

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2448

Cir. Ct. No. 1997CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF THOMAS H. BUSH:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

THOMAS H. BUSH,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County:
WILLIAM M. GABLER, SR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Thomas Bush appeals a decision and order denying petitions for discharge and supervised release of a sexually violent person

committed under WIS. STAT. Ch. 980,¹ as well as the denial of a postdisposition motion.² We affirm.

¶2 A petition for discharge and a petition for supervised release were filed on February 25, 2013. The petitions were filed after Bush's annual reevaluation. Bush's petitions were denied by written order without a hearing on March 22, 2013.

¶3 Bush sought extensions from this court to file a notice of appeal or a postdisposition motion. Extensions were granted, requiring Bush to file a notice of appeal or postdisposition motion by October 18, 2013. On October 15, Bush filed a postdisposition motion. The motion was summarily denied and this appeal follows.³

¶4 At the time Bush filed his petition for supervised release, WIS. STAT. § 980.08(1) provided that Bush could not petition the circuit court until at least twelve months had elapsed since the most recent petition was denied:

Any person who is committed under s. 980.06 may petition the committing court to modify its order by authorizing supervised release if at least 12 months have elapsed since

¹ References to Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Bush uses the phrase "abuse of discretion" throughout his briefs to this court. We have not used that phrase since 1992. The terminology used in reviewing a trial court's discretionary act is "erroneous exercise of discretion." *See, e.g., State v. Plymesser*, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

³ We note Bush filed his motions for extensions of time to file a notice of appeal "or postconviction motion," under WIS. STAT. RULE 809.30. We construed the motions as seeking postconviction relief. On October 10, 2013, we ordered "the time for filing a postdisposition motion or notice of appeal is extended to October 18, 2013. Bush filed his postdisposition motion on October 15, 2013. The motion was denied on October 21, 2013. We conclude under these facts that this court has jurisdiction over the notice of appeal filed with the circuit court on October 29, 2013. *See* WIS. STAT. RULE 809.30(2)(j).

the initial commitment order was entered or at least 12 months have elapsed since the most recent release petition was denied or the most recent order for supervised release was revoked. The director of the facility at which the person is placed may file a petition under this subsection on the person's behalf at any time.

¶5 Bush's petition for supervised release prior to the petition at issue in the present case was filed on February 24, 2012, and was denied on July 13, 2012, following an evidentiary hearing on July 12, 2012. Therefore, when Bush filed the petition at issue in this case, less than eight months had passed since the most recent petition was denied.

¶6 In a letter to the circuit court, Bush's trial counsel asserted that WIS. STAT. § 980.075(2) required Bush to petition the court for supervised release within thirty days of submission of the annual report. On appeal, the State asserts § 980.075(2) did not contain any provision that could be construed to trump the twelve-month waiting period prescribed by WIS. STAT. § 980.08(1).

¶7 Similarly, the State argues there are no provisions within WIS. STAT. § 980.08 that would allow a petition for supervised release submitted after an annual review to bypass the requirements of § 980.08(1). *See, e.g., State v. West*, 2011 WI 83, ¶45, 336 Wis. 2d 578, 800 N.W.2d 929 (explaining that committed individuals are required to wait twelve months before filing a new petition for release). The State also argues WIS. STAT. § 980.075(2) did not preclude Bush from filing a petition for supervised release outside the thirty-day window, and

§ 980.075(2) did not mandate an exclusive timeframe for filing a petition for supervised release. Rather, § 980.08 guided that process.⁴

¶8 Bush failed to reply to the State’s argument in this regard. Bush is therefore deemed to have conceded the issue. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 100, 279 N.W.2d 493 (Ct. App. 1979). The petition for supervised release was therefore properly denied as untimely.

¶9 We further conclude the circuit court also properly denied Bush’s petition for discharge without a hearing. WISCONSIN STAT. § 980.09 requires that the circuit court conduct a two-step review to determine if the petition warrants a discharge hearing. *See State v. Richard*, 2011 WI App 66, ¶11, 333 Wis. 2d 708, 799 N.W.2d 509.

¶10 First, the court must perform a paper review of the offender’s petition and its attachments to determine whether the facts alleged are those “from which the court or jury may conclude the person’s condition has changed since the date of his or her initial commitment order so that the person does not meet the criteria for commitment as a sexually violent person.” *Id.* (quoting *State v. Arends*, 2010 WI 46, ¶¶25-26, 325 Wis. 2d 1, 784 N.W.2d 513). “The purpose of the paper review is to weed out meritless and unsupported petitions.” *Id.* (citation omitted).

¶11 Here, the trial court concluded the petition was insufficient to conclude that Bush no longer meets the criteria for commitment. It was therefore

⁴ 2103 Wis. Act 84 repealed WIS. STAT. § 980.075(2), and relocates nearly all provisions into §§ 980.07, 980.08, and 980.09. *See* Wisconsin Legislative Council Act Memo regarding 2013 Wis. Act 84.

proper for the circuit court to deny the petition without a hearing. However, the circuit court went on to the second step of the analysis to “give Mr. Bush every benefit of the doubt.”

¶12 To warrant a discharge under WIS. STAT. § 980.09(2), the petitioner must submit new evidence not considered by a previous trier of fact from which a reasonable fact finder could conclude that the petitioner is no longer sexually violent. *See State v. Schulpius*, 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311. We agree with the trial court in this case that the petition and postdisposition motion failed to provide new evidence that Bush’s condition had changed such that he currently does not qualify for commitment. Accordingly, there was an insufficient basis for a new discharge hearing.

By the Court.—Orders affirmed.

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

