COURT OF APPEALS
DECISION
DATED AND FILED

March 20, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2010AP2627 **Cir. Ct. No. 2002CI1**

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

IN RE THE COMMITMENT OF RANDY PURIFOY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

RANDY PURIFOY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Randy Purifoy, *pro se*, appeals from an order of the circuit court denying his petition for discharge under WIS. STAT. § 980.09(2)

(2007-08).[1] Purifoy asserted that he was no longer sexually violent and in need of commitment. After a hearing, the circuit court disagreed and denied the petition. Purifoy alleges several errors by the circuit court. We affirm the order.

BACKGROUND

¶2 The historical facts of this case are undisputed. In 1976, when Purifoy was fifteen years old, he raped and killed a woman. Purifoy, by his own admission, had also "previously violently raped six other women and stabbed one of those in the neck." He turned himself in after the homicide, admitted the other rapes, and confessed to two armed robberies. Pursuant to a plea agreement, Purifoy pled guilty to one count of rape and one count of second-degree murder; the other counts were read in. Purifoy was committed to the Department of Health and Social Services under WIS. STAT. ch. 975 (1975-76) for the rape and sentenced to a consecutive five to twenty-five years' imprisonment for the murder.

¶3 In July 1990, Purifoy was discharged from the WIS. STAT. ch. 975 commitment into the Department of Corrections' custody so that he could serve his murder sentence. Purifoy prevailed on a federal *habeas corpus* petition relating to the calculation of his mandatory release date, which the federal court calculated as September 26, 2001. The federal court ordered Purifoy released by May 22, 2002. Prior to that release, the State filed a petition alleging that Purifoy was a sexually violent person, *see* WIS. STAT. § 980.01(7) (2001-02), and seeking his commitment, *see* WIS. STAT. § 980.06 (2001-02). The State prevailed, Purifoy

[1] All references to WIS. STAT. ch. 980 are to the 2007-08 version unless otherwise noted.

appealed, and we affirmed. *See* ***State v. Purifoy***, No. 2004AP1874, unpublished slip op. (WI App July 3, 2007).

¶4 On November 7, 2008, Purifoy petitioned for discharge from the commitment, asserting that new information established that he was "no longer 'more likely than not' to commit" a sexually violent act. After a three-day hearing, the circuit court denied the petition. Purifoy appeals. Additional facts will be set forth below as necessary.

DISCUSSION

¶5 WISCONSIN STAT. ch. 980 "is intended to 'protect[] the public by providing concentrated treatment for convicted sex offenders who are at a high risk to reoffend based upon a mental disorder which predisposes them to commit acts of sexual violence.'" *See* ***State ex rel. Marberry v. Macht***, 2003 WI 79, ¶14, 262 Wis. 2d 720, 665 N.W.2d 155 (citation omitted; brackets in ***Marberry***). The chapter "provides for discharge from commitment once the statutorily-defined dangerousness 'abates.'" ***Id.*** (citation omitted).

¶6 "A committed person may petition the committing court for discharge at any time." WIS. STAT. § 980.09. If the circuit court determines that the petition "contains facts from which the court or jury may conclude that the person does not meet the criteria for commitment as a sexually violent person[,]" the court shall set the matter for a hearing. WIS. STAT. § 980.09(2). At the hearing, the State "has the burden of proving by clear and convincing evidence that the person meets the criteria for commitment as a sexually violent person." WIS. STAT. § 980.09(3). If the State fails to fulfill its burden, the petitioner is to be discharged. WIS. STAT. § 980.09(4).

¶7 To prove a petitioner is a sexually violent person, the State must show three things: that the person has been convicted of a sexually violent offense; that the person has a mental disorder; and that the person is dangerous to others because he has a mental disorder which makes it more likely than not that he will engage in one or more future acts of sexual violence. *See* WIS JI—CRIMINAL 2502; WIS. STAT. § 980.01(7). A "sexually violent offense" includes first- and second-degree sexual assaults. *See* WIS. STAT. § 980.01(6). A "mental disorder" is a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." WIS. STAT. § 980.01(2).

¶8 Here, the circuit court granted a hearing on Purifoy's petition. Purifoy waived his right to a jury and tried the matter to the circuit court instead. Purifoy does not dispute that his rape conviction constitutes a sexually violent offense. In addition, the circuit court accepted testimony that Purifoy has diagnoses of paraphilia and antisocial personality disorder, such a factual finding is not clearly erroneous. Thus, the real dispute centers on whether those diagnoses make Purifoy dangerous to others because his mental disorders make him more likely than not to commit a future act of sexual violence. The circuit court concluded that the State fulfilled its burden and denied the petition for discharge. On appeal, Purifoy makes four claims of error against the circuit court; we address each in turn.

I. Consideration of Purifoy's lack of treatment.

¶9 Purifoy's first complaint is that it was "erroneous and incredible reasoning" for the circuit court to consider his lack of treatment in determining that he remains a sexually violent person. Purifoy's reasoning is that actuarial

tests showed his risk to be below a fifty-one-percent risk threshold, and treatment is used to lower risk to a point below that threshold, so if Purifoy was already below the threshold then he did not need treatment to reduce his risk of reoffense.[2]

¶10 The circuit court acknowledged that "it is uncontroverted that the actuarial instrument is below that 51 percent threshold." However, Purifoy cites no authority for his implicit contention that the circuit court must rely on actuarial results alone. Quite the contrary, the circuit court is free to accept only so much of the testimony or evidence that it finds credible. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 435, 597 N.W.2d 712 (1999).

¶11 Here, two of the three psychologists who evaluated Purifoy testified[3] that the actuarial results might be unreliable as to Purifoy. Actuarial assessment tests are "based on aggregate or group data." *See* ***State v. Brown***, 2005 WI 29, ¶84 n.31, 279 Wis. 2d 102, 693 N.W.2d 715 (citation omitted). The doctors explained that Purifoy, as a juvenile who committed a rape and a murder, did not really have a comparable peer group from which risk could be predicted. Moreover, actuarial tests only predict the risk that an individual will reoffend and be caught and processed through the legal system. That is, the tests do not predict

[2] Relatedly, Purifoy also asserted that the circuit court acknowledged "there was no proof that Purifoy's mental disorder involves serious difficulty controlling his behavior[.]" The circuit court acknowledged there was no evidence of "sexual deviancy" since Purifoy's commitment in 1976. Recent overt acts, however, are not a required element of proof, particularly when an offender is continuously confined. *See* ***State v. Bush***, 2005 WI 103, ¶¶34, 38-39, 283 Wis. 2d 90, 699 N.W.2d 80.

[3] Purifoy only provided the transcript of the third day of the hearing, where the circuit court issued its opinion. Thus, we do not have the transcripts of the doctors' testimony and our description of the testimony is based on the circuit court's summary thereof. As the appellant, it was Purifoy's obligation to ensure a complete record, and we assume the missing transcripts support the circuit court's decision. *See* ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993).

the risk for reoffense without apprehension. Thus, the circuit court acknowledged the actuarial tools as a starting point for its analysis but rejected them as any sort of definitive proof.

¶12 When the circuit court evaluated the totality of the evidence, it was free to weigh whether Purifoy's lack of progress in treatment contributed to the risk of reoffense, despite his actuarial test scores. *Cf.* ***State v. Pocan***, 2003 WI App 233, ¶12, 267 Wis. 2d 953, 671 N.W.2d 680 (progress in treatment one way to show petitioner is no longer sexually violent). As the circuit court concluded, "I think the reason he doesn't engage in treatment, the reason he doesn't want to change, is because he is still suffering from that antisocial disorder. And I think that that is prohibiting him from … get[ting] engaged in the treatment so he can get out[.]" Purifoy's lack of treatment participation was not an improper consideration.

II. Nature of the crime of commitment.

¶13 Purifoy complains it was erroneous for the circuit court to consider the nature of the original crime that led to his commitment when determining his likelihood of reoffense. Specifically, he contends that such a consideration converts a WIS. STAT. ch. 980 commitment into a punitive, criminal sanction. Purifoy is mistaken.

¶14 "[T]his reasoning has been rejected by the U.S. Supreme Court in its analysis of other involuntary commitment statutes that may be 'triggered' by a crime." ***State v. Rachel***, 2002 WI 81, ¶58, 254 Wis. 2d 215, 647 N.W.2d 762. "[A] mere connection to criminal activity is not sufficient to render the statute punitive." ***Id.***

III. Evidence of Purifoy's mental health history.

¶15 Purifoy's third argument is: "The State's reliance and the circuit court's allowance of mental health history is contrary to the fundamental fairness doctrine of the due process clause and violative of Purifoy's constitutional rights." However, there are actually multiple claims set forth in this section.

A. Presumption of sanity.

¶16 As noted, Purifoy was transferred in 1990 from his WIS. STAT. ch. 975 commitment for the rape conviction to the Department of Corrections in order to serve his homicide sentence. Purifoy asserts that he was "granted a discharge … certifying that Purifoy was no longer a danger to the public … and by that discharge the State certified that Purifoy was no longer suffering from a mental illness requirement treatment[.]" He goes on to claim that it is "the law of Wisconsin that 'after the expiration of two years from the discharge of a patient from a hospital for the insane, without his having been recalled, the presumption of insanity as to such person, because of the adjudication upon which he was committed to the hospital, ceases, and he is presumed to be sane[.]"[4] *See* WIS. STAT. § 587(c) (1898).

¶17 We are aware of no modern equivalent statute as it relates to a WIS. STAT. ch. 980 commitment, and Purifoy cites none. The most recent equivalent statute appears to be WIS. STAT. § 51.13(3) (1973), which provided that "[u]pon the expiration of one year from the granting of a conditional release … the patient

[4] Purifoy does not show he was ever declared "insane" as that term may have been previously used.

shall be presumed competent."[5] However, Purifoy was never committed under ch. 51. Thus, presumptions of sanity under prior versions of ch. 51 and its predecessor statutes are irrelevant.

B. Use of mental health history evidence.

¶18 Purifoy also complains that "the State's psychiatric opinion testimony as to Purifoy's current diagnosis stemming from his 1976 sexual offenses is prohibited since the opinions are based on mental health history." However, the primary case he cites does not stand for such a proposition. ***State v. Flattum***, 122 Wis. 2d 282, 361 N.W.2d 705 (1985), held that psychiatric opinion testimony that is partially based on a defendant's mental health history is inadmissible on the issue of a defendant's capacity to form intent as the *mens rea* element of a crime. ***Id.*** at 284. However, ***Flattum*** does not create a blanket prohibition as Purifoy suggests. Rather, the case states that "properly qualified psychiatric testimony with respect to a defendant's mental health history *is admissible* if such testimony is shown to be relevant." ***Id.*** at 305 (emphasis added). Purifoy develops this argument no further, and we will not do it for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

C. ***Brady*** discovery violation.

¶19 Purifoy further contends that the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963), because the State "had the obligation to act in accordance with the law and disclose the exculpatory evidence of Purifoy's 1990 discharge,

[5] WISCONSIN STAT. § 51.13(3) (1973) was repealed in 1975. *See* 1975 Wis. Laws, ch. 430, § 11.

the determination that Purifoy was then deemed no longer a danger to the public and no longer evidenced sexual pathology requiring treatment[.]"

¶20 Purifoy has not established the duty of the State to disclose a copy of the discharge order to him or to the circuit court. He contends that the 1990 discharge order is exculpatory because he believes that it amounts to a clean bill of mental health. But Purifoy's discharge order did not declare outright that he was no longer dangerous. Instead, it states only that "*subject to incarceration on his criminal sentence*, he may now be given full liberty without danger to the public[.]" (Emphasis added.) That is, his "lack" of dangerousness was conditioned upon his continued confinement away from the public. Further, nothing in the discharge order or the unsigned letter accompanying it states that Purifoy "no longer evidenced sexual pathology." The discharge order is not "exculpatory" and the State had no duty to disclose it.

IV. Double jeopardy.

¶21 Finally, Purifoy contends that his WIS. STAT. ch. 980 commitment violates double jeopardy. State and federal double jeopardy clauses "protect a person against three types of action: (1) subsequent prosecution for the same offense after acquittal; (2) subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." ***Rachel***, 254 Wis. 2d 215, ¶20. Purifoy complains that prior cases do not address "the double

jeopardy violation of prosecution after an acquittal that Purifoy has been subjected to."[6]

¶22 Purifoy's complaint has been squarely rejected by our supreme court. The double jeopardy clause "protects against subsequent *criminal* prosecutions." ***Id.*** "Consequently, if we conclude that one of the actions in question is civil and does not impose a criminal punishment, our double jeopardy analysis ends there." ***Id.*** WISCONSIN STAT. ch. 980 "is not a punitive criminal statute." ***Id.***, ¶60. "Because whether a statute is punitive is a threshold question" for the double jeopardy analysis, that clause is not violated by ch. 980. ***Id.***

By the Court.—Order affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2009-10).

[6] An acquittal is a "legal certification … that an accused person is not guilty of the charged offense." BLACK'S LAW DICTIONARY 27 (9th ed. 2009). Thus, because ch. 980 is a civil matter, the concept of "acquittal" does not apply here.

To the extent Purifoy suggests that his discharge from his WIS. STAT. ch. 975 commitment precludes the State from seeking a WIS. STAT. ch. 980 commitment, he is in error. A discharge under WIS. STAT. § 975.12 "does not limit the state's ability to seek separate civil commitment under chapter 980." *See* ***State v. Post***, 197 Wis. 2d 279, 332, 541 N.W.2d 115 (1995).