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March 26, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2012AP233 In re the commitment of Kenneth Roberts: State of Wisconsin v. Kenneth Roberts (L.C. # 2004CI2)

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

Kenneth Roberts appeals pro se from an order denying his motion under WIS. STAT. § 806.07 (2011-12),[1] to vacate his WIS. STAT. ch. 980 commitment. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1). Roberts' § 806.07 motion was not timely and we affirm the order of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Roberts was committed as a sexually violent person under WIS. STAT. ch. 980 in June 2005. Six years later, in June 2011, Roberts moved under WIS. STAT. § 806.07(1)(h), to vacate his commitment. Roberts alleged that: the psychological evaluations presented at trial were based on inaccurate and false information; the diagnoses in the evaluations were broad and nonconclusive; he does not meet the diagnostic criteria for the underlying diagnoses; and ch. 980 is unconstitutional. The circuit court denied Roberts' motion, concluding that it was untimely, that Roberts had been afforded fairness throughout the commitment proceeding, and that the interest in finality was overriding.

Roberts argues that the State procedurally defaulted on his motion by not timely filing a response and by allegedly failing to serve him with a copy of its response. He also contends the circuit court denied him due process by not conducting an evidentiary hearing on his motion. These issues are forfeited by Roberts' failure to raise them in the circuit court.[2] Also, we need not address them because the dispositive issue—whether Roberts' motion for relief under WIS.

[2] Courts generally will not consider an issue raised for the first time on appeal because had the issue been raised below, the opposing party might have addressed the situation, for example, by way of amendment or additional proof. ***State v. Whitrock***, 161 Wis. 2d 960, 969, 468 N.W.2d 696 (1991); *see also* ***Village of Trempealeau v. Mikrut***, 2004 WI 79, ¶16, 273 Wis. 2d 76, 681 N.W.2d 190 (forfeiture rule prevents parties from sandbagging errors or failing to object for strategic reasons and then claiming that the error is grounds for reversal). Although Roberts explains that he was not aware that the State had filed a responsive brief until he received the index to the appellate record, his failure to raise timeliness and service in the circuit court is problematic because no factual findings exist as to the date the State's response was due, or whether the State provided service by mail to Roberts.

With respect to the circuit court's failure to hold a hearing, Roberts indicates he had several additional motions prepared for submission to the circuit court, including a motion asking the circuit court judge to recuse himself. The circuit court sent a letter to the parties indicating that it would decide whether a formal hearing was warranted after reviewing Roberts' motion and the State's response. Roberts was on notice that a hearing might not be necessary. A party cannot effectively lay in the weeds and wait to raise claims at a time convenient to that party. *See* ***State ex rel. Washington v. State***, 2012 WI App 74, ¶23, 343 Wis. 2d 434, 819 N.W.2d 305.

STAT. § 806.07 was timely filed—may be resolved based solely on the allegations in Roberts' motion.[3] *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (holding that a Wisconsin appellate court need not decide an issue if the resolution of another issue is dispositive).

A circuit court's decision on a motion to vacate an existing judgment is reviewed for an erroneous exercise of discretion. ***State ex rel. Cynthia M.S. v. Michael F.C.***, 181 Wis. 2d 618, 624, 511 N.W.2d 868 (1994). Where the record shows that the circuit court utilized the correct legal standard and a reasonable basis exists for the decision, an erroneous exercise of discretion will not be found. ***Id.***

To obtain relief under WIS. STAT. § 806.07(1)(h), the moving party must show that extraordinary circumstances justify relief, and must also show that relief was sought within a reasonable time. ***Cynthia M.S.***, 181 Wis. 2d at 625-26. Determining whether the motion is made within a reasonable time requires an analysis of relevant factors—the basis for the moving party's delay and the prejudice to the party opposing the motion. ***Id.*** at 627. Consideration of those factors must be "guided by the fact that while respect for the finality of judgments is an important concern, the purpose of [§]806.07(1)(h) is to allow courts to do substantial justice when the circumstances so warrant." ***Id.*** Thus, whether extraordinary circumstances exist to justify relief in the interests of justice may factor into the reasonable time inquiry. ***Id.*** at 628.

[3] Similarly, we do not address the State's argument that under ***State v. Morford***, 2004 WI 5, 268 Wis. 2d 300, 674 N.W.2d 349, Roberts was not entitled to apply for relief from the commitment order under WIS. STAT. § 806.07. ***Morford***, ¶44, holds that the State is not entitled to utilize a motion under § 806.07(1)(h) to vacate an order for conditional release, but ***Morford*** does not explicitly determine whether a committed person is entitled to utilize § 806.07. Because we decide the appeal on other (continued)

This is not a case presenting extraordinary circumstances that overcome Roberts' six-year delay. As the circuit court pointed out, Roberts' commitment was determined at a jury trial where he was afforded the right to an attorney, to confrontation, and to cross-examination. His commitment was affirmed on appeal; on appeal he attacked the evidence as being "hearsay" and "inaccurate and false," and argued WIS. STAT. ch. 980 is unconstitutional. ***State v. Roberts***, No. 2005AP2259, unpublished slip op. at 3, 10 (WI App Mar. 13, 2007). The appellate decision also rejected Roberts' request for a new trial in the interest of justice because it did not appear that the real controversy had not been fully tried or that justice had miscarried. ***Id.*** at 10. Roberts cannot establish extraordinary circumstances by advancing issues that have already failed.

Roberts does not give any reason for his delay in pursuing relief under WIS. STAT. § 806.07(1)(h). The circuit court found that a delay of six or seven years since the original verdict is "obviously unreasonable." On appeal the State argues prejudice because Roberts' confinement as a sexually violent person has been reviewed on multiple petitions for discharge over the last six years, and he remains a sexually violent person.[4] The record confirms the litigation over Roberts' status as a sexually violent person and supports the circuit court's finding that waiting six years to challenge the original commitment is unreasonable.

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grounds, we decline to address the State's argument in this appeal. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (an appellate court should decide a case on the narrowest possible grounds).

[4] The denial of Roberts' 2010 petition for discharge was affirmed on appeal. *See* ***State v. Roberts***, No. 2012AP266, unpublished slip op. (WI App Oct. 11, 2012).

The record reflects that the circuit court understood and properly applied the correct analysis in determining that Roberts' motion was not made within a reasonable time. Denial of the motion was a proper exercise of discretion.

Upon the foregoing reasons,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals