COURT OF APPEALS
DECISION
DATED AND FILED

November 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2553

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

IN RE THE COMMITMENT OF THOMAS P. CONNELLY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS P. CONNELLY,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Thomas Connelly appeals from a judgment of the circuit court finding him to be a sexually violent person under ch. 980, STATS., and the order denying his motion for reconsideration. The issues on appeal are whether the subsequent filing of the petition violated Connelly's plea agreement,

and whether the evidence was sufficient to meet the "substantially probable" test of § 980.01(7), STATS. We conclude that the subsequent filing of the petition did not violate the plea agreement and that sufficient evidence was presented to meet the "substantially probable" test. Therefore, we affirm.

In 1994, Connelly entered into a plea agreement whereby he was convicted of two counts of first-degree sexual assault of a child and one count of second-degree sexual assault of a child. The court imposed a sentence of four years incarceration with the recommendation that Connelly attend sex offender counseling, and two six-year periods of probation. The sentence imposed was the sentence recommended by the district attorney.

In 1997, the same district attorney filed a petition pursuant to § 980.02(1)(b), STATS., asking the court to find probable cause to believe that Connelly is a sexually violent person. The court found probable cause, and an evidentiary hearing was held. The State presented two expert witnesses who testified that Connelly met the criteria of a sexually violent person in § 980.01(7), STATS., because it was "substantially probable" that he would reoffend. The court found that Connelly was a sexually violent person and ordered that he be committed to institutional care. The court later denied Connelly's motion for reconsideration.

The first issue on appeal is whether the filing of the petition violated the plea agreement. Connelly argues that a plea agreement constitutes a binding contract between the State and a defendant, and that the State is prohibited from violating the spirit as well as the letter of the agreement. The State argues that this case is controlled by this court's decision in ***State v. Zanelli***, 212 Wis.2d 358, 569

N.W.2d 301 (Ct. App. 1997), in which we held that a subsequently filed ch. 980 petition does not violate a plea agreement. We agree.

In ***Zanelli***, we stated that a ch. 980 petition is merely a "collateral consequence" of a guilty plea and the defendant "is not entitled to relief in the form of a plea withdrawal on grounds that he was unaware of a potential for a later sexual predator commitment." ***Id.*** at 367, 569 N.W.2d at 305. Connelly attempts to distinguish his case arguing that in ***Zanelli*** we did not consider a situation in which the defendant had specifically bargained for an agreement from the State that it would recommend probation when he completed his prison term. As in ***Zanelli***, however, there is nothing in the record to indicate that Connelly bargained for the State's promise not to pursue ch. 980 proceedings. *See* ***id.***

Moreover, this argument ignores the conclusion in ***Zanelli***, that the ch. 980 proceeding is "collateral" to the plea agreement. ***Id.*** As we stated in that case, "[s]uch consequences have no definite, immediate or largely automatic effect on the range of the pleader's punishment. Instead, any future ch. 980 proceeding will depend on [the defendant's] condition at the time of the ch. 980 proceeding and the evidence that the State will then present on his condition." ***Id.*** at 367-68, 569 N.W.2d at 305 (citations omitted).

The second issue on appeal is whether the State met its burden of proof by establishing that it was "substantially probable" that Connelly would engage in acts of sexual violence. *See* § 980.01(7), STATS. The first issue the parties dispute is the definition of the term "substantially probable." Since the parties submitted their briefs, however, this court has issued a decision which concludes that substantially probable means "considerably more likely to occur than not to occur." ***State v. Kienitz***, No. 97-1460, slip op. at 7 (Wis. Ct. App.

July 30, 1998, ordered published October 1, 1998). Further, we determined that the appropriate standard of review is that we will reverse "only if the evidence viewed in the light most favorable to the verdict is so insufficient in probative value and force that it can be said as a matter of law that no reasonable trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id.*** at 9 (citations omitted).

The issue on this appeal, therefore, is whether the evidence was so insufficient in probative value that no reasonable trier of fact could have concluded that Connelly was substantially probable to engage in acts of sexual violence. We conclude that the evidence was sufficiently probative to support the conclusion reached by the circuit court.

All of the expert witnesses testified that Connelly is a pedophile. All of the witnesses testified that the nature of Connelly's past offenses indicated an increased risk of recidivism. One of the witnesses testified that Connelly's risk factors were associated with very high recidivism rates. Another expert testified that Connelly's risk factors were strong indicators of recidivism. Connelly's own expert stated that "there are factors about him that render him a higher risk person as far as safety and dangerousness is concerned." We cannot conclude based on this and the other testimony presented that a reasonable finder of fact could not reach the same conclusion reached by the circuit court. Therefore, we affirm.

By the Court.—Judgment and order affirmed.

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