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DISTRICT II

March 4, 2020

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

2019AP867 State of Wisconsin v. Alvin Taylor (L.C. #1987CF368A)

Before Neubauer, C.J., Reilly, P.J., and Davis, J.

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).

Alvin Taylor appeals from an order denying his petition for conditional release filed under WIS. STAT. § 971.17(4)(d) (2017-18)[1] and from an order denying his postdisposition

[1] All references to the Wisconsin Statutes are to the 2017-18 version.

motion filed under WIS. STAT. RULE 809.30(2)(h). 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. Because Taylor's facial and as-applied constitutional due-process challenges to § 971.17(4)(d) have effectively been addressed and rejected by our supreme court in ***State v. Randall***, 192 Wis. 2d 800, 532 N.W.2d 94 (1995), ***Randall*** controls. We affirm.

On August 24, 1990, Taylor pled not guilty by reason of mental disease or defect to intentional homicide (NGI). Absent the NGI plea, the maximum penalty would have been life imprisonment. The circuit court committed Taylor to the Wisconsin Department of Health and Social Services (DHSS).

Several times since 2013, Taylor has petitioned for conditional release. In response to his 2017 petition, the circuit court ordered a psychological examination to determine whether a conditional release would be appropriate. After examining Taylor, Dr. Deborah Collins, a licensed psychologist, issued a report, concluding that, if released to a less secure setting, Taylor "would pose a significant risk of bodily harm to himself or others." She noted, among other things, Taylor's prior history of using lethal violence, including four homicides and one attempted homicide, and his more recent acknowledgement of contemplating the killing of two others.

In addition, four DHSS employees submitted a letter to the court indicating that Mendota Mental Health Institute (MMHI) recommended against Taylor's conditional release. Although acknowledging "Taylor functions fairly well in this highly structured, well supervised inpatient setting," his "crimes are serial homicides and MMHI is concerned that he would pose a

significant danger to the community if released." The letter also noted his history of "homicidal thoughts and urges" and significant issues with "boundaries and judgment."

Supporting Taylor's conditional release, Dr. William Merrick, a licensed psychologist, filed a report concluding that Taylor's mental condition has been fairly stable for years, there has been an absence of any significant mental disorders or conditions that would necessitate intervention, and that he poses a "Very Low Risk" of causing injury to property, himself, or others.

After a three-day trial, the court denied Taylor's petition. Relying on Collins' report, the abhorrent nature of the crimes ("Taylor basically in cold blood executed four innocent individuals in three separate counties"), and in particular the report of MMHI representatives opposing his release (as the court viewed these individuals as the ones who knew Taylor best, having to deal with him on a daily basis), the court concluded that the State met its burden to show that Taylor would pose a significant risk of harm to others if conditionally released.

Taylor filed a postdisposition motion challenging the constitutionality of WIS. STAT. § 971.17(4)(d) both on its face and as applied to him, principally pointing to ***Foucha v. Louisiana***, 504 U.S. 71 (1992). In ***Foucha***, the court concluded that the particular statutory scheme violated due process and equal protection by allowing the indefinite commitment of a no-longer-mentally ill acquittee to a mental hospital, with any release dependent upon the acquittee carrying the burden to prove that he or she was no longer dangerous. ***Id.*** at 77-86. The circuit court denied Taylor's motion, concluding that ***Randall*** controlled, having already addressed similar issues, including the ***Foucha*** decision itself. Taylor appeals.

"The constitutionality of a statute is a question of law reviewed de novo." ***State v. Culver***, 2018 WI App 55, ¶7, 384 Wis. 2d 222, 918 N.W.2d 103. We presume statutes are constitutional. ***State v. Jeremy P.***, 2005 WI App 13, ¶5, 278 Wis. 2d 366, 692 N.W.2d 311 (2004). The presumption must be overcome by the challenger, requiring him or her to prove unconstitutionality beyond a reasonable doubt. ***Id.*** The two main types of constitutional challenges are facial challenges and as-applied challenges, *see* ***id.***; Taylor advances both types here.

As background, criminal defendants who are found not guilty by reason of mental disease or defect "are civilly committed rather than criminally sentenced or sanctioned." ***State v. Fugere***, 2019 WI 33, ¶¶29, 44, 386 Wis. 2d 76, 924 N.W.2d 469. WISCONSIN STAT. § 971.17(4) allows NGI acquittees to petition for conditional release six months after initial confinement and every six months after the denial or revocation of a previous petition.

Taylor first challenges WIS. STAT. § 971.17(4)(d) on its face, meaning he contends, and must show, that the statute cannot be enforced in a constitutional manner "under any circumstances." *See* ***Michels v. Lyons***, 2019 WI 57, ¶11, 387 Wis. 2d 1, 927 N.W.2d 486 (citation omitted). The statute provides the procedures for NGI acquittees to petition for conditional release. It states in pertinent part as follows:

> The court shall grant the petition unless it finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others or of serious property damage if conditionally released. In making this determination, the court may consider, without limitation because of enumeration, the nature and circumstances of the crime, the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, what arrangements are available to ensure that the person has

> access to and will take necessary medication, and what arrangements are possible for treatment beyond medication.

Sec. 971.17(4)(d).

The crux of Taylor's facial challenge is that it is unconstitutional to refuse the conditional release of an NGI acquittee if he or she is no longer mentally ill; the possibility of dangerousness by itself is not enough.[2] He primarily relies on ***Foucha***, where the acquittee was no longer mentally ill.

As we stated above, our review and resolution of Taylor's due process challenges begin and end with ***Randall***. Taking ***Foucha*** into full consideration, our supreme court in ***Randall*** distinguished WIS. STAT. § 971.17(4)(d) from the Louisiana statutory scheme involved in ***Foucha*** and determined that the Wisconsin procedures passed constitutional muster:

> We read ***Foucha*** to permit the continued confinement of insanity acquittees based on dangerousness alone under a statutory scheme, such as Wisconsin's, where the nature of the commitment bears some reasonable relation to the purposes for which the individual is committed.
>
> ….
>
> Incapacitation for the purposes of treatment and rehabilitation, limited to the maximum term which could have been imposed for the criminal conduct, does not turn commitment into an impermissible form of incarceration so long as the state houses the acquittee in a facility appropriate to his or her condition and provides the acquittee with care and treatment to overcome that which makes him or her dangerous.

Randall, 192 Wis. 2d at 833-34.

[2] Taylor does not challenge the circuit court's finding that he poses a significant risk of bodily harm to others if conditionally released. Given our disposition, we need not address Taylor's mental health status.

Randall controls, and Taylor himself agrees. In his initial brief, Taylor points out that "this Court is bound by ***Randall***," but he makes the argument nonetheless contending that ***Randall*** was wrongly decided and should be overturned by our supreme court. He confirms in his one-page reply brief that ***Randall*** "currently controls the outcome of his appeal in this Court" as only our supreme court may overturn ***Randall***.

Taylor is correct; we cannot overrule or modify ***Randall***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

Taylor also made an as-applied challenge. In such a challenge, we still presume that the statute is constitutional, but we do not presume that it has been constitutionally applied to the complainant. ***Tammy W-G. v. Jacob T.***, 2011 WI 30, ¶48, 333 Wis. 2d 273, 797 N.W.2d 854. As the challenger, Taylor still carries the heavy burden to prove that the statute was unconstitutional beyond a reasonable doubt when applied to him. ***State v. Pocian***, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894.

Not much separates Taylor's facial challenge from his as-applied challenge. He asserts that he remains confined to a mental institution under an NGI commitment despite having no mental disease, again citing to ***Foucha*** as support for his contention that this signals a violation of his constitutional protections. Again, however, we are bound by ***Randall***, which found ***Foucha*** to be in line and reasoned that the confinement of an acquittee can continue when he or she poses a danger and "so long as the state houses the acquittee in a facility appropriate to his or her condition and provides the acquittee with care and treatment to overcome that which makes

him or her dangerous." ***Randall***, 192 Wis. 2d at 833-34. Taylor makes no developed argument that this is not the case here.

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals