COURT OF APPEALS
DECISION
DATED AND FILED

December 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0152

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

IN RE THE COMMITMENT OF WILBERT L. THOMAS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

WILBERT L. THOMAS,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Racine County: EMMANUEL J. VUVUNAS, Judge. *Reversed.*

Before Brown, Nettesheim and Anderson, JJ.

BROWN, J. Wisconsin's statutory scheme for commitment of sexually violent persons mandates that the Department of Justice (DOJ) may not file a commitment petition against a person unless the Department of

Corrections (DOC) first requests it. We hold that this same mandate applies to district attorneys and we reverse the trial court's contrary statutory interpretation.

Wilbert L. Thomas was convicted of a sexually violent offense in 1991 and subsequently incarcerated. In the fall of 1997, Thomas was referred for psychological evaluation to determine whether he was eligible for commitment under ch. 980, STATS. The evaluating psychologist concluded that Thomas did not meet the criteria for commitment. The Racine County District Attorney's Office then hired Dr. George Palermo, a professor of psychiatry, to evaluate Thomas. Palermo concluded that Thomas did meet the criteria for commitment under ch. 980. Based on Palermo's report, the district attorney filed a petition to commit Thomas under ch. 980. Thomas moved to dismiss the petition, claiming that the district attorney did not have authority to file a petition unless the DOC had requested that the petition be filed and the DOJ had not so filed. The court denied this motion, reading the statute as granting the district attorney authority to file a commitment petition whenever the DOJ has not done so.

To decide this case we must examine § 980.02, STATS., to see which of the parties has construed it correctly. This is a question of statutory interpretation which we review de novo, without deference to the circuit court's findings. *See* ***Grosse v. Protective Life Ins. Co.***, 182 Wis.2d 97, 105, 513 N.W.2d 592, 596 (1994). If the language of the statute is clear and unambiguous, we merely apply the language to the facts of the case. *See* ***State v. Keding***, 214 Wis.2d 363, 368-69, 571 N.W.2d 450, 452 (Ct. App. 1997).

The statute at issue in this case is § 980.02(1), STATS. It reads:

> **980.02 Sexually violent person petition; contents; filing.**
> **(1)** A petition alleging that a person is a sexually violent person may be filed by one of the following:

> (a) The department of justice at the request of the agency with jurisdiction, as defined in s. 980.015 (1), over the person. If the department of justice decides to file a petition under this paragraph, it shall file the petition before the date of the release or discharge of the person.
>
> (b) If the department of justice does not file a petition under par. (a), the district attorney ….

While both parties agree that the statute is unambiguous, they disagree on what the language means. The district attorney reads paragraph (b) as granting power to the district attorney to initiate a petition for commitment, as long as the DOJ has not filed. Thomas reads the same paragraph as empowering the district attorney only when the DOC ("the agency with jurisdiction") has requested a petition and the DOJ has declined to file it. We hold that Thomas' reading is the only reasonable interpretation of the statute.

The statute dictates who may file a petition alleging that a person is a sexually violent person. *See* § 980.02(1), STATS. Paragraph (a) allows the DOJ to file at the request of the DOC. *See* ***id.*** at para. (a). Paragraph (b) allows the district attorney to file, but only if the DOJ has not filed under para. (a). This last phrase is crucial: the district attorney may only file if the steps described in para. (a) have not been taken. Thus, in order for filing power to extend to the district attorney, the DOC must have requested a petition and the DOJ must have refused. That is the procedure prescribed by para. (a), and that is what must occur before filing power is vested in the district attorney under para. (b). To read the statute otherwise would essentially delete the words "under par. (a)" from the statute. Surely if this had been the legislature's intent it would not have inserted those words. *See* ***NCR Corp. v. DOR***, 128 Wis.2d 442, 456, 384 N.W.2d 355, 362 (Ct. App. 1986) (statutes should be construed to avoid rendering a word or clause superfluous).

Our conclusion that the legislature did not intend to grant the district attorney independent authority to file a petition absent a request from the DOC is confirmed by the legislative history of ch. 980, STATS.[1] The drafting record to 1993 Wis. Act 479, creating ch. 980, shows that under the original proposed language either the district attorney, on his or her own, or the DOJ, at the request of the DOC or the district attorney, could file a petition for commitment. *See* A.B. 3, May 1994 Spec. Sess., Analysis by the Legislative Reference Bureau, at 2-3, 21. The bill was amended, replacing that language with the language currently in the statute. *See* Senate amend. to S.B. 3, May 1994 Spec. Sess., at 2; Assembly amend. to A.B. 3, May 1994 Spec. Sess., at 2. Thus, the bill as originally introduced would have allowed the district attorney to file absent DOC request and DOJ refusal. This is how the district attorney in this case reads the current statute. But, the fact that the legislature felt it necessary to amend this language bolsters our conclusion that such is not the correct reading of the statute. Under § 980.02, STATS., a district attorney may file a commitment petition only if the DOJ has declined to do so following a DOC request.

Because the district attorney acted outside his jurisdiction in filing the petition, the petition should have been dismissed. *Cf.* ***State v. Braun***, 152 Wis.2d 500, 509, 449 N.W.2d 851, 855 (Ct. App. 1989) (vacating conviction where special prosecutor acted outside appointment order). We thus reverse the circuit court's order denying dismissal of the petition.

By the Court.—Order reversed.

[1] We acknowledge that we may not look to legislative history to create ambiguity in a statute. We may, however, use statutory history to "demonstrate that a statute plain on its face, when viewed historically, is indeed unambiguous." ***State v. Martin***, 162 Wis.2d 883, 897 n.5, 470 N.W.2d 900, 905 (1991).

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