to believe that time was of no importance. It is well established that where a party has induced certain action by the circuit court, he or she cannot later complain on appeal. ***Zindell v. Cent. Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936). *See also* ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989) (it is contrary to fundamental principles of justice and orderly procedure to allow a party to affirmatively contribute to court error and then obtain reversal because of the error).

¶10 Bush next argues that the circuit court erred in concluding that the testimony of the State's expert was more credible than the testimony he presented. Essentially Bush contends that the court should have excluded the expert's

reliance on actuarial instruments assessing future dangerousness in light of testimony he presented that such instruments are invalid. He further asks this court to grant a new trial in the interest of justice or for a remand to further litigate the reliability of the actuarial instruments.

¶11 As Bush concedes, Wisconsin is not a ***Daubert***[5] state. Rather, Wisconsin adheres to the view that the circuit court's gatekeeper role is limited. "Once the relevancy of the evidence is established and the witness is qualified as an expert, the reliability of the evidence is a weight and credibility issue for the fact finder and any reliability challenges must be made through cross-examination or by other means of impeachment." ***Conley Publ'g Group, Ltd. v. Journal Communications, Inc.***, 2003 WI 119, ¶34 n.21, ___ Wis. 2d ___, 665 N.W.2d 879 (quoting ***State v. Peters***, 192 Wis. 2d 674, 690, 534 N.W.2d 867 (Ct. App. 1995)).[6]

¶12 In ***State v. Tainter***, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538, *review denied*, 2003 WI 16, 259 Wis. 2d 101, 657 N.W.2d 707 (Wis. Feb. 19, 2003) (No. 01-2644), and ***State v. Lalor***, 2003 WI App 68, ¶14, 261 Wis. 2d 614, 661 N.W.2d 898, the admission of expert testimony based on actuarial instruments like those utilized in this case was affirmed. We need not revisit the issue and are bound by precedent. Bush's attempt to veil the same issue as one of mere misjudgment of credibility fails. The circuit court noted that the instruments were subject to criticism but nonetheless found the evidence credible. We

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[5] ***Daubert v. Merrell Dow Pharmaceuticals, Inc.***, 509 U.S. 579, 592-93 (1993), explains that in the federal system the trial court's gatekeeper role requires it to assess whether the reasoning or methodology underlying expert testimony is scientifically valid.

[6] Although Wisconsin's rejection of the ***Daubert*** standard was subject to review in ***Conley Publishing Group, Ltd. v. Journal Communications, Inc.***, 2003 WI 119, ___ Wis. 2d ___, 665 N.W.2d 879, the Wisconsin Supreme Court did not address the issue. ***Id.***, ¶34 n.21.

summarily reject Bush's contention that the reliability of the actuarial instruments was not fully tried, particularly in light of the expert testimony he presented that the instruments are not statistically sound because they are not normed on Wisconsin populations.

¶13 Bush contends that he did not knowingly waive his right to a jury trial because there was no detailed colloquy with respect to his understanding of his right to a twelve-person jury and the unanimous verdict requirement. *See* ***State v. Resio***, 148 Wis. 2d 687, 694-97, 436 N.W.2d 603 (1989) (valid waiver when defendant understands that guilt or innocence will be determined by a single judge rather than a group of twelve lay persons and court advises defendant that it cannot accept a jury verdict that is not agreed to by each member of the jury). Bush's right to a jury trial and to withdraw his request for a jury trial is governed by WIS. STAT. § 980.05(2), rather than the case law governing the constitutional right of a criminal defendant to a jury trial. ***State v. Bernstein***, 231 Wis. 2d 392, 400, 605 N.W.2d 555 (Ct. App. 1999). The circuit court was not required to advise Bush that a jury verdict must be unanimous in order for the withdrawal of his request for a jury trial to be valid. ***State v. Denman***, 2001 WI App 96, ¶12, 243 Wis. 2d 14, 626 N.W.2d 296. Section 980.05(2) "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." ***Denman***, 243 Wis. 2d 14, ¶12.

¶14 Early in this proceeding, at a hearing held on June 7, 1997, Bush withdrew his original request for a jury trial. Then Bush indicated that he was "acutely aware" of his right to a jury trial. Bush acknowledges that the colloquy at that hearing was adequate. He contends, however, that the first colloquy cannot be dispositive of whether he knowingly withdrew his second request for a jury trial,

four years and five months later on November 8, 2001, before a different judge and with new counsel. Regardless of the first colloquy, the second established that Bush understood his right to a jury trial and wished to waive it. The circuit court personally addressed Bush and inquired whether he had sufficient time to review the choice with counsel. The court further inquired about Bush's educational background. It observed that Bush had exhibited himself to be intelligent and knowledgeable about the nature of the case when it found that a knowing withdrawal of the request for a jury trial was made. Bush's withdrawal of the request for a jury trial was properly accepted.

¶15 ***State v. Thiel***, 2000 WI 67, ¶¶35-37, 235 Wis. 2d 823, 612 N.W.2d 94, holds that the State must prove beyond a reasonable doubt that the respondent in a WIS. STAT. ch. 980 proceeding is within ninety days of release or discharge when the petition is filed. Bush claims there was inadequate proof on this element.

¶16 The State filed a certified copy of a Department of Corrections form notifying Bush of his release date. Bush never argued that the proof was inadequate or, as he does for the first time on appeal, that the registrar's testimony was required to establish the date of his mandatory release. The issue is waived. ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Further, the certified copy, as uncontradicted documentary evidence, is sufficient to establish the required ninety-day element. *See* ***State v. Brown***, 2002 WI App 260, ¶22, 258 Wis. 2d 237, 655 N.W.2d 157, *review denied*, 2003 WI 1, 258 Wis. 2d 107, 655 N.W.2d 127 (Wis. Dec. 10, 2002) (No. 99-0635).

¶17 Bush next argues that the State failed to prove that he had serious difficulty in controlling violent behavior, a required element set forth in ***Kansas v.***

Crane, 534 U.S. 407, 413 (2002). He concedes that the issue is controlled by ***State v. Laxton***, 2002 WI 82, ¶21, 254 Wis. 2d 185, 647 N.W.2d 784, *cert. denied*, 537 U.S. 1114 (2003), where the court held that a separate factual finding regarding the individual's serious difficulty in controlling behavior is not required in a WIS. STAT. ch. 980 proceeding. Bush contends that ***Laxton*** is wrongly decided and is in conflict with ***Crane***. The issue is raised to preserve it for possible review by a higher court and we need not address it further since we are bound by ***Laxton***.

¶18 The same is true of the final issue—whether the denial of a dispositional hearing to consider less restrictive alternatives violated Bush's right to equal protection. Bush concedes that ***State v. Williams***, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791, *review* denied, 2002 WI 111, 256 Wis. 2d 63, 650 N.W.2d 840 (Wis. July 26, 2002) (Nos. 00-2899 and 00-3122), controls in upholding the commitment provisions of WIS. STAT. ch. 980. Bush raises the issue to preserve the equal protection challenge for possible review by a higher court.

By the Court.—Order affirmed.

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