COURT OF APPEALS
DECISION
DATED AND FILED

February 21, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2404 **Cir. Ct. No. 2001CI1**

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

IN RE THE COMMITMENT OF ALFRED T. RILEY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ALFRED T. RILEY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed*.

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Alfred Riley appeals an order denying his petition for discharge from a commitment as a sexually violent person under Chapter 980

of the Wisconsin Statutes. The sole issue on appeal is whether the use of the clear-and-convincing-evidence burden at Chapter 980 discharge trials violates principles of substantive and procedural due process, given that the Wisconsin Statutes require the State to prove the case for an initial commitment beyond a reasonable doubt. We conclude that current case law compels the conclusion that the clear and convincing standard is constitutional, and therefore affirm.

BACKGROUND

¶2 Because Riley is not challenging the sufficiency of the evidence to find that he remains a sexually violent person under the lower burden of proof applied at his trial, the specific facts of the case are not essential to the appeal. Rather, we are presented with a purely legal question based upon Wisconsin's statutory scheme, which explicitly provides that the State bears the burden of proving the subject of a petition to be sexually violent beyond a reasonable doubt at an initial confinement hearing, but only requires the State to show by clear and convincing evidence that a committed person petitioning for discharge continues to meet the criteria of a sexually violent person. *Cf.* WIS. STAT. §§ 980.05(3) and 980.09(3).

STANDARD OF REVIEW

¶3 Appellate review of the constitutionality of a statute is *de novo*. ***State v. Post***, 197 Wis. 2d 279, 301, 541 N.W.2d 115 (1995). Legislative enactments bear a presumption of constitutionality, and must be shown to be unconstitutional beyond a reasonable doubt. ***Id.***

¶4 Moreover, where, as here, a claim of error was not contemporaneously raised in the circuit court, it is subject to the plain error

standard of being fundamental, obvious, and substantial. ***State v. Jorgensen***, 2008 WI 60, ¶1, 310 Wis. 2d 138, 754 N.W.2d 77; WIS. STAT. § 901.03(4).

DISCUSSION

Substantive Due Process

¶5 A substantive due process analysis considers whether state action is arbitrary to the extent that it "'shocks the conscience'" or "'interferes with rights implicit in the concept of ordered liberty.'" ***State v. Schulpius***, 2006 WI 1, ¶33, 287 Wis. 2d 44, 707 N.W.2d 495 (quoted source omitted). Where there is a fundamental liberty interest at stake, substantive due process requires a statute or administrative rule to be narrowly tailored to achieve a compelling state interest. ***Monroe Cnty. DHS v. Kelli B.***, 2004 WI 48, ¶19, 271 Wis. 2d 51, 678 N.W.2d 831.

¶6 The United States Supreme Court has held that a person's liberty interest against an involuntary civil commitment can be substantively protected with proof by clear and convincing evidence that the commitment is for the protection of the subject or others. ***Addington v. Texas***, 441 U.S. 418, 430-33 (1979). The court reasoned that applying the intermediate burden of proof adequately balances the individual's significant liberty interest against detention and the state's interest in protecting the community from the dangerous tendencies exhibited by people with some types of mental illness. ***Id.*** at 425-26. The Wisconsin Supreme Court has likewise found that there are compelling state interests involved in both protecting the public from the dangerously mentally disordered and in providing care and treatment to those suffering from mental disorders that predispose them to violence, and that Wisconsin's commitment

procedure is narrowly designed with mechanisms for periodic review to emphasize treatment. ***Post***, 197 Wis. 2d at 302, 316-17.

¶7 The Wisconsin legislature has chosen to afford the subjects of Chapter 980 petitions greater statutory protection than that to which they are constitutionally entitled to satisfy substantive due process before an initial commitment. However, the fact that Chapter 980 subjects in Wisconsin are afforded more statutory rights than those to which they are constitutionally entitled at the initial stage of the commitment proceedings does not mean that the substantive due process requirements are any different at any other stage of the proceeding. In short, we are not persuaded that it is arbitrary or contrary to the concept of ordered liberty to require the State, in response to a discharge petition, to establish by clear and convincing evidence that the subject of a Chapter 980 commitment still meets the criteria of a sexually violent person.

Procedural Due Process

¶8 A procedural due process analysis involves a two-part inquiry, asking first "'whether there exists a liberty or property interest which has been interfered with by the State,'" and if so, "'whether the procedures attendant upon that deprivation were constitutionally sufficient.'" ***State v. Stenklyft***, 2005 WI 71, ¶64, 281 Wis. 2d 484, 697 N.W.2d 769 (quoted source omitted). The supreme court has explained:

> The nature and extent of the process due depends on the nature of the case and is influenced by the grievousness of the loss that may be suffered. In determining the process due, a reviewing court balances the private interests involved, the government interests involved, and the risk of an erroneous deprivation of those interests through the procedures used.

State v. Beyer, 2006 WI 2, ¶20 and n. 26-27, 287 Wis. 2d 1, 707 N.W.2d 509.

¶9 Riley argues that the process of requiring a lower burden of proof to keep a person committed under Chapter 980 than is required for the initial commitment is fundamentally unfair because there is too great a risk of an erroneous deprivation of an individual's continuing liberty interest when a person has already been determined once to be sexually violent. This argument turns logic on its head. By applying a higher standard of proof for initial commitments, the Wisconsin legislature has reduced the risk that non-sexually violent persons will be committed in the first place, and thus lessened the need for more stringent release procedures. *See* ***Post***, 197 Wis. 2d at 325.

¶10 Stated another way, persons who have been found to be sexually violent beyond a reasonable doubt are no more likely to be erroneously found to still be sexually violent by clear and convincing evidence, than would persons who had been initially found to be sexually violent by only clear and convincing evidence. To the contrary, the more likely scenario is that the reduced burden may result in the erroneous release of a person who is still sexually violent. *See* ***State v. West***, 2011 WI 83, ¶¶71-73, 336 Wis. 2d 578, 800 N.W.2d 929 (discussing assessment of probabilities of continued dangerousness in context of supervised release petitions).

¶11 Moreover, the Wisconsin Supreme Court has already indicated that applying the clear and convincing evidence standard to trials on discharge petitions is constitutionally appropriate, in line with the procedure used in Chapter 51 cases. ***Post***, 197 Wis. 2d at 329. Riley argues that the Supreme Court's comments were dicta, because the question of the appropriate burden of proof was not squarely before the court. However, the Court of Appeals has no power to

dismiss a statement in a supreme court case as dictum, because doing so would necessarily be withdrawing or modifying the binding language of a higher court. ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶¶50-58, 324 Wis. 2d 325, 782 N.W.2d 682; *see also* ***State v. Sanders***, 2007 WI App 174, ¶25, 304 Wis. 2d 159, 737 N.W.2d 44 ("when an appellate court intentionally takes up, discusses and decides a question germane to a controversy, such a decision is not dicta but is a judicial act of the court which it will thereafter recognize as a binding decision").

¶12 Although the supreme court's comments in ***Post*** were made in the context of analyzing an equal protection claim, we conclude that they are sufficiently on point to compel the conclusion that use of the clear and convincing burden of proof for discharge petitions is also adequate from a procedural due process perspective.

By the Court.—Order affirmed.

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