

REVIEW OF CHAPTER 980 SUPERVISED RELEASE AND DISCHARGE

Judge Michael O. Bohren

Waukesha County

October 4, 2012

Objectives and Understanding

- ▣ Be familiar with common fact patterns.
- ▣ Be familiar with the Waukesha County statistics.
- ▣ My observations of Chapter 980 procedure for supervised release and Discharge and suggested changes.
- ▣ Understanding of Chapter 980: treat sexually violent persons and protect the public; punishment is not a purpose. *State v. West*
- ▣ My comments are my view only, and not that of the Court system or any other Judge.

Waukesha County Experience

26 Commitment filings 1994 -2010

- Does not include petitions for Supervised Release(20) or Discharge(32)
- 5 were assigned to MOB

No new commitment filings in 2011 and to date in 2012

1994-2012 1 Petition for Supervised Release granted

1994-2012 4 Petitions for Discharge granted

TWO CASES

State v. West
And
State v. Ermers

Supervised Release

State v. West, 2011 WI 83

- ▣ 1993 convicted of second degree sexual assault at age approx. 26; history of four other sexual assaults.
- ▣ 1997 committed as a SVP
- ▣ Between 1998 and 2009, during re examinations and review West was found to remain a SVP
- ▣ 2008 filed Petition for Supervised Release ; asked court to determine the burden of proof.
- ▣ Trial Court found that burden was on the SVP, and denied petition for Supervised Release.

Discharge

State v. Ermers,

2011 Wi App 113

- 1986- Convicted first degree Sexual assault of 7 yr. old girl; released 1993
- 1995 -Convicted of first degree sexual assault and child abuse of 5 yr. old boy
- 2003- 980 petition filed, two reports with diagnosis of pedophilia and anti social personality disorder
Committed
- Annual examinations occurred and recommended that Ermers not be considered for Supervised release.
- September, 2009 Petition for discharge filed; amended petition filed attaching a psychologist's report that found that Ermers continued to have a mental disorder---pedophilia---that predisposed him to commit acts of sexual violence

Ermers cont'd

- ▣ Using a modified Static 99, Ermers scored a recidivist rate “somewhere between 23.0% and 42.8% over 10 years” The professional concluded that Ermers was closer to 23%.
- ▣ Petition denied without hearing;
- ▣ Appeal; Reversed June 30, 2011

Issue: May the Court deny a discharge petition without a hearing if the petition alleges facts including developments in knowledge and research that changes the diagnosis or degree of dangerousness so that a person no longer meets the definition of SVP?

Ermers' conclusion

- ▣ Hearing must be held if a change exists:
 - 1) change in person
 - 2) change in professional knowledge or research
- ▣ Change is not an opinion that relies on facts or professional knowledge considered at the initial commitment trial.
- ▣ Sec. 980.07 periodic exams and treatment progress reports continue;
- ▣ Final hearing not held as of October 1, 2012;

OPTIONS

My view of the options follows, regrouped for consistency

Option: Burden of Proof for Supervised release

- ▣ 1) Should the burden of proof for supervised release be codified?
- ▣ History
 - Current: On SVP to establish by clear and convincing evidence. *State v. West*
 - Pre-2005: the burden of proof is on the state to prove by clear and convincing evidence that supervised release is not appropriate
 - In 2005 the legislature repealed and recreated the section, setting forth specific criteria to be established to grant supervised release, but did not include a burden of proof.
 - In *West*, the Supreme Court found that the legislative intent was to place the burden of proof with the SVP by clear and convincing evidence.

Option: Place Burden on State for Supervised Release

Change Burden of Proof for Supervised Release back to the State---Pre-2005 amendments

- 1) current statute and *West* serve the public well, and place the responsibility for proving an affirmative of criteria on the person who has direct knowledge
 - Burden is tied to the SR Criteria
- 2) the current burden(on person) is reasonable and provides adequate notice to the one seeking release as to what must be proved.

Option: Permit Supervised Release by Stipulation.

▣ A court can grant supervised release only if the person meets the following:

1. Person made significant progress in treatment and progress can be sustained on release
2. Substantially probable while on supervised release person will not engage in an act of sexual violence
3. Person can reasonably expected to comply with treatment and rules
4. Treatment meeting needs is available
5. Reasonable level of resources are available for treatment

▣ Questions:

Is the Court's review of the stipulation *pro forma* or a full review to insure that criteria are met?

Option: Revise or eliminate the “Significant progress in treatment” Criteria for SR

- ▣ Rationale: If person meets all other criteria, why not permit SR if person is making treatment progress?
- ▣ Question:
 - Why?
 - Is “significant progress in treatment” critical ?
 - If “critical’ where is the support for lessening the requirement?

Option: Under SR should permitted activities be expanded in the first year while supervised?

- ▣ Activities proposed : volunteer, education, treatment , exercise, residential maintenance

Question:

- Are the activities reasonably related to purpose of Ch. 980 ?
- Costs?

Option: Discharge hearing determination starting point other than at initial commitment

- ▣ Discharge requires a two step review by Court before a hearing is held:
 - 1) Does petition allege circumstances showing that the person has changed since commitment date so that person does not meet the SVP criteria? If so then...
 - 2) After a review of all reports and statements in the record do facts exist for a trier of fact to determine that the person does not meet the criteria for commitment?
- ▣ Should the starting point be other than the initial commitment? (*Combs and Kruse: do not take document at face value; it must be something a trier of fact can reasonably rely on.*)
- ▣ As I see it: Totality of the circumstances?

Option: Should Sec. 980.09(1) and 980.09(2) contain identical language ?

▣ Language

- 980.09(1) Does Petition ‘allege facts’
- 980.09(2) to warrant discharge:
 - ▣ The petition “ contains facts” ,
 - ▣ Do the facts set forth in the petition/record “ exist” in the record?
- My view: Court must determine if facts on which the petitioner relies are those on which a trier of fact can rely so as to order a hearing,
- “allege”, “contain” or “ exist” may have different meanings,
- but the result is that there is sufficient reliable evidence for the matter to proceed to hearing
- Is there really a question?

Option: Limit discharge petitions to one each year as opposed to unlimited ability.

- ▣ Is there a rationale to limit the ability other than the press of business?
- ▣ If a person does not qualify as a SVP, should he/she be held ?
- ▣ Ch. 980 proceedings are not numerous
 - Court acts as gate keeper in reviewing the petition. Court time is involved, but that is a function of a vibrant judiciary.

Option: Grant courts authority to allow continuances and adjournments for cause in discharge hearings.

Question:

Is flexibility to meet court and attorney calendars and the need to prepare good cause consistent with the need to timely address the petition?

Is an unreasonable delay an unconstitutional delay?

Option: Require SR prior to discharge

▣ Question:

- Does discharge of a person from a 980 commitment place an institutionalized person in the community without the tools to function safely?
- If so, is public safety and rehabilitation at risk?
- But, if a person no longer qualifies as a SVP can he/she be constitutionally held?
- If discharge is more difficult to achieve than SR, is it good public policy to lessen requirements for SR?
- What have other states done?

Option: Change the definition of SVP from “likely to commit a new offense” to “unreasonable risk” or similar phrases.

▣ Questions:

- Does an “unreasonable risk” place the level of re-offense lower than “more likely than not? Where?
- Is ‘likely to commitment’ more quantifiable than “unreasonable risk”?
- Is there value to maintaining consistency and stability in definitions?

Option: Place female SVP at Wisconsin Women's Resource Center

- ▣ Question: Is it reasonable? Why?

THANK YOU