

Appeal No. 2012AP2170

Cir. Ct. No. 2010CI1

**WISCONSIN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF JOSEPH J. SPAETH:

STATE OF WISCONSIN,

PETITIONER-APPELLANT,

v.

JOSEPH J. SPAETH,

RESPONDENT-RESPONDENT.

FILED

Jul 31, 2013

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2011-12),¹ this appeal is certified to the Wisconsin Supreme Court for its review and determination.

ISSUE

WISCONSIN STAT. § 980.02(1m) and (2) require that a commitment petition be filed “before the person is released or discharged” and allege that a person has been convicted of a sexually violent offense. Does § 980.02 additionally require that the commitment petition be filed before the person is

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

released or discharged from a sentence that was imposed for the same sexually violent offense that is alleged in the petition as the predicate offense, as stated in *State v. Gilbert*, 2012 WI 72, ¶51, 342 Wis. 2d 82, 816 N.W.2d 215?

BACKGROUND

In 1993, in case No. 1992CF328 (the 1992 case), Spaeth was convicted of first-degree sexual assault of a child. In 2004, Spaeth was paroled. While on parole, Spaeth reoffended, and his parole was revoked. Spaeth was discharged from this 1993 conviction in June 2008.

In 2007, in case No. 2006CF350 (the 2006 case), Spaeth was convicted of child enticement, based on his conduct while out on parole on the 1992 case. In October 2008, the circuit court vacated Spaeth's conviction and ordered a new trial due to prejudicial and extraneous information in the jury room. In early 2009, Spaeth pled no contest to amended charges for child enticement and was convicted and sentenced. The 2009 conviction was reversed by the supreme court on July 13, 2012, *State v. Spaeth*, 2012 WI 95, ¶3, 343 Wis. 2d 220, 819 N.W.2d 769, and Spaeth's conviction was vacated on August 20, 2012, and the child enticement charges were dismissed on August 21, 2012.

In the meantime, on November 2, 2010, the State filed a petition for Spaeth's WIS. STAT. ch. 980 commitment as a sexually violent person. The petition cited the 2006 case as the predicate offense. *See Gilbert*, 342 Wis. 2d 82, ¶4 n.4 (using phrase "predicate offense" to refer to the sexually violent offense specified in the petition). While the petition was pending,² the supreme court

² Spaeth's probable cause hearing was delayed at his request.

overturned his conviction. By letter dated August 15, 2012, the State informed the circuit court that it intended to continue with the petition, relying on the 1992 case instead of the 2006 case. Spaeth responded that the petition expressly relied upon only the 2006 case. Further, argued Spaeth, even if amended to rely on the 1992 case, the petition was untimely because Spaeth had been discharged from that case in 2008, well before the petition was filed on November 2, 2010. The circuit court agreed with Spaeth, ruling that neither the 2006 case nor the 1992 case could form the predicate offense for the petition because Spaeth had been discharged from one conviction (from the 1992 case) and the other convictions had been overturned and vacated, and the enticement charges dismissed (from the 2006 case). The circuit court denied the State's motion to amend and dismissed the petition.

The State appeals, arguing that the circuit court erred in denying amendment of the petition to specify the 1992 case as the predicate offense.

DISCUSSION

WISCONSIN STAT. ch. 980 Petition Procedure

A commitment petition under WIS. STAT. ch. 980 must be filed "before the person is released or discharged." WIS. STAT. § 980.02(1m). Among other things, the petition must allege that the person has been convicted of, found delinquent for, or found not guilty by reason of mental disease or defect of a sexually violent offense. Sec. 908.02(2)(a)1.-3. The controversy in this case surrounds the required allegation that the person has been convicted of a sexually violent offense. Paragraph one of the petition states:

The Respondent, Joseph J. Spaeth, has been convicted of a sexually violent offense(s). Specifically, on or about July 3, 2007, in Winnebago County Circuit Court File No. 06CF350, the Respondent was convicted of four (4) counts

of Child Enticement-Sexual Contact in violation of [Wis. STAT. §] 948.07(1).... On May 8th, 2009 the Respondent was sentenced to five (5) years Wisconsin State Prison and ten (10) years of extended supervision on each count concurrent to one another.

Spaeth was in custody for the 2006 case when the petition was filed, but his conviction was subsequently overturned by the supreme court and the child enticement charges were dismissed. *Spaeth*, 343 Wis. 2d 220, ¶3. The dispute is whether the circuit court erred in denying the State’s proposed amendment of the petition to specify the intact, though discharged, 1992 case as the predicate offense. This presents two separate questions, which we address in turn. Was it error for the circuit court to assess the viability of the petition at the time of the requested amendment? Can a ch. 980 petition specify a predicate offense that is not the same offense for which the person is in custody? Although the first of these is governed by established case law, we address it in order to better present the second.

Petition’s Viability Is Examined at the Time of Filing

Under *State v. Virlee*, 2003 WI App 4, ¶¶17-18, 259 Wis. 2d 718, 657 N.W.2d 106 (2002), the requirement that the petition be filed within ninety days of release, which has since been amended to provide that the petition be “filed before the person is released or discharged,” WIS. STAT. § 980.02(1m), is to be assessed at the time the petition is filed. *See also State v. Carpenter*, 197 Wis. 2d 252, 275, 541 N.W.2d 105 (1995) (looking to “the time the petition was initiated”). After the State filed the petition, Virlee received sentence credit that changed his release date to before the petition was filed. *Virlee*, 259 Wis. 2d 718, ¶¶3, 5. Virlee argued that the change in his release date, with the new date prior to the State’s filing of the petition, meant that the circuit court was no longer

competent to proceed on the petition. *Id.*, ¶15. We rejected that position, holding that “the trial court’s subsequent modification of Virlee’s sentence does not change the fact the State filed the petition within ninety days of his actual release from prison.” *Id.*, ¶18.

Under *Carpenter* and *Virlee*, the viability of the petition to commit Spaeth is examined in view of the circumstances on November 2, 2010, the date the petition was filed. At that time, Spaeth was in custody from a sentence that was imposed for a conviction for a sexually violent offense (in the 2006 case, in which the 2009 conviction had not yet been overturned). Thus, we turn to the question presented here: Did the court err in denying the amendment request and dismissing the petition because the proffered predicate offense was not the same offense for which Spaeth was in custody?

Must Custody at the Time of Filing Be for the Predicate Offense?

As noted above, the statute itself does not require that custody stem from the predicate offense alleged in the petition. WIS. STAT. § 980.02(1m). In 2005, the legislature repealed § 980.02(2)(ag) (2003-04), *see* 2005 Wis. Act 434, § 83, which required that the petition allege that the person was within ninety days of discharge or release, on parole, extended supervision, or otherwise, “from a sentence that was imposed for a conviction for a sexually violent offense.” The new paragraph, § 980.02(1m), does *not* require that the petition specify that the sentence was imposed for a conviction for the specific predicate offense alleged in the petition. 2005 Wis. Act 434, § 82; § 980.02(1m). Rather, the new paragraph only requires that the petition “be filed before the person is released or discharged.”

Based on the language of the statute, the State argues that the petition can specify a predicate offense other than the offense for which the person is in custody at the time of the filing of the petition. Spaeth, however, points to the supreme court's decision in *Gilbert*. *Gilbert* stated, "This section requires, inter alia, that the State prove that the person 'has been convicted of a sexually violent offense,' [WIS. STAT.] § 980.02(2)(a)1., and that the [WIS. STAT.] ch. 980 petition must be 'filed before the person is released or discharged' *from the sentence for that sexually violent offense*, § 980.02(1m)." *Gilbert*, 342 Wis. 2d 82, ¶51 (emphasis added). *Gilbert* addressed the narrow question of whether a person's revocation of parole or extended supervision and reincarceration required dismissal of a pending ch. 980 commitment petition. *Gilbert*, 342 Wis. 2d 82, ¶2. The defendants in *Gilbert* were not in a situation like Spaeth, who is the subject of a petition that specifies a subsequently overturned conviction. In deciding that the ch. 980 petition was still viable even though Gilbert had been reincarcerated due to revocation of parole, the supreme court recognized that ch. 980 only permits dismissal of the petition for failure to find probable cause or failure to prove the person is a sexually violent person, *Gilbert*, 342 Wis. 2d 82, ¶29, that the statute does not set a time period for execution of a commitment order, *id.*, ¶35, and that the statute allows simultaneous commitment and incarceration, *id.*, ¶42.

Arguably, the quoted statement from *Gilbert* about WIS. STAT. § 980.02(1m) was not necessary to the court's conclusion. The statement appears in a hypothetical discussed after the court has reached its conclusion based on the above analyses. *Gilbert*, 342 Wis. 2d 82, ¶¶29-45. We are bound by all statements of the supreme court. *Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 ("[T]he court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum."); *Cook v.*

Cook, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) (“The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.”).

Spaeth points to the preceding statutory section, WIS. STAT. § 980.015, to further argue that custody must be tied to the predicate sexually violent offense. Section 980.015(2) directs an agency that has control over the person to inform “each appropriate district attorney” and the department of justice prior to the person’s “anticipated discharge or release ... from a sentence of imprisonment or term of confinement in prison that was imposed for a conviction for a sexually violent offense.” Arguably, this notice language, at most, ties the custody to a sexually violent offense and not necessarily the predicate offense.

*The State Argues, Pursuant to the Language of the Statute, the
Request to Amend Should Have Been Granted*

A request to amend the WIS. STAT. ch. 980 petition should be liberally granted. The petition is the very beginning of the ch. 980 commitment process, which includes multiple safeguards for the person’s liberty interests at critical stages throughout. *See, e.g.*, WIS. STAT. § 980.03 (rights of persons subject to petition, including right to remain silent and to cross-examine witnesses); WIS. STAT. § 980.036 (discovery and inspection rights); WIS. STAT. § 980.04 (probable cause hearing); WIS. STAT. § 980.05 (trial by jury). And although these ch. 980 proceedings are civil in nature, *see Carpenter*, 197 Wis. 2d at 265-68, we note that even in the criminal context, the complaint and information can be amended without leave of court at any time prior to arraignment. WIS. STAT. § 971.29. Furthermore, the State did not seek to change the essential elements of the petition, including the key allegation that Spaeth was a sexually violent person. *See* WIS. STAT. § 980.02(2) (barebones requirements

for petition). Rather, the State sought to change the predicate offense—the statement with particularity of the underlying facts. *See* § 980.02(3) (additional requirement that petition state facts of predicate offense with particularity). In this instance, however, under *Gilbert*, even though Spaeth’s case had not even reached the probable cause stage, there was simply no way for the State to amend the petition so that it would comply with § 980.02.

CONCLUSION

WISCONSIN STAT. § 980.02(1m) requires that a commitment petition be filed “before the person is released or discharged.” However, *Gilbert* adds the requirement to § 980.02(1m) that the sexually violent offense alleged in the petition must be the same sexually violent offense for which the person is in custody. Because there is a conflict between the statute’s language and *Gilbert*’s statement, we respectfully certify the issue.

