COURT OF APPEALS DECISION DATED AND FILED

March 22, 2012

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. 2011AP1004

Cir. Ct. No. 2005CI4

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

IN RE THE COMMITMENT OF CHARLES G. ANDERSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

CHARLES G. ANDERSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Portage County: JOHN V. FINN, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. Charles Anderson appeals an order denying his motion for supervised release from confinement as a sexually violent person.[1] The court found that Anderson failed to meet his burden of establishing three criteria for supervised release: sufficient progress in treatment, substantial improbability that Anderson would engage in an act of sexual violence while on supervised release, and that he would comply with treatment and rules. *See* WIS. STAT. § 980.08(4) (2009-10).[2] Anderson argues that (1) as a threshold matter, the circuit court must first rule on a petitioner's continued eligibility for ch. 980 commitment by making a finding of dangerousness to the point where it is more likely than not that he will reoffend; (2) the court's decision represents its will and not its judgment, and its ruling was arbitrary and capricious; (3) the court impermissibly interfered with Anderson's attempts to examine and cross-examine witnesses; (4) one of the State's witnesses, Dr. Lori Pierquet, "used faulty and sub-standard judgment in her testimony;" and (5) ch. 980 is unconstitutional on its face and as applied. We reject these arguments and affirm the order.

BACKGROUND

¶2 The State's witnesses were Dr. Richard McKee, a staff psychologist at Sand Ridge Secure Treatment Center, and Dr. Pierquet, a licensed psychologist who works at the Sand Ridge facility and examined Anderson in 2009 and 2010. Dr. McKee described the four-phase process for treatment at Sand Ridge. Due to

[1] The order erroneously describes Anderson's motion as a petition for discharge. Anderson amended his petition for discharge and only requested supervised release. However, the evidence presented and the court's discussion following the hearing show that the court clearly understood the nature of Anderson's revised petition.

[2] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

problems with his participation in group therapy, personality conflicts, Anderson's failure to follow rules that do not make sense to him and the sanctions that result from his behavior, Anderson has not gotten beyond the early stages of phase one.

¶3 Dr. Pierquet opined that Anderson remains more likely than not to reoffend if released from the institution. She expressed concern about Anderson's on-going attraction to boys in the age range of eight to twelve and the fact that the effect of taking Depo Provera could be countered by taking medications such as Viagra. She testified that Anderson has not demonstrated an understanding of the thoughts, attitudes, emotions, behavior, and sexual arousal linked to his sex offending and has not made significant progress in treatment.

¶4 On cross-examination, Dr. Pierquet admitted that Anderson's record showed no instances of sexual misconduct during thirteen and one-half years of incarceration. She also conceded that, because of adjustments based on Anderson's age, his score on the STATIC-99 was reduced from seven to four. A score of four corresponds to a 20.1 percent sexual reconviction rate at five years and a 29.6 percent reconviction rate at ten years. She testified that the authors of the STATIC-99R recommended use of dynamic risk factors such as deviance and impulsivity when considering the age-related statistical reduction in the conviction rate. Because of Anderson's age at the time of his most recent conviction (forty-nine) and his continued fantasies about sexual contact with young boys, Dr. Pierquet gave less weight to the STATIC-99R score. Dr. Pierquet also admitted that part of her analysis depended on her false assumption that Anderson was convicted of two counts that had actually been read-in and her belief that one of his offenses involved anal penetration when Anderson contended it involved touching penises, and that she may have been mistaken about which of his crimes

involved stranger victims. However, she reiterated that Anderson did not make significant progress in treatment.

¶5 Three witnesses testified for the defense. Robert Kriz, an institution supervisor at the Wisconsin Resource Center, discussed programs, policies, and procedures at the Resource Center. Charlene Messenger, a nursing instructor at the Resource Center, testified about Anderson's relationship with other residents. She indicated that he was cooperative, attended classes, and participated with other residents. Neither of these witnesses contradicted the evidence or opinions presented by the State's witnesses.

¶6 Anderson testified on his own behalf. He stated that he was sixty-seven years old and had been in the WIS. STAT. ch. 980 program for nearly five years. He admitted that he is a pedophile, attracted to boys between eight and twelve years old. Anderson testified that he took Depo Provera and it substantially affected his sex drive, but he believes he has prostate cancer and the Depo Provera may have caused the cancer. He stopped taking Depo Provera because he thought it was doing him no good, but he would take it again if he was released. Anderson testified that he was subject to harassment and bullying by other residents at Sand Ridge and he should have been placed in a group that consisted only of child molesters. He admitted having trouble obeying rules if they do not make sense to him.

DISCUSSION

¶7 WISCONSIN STAT. § 980.08(4)(cg) prohibits supervised release unless the court finds all of five criteria are met: (1) the person has made significant progress in treatment that can be sustained while on supervised release; (2) it is substantially probable that the person will not engage in an act of sexual

violence while on supervised release; (3) treatment that meets the person's needs and a qualified provider of the treatment are reasonably available; (4) the person can be reasonably expected to comply with his or her treatment requirements and with all of his or her conditions or rules of supervised release that are imposed by the court or by the department; and (5) a reasonable level of resources can provide for the level of residential placement, supervision, and ongoing treatment needs that are required for the safe management of the person while on supervised release. Anderson's argument that the State must at each hearing prove that he remains more likely than not to reoffend is not contained in the statute. The statute does require a comparable determination of whether he will engage in an act of sexual violence while on supervised release. However, the burden is on Anderson to establish all of the criteria set out in § 980.08(4)(cg). *See* ***State v. West,*** 2011WI 83, ¶55 n.17, 336 Wis. 2d 578, 800 N.W.2d 929. The statute does not require any threshold showing by the State before the court considers the statutory factors.

¶8 Anderson argues that the circuit court imposed its will and not its judgment and its ruling was arbitrary and capricious. That language comes from cases involving certiorari review of administrative decisions and is not applicable here. Therefore, we construe Anderson's argument as a challenge to the sufficiency of the evidence to support the circuit court's findings. The findings are supported by the testimony of Dr. McKee and Dr. Pierquet. Anderson's argument is substantially based on his assertion that the actuarial statistics taken from the STATIC-99R are the only valid indicator of his likelihood to reoffend. The statistics, however, reflect the conviction rates only for sex offenses five years and ten years after release. While these statistics may be more persuasive than a psychologist's opinion in a given case, no law requires the court to reject the

psychologist's opinion in favor of the actuarial scores. The court had the right to rely on Dr. Pierquet's testimony that the authors of the STATIC-99R recommend consideration of dynamic risk factors and old test scores when evaluating the lower scores that result from a person's advanced age. Because Anderson was forty-nine years old when he committed his last offense and he continued to fantasize about sex with young boys, the court could reasonably find the State's expert witnesses more persuasive than the actuarial scores. Anderson's argument also fails to address the other statutory criteria, particularly his lack of progress in treatment, and he fails to refute Dr. McKee's testimony in that regard.

¶9 Anderson next argues that the court impermissibly interfered with his efforts to examine witnesses. We disagree. The court repeatedly warned Anderson to let witnesses finish their statements before he asked the next question and to refrain from making declarative statements rather than asking questions of the witnesses. It was appropriate for the court to require Anderson to follow the rules of procedure and evidence, and its rulings did not unfairly interfere with Anderson's right to examine witnesses.

¶10 Anderson next faults Dr. Pierquet for errors she made in her testimony, particularly regarding his offense history. However, when presented with Anderson's version of his offense history, Dr. Pierquet acknowledged some errors but did not change her ultimate conclusions. Anderson particularly objected to a characterization of one of his offenses as involving anal penetration. In light of Anderson's numerous encounters with many victims over many years, the alleged misrepresentation is not particularly significant. In any event, the credibility of witnesses and the weight to be accorded their testimony are matters for the trier of fact. *See* ***State v. Kienitz***, 227 Wis. 2d 423, 440, 597 N.W.2d 712 (1999) (citation omitted).

¶11 Finally, Anderson argues that WIS. STAT. ch. 980 is unconstitutional facially and as applied. However, that argument was not raised in the circuit court. In his reply brief, Anderson claims the issue was raised in his motion for reconsideration. It was not. In addition, none of the arguments he makes in support of his constitutional arguments were addressed in the motion for reconsideration. We generally do not address issues raised for the first time on appeal, *see* ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727, and we decline to do so here.

By the Court.—Order affirmed.

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