

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 18, 2017

Diane M. Fremgen
Clerk of Court of Appeals

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.

**Appeal No. 2016AP5
STATE OF WISCONSIN**

Cir. Ct. No. 2006CI2

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE COMMITMENT OF KENNETH WILLIAM JAWORSKI:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

KENNETH WILLIAM JAWORSKI,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and DENNIS R. CIMPL, Judges. *Affirmed.*

Before Brennan, P.J., Kessler and Dugan, JJ.

¶1 KESSLER, J. Kenneth William Jaworski appeals a judgment committing him as a sexually violent person. He also appeals from an order of the circuit court denying his postcommitment motion.¹ Jaworski argues that the court erred in denying his motion because the Department of Corrections (DOC) deliberately miscalculated his release date and the State's commitment petition was untimely. We affirm.

BACKGROUND

¶2 In May 1984, a Racine County jury found Jaworski guilty of five counts of second-degree sexual assault for offenses which occurred in November 1983. On June 18, 1984, the circuit court sentenced Jaworski to a sixteen-year term of imprisonment on count one and a seven-year term of imprisonment each on counts two through five. It ordered Jaworski to serve those sentences consecutively to each other, for a total of forty-four years, with credit for twenty days. In October 1984, Jaworski pled guilty to one count of second-degree sexual assault in a Milwaukee County case. On October 23, 1984, the circuit court imposed a seven-year term of imprisonment. It ordered Jaworski to serve this sentence concurrently with his other sentences, with credit for 438 days. The DOC calculated Jaworski's mandatory release date as April 1, 2006.

¶3 On March 24, 2006, the State filed a petition to commit Jaworski as a sexually violent person, pursuant to WIS. STAT. ch. 980 (2015-16).² The petition was based on Jaworski's Racine County and Milwaukee County offenses. The

¹ The Honorable Timothy M. Witkowiak entered the judgment committing Jaworski as a sexually violent person. The Honorable Dennis R. Cimpl entered the order denying Jaworski's postcommitment motion.

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

petition also alleged, based on a DOC document titled “Notice of Sentence Data,” that Jaworski’s mandatory release date was April 1, 2006, and that his anticipated release date was March 28, 2006.

¶4 At a probable cause hearing on April 5, 2006, Jaworski argued that the State failed to present sufficient evidence establishing that it had timely filed its petition. The circuit court denied the motion.

¶5 Two years later, in May 2008, Jaworski again moved to dismiss the State’s petition on the ground that the State did not timely file the petition. Jaworski argued that the DOC miscalculated his mandatory release date by miscalculating his good time credit and “he reached his mandatory release date before the state filed the 980 petition.” Because Jaworski should have been released before the date of the State’s petition, he argued, the State’s petition was untimely filed.

¶6 On June 5, 2008, at a hearing on the motion, the circuit court denied Jaworski’s motion. Relying on the “Notice of Sentence Data” form attached to the State’s commitment petition, the court found that Jaworski’s mandatory release date was April 1, 2006, and his actual release date was March 28, 2006; thus, the State’s March 24, 2006 petition was timely filed. The court found that the State had a right to rely upon information provided by the DOC and that even if a miscalculation occurred, the petition was still timely filed based upon the DOC information.

¶7 On June 23, 2008, the day Jaworski’s commitment trial was scheduled to begin, the State informed the circuit court that a DOC employee, Carol Briones, informed the State about a miscalculation of Jaworski’s mandatory and actual release dates. The State told the court that based on its conversation

with Briones, “there was some irregularity in calibrating the release date and the actual release date may in fact be different than the one that was calibrated by the [DOC] at the time the State filed its petition.” The circuit court granted an adjournment.

¶8 Briones subsequently prepared a memorandum explaining the sources of the calculation error:

I have reviewed Mr. Jaworski’s legal file for proper sentence calculation of his release in March 2006.

When reviewing, I discovered two points of errors; one where the information didn’t match, and a second, where the Department of Corrections’ policy on extra good time wasn’t followed.

One source of the errors was from what appears to be a complete review of the file information and compared with the security face card.... The security face card is supposed to maintain all movements of an offender.... The security card and the file information did not match; the person completing the computation relied on [the security face card].... The [security face card] is not typically compared with the file information to update release dates.

A second source of the errors was extending the mandatory release (MR) date for time that Mr. Jaworski was in unassigned status. Under the old good time law, there was a provision for extending the release date (or not granting good time) when an offender was not diligent in labor or study.... When the [DOC] did not have enough jobs or room for students because of a larger population in the prisons, the practice of extending the MR (or not granting good time) for the period an offender was in unassigned status was discontinued.

¶9 Briones attached multiple pages of calculations reflecting that Jaworski would have been released on January 31, 2006, or February 1, 2006. If Jaworski was entitled to an additional twenty days, his release date would have been January 10, 2006, or January 11, 2006.

¶10 Jaworski subsequently filed a motion to dismiss the WIS. STAT. ch. 980 petition on March 26, 2009, arguing that the “program assistant at Waupun Prison facility ‘illegally’ miscalculated his mandatory release dates” by “falsif[ying] times and dates” and that prison officials maintained “tainted” records, rendering the circuit court without jurisdiction over the petition. (Underlining and one set of quotation marks from the motion omitted.) At a nonevidentiary hearing on the motion, Jaworski argued that the DOC’s allegedly intentional conduct made relevant case law inapplicable. The circuit court disagreed, finding that in accordance with *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995), and *State v. Virlee*, 2003 WI App 4, 259 Wis. 2d 718, 657 N.W.2d 106, the State properly acted in reliance on information provided by the DOC:

Once that petition is filed irrespective of whether that MR date is then changed, recalculated, moved forward, and even if I accept all of Mr. Jaworski says as being true fact ... [that] doesn’t cause a court to lose jurisdiction. It’s not a basis for the court to dismiss the petition.

¶11 Jaworski filed a motion for postcommitment relief, again asserting that the DOC deliberately miscalculated his mandatory release date for the purpose of manipulating the State’s WIS. STAT. ch. 980 filing deadline. At a nonevidentiary hearing on the motion, the circuit court denied the motion stating:

[Y]ou make allegations that [the DOC] deliberately miscalculated [your] release date in order to manipulate the deadline for filing a Chapter 980 petition, but you don’t give me any -- any reason to believe that allegation, and that’s what I need. I need some reason to believe that allegation. So if you haven’t got any reason, I’m going to deny your motion.

This appeal follows.

DISCUSSION

¶12 Jaworski reiterates his postcommitment argument that the State did not timely file its WIS. STAT. ch. 980 petition because the DOC acted in bad faith when it calculated his mandatory release date to facilitate the State’s timely filing. Jaworski argues that he was entitled to an evidentiary hearing on his postcommitment motion. We disagree.

¶13 Under WIS. STAT. § 980.02(2), the State may file a petition alleging that a person is a sexually violent person subject to commitment. *See id.* WISCONSIN STAT. § 980.02(1m) specifies that the State must file the petition “before the person is released or discharged.”

¶14 In *State v. Stanley*, we interpreted WIS. STAT. § 980.02(1m) as providing two means for the State to file a timely WIS. STAT. ch. 980 commitment petition: (1) either before the date of the offender’s mandatory release; or (2) before the offender’s discharge date. *See Stanley*, 2014 WI App 89, ¶23, 356 Wis. 2d 268, 853 N.W.2d 600. We explained the difference between the terms “release” and “discharge”:

Based on the usage of the words “released” and “discharged” in the case law and in closely related statutes and regulations, we conclude that the words have the following common and accepted legal meanings in the context of a criminal sentence: “released” means to free a person from confinement in prison, and “discharged” means to free a person from DOC custody status upon completion of the criminal sentence. A person serving a prison sentence is “confined” until he or she is “released” from prison, and the person remains in DOC “custody status” until he or she is “discharged” upon completion of the criminal sentence. Hence, the use of the word “discharge” in a person’s maximum “discharge” date corresponds to its use in WIS. STAT. § 980.02(1m), and in both usages the meaning is the completion of the criminal sentence.

Stanley, 356 Wis. 2d 268, ¶22. Accordingly, we concluded that the statute requires the State to file a WIS. STAT. ch. 980 petition “either before the person is freed from confinement in prison or before the person’s entire sentence is completed.” See *Stanley*, 356 Wis. 2d 268, ¶23.

¶15 Here, the focus of Jaworski’s appeal is the DOC’s calculation of his mandatory release date. Jaworski ignores the portion of the statute that allows the State to file its petition before the discharge date. Jaworski received lengthy sentences in both his Racine County and Milwaukee County cases. His discharge date for the Racine County sexual assault convictions is November 27, 2030. His discharge date for the Milwaukee County conviction is March 11, 2031. The State filed its petition on March 24, 2006. Clearly, the State was within the statutory deadlines when it filed the WIS. STAT. ch. 980 petition. Thus, the circuit court did not err in denying Jaworski’s postcommitment motion without a hearing.³

¶16 For the foregoing reasons, we affirm.

By the Court—Judgment and order affirmed.

Not recommended for publication in the official reports.

³ Neither party raised the question of whether the State filed the petition prior to the discharge date in the circuit court. Jaworski argues that the State has thus waived its right to raise this argument on appeal. The issue on appeal is whether the State’s petition is timely, which was a question raised in the circuit court, and we may affirm a circuit court’s ruling on grounds the court did not consider. Because the statute is clear in its mandate that the State may file a WIS. STAT. ch. 980 petition either before an offender’s mandatory release date or his discharge date, we affirm the circuit court on grounds it did not consider. See *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (On appeal, we may affirm on different grounds than those relied on by the circuit court.).

