COURT OF APPEALS
DECISION
DATED AND FILED

August 13, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2021 **Cir. Ct. No. 1996CV1156**

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

IN RE THE COMMITMENT OF TOD A. BERGEMANN:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

TOD A. BERGEMANN,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Brown County: TIMOTHY A. HINKUFSS, Judge. *Affirmed*.

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

¶1 PER CURIAM. Tod Bergemann appeals an order rejecting the parties' stipulation for supervised release from his WIS. STAT. ch. 980

commitment.[1] Bergemann asserts the circuit court improperly linked the statutory requirements for supervised release to completion of a particular treatment phase at Sand Ridge Secure Treatment Center. We conclude the court properly applied the statutory criteria, and affirm.

BACKGROUND

¶2 Bergemann was committed pursuant to WIS. STAT. ch. 980 in 1996. He has an extensive history of criminal and sexually deviant behavior, including contact with prepubescent and adolescent children.

¶3 Bergemann petitioned for discharge from his commitment, and a bench trial was conducted on September 6, 2011. When asked prior to the hearing whether he wanted the court to consider supervised release as an alternative to discharge, Bergemann answered, "No," and confirmed that he wanted "all or nothing." Accordingly, the court observed that some of the testimony "may … be moot because Mr. Bergemann has stated that it's all or nothing from his perspective of discharge or not discharge. He does not want this Court to consider supervised release."

¶4 Nonetheless, the court heard testimony from doctors Stephen Kopetskie and Lori Pierquet, both of whom indicated Bergemann was not a candidate for supervised release. Pierquet specifically testified that Bergemann did not meet the statutory criteria for supervised release under WIS. STAT. § 980.08(4)(cg) because Bergemann had "not identified his risk factors and shown

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

behaviorally that he can control them." Both Kopetskie and Pierquet testified that one criterion for supervised release, significant progress in treatment, was defined, for institutional purposes, as completion of phase three of the patient's treatment at Sand Ridge. However, both acknowledged that completion of phase three was not a condition precedent to court-ordered supervised release.

¶5 Following the noon recess, the State presented the court with a stipulation in which Bergemann would withdraw his petition for discharge and substitute a petition for supervised release. The State would stipulate that Bergemann met the WIS. STAT. § 980.08(4)(cg) criteria for supervised release and agree to a court-ordered supervised release plan. In exchange, Bergemann agreed not to petition for discharge until after March 2014. Bergemann's counsel explained the stipulation was a result of Pierquet's sudden change in her opinion regarding Bergemann's suitability for supervised release, voiced to counsel during the lunch recess.

¶6 The court struggled with whether it could make the findings necessary to support the stipulation. It observed that the "last thing that I wrote in my notes … [was that Bergemann] is not meeting the statutory requirement[s for supervised release] … right before we took a break." The court concluded it could not make the necessary findings based on the record before it, and directed the trial to continue. Pierquet resumed her testimony and stated that, "in listening to [defense counsel] talk about how many years it's been since [Bergemann] had broken a rule with the sexual issues, that got me thinking that, you know, perhaps he has had sufficient treatment at present to reduce his risk of sexual reoffending below threshold." The final witness, doctor Craig Rypma, recommended discharge. At the close of evidence, the court stated it would like additional time

to consider the evidence and read the trial transcript before approving the stipulation.

¶7 The court ultimately denied Bergemann's discharge petition and refused to accept the stipulation, finding that Bergemann was not a candidate for supervised release under WIS. STAT. § 980.08(4)(cg) because he had not demonstrated significant progress in treatment or a substantial probability that he would not engage in an act of sexual violence while on supervised release. Bergemann appeals and argues the court erroneously rejected the stipulation.[2]

DISCUSSION

¶8 "A trial court may totally accept or reject a stipulation presented by the parties for its approval." ***Phone Partners Ltd. P'ship v. C.F. Commc'ns Corp.***, 196 Wis. 2d 702, 709, 542 N.W.2d 159 (Ct. App. 1995). A stipulation, until approved, is no more than a recommendation to the court. ***Id.*** Because the stipulation becomes the court's judgment once approved, we review a court's decision to approve or reject a stipulation for an erroneous exercise of discretion. ***Id.*** at 710. "We will sustain a discretionary act if we find the trial court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Lane v. Sharp Pkg'g Sys., Inc.***, 2002 WI 28, ¶19, 251 Wis. 2d 68, 640 N.W.2d 788.

¶9 Bergemann argues that the circuit court misapplied the applicable supervised release statute. He asserts the court adopted the "official" Sand Ridge

[2] Bergemann has not challenged that portion of the court's order denying his discharge petition.

position linking the statutory criteria for supervised release to completion of phase three of Bergemann's particular treatment program at the facility. In essence, this is a claim that the court applied the wrong legal standard. Determination of the correct legal standard presents a question of law, which we review de novo. ***Hottenroth v. Hetsko***, 2006 WI App 249, ¶23, 298 Wis. 2d 200, 727 N.W.2d 38. Whether there is sufficient evidence to satisfy that legal standard is also a question of law. *See* ***State v. Banks***, 2010 WI App 107, ¶43, 328 Wis. 2d 766, 790 N.W.2d 526.

¶10 Pursuant to WIS. STAT. § 980.08(1), any person committed as a sexually violent person may petition the court for supervised release if at least twelve months have passed since the initial commitment or denial of the most recent release petition. The court may authorize supervised release only if it finds that five criteria have been satisfied:

> 1. The person has made significant progress in treatment and the person's progress 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.
>
> 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.

WIS. STAT. § 980.08(4)(cg). The statute unambiguously assigns the burden of producing probative evidence to the committed individual. ***State v. West***, 2011 WI 83, ¶55, 336 Wis. 2d 578, 800 N.W.2d 929. "[T]he court now begins from the default position of denying the petition, unless and until certain factors are established." ***Id.***, ¶56.

¶11 The circuit court heavily relied on the testimony of doctor Kopetskie, the author of Bergemann's treatment progress report. Kopetskie stated that Bergemann's specific treatment program has four phases, the first three of which occur at the facility. The first phase prepares patients for treatment and deals with "characteristics or behavior patterns that are generally chronic and pervasive." Phase two involves "disclosure" and "discovery" processes intended to help patients discuss formative events in their lives and understand how those events may have led them to commit sexual offenses. According to Kopetskie, phase three involves "learning to manage those identified sex offense risks reliably and, when possible, replace them with healthy alternative behaviors." The fourth phase is supervised release, which involves "continuity of care from inpatient treatment on an outpatient basis."

¶12 Bergemann argues the circuit court interpreted WIS. STAT. § 980.08(4)(cg)1. to require completion of phase three as a condition precedent to a "sufficient progress in treatment" finding. To be sure, the court did identify Bergemann's failure to complete phase two of his treatment as one factor militating against a finding of significant treatment progress. However, it is clear from the court's comments that it did not adopt what Bergemann argues is the institution's rigid definition of "substantial progress in treatment." The court simply observed that, given Bergemann's lifetime of problems and "horrific history," Bergemann may well need to complete all four phases of the treatment

program "or at the very least, [display] more certainty in his treatment progress if he is released or discharged prior to Phase Three."

¶13 In any event, Kopetskie testified that while the official treatment progress report indicated that "completion of Phase Three is commensurate with significant treatment progress," the treatment providers preferred to "look at things a little bit differently in terms of more task-specific kinds of domains." Kopetskie offered extensive testimony on these criteria, which was specifically incorporated into the circuit court's written order:

> [O]ne thing we look at is, is this individual participating meaningfully in treatment? And … I believe that Mr. Bergemann is participating meaningfully in treatment in Phase Two.
>
> The second thing we're interested in, has this patient identified his specific treatment needs, and has he demonstrated through his overt behavior [a] willingness to work on those specific treatment needs? And my opinion in that area is that he has partially completed this particular domain in that he has identified many of his very important treatment needs.
>
> However, one thing we've failed to see is consistent application of what he knows, consistent application of treatment principles in his behavior. And so once that consistency has been achieved, I'd be more inclined to give a more affirmative opinion on that particular domain.
>
> The third area has to do with demonstrating an understanding of the thoughts, attitudes, emotions, behaviors, and sexual arousal linked to his sexual offending and whether he has the ability to identify those when they occur. In my opinion at this point in his treatment he has not met that particular criteri[on].
>
> And … the final criteri[on] is has the patient demonstrated sufficiently sustained change in the thoughts, attitudes, emotions, and behaviors and significant management of sexual arousal such that one could assume reasonably that those changes would be maintained with continued treatment? And my opinion in that domain is no, not at this time.

Thus, Kopetskie effectively testified that Bergemann was not a candidate for supervised release, regardless of which phase of treatment he was in.

¶14 In addition, the court stated it was "very concerned" about Bergemann's lack of motivation for treatment. Kopetskie testified that Bergemann experienced "motivational fluctuations," meaning "periods of time where his motivation has been lower than at other times." Bergemann admitted to his treatment team that, from a motivation standpoint, he felt he should be in the Motivation Assessment Program. Kopetskie described the Motivation Assessment Program as "a step aside" from the applicable treatment phase for patients who are "having difficulty finding the motivation to pursue meaningful personal change." Such patients take a "time out" from phase treatment activities to "address the motivational issues, hopefully fortify their motivation, and then return to Phase Two to resume their participation." The court concluded that Bergemann's "sporadic motivation to control his sexual deviancy" suggested he should not be on supervised release.

¶15 The circuit court also expressed concern about the degree of Bergemann's psychopathy. Pierquet described psychopathy as a "more serious form of antisocial personality disorder where you are likely to see someone who is grandiose, has problems with impulse control, lies, typically has been arrested, variety of emotional characteristics as well, callous, no remorse, things like that." Bergemann scored high for psychopathy, a 32.5 out of 40 on the particular test used. Pierquet stated that according to some literature, "psychopaths as they are released will often recidivate quicker than nonpsychopaths …." She added that Bergemann has a combination of sexual deviancy and psychopathy, and research suggests individuals with that combination "are at a higher rate of sexual reoffending than individuals [who] don't have that combination." The circuit

court observed that Bergemann had lied to his treatment group during a recent polygraph examination and found that "[t]his untruthfulness, [combined] with his psychopathy, is a dangerous combination."

¶16 Kopetskie identified several other obstacles in Bergemann's treatment progress. Kopetskie testified that Bergemann had engaged in episodes of "self-sabotage," or "activities that would result in him being placed back in treatment." Kopetskie speculated that the failed polygraph may have been one such instance, and discussed other instances of untruthfulness. According to Kopetskie, Bergemann also needed to develop better coping strategies "so that, when he's frustrated, he doesn't fall into an emotional collapse." Kopetskie discussed Bergemann's history of sexualized coping:

> He has a history of using sexualized coping which has led to sexual preoccupation for him which is another treatment issue. And by "sexualized coping" I'm referring to … when a person becomes angry, disappointed, frustrated, bored, or other kinds of emotional states, that they will masturbate or seek sexual partners in order to alleviate the unpleasant emotions that they are experiencing.
>
> So, we need to help him find alternative ways of soothing himself, more productive ways of soothing himself so that he no longer engages in those kinds of activities. Those are some of the more salient treatment issues that he needs to work on in addition to the emotional regulation issues that have been present since the day he entered [the] Wisconsin Resource Center.

Kopetskie refused to state a definite time at which Bergemann would be ready for supervised release, but he suggested if Bergemann "continue[d] his present work, that within eighteen months to two years he would probably be in a good position for consideration for supervised release."

¶17 The circuit court extensively quoted relevant portions of testimony throughout its twenty-four page decision. While the court acknowledged that Bergemann failed to complete phase two (and, by extension, phase three), that was by no means the circuit court's sole reason for finding that Bergemann failed to show "significant progress in treatment" under WIS. STAT. § 980.08(4)(cg)1. Thus, we reject Bergemann's argument that the court rejected the parties' stipulation based on an improper legal standard. Kopetskie's testimony was far more nuanced than Bergemann suggests, and not even Kopetskie believed "significant progress in treatment" was commensurate with completion of phase three.

¶18 The court also specifically found that Bergemann failed to meet his burden of showing a substantial probability that he would not engage in an act of sexual violence while on supervised release. *See* WIS. STAT. § 980.08(4)(cg)2. The court may not authorize supervised release unless it finds that all of the § 980.08(4)(cg) criteria are satisfied. Bergemann does not argue the court erred in making this finding. This court does not abandon its neutrality to develop arguments for the parties. ***Industrial Risk Ins. v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. Accordingly, the court's finding on § 980.08(4)(cg)2. provides an alternative basis for affirming.

By the Court.—Order affirmed.

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