

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 6, 1999

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.

**Nos. 99-0854-CR
99-0855-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MATTHEW A. BENNETT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT A. HAASE, Judge. *Affirmed.*

¶1 SNYDER, J. Matthew A. Bennett appeals from a judgment of conviction that resulted in his incarceration in a prison facility during a period in which he was already under a commitment order to a secure facility under ch. 980, STATS. He contends that he is entitled to remain in the ch. 980 facility and asks that we “direct the trial court to amend its judgment of conviction to order the

department of corrections to place [Bennett] at the Wisconsin resource center so long as [Bennett] is deemed a sexually violent person requiring institutional care.” We decline his invitation and affirm the trial court judgment.

¶2 The history and facts necessary to this appeal are undisputed. On November 24, 1997, Bennett was adjudged a sexually violent person pursuant to § 980.05, STATS., and committed to the Wisconsin Resource Center (WRC) at the Winnebago Mental Health Institution.¹ On August 7, 1998, while at WRC, Bennett was charged with disorderly conduct, as a repeater, contrary to §§ 947.01 and 939.62(1)(a), STATS.² He was convicted as charged and sentenced on October 27, 1998, to “30 months in the Wisconsin Prison System consecutive to any previously imposed sentence.”³ After imposing the sentence, the trial court noted that Bennett was under a ch. 980, STATS., commitment order and designated the Dodge Correctional Institution as the reception center for the prison sentence.

¹ The order for commitment directs in relevant part that:

1. Matthew B. be committed to institutional care in a secure mental health unit or facility as provided under sec. 980.065, Stats.

....

3. The Sheriff shall deliver Matthew B. into the custody of the Department of Health and Family Services located at the Wisconsin Resource Center, Winnebago, Wisconsin.

² The conviction and sentencing are the basis for appeal no. 99-0855-CR. An allegation that Bennett committed a battery at WRC on April 23, 1998, designated as appeal no. 99-0854-CR, was dismissed and read in as a part of his sentencing for disorderly conduct as a repeater.

³ Bennett concedes that on August 8, 1998, he was on parole for a conviction for felony battery by a prisoner in Lincoln county. Bennett also admits that his parole was revoked and that he is presently serving the disorderly conduct sentence consecutive to the battery conviction sentence in the prison system.

¶3 Bennett contends that he should be at WRC under the ch. 980, STATS., commitment order rather than incarcerated under the imposed prison sentence. This case involves the interpretation of chs. 980 and 973, STATS. The issue of statutory interpretation presents a question of law that we review independently of the trial court, benefiting from its analysis. *See Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis.2d 650, 658, 529 N.W.2d 905, 908 (1995). Chapter 980 creates a civil commitment procedure for sexually violent offenders. *See State v. Carpenter*, 197 Wis.2d 252, 258, 541 N.W.2d 105, 107 (1995). Chapter 973 governs criminal sentences.

¶4 Section 980.06(1), STATS., requires that when a person is determined to be a sexually violent offender, “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.” The “department” is defined as the department of health and family services (DHFS). *See* § 980.01(1), STATS. If the ch. 980, STATS., commitment is for institutional care, DHFS may place the person at WRC or a secure mental health unit or facility provided by the department of corrections (DOC). *See* § 980.065(1m), (2), STATS.

¶5 Section 973.15, STATS., controls the sentencing of defendants to prison. Trial courts have only such sentencing powers as the legislature has granted. *See Grobarchik v. State*, 102 Wis.2d 461, 467, 307 N.W.2d 170, 174 (1981). Section 973.15(1) provides that “[e]xcept as otherwise provided in this section, all sentences commence at noon on the day of sentence.” Section 973.15(8)(a) relates the exceptions to § 973.15(1) as follows: “The sentencing court may stay execution of a sentence of imprisonment ... only: 1. For legal cause; 2. Under s. 973.09(1)(a); or 3. For not more than 60 days.” Bennett’s prison sentence commenced at noon on October 27, 1998, and he did not request

at sentencing, nor did the trial court grant, an exception to that commencement time.

¶6 Bennett argues that he is entitled to continued placement under the ch. 980, STATS., treatment directives rather than incarceration in the Wisconsin prison system because he was serving an indefinite ch. 980 commitment at the time of the criminal sentencing. He contends that we should direct that the sentencing court order the DOC to place him at WRC under the ch. 980 commitment. His argument fails. The sentencing court has no jurisdiction to impose such a requirement upon the DOC by placing conditions on a prison sentence. *See State v. Lynch*, 105 Wis.2d 164, 168, 312 N.W.2d 871, 874 (Ct. App. 1981). Once a prison term is ordered, the trial court may not order specific treatment, and control over the care of prisoners is vested by statute in the DOC. *See* § 301.03(2), STATS.; *State v. Gibbons*, 71 Wis.2d 94, 99, 237 N.W.2d 33, 36 (1976).

¶7 In addition, our supreme court has held that a defendant is required to serve a prison sentence in accordance with § 973.15(1), STATS., even though the defendant has not been discharged from DHFS custody on a § 971.17, STATS., commitment.⁴ *See State v. Szulczewski*, 216 Wis.2d 495, 507-08, 574 N.W.2d 660, 666 (1998). “‘Sentence’” is defined as ‘the judgment of a court by which the court imposes the punishment or penalty provided by statute for the offense upon the person found guilty.’” *State v. Harr*, 211 Wis.2d 584, 587, 568 N.W.2d 307, 308 (Ct. App. 1997) (quoted source omitted). Because neither a ch. 971, STATS.,

⁴ Section 971.17, STATS., addresses the procedure for the discharge of an NGI (not guilty by reason of mental disease or defect) acquittee from DHFS and from placement in a mental health institution.

commitment nor a ch. 980, STATS., civil commitment is a sentence, *see id.*; *Carpenter*, 197 Wis.2d at 258, 541 N.W.2d at 107, we conclude that the *Szulcowski* analysis is applicable here.

¶8 As with ch. 971, STATS., no provision in ch. 980, STATS., authorizes the discharge of a person from DHFS custody upon the sentence for a crime while under a ch. 980 commitment. However, § 973.15, STATS., requires immediate imprisonment of a convicted defendant with no exception expressly made for a ch. 980 civil commitment. *See Szulcowski*, 216 Wis.2d at 501, 574 N.W.2d at 663 (noting lack of express exception for § 971.17, STATS., commitment). Also, as did the ch. 971 commitment in *Szulcowski*, the requirement in § 980.06, STATS., that sexually violent persons be committed to DHFS until discharged from the commitment under ch. 980 runs counter to the trial court's imposition of an immediate sentence under § 973.15(1). *See Szulcowski*, 216 Wis.2d at 501, 574 N.W.2d at 663. That contradiction, however, was addressed by the supreme court in harmonizing § 973.15 with the ch. 971 commitment:

We conclude that a circuit court can give effect to both statutes and to the objectives of the legislature if the statutes authorize the circuit court to make a reasoned determination about imposing or staying a prison sentence on the basis of the facts of each case.

The legislature has authorized circuit courts to exercise this kind of discretion in staying sentences of imprisonment by providing in Wis. Stat. § 973.15(8)(a) that a court may stay a sentence “[f]or legal cause.”

Szulcowski, 216 Wis.2d at 505, 574 N.W.2d at 665 (alteration in original).

¶9 We are satisfied that § 973.15, STATS., can be harmonized with ch. 980, STATS., commitments as well. The question in this case is whether a sexually violent person's ch. 980 commitment, rather than a ch. 971, STATS., commitment,

constitutes “legal cause” for a sentence stay under § 973.15(8)(a)1. Bennett was not without legal recourse in his desire to continue treatment at WRC as he could have requested the sentencing court to stay the execution of his prison sentence for “legal cause.” See *Szulcowski*, 216 Wis.2d at 501, 505-08, 574 N.W.2d at 663, 665-66. He did not do so.⁵

By the Court.—Judgment affirmed.

This opinion will not be published. See RULE 809.23(1)(b)4, STATS.

⁵ Bennett concedes that he did not present this question to the trial court.

