COURT OF APPEALS
DECISION
DATED AND FILED

June 16, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP499 **Cir. Ct. No. 2007CI3**

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

IN RE THE COMMITMENT OF MICHAEL LEWIS WATTLETON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MICHAEL LEWIS WATTLETON,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: KEVIN E. MARTENS, Judge. *Affirmed.*

Before Curley, P.J., Brennan, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Michael Lewis Wattleton, *pro se*, appeals a judgment and order finding that he is a sexually violent person and committing

him to the Department of Health Services for control, care and treatment. *See* WIS. STAT. ch. 980 (2013-14).[1] He asserts that the circuit court erred by failing to hear or resolve the pretrial motion he filed *pro se* while represented by counsel and that proceedings to commit him under ch. 980 are barred for multiple reasons, the bulk of which are related to the law in effect when he was convicted of sex crimes in 1980. We reject his claims and affirm.

BACKGROUND

¶2 On June 19, 1980, a jury found Wattleton guilty in case No. J-6809 of one count of armed burglary, two counts of armed robbery, and four counts of first-degree sexual assault. *See* WIS. STAT. §§ 943.10 (1979-80), 943.32(2) (1979-80), 940.225(1)(b) (1979-80). At the time of Wattleton's convictions, the Wisconsin Sex Crimes Law was in effect. *See* WIS. STAT. ch. 975 (1979-80).[2] The law required sexual offenders convicted under § 940.225(1)-(3) (1979-80) to undergo a social, physical, and mental examination prior to sentencing. *See* WIS. STAT. § 975.01 (1977-78) (effective through June 30, 1980, pursuant to 1979 Wis. Laws, ch. 117, §§ 6, 15). Depending on the outcome of the examination, the circuit court would then either sentence the offender or conduct a hearing to determine whether to commit the offender for treatment. *See* WIS. STAT. §§ 975.05-975.06. Accordingly, on June 19, 1980, the circuit court ordered Wattleton to undergo a presentence examination.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] All references to WIS. STAT. ch. 975 are to the 1979-80 version unless otherwise noted.

¶3 The legislature repealed WIS. STAT. ch. 975 effective July 1, 1980, and thereafter the circuit court could not commit anyone under that chapter. *See* 1979 Wis. Laws, ch. 117, §§ 6, 15. Therefore, when Wattleton returned to court in August 1980, the circuit court continued case No. J-6809 for sentencing. The circuit court delayed selecting a sentencing date, however, until resolution of pending charges in a second case, No. J-6823.

¶4 On October 20, 1980, Wattleton pled no contest in case No. J-6823 to one count of armed burglary, four counts of armed robbery, and six counts of first-degree sexual assault. On November 14, 1980, all of the eighteen matters in case Nos. J-6809 and J-6823 proceeded to sentencing. The circuit court imposed an aggregate sixty-year indeterminate prison sentence.

¶5 While Wattleton was incarcerated, the Wisconsin legislature enacted WIS. STAT. ch. 980, a procedure permitting the State to seek civil commitment of sexually violent persons for control, care and treatment. *See* 1993 Wis. Act 479; ***State v. Carpenter***, 197 Wis. 2d 252, 258-60, 541 N.W.2d 105 (1995). In 2007, ninety days before Wattleton's scheduled date for release from prison, the State petitioned to commit him as a sexually violent person under ch. 980. With the assistance of appointed counsel, Wattleton opposed the petition, and the matter proceeded to a bench trial. The circuit court found that Wattleton was a sexually violent person and committed him to the Department of Health Services.

¶6 The state public defender appointed new counsel to represent Wattleton in postdisposition and appellate proceedings. Wattleton discharged his appointed appellate counsel, and he now appeals *pro se*.

DISCUSSION

¶7 Wattleton first contends the circuit court erred by failing to hear or resolve his *pro se* pretrial motion to dismiss the proceedings. He is wrong. The Wisconsin Constitution gives a litigant the right to prosecute or defend a lawsuit in state court "either in his own proper person or by an attorney of the suitor's choice." WIS. CONST. art. I, § 21(2). Wattleton elected representation by counsel. The general rule is that when a litigant is represented by counsel, he or she is not entitled to conduct court proceedings *pro se*. *See* H.C. Lind, Annotation, *Right of Litigant in Civil Action Either to Assistance of Counsel Where Appearing Pro Se or to Assist Counsel Where Represented*, 67 A.L.R.2d 1102, § 3 (1959). Wisconsin follows the general rule. *See* ***Robinson v. State***, 100 Wis. 2d 152, 165, 301 N.W.2d 429 (1981) (applying the rule in the context of criminal proceedings). Because Wattleton was represented by counsel throughout the pretrial and trial proceedings, the circuit court did not err by declining to address Wattleton's *pro se* pretrial motion.

¶8 Wattleton next alleges that various procedural bars prevent the State from bringing commitment proceedings against him under WIS. STAT. ch. 980. It appears Wattleton's trial counsel did not seek to defeat the petition based on any procedural bars. We conclude the issues are not properly preserved. *See* ***State v. Harper***, 57 Wis. 2d 543, 550, 205 N.W.2d 1 (1973) (litigant's attorney has the right to control the litigation). For this reason, we reject Wattleton's remaining arguments. *See* ***Jackson v. Benson***, 218 Wis. 2d 835, 901, 578 N.W.2d 602 (1998) (explaining that we do not resolve issues raised for the first time on appeal). Because the State has addressed the substance of Wattleton's contentions, however, we elect to do so as well. *See* ***id.***

¶9 Wattleton asserts he was eligible to be committed for treatment under WIS. STAT. ch. 975, he was not committed for treatment under ch. 975, and therefore he cannot be committed now because the proceedings in 1980 conclusively resolved the question of whether he should ever be committed. Wattleton states and restates this claim in various ways, but controlling decisions from Wisconsin courts dictate that the claim must fail, whether couched in the language of estoppel, preclusion, or waiver.

¶10 Wattleton argues judicial estoppel bars the State from pursuing his commitment under WIS. STAT. ch. 980 because, during the course of the criminal prosecution in case J-6809, the prosecutor argued "[Wattleton] was a criminal and should be sentenced" rather than committed under WIS. STAT. ch. 975. Judicial estoppel is an equitable doctrine applied to prevent a party from playing "'fast and loose'" with the legal system by persuading a court to adopt one position, then asking a second court to adopt a contrary position. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) (citation omitted). Before a court applies judicial estoppel to bar a party's argument, the party's "'later position must be clearly inconsistent with the earlier position; second, the facts at issue should be the same in both cases; and finally, the party to be estopped must have convinced the first court to adopt its position.'" ***Id.*** at 348 (citations omitted). Wattleton contends the State's position regarding his eligibility for commitment under ch. 975 is fatally inconsistent with the State's effort to commit him under ch. 980. He is incorrect.

¶11 As Wattleton's submissions show, the State's position in 1980 was that Wattleton could not be committed for treatment under WIS. STAT. ch. 975 because the statute would expire before a commitment proceeding could be completed. That position is not inconsistent with the State's effort to commit

Wattleton several decades later under a different—and robust—statute. Judicial estoppel is inapplicable.

¶12 Wattleton next offers the doctrines of claim preclusion and issue preclusion as bars to committing him under WIS. STAT. ch. 980. The doctrine of claim preclusion provides that a judgment is conclusive in all subsequent actions between the same parties or their privies involving all matters litigated, and all matters that could have been litigated, in the proceeding leading to the judgment. ***State v. Parrish***, 2002 WI App 263, ¶14, 258 Wis. 2d 521, 654 N.W.2d 273. The doctrine of issue preclusion bars a party from relitigating a factual or legal issue that actually was litigated and decided in an earlier action. ***Id.*** Wattleton argues these doctrines apply because, he says, the psychiatrist who examined him before his sentencing in 1980 "diagnosed [him] as a criminal" and "not in need of specialized [c]are." In Wattleton's view, the State could have challenged these opinions and, because it did not, the 1980 proceedings conclusively establish him as unsuitable for commitment.

¶13 Assuming for the sake of argument only that in 1980 the State could have litigated or did litigate Wattleton's suitability for commitment under WIS. STAT. ch. 975, the State is not thereby precluded from later pursuing commitment proceedings under WIS. STAT. ch. 980. We expressly rejected such preclusion arguments in ***Parrish***, 258 Wis. 2d 521, ¶¶13-23. There, the State filed a second petition seeking to commit an offender under ch. 980 more than a year after failing to prevail on an earlier such petition. *See* ***id.***, ¶¶5-6. The offender objected: "[r]elying on what he termed 'the concepts of *res judicata*, issue preclusion, collateral estoppel, estoppel by the record, and double jeopardy,' [the offender]

requested dismissal 'on the grounds that the same issues have been, and are being, presented in the two petitions.'"[3] ***Id.***, ¶6. We disagreed, stressing "the singular significance of the present-time focus of a ch. 980 commitment trial." ***Id.***, ¶20. We concluded that the "'sheer passage of time,'" *see* ***id.***, ¶22 (citation omitted), as well as "new circumstances, and the dynamic nature of [the offender's] mental health and potential dangerousness allowed the State to file a new petition for [the offender's] commitment," *see* ***id.***, ¶23.

¶14 ***Parrish*** is controlling. Like the offender in ***Parrish***, Wattleton seeks to preclude the State from seeking his commitment now in light of a prior proceeding. As in ***Parrish***, however, much time has passed since the first proceeding, and the evidence presented by the State in the later proceeding includes new information. For example, the record indicates that a psychiatrist in 1980 diagnosed Wattleton only with an antisocial personality disorder. During the WIS. STAT. ch. 980 trial, by contrast, the State presented expert testimony that Wattleton presently carries additional diagnoses of sexual sadism and paraphilia not otherwise specified and that he exhibits a high degree of psychopathy. Expert testimony further established that a high degree of psychopathy increases the risk of an offender committing another sex crime.

¶15 Moreover, the State presented evidence during the WIS. STAT. ch. 980 trial regarding the various sex offender treatments that Wattleton received while he was imprisoned, his decision to terminate some of the treatment "against his provider's advice," his treatment providers' ongoing concerns that he has

[3] In 1995, the supreme court replaced the terms *res judicata* and collateral estoppel with, respectively, the terms claim preclusion and issue preclusion. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995).

failed to internalize his treatment, the slew of conduct reports he received while institutionalized, his bizarre behavior in relation to a female prison psychologist, and his conflicts with institution staff. Finally, the State's experts opined to a reasonable degree of professional certainty that Wattleton is more likely than not to engage in future acts of sexual violence. In sum, the State presented evidence of Wattleton's present need for control, care, and treatment in a confined setting, evidence developed in substantial part after his sentencing in 1980.

¶16 The passage of time, new information, and the dynamic nature of a person's mental health permit the State to file successive petitions for commitment without running afoul of the doctrines of claim preclusion and issue preclusion. *See* ***Parrish***, 258 Wis. 2d 521, ¶23. All three relevant factors are present here. Accordingly, as in ***Parrish***, neither claim preclusion nor issue preclusion barred the State from pursuing Wattleton's commitment under WIS. STAT. ch. 980.[4] *See* ***Parrish***, 258 Wis. 2d 521, ¶23.

¶17 Wattleton next asserts estoppel by record bars a commitment proceeding under WIS. STAT. ch. 980. "Estoppel by record is a doctrine similar to claim preclusion under which a party is prevented from litigating what was litigated or might have been litigated in another proceeding, but it is the record of

[4] Wattleton asserts that, as a result of the bars allegedly imposed by the doctrines of issue and claim preclusion, "the court lacked jurisdiction of the subject matter." Wattleton is confused. "It is axiomatic that a circuit court is never without subject matter jurisdiction." ***In re Ambac Assur. Corp.***, 2012 WI 22, ¶28, 339 Wis. 2d 48, 810 N.W.2d 450. An exception to this rule exists for an action premised upon a statute that is unconstitutional on its face. *See* ***State v. Bush***, 2005 WI 103, ¶¶15-17, 283 Wis. 2d 90, 699 N.W.2d 80. Wattleton does not argue, let alone prove, that WIS. STAT. ch. 980 is facially unconstitutional. *See* ***State v. Pocian***, 2012 WI App 58, ¶6, 341 Wis. 2d 380, 814 N.W.2d 894 ("In a facial challenge, the 'challenger must establish, beyond a reasonable doubt, that there are no possible applications or interpretations of the statute which would be constitutional.'") (citation omitted). Wattleton's contention that the circuit court lacked subject matter jurisdiction is without merit, and we address it no further.

the prior proceeding, not the judgment, that is the bar to the second proceeding." ***State v. Miller***, 2004 WI App 117, ¶30, 274 Wis. 2d 471, 683 N.W.2d 485. ***Parrish*** again requires us to reject Wattleton's claim. In ***Parrish***, the offender contended that the circuit court must examine the record of proceedings in the offender's first ch. 980 trial to determine whether a second ch. 980 trial was precluded. *See* ***Parrish***, 258 Wis. 2d 521, ¶24. We disagreed, explaining: "[t]he issue, when the second petition was filed, was whether [the offender] was a sexually violent person in need of commitment in 2000, following release and revocation, not in 1997, prior to parole. The [circuit] court did not need to read the record of the first trial to understand that." ***Id.***, ¶26. Here, the question underlying the ch. 980 proceeding was whether Wattleton was a sexually violent person in 2007, at the conclusion of his time in prison, not in 1980, when the circuit court sentenced him. Accordingly, nothing in the record of proceedings that ended in 1980 precluded commitment proceedings commencing in 2007.

¶18 Next, Wattleton asserts the State waived the opportunity to file a commitment proceeding under WIS. STAT. ch. 980 because the State did not insist on seeking his commitment under WIS. STAT. ch. 975 in 1980. Waiver is "'a voluntary and intentional relinquishment of a known right.'" ***State v. Nichelson***, 220 Wis. 2d 214, 228, 582 N.W.2d 460 (Ct. App. 1998) (citation omitted). Chapter 980 did not exist in 1980. The State therefore had no opportunity at that time to relinquish the right to pursue Wattleton's commitment under ch. 980. Waiver does not apply.

¶19 We turn to Wattleton's contention that the circuit court should have dismissed the commitment petition to avoid violating the constitutional prohibition against *ex post facto* laws. "It is well established that the constitutional prohibition on *ex post facto* laws applies only to penal statutes." ***Carpenter***, 197 Wis. 2d at

272 (italics added). In ***Carpenter***, the court explained that WIS. STAT. ch. 980 creates a civil commitment procedure. ***Carpenter***, 197 Wis. 2d at 258. Therefore, the court held ch. 980 does not constitute an unconstitutional *ex post facto* law. ***Carpenter***, 197 Wis. 2d at 258-59. Accordingly, an *ex post facto* challenge is not available to Wattleton.

¶20 Finally, Wattleton offers a one-paragraph argument under the heading "equal protection." In this paragraph, he includes no citations to authority but asserts the judge and the lawyers involved in the WIS. STAT. ch. 980 proceedings "knew or should have known the law does not allow someone to twice be persecuted [sic] for the same offense under the civil statu[t]es or criminal statu[t]es."

¶21 Because the double jeopardy clauses of the Wisconsin and federal constitutions protect against a second prosecution for the same offense after either acquittal or conviction, *see* ***Carpenter***, 197 Wis. 2d at 263, we conclude the "equal protection" claim Wattleton offers is actually an assertion that the WIS. STAT. ch. 980 proceedings violated his right to be free from double jeopardy. The argument, however, is wholly undeveloped, and we will not develop it for him. *See* ***Cemetery Servs. Inc. v. Wisconsin Dep't of Regulation and Licensing***, 221 Wis. 2d 817, 831, 586 N.W.2d 191 (Ct. App. 1998) (we cannot serve as both advocate and judge). Nonetheless, we observe that a double jeopardy claim, like a claim based on the bar to *ex post facto* laws, appears unavailable to Wattleton. In ***Carpenter***, the supreme court held that ch. 980 does not violate the double jeopardy clause. ***Carpenter***, 197 Wis. 2d at 258-59.

By the Court.—Judgment and order affirmed.

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