COURT OF APPEALS
DECISION
DATED AND FILED

March 28, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP3225 **Cir. Ct. No. 1995CF954368**

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

IN RE THE COMMITMENT OF
PAUL WOZNIAK:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

PAUL BARNEY WOZNIAK,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL B. BRENNAN, Judge. *Affirmed*.

Before Fine, Curley and Kessler, JJ.

¶1 FINE, J. In 1996, Paul Barney Wozniak was found by a jury to be a sexually violent person and was committed to a secure facility pursuant to WIS.

STAT. ch. 980. We affirmed in an unpublished opinion. ***State v. Wozniak***, No. 96AP3441, unpublished slip op. (Wis. Ct. App. Aug. 18, 1998). He subsequently sought supervised release into the community, pursuant to WIS. STAT. § 980.08(1) (2001–02). The trial court denied Wozniak's petition, determining that the State had proven by clear and convincing evidence that Wozniak was still a sexually violent person and that it was still substantially probable that he would commit acts of sexual violence if he were granted supervised release. *See* § 980.08(4) (2001–02).[1] Wozniak appeals from that order. We affirm.

[1] WISCONSIN STAT. § 980.08(4) (2001–02) provided, as material:

> The court shall grant the petition unless the state proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if the person is not continued in institutional care. In making a decision under this subsection, the court may consider, without limitation because of enumeration, 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, including pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen if the person is a serious child sex offender. A decision under this subsection on a petition filed by a person who is a serious child sex offender may not be made based on the fact that the person is a proper subject for pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen or on the fact that the person is willing to participate in pharmacological treatment using an antiandrogen or the chemical equivalent of an antiandrogen.

I.

¶2 Wozniak was born in 1920, and has a long sordid history of pedophilia, preying on both boys and girls. He contends, essentially, that his age and physical debilities make him appropriate for supervised release. The views of the three testifying psychologists were mixed.

¶3 Richard D. McKee, employed by the Wisconsin Department of Corrections as a psychologist supervisor at the Jackson Correctional Institution, and who recommended that Wozniak be put into the community on a stringent form of supervised release, noted in his August 2003 report that given Wozniak's pervasive history of sexual crimes, the effect of Wozniak's age on his recidivism was speculative at best:

> It might occur to some that Mr. Wozniak's risk of future sexual violence is less than it once was, because of his advanced age. Data from a few recent studies, one published and the others unpublished, shed some light on this question. … In the examiner's opinion, the evidence on this topic is sketchy and its implications unclear. What is clear is that Mr. Wozniak has been a life-long, high-risk sex offender who perpetrated his last known sexual assault of a child when he was 65 years old. He was found to be at high risk for future sexual violence in 1996, when at the age of 75 years he was civilly committed under § 980 Wis. Stats. There appears to be no factual basis for concluding that his sexual reoffense risk has declined due to his having grown older since then.

Nevertheless, he opined:

> Because Mr. Wozniak remains a sexually violent person as defined by § 980, Wis. Stats., it is recommended that his commitment as such be continued. He should not be considered for discharge at this time. However, it would seem to be possible to devise a realistic community supervision program, such that his continued high sexual reoffense risk could be safely managed on supervised release.

¶4 Wozniak supported his petition for supervised release with the report and testimony by Charles M. Lodl, a psychologist in private practice. Conceding that Wozniak "meets the criteria for continued commitment under Chapter 980" and that "[t]here is no information to suggest that he has mitigated this level of pretreatment risk through participation in a sex offender treatment program," he opined that Wozniak's age and physical debilities "greatly limit his mobility and capability to an extent that a structured facility does not appear necessary to control his behavior and prevent future sexual offense."

¶5 In opposition to Wozniak's petition for supervised release, the State submitted the testimony and a February 2002 report by Stephen Paul Del Cerro, a psychologist employed by the Wisconsin Department of Corrections at the Jackson Correctional Institution. His report concluded:

> Mr. Wozniak's response to treatment to date has not been sufficient to substantially reduce the likelihood of future sexually violent offenses. Mr. Wozniak remains a sexually violent person as defined by Chapter 980 of the Wis. State Statutes, and his commitment and confinement as such should be continued. Hence, with a reasonable degree of psychological and scientific certainty, it is this examiner's opinion that Mr. Wozniak presents a substantial probability (much more likely than not) that he would commit another sexually violent offense should he be released from secure confinement at this time. It is recommended that the court not consider Mr. Wozniak for supervised release or discharge at this time.

(Parenthetical by Dr. Del Cerro.) As noted, the trial court denied Wozniak's petition.

II.

¶6 The trial court has "broad discretion when determining" if a person committed under WIS. STAT. ch. 980 "is appropriate for supervised release." ***State***

v. Sprosty, 227 Wis. 2d 316, 326, 595 N.W.2d 692, 696 (1999). The trial court also has broad discretion in admitting or excluding evidence. ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30, 36 (1998). Wozniak contends that the trial court erroneously exercised its discretion when it received into evidence a report and testimony by Deborah J. McCulloch, the Community and Treatment Support Director with the State Department of Health and Family Services at the Sand Ridge Secure Treatment Center.

¶7 McCulloch testified that part of her job was to "oversee the State-wide supervised release programs for people who are committed under Chapter 980 and then granted a supervised release into the community." She opined that although Dr. McKee recommended what he characterized as supervised release for Wozniak, there was no community facility that could meet the restrictive supervised-release conditions Dr. McKee recommended because Wozniak "would need to be in a secure, locked facility," given what she characterized as the "very impulsive" nature of his crimes and because he "has engaged in no treatment, [and] continues to be in a state of denial about his behaviors." As summarized by the trial court in its extensive oral decision, McCulloch indicated that "she would not be able to craft a supervised release plan for Mr. Wozniak in Milwaukee County" and that "the current resources did not approach the needs identified by Dr. McKee with regard to risk management."

¶8 Wozniak contends that receipt of McCulloch's report and testimony violates ***Sprosty***'s determination that once a trial court determines that a person is suitable for supervised release, the absence of facilities willing to assume responsibility for that person may not be used as a reason to deny supervised release. Thus, ***Sprosty*** explained:

> In making its decision on supervisory release, a circuit court *may* consider *without limitation because of enumeration* several factors, such as "where the person will live" and what arrangements for treatment are available. [Wis. Stat.] § 980.08(4). We construe the listed statutory factors contained in § 980.08(4), not as limitations on what can be considered in determining supervisory release, but as several examples of factors that *may* be considered in determining whether supervisory release is appropriate. In the context of where the person may live and what arrangements for treatment are available such things as the availability of facilities, security, and cost considerations may, in the court's discretion, factor into the court's decision on the appropriateness of supervisory release.
>
> This does not mean, however, that the circuit court can or should consider whether the available facilities are willing to undertake the person's supervision *before* ordering supervised release. This places the proverbial cart before the horse. As stated above, the petition must be granted "unless the state proves by clear and convincing evidence that the person is still a sexually violent person and that it is still substantially probable that the person will engage in acts of sexual violence if not confined" in a secure mental health unit or facility. Wis. Stat. § 980.08(4). While the court can include in its order conditions which it considers necessary for placement, prior acceptance of the person into those facilities or programs is an inappropriate consideration at the hearing on the petition for supervisory release. If the court concludes that supervisory release is appropriate, it is then *DHFS's* statutory duty to "arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order." Wis. Stat. § 980.06(2)(b) and (d); Wis. Stat. § 980.08(6).

Sprosty, 227 Wis. 2d at 326–327, 595 N.W.2d at 696–697 (emphasis by ***Sprosty***; some citations omitted). We need not consider the parties' argument whether the trial court should have either received or considered McCulloch's opinions, however, because the trial court specifically ruled that its decision to deny Wozniak's petition for supervised release would be the same wholly apart from McCulloch's report or testimony because "[e]ven if" the secure facilities McCulloch indicated were not available "did exist and Ms. McCullough's [*sic*]

report was excluded completely and her testimony was excluded completely, this Court would not find Mr. Wozniak to be a proper candidate for supervised release" based on the trial court's assessment of the credibility and persuasive force of the opinions proffered by the three psychologists, Drs. McKee, Lodl, and Del Cerro *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

¶9 Just as we presume that juries are able to decide cases based only on the evidence they are told is properly admissible, *see* ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432, 436 (Ct. App. 1989), we presume that judges will also decide cases excluding those things they indicate they will not consider, *see* ***Milburn v. State***, 50 Wis. 2d 53, 61–62, 183 N.W.2d 70, 74–75 (1971); ***Gauthier v. State***, 28 Wis. 2d 412, 421, 137 N.W.2d 101, 106 (1965) ("'In a case tried by the court the admission of improper evidence is to be regarded on appeal as having been harmless, unless it clearly appears that but therefor the finding would probably have been different.'") (quoted source omitted). The trial court cogently explained why, in not considering or giving weight to McCulloch's evidence, Wozniak could not be released into the community:

> Treatment is a premise of Chapter 980. Mr. Wozniak has rejected that treatment. Even if that treatment analysis is not dispositive, but to some of the evaluators it's a reasonable factor for the Court to conclude.
>
> All the doctors indicated that Mr. Wozniak is still sexually violent.[2] He's still substantially probable to engage in acts of sexual violence. The instruments all indicate that he's a high risk.
>
> I note the impulsive nature of his past crimes, nothing done to mitigate that risk. He is 84. He has cancer.

[2] McCulloch does not have a doctorate and is not a psychologist.

> His health condition may reduce his physical abilities to be sexually violent, but as the [State] has pointed out, even the most recent sex offense occurred while Mr. Wozniak was quite old and hobbled in many ways, so the impulsive nature and the opportunity nature [of his sex crimes] means that all Mr. Wozniak has to do is potentially get close to any child and this could occur again.

(Footnote added.) The trial court appropriately exercised its discretion, and we affirm.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.