COURT OF APPEALS
DECISION
DATED AND FILED

March 1, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2016AP2415 **Cir. Ct. No. 2006CI1**

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

IN RE THE COMMITMENT OF ROBERT LARSON, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ROBERT LARSON, JR.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County: JOSEPH G. SCIASCIA, Judge. *Affirmed*.

Before Lundsten, P.J., Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Robert Larson appeals an order that denied his motion to enforce a stipulation in which the State agreed not to oppose Larson's petition for supervised release from a WIS. STAT. ch. 980 commitment in exchange for Larson's agreement not to file a petition for discharge until after having completed 24 months of uninterrupted supervised release in the community. Larson contends that his ability to obtain supervised release under the stipulation was prevented by the operation of WIS. STAT. § 980.08(5m) (2015-16),[1] which prohibits the placement of persons adjudicated to be sexually violent in any facility that did not exist before January 1, 2006. Larson challenges § 980.08(5m) as unconstitutional both on its face and as applied. For the reasons discussed below, we reject Larson's challenges to the constitutionality of § 980.08(5m), and affirm the order of the circuit court.

BACKGROUND

¶2 In January of 2015, pursuant to a stipulation between Larson and the State, the circuit court granted Larson's petition for supervised release from a WIS. STAT. ch. 980 commitment. The court subsequently approved a placement plan for Larson, and Larson was released into the community in June of 2015. However, in July of 2015, the community placement decision was reopened and reversed based upon the discovery that eleven-year-old twins were living in a property adjacent to the residence where Larson had been placed. Larson was returned to Sand Ridge Secure Treatment Center.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶3 Department of Health Services officials conducted an extensive search for another community placement for Larson, investigating 140 potential residences, but found no viable options that would satisfy all of the statutory criteria of 2015 Wis. Act 156. Among the criteria in Act 156 were that a serious child sex offender such as Larson could not be placed in or adjacent to a property serving as a child's primary residence, or within 1,500 feet from any school, child care facility, public park, place of worship, or youth center. 2015 Wis. Act 156, §§ 11 and 13 (eff. Mar. 2, 2016); WIS. STAT. § 980.08(4)(f)2. and 4. Therefore, Larson remained at Sand Ridge, even though he continued to meet the criteria for supervised release.

¶4 As to WIS. STAT. § 980.08(5m), a DHS placement specialist testified that Larson could not be placed in a facility built after 2006, even if all of the Act 156 criteria were satisfied, and even though there were no added safety concerns from placing a person adjudicated to be sexually violent in a facility built after 2006 as opposed to one built before 2006. However, the specialist further testified that it was not § 980.08(5m) that was keeping the agency from finding a placement for Larson.

STANDARD OF REVIEW

¶5 The constitutionality of a statute is a question of law subject to de novo review on appeal. ***State v. Wood***, 2010 WI 17, ¶15, 323 Wis. 2d 321, 780 N.W.2d 63. A party challenging the constitutionality of a statute on its face must overcome a presumption of constitutionality and prove that the statute is unconstitutional beyond a reasonable doubt. ***Id.*** However, there is no presumption that the State is applying a statute in a constitutional manner. ***Society Ins. v. LIRC***, 2010 WI 68, ¶27, 326 Wis. 2d 444, 786 N.W.2d 385.

DISCUSSION

Facial Challenge

¶6 When a statute is unconstitutional on its face, it is "void 'from its beginning to the end.'" *See* ***Wood***, 323 Wis. 2d 321, ¶13 (quoted source omitted). A party raising a facial challenge to a statute must show that the law "cannot be enforced 'under any circumstances.'" ***Id.*** (quoted source omitted).

¶7 Here, Larson argues that WIS. STAT. § 980.08(5m) violates the substantive due process clause because there is no compelling state interest that justifies restricting the placement of persons committed as sexually violent who have satisfied the criteria for supervised release to facilities that were built before 2006. However, as the State points out, a committed person "does not have a recognized, protectable liberty interest in supervised release." *See* ***State v. West***, 2011 WI 83, ¶89, 336 Wis. 2d 578, 800 N.W.2d 929.

¶8 Larson attempts to distinguish ***West*** on the grounds that he is being barred from both seeking discharge from his commitment as well as obtaining supervised release. *See* ***State v. Knipfer***, 2014 WI App 9, ¶¶1, 14, 352 Wis. 2d 563, 842 N.W.2d 526 (2013) (a committed person has a liberty interest in the outcome of a discharge proceeding), *aff'd sub nom.* ***State v. Alger***, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346. However, it is not WIS. STAT. § 980.08(5m) that is barring Larson from seeking discharge, but rather his stipulation with the State. That stipulation is a circumstance particular to this case, not something that would bar enforcement of § 980.08(5m) under any circumstances.

¶9 Because a protected liberty interest is a prerequisite for a substantive due process claim, we conclude that Larson's facial challenge to WIS. STAT. § 980.08(5m) fails under ***West***.

As Applied Challenge

¶10 A statute that is constitutional on its face may nonetheless be unconstitutional as applied to a particular party in a particular set of facts. *See* ***Olson v. Town of Cottage Grove***, 2008 WI 51, ¶44 n.9, 309 Wis. 2d 365, 749 N.W.2d 211. A party raising an as-applied challenge to a statute must show that his or her constitutional rights were actually violated. ***Wood***, 323 Wis. 2d 321, ¶13.

¶11 Larson argues that WIS. STAT. § 980.08(5m) is unconstitutional as applied to him because he has been found eligible for supervised release but is not being placed in the "least restrictive manner" available due to the statute. Aside from the fact that this claim also appears to be premised on a non-protected liberty interest in supervised release, there is no factual basis for the argument in the record.

¶12 According to the uncontroverted testimony of the DHS placement specialist, the department was unable to find any potential placement for Larson that satisfied the 2015 Wis. Act 156 criteria. There was no testimony that there was any available facility built after 2006 that would have satisfied the Act 156 criteria. We conclude that it was not WIS. STAT. § 980.08(5m) that was preventing Larson from being placed in the least restrictive manner, and therefore reject Larson's as-applied challenge to the statute.

By the Court.—Order affirmed.

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