

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 23, 2001

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

Nos. 99-2441 & 00-0454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE COMMITMENT OF HARRIS D. BYERS:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

HARRIS D. BYERS,

RESPONDENT-APPELLANT.

APPEALS from a judgment and orders of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 HOOVER, P.J. Harris Byers appeals a judgment and an order adjudging him to be a sexually violent person under WIS. STAT. § 980.05¹ and committing him to a secure mental health facility under WIS. STAT. § 980.065. He also appeals an order denying his post-commitment motion. He argues that (1) the court lacked subject matter jurisdiction to take a plea in a ch. 980 case; (2) if the court could take a plea, it was involuntarily made; (3) he was denied the effective assistance of counsel when his attorney advised him that an admission would not waive his right to contest the district attorney's authority to file the petition; and (4) the district attorney lacked the authority to file the petition for commitment without a referral from the Department of Corrections (DOC). We disagree and affirm the judgment and orders.

BACKGROUND

¶2 The Brown County district attorney filed a petition against Byers under WIS. STAT. ch. 980 and demanded a jury trial. Before the trial, Byers filed a motion to dismiss alleging that the district attorney lacked authorization to file the petition. The parties agreed that the DOC did not refer this case to the district attorney for filing. The circuit court denied the motion, concluding that the statute was clear and unambiguous and did not require a referral from the DOC. Byers filed a petition for leave to appeal on this theory and review was denied.

¶3 On the second day of the jury trial, the parties discussed settlement. Byers executed a document entitled "Respondent's Request to Enter an Admission as a Sexually Violent Person" and the court received this document. The court established that the district attorney agreed not to oppose a request for conditional

¹ All reference to the Wisconsin Statutes are to the 1997-98 version.

release and Byers would admit to the petition that alleged Byers is a sexually violent person within the meaning of WIS. STAT. ch. 980.

¶4 The court explained the document's impact to Byers, including that the jury would be excused and the State would not have to prove that Byers was a sexually violent person. The court advised Byers that the next step in the process would be for the court to decide the appropriate form of commitment, if it ordered commitment. The court explained that it could order confinement if the public interest dictated such a result, even if the district attorney would not oppose conditional release.

¶5 Byers stated that he understood. He conceded that no promises had been made to him other than that the district attorney would not oppose conditional release. He agreed that he was not under the influence of any substance, was not threatened and that all of his questions about the admission had been resolved. Byers' counsel, who had advised him until the court issued its commitment order, told the court that he was satisfied that Byers understood the consequences of entering his admission.

¶6 The circuit court determined that Byers understood his rights, what the State would have needed to prove, and the consequences of admitting the petition. The court concluded that the facts supported the admission and that Byers had entered the admission freely, voluntarily waiving his rights. It thus accepted the admission and dismissed the jury.

¶7 At the dispositional hearing, the district attorney did not oppose Byers' request for supervised placement. The court, however, concluded that Byers required confinement for institutional care.

¶8 Byers appealed. Soon after filing the appeal, he filed a motion to remand to the circuit court for a hearing on the effectiveness of his trial counsel. We granted the motion. Although we retained jurisdiction, we instructed Byers to file another notice of appeal if he wanted review of the circuit court's decision on his trial counsel's effectiveness.

¶9 In support of his motion, Byers submitted a fax written by his trial counsel that advised:

Prior to entering the admission I advised Harris [Byers] that in my opinion the issue of the authority of the Brown County DA to file the petition would still be jurisdictional and not waived by an admission. This was one of the key components of Harris' decision to enter the admission. In the absence of that, it is my opinion Harris would not have entered the admission and my recommendation on [the assistant district attorney's] offer might have been different.

¶10 The circuit court found that Byers' counsel advised him that the issue of the district attorney's authority to file the petition would be preserved for appeal. It determined that Byers relied upon this advice and would not have made the admission if he had not been so advised. The court further determined that the advice was erroneous because at the very least the law is unclear whether an admission would preserve the issue. However, it concluded that Byers had not suffered any prejudice. "Even if the issue had been preserved for appeal, I am satisfied that Byers would not have prevailed." The court denied Byers' post-commitment motion. Byers filed an appeal of the circuit court's decision and we consolidated the appeals.

DISCUSSION

¶11 The trial court's postconviction conclusion that Byers suffered no prejudice because the district attorney has the authority to file a WIS. STAT. ch. 980 petition preserved the authority issue for appeal. Because we conclude that the district attorney had authority to file a petition for commitment and that Byers' other arguments rely on the premise that the district attorney lacked authority, we begin our discussion with this issue.

A. District Attorney's Authority to File a Petition Under WIS. STAT. ch. 980

¶12 Byers argues that WIS. STAT. § 980.02(1) is ambiguous because two districts of the Wisconsin Court of Appeals have interpreted the statute differently, albeit in unpublished decisions. He contends that WIS. STAT. § 980.02(1)(a) requires the DOC and the Department of Justice (DOJ) to be involved with Byers' commitment proceeding as the gatekeepers of commitment proceedings.² He submits that the legislative history shows that the district attorney's authority to issue commitment complaints was intended to be limited. He asserts that statutory language would have to be impermissibly stricken in order for the State's interpretation, and the trial court's, to prevail. Byers further contends that the district attorney has no inherent power to file a petition and therefore the petition must be dismissed.

² WISCONSIN STAT. § 980.02(1)(a) provides that a sexually violent person petition may be filed by the DOJ at the request of the agency with jurisdiction, which in this case is the DOC. WISCONSIN STAT. § 980.015 defines "agency with jurisdiction" as the "the agency with the authority or duty to release or discharge the person." The parties agree that at all relevant times, the DOC was the agency with jurisdiction.

¶13 The State responds that the statute is unambiguous. It claims that a district attorney has authority to file a petition in instances where the DOJ has not filed one. It asserts that the statute does not require the district attorney to receive an agency request before it may file a petition. The State submits that the statute is written such that a district attorney may provide oversight to the DOJ because WIS. STAT. § 980.02(1)(b) grants petition-filing authority to more than one district attorney. Because the statute is not ambiguous, the State insists that the court should not resort to legislative history. *See Madison Teachers, Inc. v. Madison Sch. Dist.*, 197 Wis. 2d 731, 756, 541 N.W.2d 786 (Ct. App. 1995).

¶14 The circuit court agreed with the State and reasoned:

The statute granting the District Attorney authority to file a petition, while poorly written, does not limit such authority to cases where DOC ... makes such a request. It authorizes the District Attorney to so act “if the Department of Justice does not file a petition under par. (a) ...” Sec. 980.02(1)(b). Nothing in the subsection granting the district attorney such authority qualifies or limits this authority to cases where DOC has first made a request of the DOC [sic]. I do not read the reference to “par. (a)” as creating such a limitation upon the district attorney's authority to file. Neither the language nor the structure of that section supports the interpretation Byers seeks to impose on it.

We agree that the statute authorizes the district attorney to file a petition if the DOJ does not.

¶15 WISCONSIN STAT. § 980.02(1) provides:

(1) A petition alleging that a person is a sexually violent person may be filed by *one of the following*: (a) *The department of justice* at the request of the agency with jurisdiction, as defined in s. 980.015 (1), over the person. If the department of justice decides to file a petition under this

paragraph, it shall file the petition before the date of the release or discharge of the person.

(b) *If the department of justice does not file a petition under par. (a), the district attorney for one of the following:*

1. The county in which the person was convicted of a sexually violent offense, adjudicated delinquent for a sexually violent offense or found not guilty of or not responsible for a sexually violent offense by reason of insanity or mental disease, defect or illness.

2. The county in which the person will reside or be placed upon his or her discharge from a sentence, release on parole or extended supervision, release from imprisonment, from a secured correctional facility, as defined in s. 938.02 (15m), or a secured child caring institution, as defined in s. 938.02 (15g), or from a commitment order. (Emphasis added.)

¶16 Statutory construction presents a question of law that this court reviews de novo. *State v. Setagord*, 211 Wis. 2d 397, 405-06, 565 N.W.2d 506 (1997). The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *Id.* at 406. In determining legislative intent, first resort must be to the language of the statute itself. *Id.* If the meaning of the statute is clear on its face, this court will not look outside the statute in applying it. *Id.*

¶17 We conclude that WIS. STAT. § 980.02(1) is unambiguous. The statute grants that a WIS. STAT. ch. 980 petition may be filed by "one of the following" parties and specifies those parties. Subsection (a) permits the DOJ to file a petition at the request of the DOC.³ Because the language "at the request of the agency with jurisdiction," appears in subsec. (a) and does not appear in subsec. (b) or even in the introductory language in subpara. (1), it only modifies subsec. (a), which applies to the DOJ. *See Mutual Fed. S&L Ass'n v. S&L Adv. Comm.*,

³ WISCONSIN STAT. § 165.255 provides that "[t]he department of justice may, at the request of an agency under s. 980.02(1), represent the state in sexually violent person commitment proceedings under ch. 980."

38 Wis. 2d 381, 387, 157 N.W.2d 609 (1968) (under the rule of *reddendo singula singulis*, a sentence containing antecedents and consequents are to be read distributively, so that each word is applied to the subject or consequent that most properly relates and applies to it) (citing 2 SUTHERLAND, STATUTORY CONSTRUCTION, § 4918, at 423 (3d ed.)).

¶18 If the DOJ does not file a petition, subsec. (b) allows the district attorney for the county where the person was convicted of the sexually violent offense or where that person will reside or be placed upon release from imprisonment to file a petition for commitment. WIS. STAT. § 980.02(1)(b). We note that § 980.02(1) neither requires the DOC to make a referral to the DOJ nor the latter to expressly decline filing as a condition precedent to the district attorney instituting proceedings. The sole requirement is that the DOJ, under whatever circumstances, did not file a petition.

¶19 We conclude that WIS. STAT. § 980.02(1)(b) unambiguously permits the district attorney in either the county of conviction or of anticipated residence or placement upon discharge to file a WIS. STAT. ch. 980 petition in the event the DOJ does not. Here it is undisputed that the department did not file a petition, but the district attorney for the county in which Byers would have resided upon discharge did.

¶20 The supreme court has not spoken on this topic, and we are not bound by reasoning in unpublished decisions. WIS. STAT. § 809.23(3). Byers does not consider the statute as a whole or provide other authority that the DOC or the DOJ is the gatekeeper of commitment proceedings. We thus conclude that the ch. 980 proceedings against Byers were properly instituted.

B. The Circuit Court's Subject Matter Jurisdiction to Accept an Admission or Plea

¶21 Byers argues that the circuit court lacked subject matter jurisdiction to accept a plea in a WIS. STAT. ch. 980 case because it is a civil proceeding. He does not contend that the court lacks subject matter jurisdiction to hear a ch. 980 case. Rather, he argues that the civil rules of procedure as found in WIS. STAT. chs. 801 to 847 do not provide a plea-taking procedure, therefore the court lacks subject matter jurisdiction.

¶22 This court has previously held that a plea agreement in a WIS. STAT. ch. 980 proceeding is permitted so long as constitutional safeguards are met. *See State v. Castillo*, 205 Wis. 2d 599, 607-08, 556 N.W.2d 425 (Ct. App. 1996) (designating the proceeding as civil or criminal is immaterial with regard to plea bargains). Byers has not explained, with citation to authority, how the court could have subject matter jurisdiction over the subject but not over a procedural matter in the same case. The circuit court has subject matter jurisdiction to hear a WIS. STAT. ch. 980 case and to conduct the proceedings, including accepting an admission or plea. We conclude that Byers' jurisdictional challenge is without merit.

C. Ineffective Assistance of Counsel

¶23 Byers next argues that his counsel ineffectively assisted him when counsel erroneously advised that even if Byers admitted the allegations in the complaint, he could still reserve for appeal the issue whether the district attorney has authority to file a complaint absent a referral from the DOC.

¶24 For ineffective assistance of counsel claims, Wisconsin has adopted the two-pronged standard of *Strickland v. Washington*, 466 U.S. 668 (1984).

State v. Sanchez, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996) (the federal constitutional *Strickland* analysis applies equally to ineffectiveness claims under the state constitution). A defendant must show both that counsel's performance was deficient and prejudicial to the defense. *Id.*

¶25 Appellate review of a trial court's conclusion about ineffective assistance claims involves a mixed question of law and fact. *Id.* The trial court's assessment of the historical facts will not be set aside unless it is clearly erroneous. WIS. STAT. § 805.17(2); *Sanchez*, 201 Wis. 2d at 236. Whether the representation was deficient and prejudicial is a question of law, which we review de novo. *Sanchez*, 201 Wis. 2d at 236-37.

¶26 In order to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 236 (quoting *Strickland*, 466 U.S. at 694). Here it is obvious that Byers suffered no prejudice for two independent reasons. First, he has received what he sought to preserve: appellate review of the district attorney's authority to file a commitment petition. Moreover, as discussed above, even if the issue of the district attorney's authority to file a WIS. STAT. ch. 980 action had been otherwise preserved, Byers would not have prevailed on appeal. Therefore, Byers suffered no prejudice. Absent prejudice, his claim for ineffective assistance of counsel must fail. *Sanchez*, 201 Wis. 2d at 236.

D. Knowing and Voluntary Plea

¶27 Byers argues that his plea was not voluntarily or knowingly entered. See *Foster v. State*, 70 Wis. 2d 12, 21, 233 N.W.2d 411 (1975); *State v. Reikkoff*,

112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983). He contends that the trial court determined that he would not have entered the plea had he known that he was not preserving his right to appeal the issue of the district attorney's authority to file the petition. Therefore, he argues, he should be allowed to withdraw his plea.

¶28 The State admits that no case law explains the procedure for pleas in WIS. STAT. ch. 980 cases. It contends that the criminal standards for pleas do not apply to civil proceedings. Nevertheless, it argues that the court conducted an adequate colloquy to determine voluntariness and knowledge, a standard applicable to pleas in criminal cases. See WIS. STAT. § 971.08; *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Because Byers' admission or plea did not waive his right to appeal on the issue that the district attorney was without authority to file a petition, the State argues that no other grounds bar a conclusion that Byers entered his admission knowingly and intelligently. See WIS. STAT. RULE 809.10(4);⁴ *RecycleWorlds Consult. Corp. v. Wisconsin Bell*, 224 Wis. 2d 586, 594, 592 N.W.2d 637 (Ct. App. 1999). We agree.

¶29 Even if Byers waived his right to appeal this issue, any error is harmless. We addressed the issue he sought to preserve and concluded that the district attorney has authority to file a petition in this case. Byers raises no other lack of knowledge or voluntariness in his admission or plea. Therefore, the trial court properly denied Byers' post-commitment motion.

⁴ WISCONSIN STAT. RULE 809.10(4) provides:

An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon.

By the Court.—Judgment and orders affirmed.

Recommended for publication in the official reports.

