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DISTRICT IV

January 25, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2403 In re the commitment of Stephen J. Weissenberger, Jr.: State of Wisconsin v. Stephen J. Weissenberger, Jr. (L.C. # 1995CV102)

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Stephen Weissenberger, Jr., pro se, appeals the order revoking his supervised release from commitment under WIS. STAT. ch. 980 and the order denying his motion for postcommitment relief. Weissenberger argues that the order revoking his supervised release is invalid because the circuit court failed to hold a hearing within thirty days of the State's filing the petition to revoke his supervised release. Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We summarily affirm.

On December 21, 2015, the State petitioned to revoke Weissenberger's supervised release from commitment under WIS. STAT. ch. 980. Weissenberger was detained at Sand Ridge Secure Treatment Facility pending the disposition of the petition. On January 29, 2016, Weissenberger moved to dismiss the petition on grounds that the circuit court had failed to hold a hearing within thirty days of the filing of the petition. The court denied the motion. On February 22, 2016, the court held a hearing on the State's petition. The court entered an order revoking Weissenberger's supervised release on February 29, 2016. Weissenberger moved for postcommitment relief, arguing that the order was invalid because the court had failed to hold a hearing within thirty days of the filing of the State's petition. The court denied the motion.

Weissenberger argues that the circuit court was required to hold a hearing within thirty days of the filing of the petition to revoke his supervised release. Weissenberger points out that WIS. STAT. § 980.08(7)(d) provides: "The court shall hear the petition [to revoke supervised release] within 30 days, unless the hearing or time deadline is waived by the detained person." Weissenberger argues that the term "shall" in a statute setting a time limit is generally construed as making the time limit mandatory rather than directive, particularly when, as here, the legislature also used the word "may" in the same provision. *See* ***State v. Sprosty***, 227 Wis. 2d 316, 324, 595 N.W.2d 692 (1999) (explaining that "[t]he general rule in interpreting statutory language is that 'the word "shall" is presumed mandatory when it appears in a statute,'" and that

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

"[f]urther support is given to a mandatory interpretation of 'shall' when the legislature uses the words 'shall' and 'may' in a particular statutory section, indicating the legislature was aware of the distinct meanings of the words" (quoted sources omitted)). Weissenberger also points out that other sections of WIS. STAT. ch. 980 expressly provide good cause exceptions to time limits, and argues that the lack of an express good cause exception to the time limit for the hearing on the State's petition indicates that the time limit may not be extended. *See, e.g.*, WIS. STAT. § 980.04(2)(b)1. (providing that the court may extend the time to hold the probable cause hearing upon a finding of good cause).

However, as the State points out, the legislature has expressly provided that a violation of a time limit set forth in WIS. STAT. ch. 980 does not invalidate a circuit court's order. WISCONSIN STAT. § 980.038(5) provides in pertinent part:

> Failure 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. Failure to comply with any time limit specified in this chapter is not grounds for an appeal or grounds to vacate any order, judgment, or commitment issued or entered under this chapter.

Accordingly, we reject Weissenberger's argument that WIS. STAT. § 980.08(7)(d) sets forth a mandatory time limit and that failure to comply with that time limit invalidates the court's order.

Weissenberger also contends, however, that WIS. STAT. § 980.038(5) is unconstitutional as applied to him. He contends that he was denied procedural due process when the hearing on the State's petition was not held within the thirty days required by statute. He also argues that he was denied equal protection of the laws because other statutory schemes for civil commitments provide remedies for violations of statutory time limits. *See, e.g.*, ***State ex rel. Lockman v.***

Gerhardstein, 107 Wis. 2d 325, 328-29, 320 N.W.2d 27 (Ct. App. 1982) (holding that a court may not conduct a final commitment proceeding after the mandatory time limits of WIS. STAT. ch. 51 have expired). We are not persuaded.

"Under a procedural due process analysis, we must determine first whether there exists a liberty interest of which the individual has been deprived, and if so, whether the procedures used to deprive that liberty interest were constitutionally sufficient." ***State v. West***, 2011 WI 83, ¶83, 336 Wis. 2d 578, 800 N.W.2d 929. A finding that a person is a sexually violent person under WIS. STAT. ch. 980 constitutionally limits the person's liberty interest in freedom from physical restraint. ***Id.***, ¶85. Our supreme court has analogized a sexually violent person's liberty interest in supervised release to a criminally convicted person's liberty interest in parole. ***Id.***, ¶¶84-85. We therefore find instructive ***Morrissey v. Brewer***, 408 U.S. 471, 488 (1972), in which the United States Supreme Court held that a "revocation hearing must be tendered within a reasonable time after the parolee is taken into custody," but that "[a] lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable." Here, the circuit court held a hearing on the State's petition sixty-three days after the petition was filed. As in ***Morrissey***, that lapse of time does not appear to be unreasonable and does not establish a violation of Weissenberger's procedural due process rights.

"To prove an equal protection clause violation, the party challenging a statute's constitutionality must show that 'the state unconstitutionally treats members of similarly situated classes differently.'" ***West***, 336 Wis. 2d 578, ¶90 (quoted source omitted). Weissenberger has not made that showing here. Weissenberger asserts that he was denied equal protection because WIS. STAT. chs. 48, 51, and 55 provide mandatory time limits that affect a circuit court's competency to proceed. However, Weissenberger has not set forth any argument that persons

committed under WIS. STAT. ch. 980 are similarly situated to persons subject to ch. 48 or confined under chs. 51 or 55, or, more importantly, that the different treatment among the classes is unconstitutional. *See* ***West***, 336 Wis. 2d 578, ¶90 ("The right to equal protection does not require that such similarly situated classes be treated identically, but rather requires that the distinction made in treatment have some relevance to the purpose for which classification of the classes is made."). In ***West***, our supreme court held that treating persons committed under ch. 980 differently than persons committed under ch. 51 did not violate equal protection, even though the classes were similarly situated, "due to classification distinctions as to the dangerousness of those confined." ***Id.***, ¶98. Weissenberger has made no showing that the different treatment of time limits in the chapters does not "have some relevance to the purpose for which classification of the classes is made." ***Id.***, ¶90.

Therefore,

IT IS ORDERED that the orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals