

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 2012

Diane M. Fremgen
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. 2011AP789

Cir. Ct. No. 2003CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF MICHAEL L. MCGEE:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL L. MCGEE,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County:
ALLAN B. TORHORST, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Michael L. McGee appeals an order of the circuit court denying his petition for discharge from commitment under WIS. STAT.,

ch. 980 (2009-10).¹ McGee argues on appeal that the testimony of psychologist Dr. Cynthia Marsh should have been excluded at his discharge trial because her examination report was not submitted at least ten days before the proceeding, as required by WIS. STAT. § 980.031(5). We affirm the order of the circuit court.

BACKGROUND

¶2 McGee, by his counsel, filed a petition for discharge from commitment as a sexually violent person under WIS. STAT. ch. 980. A bench trial was held in July 2010. At trial, McGee relied on testimony by Dr. Carolyn Hensel Fixmer, a psychologist employed by the Department of Health and Family Services, who testified that it was her professional opinion that McGee’s degree of risk was in a category beneath the legal threshold of “much more likely than not” that he would commit another sexually violent crime. *See State v. Curiel*, 227 Wis. 2d 389, 401, 597 N.W.2d 697 (1999). The State relied on the testimony of Marsh, a Department of Corrections psychologist retained in her private capacity.

¶3 Prior to trial, McGee moved to exclude Marsh’s testimony because Marsh did not submit a written report of her examination to the court and to both parties at least ten days before the trial, pursuant to WIS. STAT. § 980.031(5). On the day of trial, the circuit court asked McGee if he wished to adjourn the trial to allow for more time to evaluate Marsh’s report. McGee declined to have the trial adjourned, expressing his desire to have the trial take place within the ninety-day time frame specified by statute for chapter 980 proceedings. *See* WIS. STAT. § 980.015(2). The circuit court denied McGee’s motion to exclude Marsh’s

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

testimony. On appeal, McGee argues that the circuit court erred in denying the motion and permitting Marsh to testify.

DISCUSSION

¶4 At issue in this appeal is the construction and application of a statute, WIS. STAT. § 980.031, which is a question of law that we review de novo. *See Kamps v. DOR*, 2003 WI App 106, ¶11, 264 Wis. 2d 794, 663 N.W.2d 306.

¶5 It is undisputed that the written report of Marsh was not submitted ten days before trial, as required by WIS. STAT. § 980.031(5). Rather, the report was emailed to McGee’s counsel five days before trial. Section 980.031(5) states, in relevant part:

No licensed physician, licensed psychologist, or other mental health professional who is expected to be called as a witness by one of the parties or by the court may testify at any proceeding under this chapter unless a written report of his or her examination has been submitted to the court and to both parties at least 10 days before the proceeding.

McGee argues that this statutory language is clear and unambiguous, with no exceptions. He asserts that the statute should have been applied by the circuit court to bar Marsh from testifying at trial. McGee further argues that the presence of a “good cause” exception in the Chapter 980 discovery statute, WIS. STAT. § 980.036(9)(a), when such language does not exist in WIS. STAT. § 980.031(5), indicates that the legislature did not intend for there to be any exception to § 980.031(5).

¶6 The State argues that McGee’s appeal fails in light of WIS. STAT. § 980.038(5), which provides that “[f]ailure to comply with any time limit specified in this chapter does not deprive the circuit court of personal or subject

matter jurisdiction or of competency to exercise that jurisdiction.” The State argues that this subsection is to be interpreted broadly, such that failure to comply with the ninety-day time limit for Chapter 980 proceedings does not deprive the court of jurisdiction or competency. Implicit in the State’s argument is the assertion that, if McGee had elected to adjourn the trial, it would have been acceptable, under § 980.038(5), for the circuit court to have extended the ninety-day time frame to allow McGee and his counsel the opportunity to review Marsh’s report.

¶7 McGee counters that, when comparing WIS. STAT. § 980.038(5) with WIS. STAT. § 980.031(5), the latter is the more specific statute and, therefore, controls what sanction should be applied when an expert report is not submitted in a timely manner. See *Pruitt v. State*, 16 Wis. 2d 169, 173, 114 N.W.2d 148 (1962) (“The general statutory rule of construction is when a specific statute and a general statute relate to the same subject matter, the specific statute controls”). McGee argues that the remedy should be to exclude the witness’s testimony, not to extend the ninety-day time frame for conducting a Chapter 980 discharge trial. He asserts that annual re-examinations and other statutory procedures for discharge are among the protections that the Wisconsin Supreme Court has considered significant in concluding that Chapter 980 does not violate the equal protection clause or the right to due process.² See *State v. Combs*, 2006 WI App 137, ¶28, 295 Wis. 2d 457, 720 N.W.2d 684.

² We need not address the constitutional argument touched upon in McGee’s briefs because we affirm the circuit court on alternate grounds.

¶8 The State asserts that the ten-day limit for disclosure under WIS. STAT. § 980.031(5) is preceded by the word “may,” whereas the sanction in WIS. STAT. § 980.036(9)(a) for failure to make timely discovery disclosures contains the word “shall.” The State argues that Wisconsin courts have characterized “may” as permissive and “shall” as mandatory, and that legislative intent weighs against a mandatory interpretation of WIS. STAT. § 980.031(5). See *Forest Cnty. v. Goode*, 219 Wis. 2d 654, 663, 579 N.W.2d 715 (1998).

¶9 We need not address the legislative intent behind WIS. STAT. § 980.031(5), nor the issue of how broadly WIS. STAT. § 980.038(5) should be interpreted, because we affirm the circuit court on alternate grounds, relying instead upon § 980.038(6). Subsection (6) provides:

(6) ERRORS AND DEFECTS NOT AFFECTING SUBSTANTIAL RIGHTS. The court shall, in every stage of a proceeding under this chapter, disregard any error or defect in the pleadings or proceedings that does not affect the substantial rights of either party.

Neither party addressed § 980.038(6) in its briefs, but we conclude that it applies to this case. For purposes of this decision, we read § 980.038(6) in harmony with the time limit set forth in WIS. STAT. § 980.031(5), by acknowledging that there may be circumstances under which violation of the ten-day time limit will have an effect on the substantial rights of a party. However, in this case, McGee does not demonstrate that any of his substantial rights were affected by the lack of a timely disclosure of Marsh’s report.

¶10 McGee acknowledges in his brief that, prior to denying his motion to exclude Marsh’s testimony, the court offered him the option of adjourning the trial to a later date, but he declined. McGee does not dispute that he had notice that

Marsh would be a witness. Fixmer, the expert witness on which McGee's defense relied, testified that she had reviewed Marsh's report in preparing for trial.

¶11 In summary, McGee has not argued that the State's failure to comply with the ten-day disclosure requirement of WIS. STAT. § 980.031(5) compromised his ability to present his case. Therefore, we conclude that the State's failure to submit Marsh's report ten days prior to trial was an error or defect in the proceedings that did not affect the substantial rights of either party in this case and may be disregarded pursuant to WIS. STAT. § 980.038(6).

By the Court.—Order affirmed.

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

