COURT OF APPEALS
DECISION
DATED AND FILED

May 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3153

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

IN RE THE COMMITMENT OF ERVIN BURRIS:

STATE OF WISCONSIN,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

ERVIN BURRIS,

RESPONDENT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Rock County: JAMES WELKER, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. The State of Wisconsin appeals from an order placing Ervin Burris—a person found to be a "sexually violent person" under ch. 980,

STATS.—on supervised release in the community, rather than in an institution. It argues that the court erroneously exercised its discretion by making the commitment decision without first examining the relevant factors applicable to supervised release set forth under § 980.06, STATS. Burris cross-appeals from that portion of the order adjudging him a "sexually violent person," arguing that the evidence was insufficient to establish that he has a "mental disorder," and that, even if the evidence was sufficient on that point, there was insufficient evidence to conclude that it is "substantially probable" that he will engage in acts of sexual violence in the future, as required by applicable statutes.

We conclude that, whatever inadequacy in the court's initial commitment decision, there was sufficient evidence admitted during subsequent proceedings from which the court could, as it eventually did, reasonably determine that a specific supervised release plan proposed by the Department of Health and Social Services would adequately meet Burris's treatment and care needs and protect the community's interests. We also conclude that there was sufficient evidence to support the court's determination that Burris is a sexual predator. We therefore affirm the orders.

In 1989, while on parole, Burris was convicted of first-degree sexual assault and sentenced to ten years in prison. Before his scheduled release date, the State filed a ch. 980, STATS., petition alleging that Burris was dangerous because he suffers from a mental disorder that predisposes him to engage in acts of sexual violence. A hearing on the petition was held in April 1997. The State's primary witness was Dr. Caton Roberts, a psychologist at Mendota Mental Health Institute, who testified that Burris suffered from various mental disorders—exhibitionism, pedophilia and an antisocial personality disorder—all of which created a substantial probability that he would reoffend. The defense's primary expert

witness, Dr. Frederick Fosdal, a psychiatrist, testified that, in his opinion, Burris was not a pedophile, but suffered only from an antisocial personality disorder; and while Fosdal conceded that there was a risk that Burris might act out sexually, he was reluctant to speculate as to Burris's future behavior. At the conclusion of the hearing, the court, in an oral decision, found that Burris was a sexual predator and ordered his supervised release in the community. The court continued the matter for further hearings to determine the appropriate terms and conditions of Burris's supervised release.

Thereafter, considerable time was spent attempting to structure an adequate plan for Burris. Over the next year and one-half, several plans for Burris were proposed by the department, all of which were rejected by the court as containing inadequate protection for the public, or inadequate treatment for Burris. The State continued to object to any supervised release order, arguing that the only appropriate placement for Burris was in a secure facility. Finally, in October 1998, the court approved a plan to release Burris from the Wisconsin Resource Center to the Rock Valley Halfway House in Janesville, under strict supervision by the department and with the condition that he participate in weekly sex offender treatment.

Because it necessarily involves consideration of "interrelated statutory factors," determining the appropriate placement for a person adjudged to be a sexual predator under § 980.06(2), STATS., is committed to the discretion of the circuit court. ***State v. Keding,*** 214 Wis.2d 363, 366, 571 N.W.2d 450, 451 (Ct. App. 1997). Generally, we will sustain a discretionary act if the court examined the relevant facts, applied a proper standard of law, and used a demonstrated rational process to reach a conclusion that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184 (1982). Under the

law, we are to look for reasons to sustain discretionary decisions, ***Burkes v. Hales***, 165 Wis.2d 585, 591, 478 N.W.2d 37, 39 (Ct. App. 1991); and even in cases where the trial court fails to adequately state the reasons underlying its decision, an appellate court will independently review the record to determine whether it provides a reasonable basis for the trial judge's decision. ***Stan's Lumber, Inc. v. Fleming***, 196 Wis.2d 554, 573, 538 N.W.2d 849, 857 (Ct. App. 1995).

The State argues that the circuit court erroneously exercised its discretion by placing Burris on supervised release without first considering the factors under § 980.06, STATS.,[1] which focus on the individual's dangerousness, his or her treatment needs, and the protection of the public.[2] We agree that the court did not properly exercise its discretion in making its initial commitment decision immediately following trial, but instead relied upon what we believe to be an immaterial fact upon which to base that decision.[3] However, when the hearings resumed in the months following that original decision, the court stated that it was

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[1] We discuss the statute at some length below.

[2] We reject Burris's argument that the State should be precluded from raising its argument for the first time on appeal, without having raised it before the trial court. Upon this record, we are satisfied that, while the State may have stated its objections differently to the trial court, the court was well aware that the State strenuously objected to Burris being placed on supervised release. As the State says in its reply brief: "This is not a case of a trial court being blind-sided by an argument raised for the first time on appeal."

[3] The court, in making its initial commitment determination, relied heavily upon the fact that in 1989, during Burris's criminal prosecution for the underlying first-degree sexual assault offense, the State agreed to a ten-year sentence, when the maximum period of incarceration for that offense was forty years. The court stated that "[t]here is something fundamentally unfair about the conclusion that Mr. Burris is [now] a sexual predator," when the State, in 1989, knew that, realistically, Burris would serve only six and one-half (or less) years in prison. We, however, agree with Burris that the proper inquiry for the court in any sexual predator case is to determine a sexually violent person's *current* degree of dangerousness. The length of the person's sentence, the recommendations made by either party at the time of the original sentencing, or the person's level of dangerousness at that time are immaterial facts which should not be relied upon by the committing court in making its determination.

"treating this as a motion by the state or by the department for modification of the Court's prior order"—in other words, as an objection to the initial supervised-release decision. Then, after several hearings were held providing additional evidence concerning Burris's placement—his treatment needs and options and the provisions that would be necessary to adequately protect the public—the court again decided that Burris was appropriate for supervised release under the specific program proposed by the department.

Relying on ***State v. Sprosty***, 221 Wis.2d 401, 585 N.W.2d 637 (Ct. App. 1998), the State argues that the court was precluded from considering evidence introduced after the initial commitment decision. In the State's words, ***Sprosty*** "seems to prohibit the trial court from reconsidering the commitment once made." We don't read ***Sprosty*** as saying that at all. After the trial court found Sprosty to be a sexual predator and ordered his supervised release, the State appeared at numerous placement proceedings objecting that it didn't have the physical resources to address Sprosty's treatment needs in a community setting. Based on that evidence, the court concluded that it could not require the State to build the necessary facilities and denied Sprosty's supervised release, returning him to secure confinement. We reversed, concluding that once the court determines that supervised release is appropriate, the person must be released, regardless of whether the department has located an appropriate treatment facility willing to accept the person. ***Id.*** at 409, 585 N.W.2d at 640. We agree with Burris that ***Sprosty*** does not limit the court's authority to reconsider whether its initial commitment order was in fact appropriate after hearing additional evidence at subsequent placement proceedings—as is the case here. ***Sprosty*** merely limits the court's authority to revoke a person's release due to a lack of resources, once the court has determined that supervised release is appropriate.

The record in this case indicates that the circuit court, in its ultimate decision to commit Burris to supervised release, carefully considered the relevant statutory factors, as enumerated under § 980.06(2)b, STATS. That section provides in part:

> In determining whether commitment shall be for institutional care or for supervised release, the court may consider ... 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 court was well aware of Burris's underlying offense of sexually assaulting a nine-year-old girl. It also heard testimony regarding Burris's lengthy history of sexually motivated behavior, and his past mental and criminal history. As to his current mental condition, Dr. Roberts testified that, while Burris was in prison, he was "typically seen as a very positive employee" and received work reports describing him as cooperative and having an open attitude. Karl Gilbertson, a registered nurse, testified that, while at Mendota pending his sexual predator commitment proceedings, Burris was "socially appropriate with his peers," exhibited no problems with anger control or impulsive behavior, and was cooperative with the staff. A psychiatric care technician at Mendota, John Jones, also testified that Burris acted appropriately even in tense and provocative situations. The court was also informed that Burris was an experienced cook and was regarded by the Department of Corrections as the "best employee" they had.

The court also heard evidence—again, over the course of several hearings—about what placement and treatment options were available for Burris, and the court expressed its concern for the safety of the public, stating at one

point: "I'm not going to order that Mr. Burris be released until a suitable place can be found ... I think that would not be safe for the community." The court rejected one facility as a possible placement because it felt the facility was "not a suitable place" for Burris. The court also denied the department's request for placement in a second facility—emphasizing the importance of "community confidence," questioning the effectiveness of the recommended electronic monitoring program, and expressing its "concerns about whether we are setting Mr. Burris up just to fail here."

The court also ordered Burris to undergo an evaluation by Dr. Robert Gordon to determine whether he was an appropriate candidate for Gordon's outpatient sex offender treatment group. Because Burris's participation in—and successful completion of—that program would be a condition of his supervised release, the court conditioned Burris's release upon Gordon's approval—that Burris would in fact be amenable to such treatment. After reading Gordon's post-evaluation report, the court stated that it appeared "clear" that Burris would be amenable to sex offender treatment and group counseling, and that his release under electronic monitoring, coupled with participation in Gordon's group, would adequately satisfy his treatment needs. "[T]here's no doubt in my mind," said the judge, "that Mr. Burris can be treated in a community setting."

Under the deferential standards applicable to our review of a circuit court's discretionary decisions, we conclude that the court did not erroneously exercise its discretion in ordering Burris's supervised release.

Burris argues on his cross-appeal that the trial court erred in finding that he was a "sexually violent person." The term is defined in § 980.01(7), STATS., which states as follows:

> "Sexually violent person" means 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* (emphasis added).

Burris argues first that the evidence was insufficient to show that he had a "mental disorder" within the meaning of the statute. He claims that his diagnosed "antisocial personality disorder" does not *per se* constitute a "mental disorder" under the statute. However, as Burris acknowledges, we have recently rejected a similar argument. We concluded in ***In re Adams***, 223 Wis.2d 60, 588 N.W.2d 336 (Ct. App. 1998), that a diagnosis of "antisocial personality disorder," uncoupled with any other mental disorders, is adequate to satisfy the "mental disorder" portion of the § 980.01(7) definition of a "sexually violent person." ***Id.*** at 64, 558 N.W.2d at 338.

Burris next argues that the evidence was insufficient to support a determination beyond a reasonable doubt that his "antisocial personality disorder" makes it substantially probable that he will engage in future acts of sexual violence. In ***State v. Kienitz***, 221 Wis.2d 275, 282, 585 N.W.2d 609, 612 (Ct. App. 1998), we concluded that the phrase "substantially probable," as it appears in § 980.01(7), STATS, means "considerably more likely to occur than not to occur." We also concluded that the standard for reviewing challenges to the sufficiency of the evidence in ch. 980 cases is the same standard applicable in criminal cases:

> [W]e reverse only if the evidence, viewed in the light most favorable to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier

> of fact, acting reasonably, could have found [it was substantially probable that the person will engage in acts of sexual violence] beyond a reasonable doubt.

Id. at 301, 585 N.W.2d at 619.

While Burris acknowledges that the State's expert witness, Roberts, testified that, in his opinion, Burris suffered from exhibitionism, pedophilia and antisocial personality disorder, and that these mental disorders created a substantial probability that Burris would engage in future acts of sexual violence, Burris also points out that the circuit court expressly rejected Roberts's testimony, and relied solely on Fosdal's testimony on this point. And he claims that Fosdal was unable to give an opinion that reoffense was substantially probable beyond a reasonable doubt. The State counters by pointing out that the court discounted only that portion of Roberts's testimony dealing with his diagnosis of Burris's condition—not Roberts's opinion as to whether it is substantially probable that Burris will reoffend. Our review of the record bears that assertion out. Beyond that, however, we note that the court, by its own acknowledgment, didn't rely heavily—if indeed it relied at all—on Roberts's testimony as to Burris's likelihood of reoffending.[4] And to the extent the court did accept portions of Roberts's testimony relating to, for example, the chronology of events or Burris's past criminal or mental history, it is well-established that a fact finder may accept certain portions of an expert's testimony while rejecting others. ***State v. Owen***, 202 Wis.2d 620, 634,551 N.W.2d 50, 56 (Ct. App. 1996).

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[4] The court stated:

> Counsel has correctly pointed out that the Court, at the time of disposition, or the time of making findings, indicated that Dr. Roberts'[s] testimony did not seem to rely on the scientific basis and, frankly, it's not something that this Court considered particularly helpful with respect to the conclusions ….

We thus consider whether Fosdal's testimony, considered in the light of other evidence, provides a basis for the court's determination that Burris was likely to reoffend; and we think it does. Burris disagrees. He begins by pointing out that although Fosdal opined that Burris had an antisocial personality disorder, he did not diagnose Burris as being a pedophile. And he says, with respect to his future dangerousness, that Fosdal testified he did not know what Burris would do when released—only that there was some risk that he might do something, sexual or non-sexual. As the court reiterated, Fosdal "certainly didn't put [Burris's probability of reoffending] at a great level of substantial risk, and he certainly didn't say it was specifically a risk of sexual violence in the future based on his mental disorder." Fosdal testified that he could not say that it was "probable"—or more than a 51% chance—that Burris would commit a future act of sexual violence. He only could say it was "possible." This, says Burris, establishes a reasonable doubt that it is "considerably more likely" than not that he will commit future acts of sexual violence.

However, a court needn't rely on an expert opinion that it is substantially probable that an individual will reoffend in making that determination. We concluded in ***Kienitz*** that "there may be sufficient evidence that acts of sexual violence are substantially probable, even though the fact-finder chooses not to rely on an expert opinion to that effect."[5] ***Id.*** at 304, 585 N.W.2d at

[5] We further stated in ***State v. Kienitz***, 221 Wis.2d 275, 307, 585 N.W.2d 609, 622 (Ct. App. 1988):

> The trial court as fact-finder was free to weigh the expert's testimony when it conflicted and decide which was more reliable; to accept or reject the testimony of any expert, including accepting only parts of an expert's testimony; and to consider all the non-expert testimony in deciding whether it was substantially probable that Kienitz would commit future acts of sexual violence.

621. Such is the case here. Although Fosdal did not give his opinion that it was substantially probable that Burris will commit future acts of sexual violence, we are satisfied that his testimony, coupled with the other evidence presented at trial, was sufficient to support the court's determination. There was, for example, evidence on: Burris's lengthy history of exhibitionism; a 1978 conviction for a sexually violent offense resulting in his commitment to the Mendota Mental Health Institute for a specialized offender treatment; at least two other convictions for offenses which, while not sexually violent in themselves, had sexually violent undertones; the details surrounding the underlying offense, which was undeniably sexually violent and involved a nine-year-old victim; his history of antisocial behavior; evidence of recidivism and his past refusals to participate in sex-offender treatment; his lack of motivation while in prison to receive sexual offender treatment; and his denial of responsibility for his offenses.

In addition, Fosdal's testimony itself is not at all unsupportive of the circuit court's conclusion. While, unlike Roberts, Fosdal did not diagnose Burris as being a "pedophile," but did testify that Burris "for sure ... has engaged in pedophilic behavior." And, in Fosdal's experience, he has seen much more child molesting behavior emanating from these type of nonpedophilic individuals than from the classic pedophile. Fosdal also testified that Burris's past behavior has demonstrated his capacity to engage in various antisocial acts which reflect his disregard for the rules of society and the welfare of others; and he acknowledged that Burris has a demonstrated a propensity to act out sexually as part of his "defective values." Burris's sexual behavior, Fosdal explained, is "more of an on again/off again issue," and although his exhibitionistic behavior has subsided over the years, Fosdal believes Burris has demonstrated "a degree of nondeterability." Finally, Fosdal testified that he thinks Burris's antisocial personality disorder "is

the leading explanation as to why he engaged in the sexual offenses" and that such a condition "does predispose him to engage in acts of sexual violence."

Fosdal's testimony, considered along with the other evidence taken in the several hearings in this matter, provides a sufficient basis for a reasonable determination that, beyond a reasonable doubt, it was substantially probable that Burris would engage in future acts of sexual violence.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.