COURT OF APPEALS DECISION DATED AND FILED

August 11, 1998

**Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin**

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* § 808.10 and RULE 809.62, STATS.

No. 97-0043

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

IN RE THE COMMITMENT OF JOE WOFFORD:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOE WOFFORD,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Joe Wofford appeals from the trial court's order finding that Wofford is a sexually violent person and committing him to a secure mental health facility pursuant to Chapter 980, STATS. Wofford argues that: (1) the evidence is insufficient to support a finding that he is a sexually violent person;

(2) the trial court erroneously failed to consider imposing supervised release or commitment to a non-secure facility before committing Wofford to a secure facility; (3) Chapter 980, as it was applied to him, violates the Double Jeopardy Clause, the Ex Post Facto Clause, and the Due Process Clause of the United States Constitution, and also constitutes cruel and unusual punishment. We affirm.

I. BACKGROUND

The State petitioned to have Wofford committed to a mental health facility as a sexually violent person under § 980.01(7), STATS. Wofford waived his right to a jury trial, and was tried by the court. At the trial, the State presented testimony from two psychologists who concluded that, based upon Wofford's history of violent sexual offenses, his participation in and response to treatment for those offenses, and a variety of other information, Wofford suffers from sexual sadism, and that it is substantially probable that Wofford will commit future acts of sexual violence.[1] Wofford, however, presented testimony from one psychologist who concluded that there is not sufficient evidence to diagnose Wofford with sexual sadism.

In forming their opinions regarding Wofford's diagnosis, the psychologists relied on the following history of Wofford's sexually violent offenses. Wofford had previously been convicted of three offenses that involved sexual violence. The first was for second-degree sexual assault, which was based upon Wofford's violent rape of a fifteen-year-old girl. Wofford had made sexual advances towards the girl, and when she indicated that she did not want to have

[1] One of the psychologists defined sexual sadism as "recurrent and intense fantasies, urges and or behavior involving sexual arousal to infliction of pain and or humiliation to others."

sex, Wofford punched her in the face and then raped her. Wofford continued hitting the girl in the face while he raped her. The girl's face was severely bruised and swollen after the sexual assault.

While Wofford was out on bail prior to his conviction for rape of the fifteen-year-old, he committed a first-degree sexual assault, the rape of a seven-year-old girl. The girl was sleeping in the home where Wofford was staying. Wofford awoke her, took her into another room, and raped her. As with the fifteen-year-old girl, Wofford also hit the seven-year-old girl in the face several times during the rape.

Although Wofford received sex-offender treatment after the two rapes, Wofford committed other sexual crimes while he was out on parole from his sentence on the first-degree sexual assault conviction. He beat his girlfriend, burned her with a cigarette, poured salt down her throat, and forced her to put a beer bottle into her vagina. Wofford also placed his fist and his foot into her vagina. These crimes were plea-bargained, and Wofford was charged with a series of batteries, all but two of which were dismissed, also as part of a plea bargain. He pled guilty to two counts of misdemeanor battery as an habitual offender. *See* §§ 940.19(1) and 939.62, STATS.[2]

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[2] Section 940.19(1), STATS., provides:

> Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor.

Section 939.62, STATS., provides, in relevant part:

(continued)

Wofford's psychologist testified that there was not enough evidence to diagnose Wofford as a sexual sadist because Wofford denied that he was sexually aroused by the violence he inflicted on his victims during the sexual assaults, and the violence may have been Wofford's means of controlling the victim. The State's psychologists rejected this explanation and concluded that Wofford was sexually aroused by the violence because they believed that Wofford used more violence than was necessary to control his victims; they also noted that Wofford said that he and his sexual partner often inflicted pain on one another during their consensual sexual encounters. The trial court concluded that Wofford

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Increased penalty for habitual criminality. (1) If the actor is a repeater, as that term is defined in sub. (2), and the present conviction is for any crime for which imprisonment may be imposed (except for an escape under s. 946.42 or a failure to report under s. 946.425) the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

(a) A maximum term of one year or less may be increased to not more than 3 years.

(b) A maximum term of more than one year but not more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 6 years if the prior conviction was for a felony.

(c) A maximum term of more than 10 years may be increased by not more than 2 years if the prior convictions were for misdemeanors and by not more than 10 years if the prior conviction was for a felony.

(2) The actor is a repeater if the actor was convicted of a felony during the 5-year period immediately preceding the commission of the crime for which the actor presently is being sentenced, or if the actor was convicted of a misdemeanor on 3 separate occasions during that same period, which convictions remain of record and unreversed. It is immaterial that sentence was stayed, withheld or suspended, or that the actor was pardoned, unless such pardon was granted on the ground of innocence. In computing the preceding 5-year period, time which the actor spent in actual confinement serving a criminal sentence shall be excluded.

is a sexually violent person, and committed Wofford to a secure mental health facility.

II. DISCUSSION

Section 980.06(1), STATS., provides:

> If a court or jury determines that the person who is the subject of a petition under s. 980.02 is a sexually violent person, the court shall order the person to be committed to the custody of the department for control, care and treatment until such time as the person is no longer a sexually violent person.

A sexually violent person is "a person who has been convicted of a sexually violent offense … and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." Section 980.01(7), STATS. A mental disorder is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." Section 980.01(2), STATS.

Wofford argues that the evidence is insufficient to support a finding that he is a sexually violent person. Specifically, he asserts that, because his psychologist witness had interviewed him more recently than the State's psychologist witnesses, the trial court erred in failing to give more weight to his psychologist's opinion. Wofford also asserts that the trial court erroneously focused on his previous sexually violent offenses and failed to sufficiently consider his alleged treatment progress in determining that he is a sexually violent person.

We give great deference to the fact-finder when reviewing challenges to the sufficiency of the evidence. *See* ***Widell v. Tollefson***, 158 Wis.2d 674, 684, 462 N.W.2d 910, 913 (Ct. App. 1990). If there is any credible evidence supporting the determination of the fact-finder, we will sustain it. *See* ***id.***; § 805.17(2), STATS. (trial court's findings of fact will not be set aside unless clearly erroneous). We neither weigh the evidence nor judge the credibility of the witnesses on appeal. *See* ***In re Estate of Dejmal***, 95 Wis.2d 141, 151, 289 N.W.2d 813, 818 (1980).

Although Wofford's psychologist had interviewed Wofford more recently than the State's psychologists, one of the State's psychologists reviewed the treatment and assessment records kept by the staff at the facility where Wofford was receiving treatment; thus, both the State's psychologist and Wofford's psychologist were able to testify regarding Wofford's status after treatment. Wofford's arguments that the trial court should have given greater weight to the opinion of his psychologist and to his treatment progress are merely invitations for us to reweigh the evidence. We decline to do so.

After reviewing the record, we conclude that the evidence is more than sufficient to support the trial court's finding that Wofford is a sexually violent person. The State presented testimony from two psychologists who diagnosed Wofford as a sexual sadist and opined that there is a substantial probability that Wofford will commit a future act of sexual violence. Those opinions were supported by substantial evidence that Wofford was sexually aroused by inflicting pain on others during his sexual encounters. The State's psychologists also testified that Wofford had significant treatment needs and that there was a substantial probability that Wofford would commit a future sexually violent offense.

Next, Wofford asserts that the trial court erroneously failed to consider imposing supervised release or commitment to a non-secure facility before committing Wofford to a secure facility.[3] The record, however, belies this claim. The following exchange took place before the trial court rendered its decision to commit Wofford to a secure facility:

> THE COURT: I do have at this point, really two options. One is, in terms of where that commitment should be. One is institutional care in a secure mental health center or facility. Other is in a facility.
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> MR. BACKES [Wofford's attorney]: Well, Your Honor, I think the testimony of Dr. Doren and Dr. Kotkin, plus the reports of Dr. Hyatt, what her reliance was on, all indicate Mr. Wofford has come a long way. There is, certainly the trend is toward acknowledgement, [sic] recognition.
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> Mr. Wofford has a lengthy period of probation before him to the year 2003, I believe. In looking at this position, I would think that a similar arrangement should be made to establish a means of returning him to the community ….
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> THE COURT: … I agree with you, Mr. Backes, that Mr. Wofford has made, even from the view of Dr, Doren, made some significant progress in the treatment

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[3] Section 980.06(2)(b), STATS., provides:

> An order for commitment under this section shall specify either institutional care in a secure mental health unit or facility, as provided under s. 980.065, or other facility or supervised release. In determining whether commitment shall be for institutional care in a secure mental health unit or facility or other facility or for supervised release, the court may consider, without limitation because of enumeration, the nature and circumstances of the behavior that was the basis of the allegation in the petition under s. 980.02 (2) (a), the person's mental history and present mental condition, where the person will live, how the person will support himself or herself, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment. The department shall arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order.

> program he is in at the Wisconsin Resource Center and he deserves credit for that.
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> The problem is, until he reaches a point where he is no longer dangerous as defined by 980, he still needs to continue that path and I hope, speaking to Mr. Wofford now, you don't become discouraged because you didn't win this proceedings [sic].
>
> You have made substantial progress. I have something like 18 or 19 of these cases on my calendar and I read the reports of probably 8 or 9 or10 of 'em. In terms of what I have seen so far, in terms of progress notes in the program they have going at W.R.C., Mr. Wofford is at least as far along as anybody that I have seen. So that also inures to his benefit.
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> I was up at W.R.C. on Friday as part of a tour. So, I have got all this material on what their program consists of. I have seen the kinds of reports they can generate. I have some understanding of what the stages mean. I think it appears to be a very good program. So, I would, in my view I don't think that should be interrupted at this point in time.
>
> Mr. Wofford needs to continue that program and I don't think that that is something that can be done in the community at this point in time.

The record clearly discloses that the trial court considered both supervised release and commitment to a non-secure facility in determining that Wofford should be committed to a secure facility. The trial court concluded, however, that both Wofford and the community would be best served by Wofford continuing his treatment program at the secure facility. This conclusion is supported by one psychologist's testimony that Wofford has a short grooming period for choosing his victims, and that it would, therefore, be very difficult for the authorities to successfully intervene and prevent Wofford's future acts of sexual violence if Wofford were granted supervised release.[4] The trial court did not err in committing Wofford to a secure facility.

[4] The psychologist testified that a grooming period is the "process the person goes through to obtain a victim."

Wofford also argues that Chapter 980, as it was applied to him, is unconstitutional. He asserts that his commitment violates the Double Jeopardy Clause, the Ex Post Facto Clause, and the Due Process Clause of the United States Constitution. Wofford also asserts that his commitment constitutes cruel and unusual punishment. Wofford concedes that the Wisconsin Supreme Court has upheld Chapter 980 against constitutional attacks based on the Double Jeopardy Clause, the Ex Post Facto Clause, and the Due Process Clause of the United States Constitution. *See* ***State v. Carpenter***, 197 Wis.2d 252, 271–274, 541 N.W.2d 105, 112–114 (1995) (Chapter 980 does not violate double jeopardy, and it is not an ex post facto law); ***State v. Post***, 197 Wis.2d 279, 293–294, 301–317, 541 N.W.2d 115, 118, 122–128 (1995) (Chapter 980 comports with due process). He attempts to avoid those rulings, however, by asserting that Chapter 980 is, nonetheless, unconstitutional as it was applied in his case.

Wofford's rationale in support of his double jeopardy, due process, and cruel and unusual punishment claims mirrors that of his earlier claims. He argues that an option less severe than commitment to a secure facility was appropriate, and that, therefore, (1) his commitment is an excessive and disproportionate civil sanction that serves as a punishment; and (2) the commitment is broader than necessary to achieve the State's legitimate goal and violates substantive due process. He also argues that the commitment was based upon his past conduct rather than his current state after treatment and that, therefore, it is further punishment for his past crimes. As noted, the record more than supports the trial court's decision to commit Wofford to a secure facility. The record also reveals that the trial court considered both Wofford's past conduct and his treatment progress before committing him. Accordingly, Wofford's double jeopardy, due process and cruel and unusual punishment claims are wholly

without merit. With respect to his ex post facto claim, Wofford has failed to distinguish his claim from the claim rejected in ***Carpenter***.

By the Court.—Order affirmed.

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