STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2015AP1311

In re the commitment of Howard Carter:

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

HOWARD CARTER,

Respondent-Appellant.

APPEAL FROM AN ORDER OF THE
CIRCUIT COURT FOR BROWN COUNTY,
KENDALL M. KELLEY, JUDGE

BRIEF FOR PETITIONER-RESPONDENT

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ORAL ARGUMENT AND PUBLICATION

There is no need for oral argument of this appeal because it would add nothing to the arguments in the briefs. There will be no need to publish the opinion because the first issue raised on this appeal has been raised in another appeal, has already

been fully briefed, and is likely to be decided before this case. The other issues can be decided by applying established law to the situation in this case.

ARGUMENT

I. Carter failed to prove that the attorney who represented him in connection with his petition for discharge from a sexually violent person commitment was ineffective.

A. Carter failed to prove that his attorney was ineffective for agreeing that a change in the law regarding the standard of proof that must be met to get a trial on a discharge petition applied retroactively to this pending case.

The respondent-appellant, Howard Carter, filed a petition for discharge from a sexually violent person commitment on December 13, 2013 (143).[1] 2013 Wisconsin Act 84 was enacted into law the day before, was published the same day, and went into effect the next day. 2013 Laws of Wisconsin, Vol. 1., 813.

As relevant in this case, this act changed the standard of proof a sexually violent person must meet to be entitled to a trial on a petition for discharge. Instead of alleging facts from which a trier of fact "may" conclude that the committed person's condition had changed, the person must now allege facts from which a trier of fact "would likely" conclude that his condition had changed. 2013 Wisconsin Act 84, §§ 21, 23.

[1] The petition also sought supervised release, but any issues relevant to supervised release are moot because the circuit court ordered Carter to be released on supervision August 6, 2015 (193.5).

The attorney who represented Carter in connection with his discharge petition agreed that this change in the law applied retroactively to this pending case (194:6-7).

Carter's attorney thereby waived any right to argue on appeal that this charge was not retroactively applicable to his case. *See State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511; *State v. Anderson*, 2005 WI App 238, ¶¶ 9-10, 288 Wis. 2d 83, 707 N.W.2d 159; *State v. Nielsen*, 2001 WI App 192, ¶ 11, 247 Wis. 2d 466, 634 N.W.2d 325.

As long as a defendant is represented by counsel whose performance is not constitutionally ineffective, there is no inequity in requiring him to bear the risk of an alleged attorney error that results in a procedural default. *Coleman v. Thompson*, 501 U.S. 722, 752 (1991). *See State v. Wilkens*, 159 Wis. 2d 618, 624, 465 N.W.2d 206 (Ct. App. 1990) (a tactical waiver by counsel is binding on the defendant).

A claim of ineffective assistance of counsel is a means of circumventing a waiver. *State ex rel. Rothering v. McCaughtry*, 205 Wis. 2d 675, 680 n.5, 556 N.W.2d 136 (Ct. App. 1996). In the absence of an objection, a waived error, even a constitutional error, is not reviewed directly, but is analyzed under the standards for determining whether counsel was ineffective. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986); *State v. Carprue*, 2004 WI 111, ¶ 47, 274 Wis. 2d 656, 683 N.W.2d 31; *State v. Erickson*, 227 Wis. 2d 758, 764-68, 596 N.W.2d 749 (1999).

A criminal defendant who claims his attorney was ineffective has a dual burden to prove both that his attorney's performance was deficient and that the deficient performance prejudiced his defense. *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433; *State v. Thiel*, 2003 WI 111, ¶ 18, 264 Wis. 2d 571, 665 N.W.2d 305; *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). A claim of ineffective assistance

fails if the defendant fails to prove either one of these requirements. *State v. Williams*, 2006 WI App 212, ¶ 18, 296 Wis. 2d 834, 723 N.W.2d 719; *State v. Taylor*, 2004 WI App 81, ¶ 14, 272 Wis. 2d 642, 679 N.W.2d 893.

On appeal the circuit court's findings of fact will be upheld unless they are clearly erroneous. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334. Whether counsel's performance was deficient and/or prejudicial to the defense are questions of law which are determined independently. *Thiel*, 264 Wis. 2d 571, ¶ 23.

1. Carter's attorney did not perform deficiently by agreeing that the new rule applied retroactively to this case.

To prove that his attorney performed deficiently, the defendant must overcome a strong presumption that counsel acted reasonably, and establish that counsel's representation fell below an objective standard of reasonableness. *State v. Mayo*, 2007 WI 78, ¶ 60, 301 Wis. 2d 642, 734 N.W.2d 115; *Thiel*, 264 Wis. 2d 571, ¶ 19; *State v. Johnson*, 133 Wis. 2d 207, 217, 395 N.W.2d 176 (1986).

There is a range of reasonableness, *Chen v. Warner*, 2005 WI 55, ¶ 37 n.24, 280 Wis. 2d 344, 695 N.W.2d 758, permitting different people to reasonably make different decisions in the same circumstances. *State v. St. George*, 2002 WI 50, ¶ 58, 252 Wis. 2d 499, 643 N.W.2d 777; *State v. Robinson*, 146 Wis. 2d 315, 330, 431 N.W.2d 165 (1988).

When different people can reasonably make different decisions there is a limited right to be wrong. *State v. Jeske*, 197 Wis. 2d 905, 913, 541 N.W.2d 225 (Ct. App. 1995). To be reasonable is not to be perfect, so a decision can be perfectly

reasonable even though it is mistaken. *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014); *State v. Houghton*, 2015 WI 79, ¶ 44, 364 Wis. 2d 234, 868 N.W.2d 143. Thus, the test for ineffective assistance of counsel does not assess the legal correctness of counsel's judgments, but the reasonableness of those judgments under the circumstances of the case. *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993).

The reasonableness of an attorney's acts is judged deferentially on the facts of the particular case viewed from counsel's contemporary perspective to eliminate the distortion of hindsight. *State v. Maloney*, 2005 WI 74, ¶ 25, 281 Wis. 2d 595, 698 N.W.2d 583; *Johnson*, 133 Wis. 2d at 217.

From this perspective, an attorney is not ineffective for making what in retrospect appears to be an error of judgment on law that is unsettled. *State v. Van Buren*, 2008 WI App 26, ¶¶ 18-19, 307 Wis. 2d 447, 746 N.W.2d 545; *Maloney*, 281 Wis. 2d 595, ¶ 23; *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

That the law remains unsettled to this day is shown by the fact that the question of whether 2013 Wisconsin Act 84 applies retroactively is being raised in at least two presently pending appeals, this one and *In re the commitment of Richard D. Sugden: State of Wisconsin v. Richard D. Sugden*, Case No. 2014AP2724 (District IV).

Moreover, an attorney could reasonably conclude, not necessarily correctly, but reasonably for the purpose of the performance analysis, that the new law is retroactive. Indeed, the circuit court determined that the new law does apply retroactively to this case (189:8).

The legal rules regarding the retroactivity of statutes were comprehensively considered in *Trinity Petroleum, Inc. v.*

Scott Oil Co., Inc., 2007 WI 88, 302 Wis. 2d 299, 735 N.W.2d 1. *See also Kroner v. Oneida Seven Generations Corp.*, 2012 WI 88, ¶¶ 26-27, 33, 342 Wis. 2d 626, 819 N.W.2d 264 (reaffirming the *Trinity Petroleum* rules).

In civil cases, a statute that is procedural or remedial rather than substantive is presumed to have retroactive application. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 40, 80.

A statute is substantive when it creates, defines or regulates rights or obligations. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 41. A statute is procedural when it prescribes the manner or mode of conducting legal proceedings. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 41.

The standard of proof to be applied in conducting legal proceedings is a matter of procedure. *Alison v. Byard*, 163 F.3d 2, 4 (1st Cir. 1998); *Williams v. Silvola*, 234 S.W.3d 396, 399 (Mo. Ct. App. 2007); *Illinois Tool Works, Inc. v. Harris*, 194 S.W.3d 529, 532 (Tex. App. 2006). *See Nowell v. City of Wausau*, 2013 WI 88, 351 Wis. 2d 1, 838 N.W.2d 852 (noting that a statute that dictated the procedure for judicial review was silent on which standard of review to apply).

However, a procedural statute will not be given retroactive effect if it disturbs a vested right other than in a matter of procedure. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 53. A litigant has no vested right to any particular procedure. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 48, 62. The vested right must be a substantive right, such as a right to assert a cause of action. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 57-58, 60.

A change in a procedural rule that merely alters the standard of proof does not impair a person's right to assert a cause of action by seeking discharge from a sexually violent person commitment. Everything else remains exactly the same.

A sexually violent person is still entitled to bring a petition for discharge at any time. Wis. Stat. § 980.09(1) (2013-14). The person is still entitled to a trial if he makes the same preliminary showing as before. Wis. Stat. § 980.09(1), (2). The person is still entitled to discharge if the state fails to prove at the trial that he is still sexually violent. Wis. Stat. § 980.09(3), (4).

The only change is in the means or method by which a committed person asserts the cause of action he continues to have exactly the same right to assert.

Moreover, the right to a trial is not a vested right. Until a court makes a finding that the committed person has alleged facts that would entitle him to a trial, no right to relief accrues. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶ 62. *See State v. Alger*, 2015 WI 3, ¶ 43, 360 Wis. 2d 193, 858 N.W.2d 346 (there is no right to a jury of twelve in civil commitment proceedings).

Finally, a procedural statute will not be given retroactive effect if it imposes an unreasonable burden on a party attempting to comply with the new procedural requirements. *Trinity Petroleum*, 302 Wis. 2d 299, ¶ 53. In a situation like the one in this case where a pleading was filed before the effective date of the new rule but was not litigated until after the effective date, the question is whether the parties were given adequate notice of the new rule, and could have tailored the way they litigated the case so as to comply with it. *See Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 59, 72.

Here, the new rule actually became law the day before the discharge petition was filed, and became effective the day after the filing, 2013 Laws of Wisconsin 813, so that it was in force for all but one day that the proceedings in this case were pending.

Here, all the parties were aware of the new rule before the commencement of the first hearing (194:4-7). This court noted the change in a published opinion decided a couple weeks after that hearing. *State v. Richard*, 2014 WI App 28, ¶ 12 n.9, 353 Wis. 2d 219, 844 N.W.2d 370. Therefore, this case easily could have been, and was, litigated under the new standard.

Carter failed to prove that his attorney performed deficiently since it was perfectly reasonable for counsel to conclude that the new procedural rule created by 2013 Wisconsin Act 84 applied retroactively to this case.

2. Carter failed to prove he was prejudiced by his attorney's agreement that the new rule applied retroactively to this case.

Because Carter's attorney waived any right to argue that Carter was entitled to a trial under the standard of proof that applied before the change made by 2013 Wisconsin Act 84, *Torkelson*, 306 Wis. 2d 673, ¶ 25; *Anderson*, 288 Wis. 2d 83, ¶¶ 9-10; *Nielsen*, 247 Wis. 2d 466, ¶ 11, Carter cannot make a standalone argument on this appeal that he was entitled to a trial under the old standard.

Because Carter failed to prove that his attorney performed deficiently by agreeing that the new standard of proof applies retroactively to this case, Carter's claim of ineffective assistance fails completely, and there is no need to inquire whether he was prejudiced by his attorney's performance because he would have been entitled to a trial under the old standard. *Williams*, 296 Wis. 2d 834, ¶ 18; *Allen*, 2004 274 Wis. 2d 568, ¶ 26; *Taylor*, 272 Wis. 2d 642, ¶ 14; *Thiel*, 264 Wis. 2d 571, ¶ 18.

In any event, Carter cannot prove prejudice because the conclusion that the new standard of proof applies to this case is not just reasonable, it is correct. For the reasons discussed above, the new standard does apply retroactively, and Carter concedes that he is not entitled to a trial under this standard. Brief for Defendant-Appellant at 16.

B. Carter failed to prove that his attorney was ineffective for not objecting to the circuit court's consideration of the principles of reliability discussed in the *Daubert* case.

Wisconsin Statute § 974.02(1) (2013-14) is a rule that governs the admissibility of evidence.

Under the current version of this statute, which adopts the judicial gatekeeping function of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), expert testimony is not admissible into evidence unless the court finds that it is based on reliable scientific principles and methods reliably applied to the facts of the case.

Although the current version of § 974.02(1) does not apply to cases like this one which were commenced before February 2011, *Alger*, 360 Wis. 2d 193, ¶ 26, Carter's contention that his attorney was ineffective for failing to object to the circuit court's consideration of the principles of reliability discussed in *Daubert* necessarily fails because the circuit court never applied either the current version of § 974.02(1) or the underlying principles of *Daubert* to exclude any evidence at any phase of this case.

To the contrary, in assessing at the phase two hearing whether Carter made a sufficient showing under § 980.09(2) to

entitle him to a trial, the court considered in some detail the report of Carter's expert witness (196:40-46, 54).

The court speculated that the testimony of Carter's expert might not be admissible under *Daubert* at a trial (196:48), but never actually ruled that it would not be admissible. Indeed, since the court did not order any trial, there was no occasion to actually make any such ruling.

Whether or not a court acts as a gatekeeper to determine the admissibility of expert testimony, the reliability of expert testimony is still an important issue in a trial. Reliability must still be determined by the trier of fact. *State v. Fischer*, 2010 WI 6, ¶ 36, 322 Wis. 2d 265, 778 N.W.2d 629; *City of West Bend v. Wilkens*, 2005 WI App 36, ¶ 23, 278 Wis. 2d 643, 693 N.W.2d 324.

So in determining whether a person seeking to be discharged from his commitment is entitled to a trial because a jury would likely find that he is no longer sexually violent, a court should consider whether the expert testimony on which the person relies is firmly rooted in facts, professional knowledge and research. *Richard*, 353 Wis. 2d 219, ¶ 17. *See State v. Arends*, 2010 WI 46, ¶ 39, 325 Wis. 2d 1, 784 N.W.2d 513.

In this case, the circuit court properly considered the principles of reliability discussed in *Daubert* to determine, under the test set forth in § 980.09(2), whether a reasonable jury would likely conclude that Carter no longer met the criteria for commitment as a sexually violent person (196:40-46, 54).

The court indicated that the *Daubert* analysis would be relevant in trying to determine whether there was a likelihood of success because, if Carter's expert testimony was not sufficiently reliable to even be admissible into evidence if present § 974.02(1) applied, it is not likely that a jury would find this testimony sufficiently reliable to support a conclusion

that Carter was no longer a sexually violent person in a case where the rule of exclusion did not apply (196:15).

In other words, a jury would likely reject Carter's expert testimony as unreliable in a case where the *Daubert* gatekeeping function did not apply for the same reasons that a court would reject this testimony as unreliable if *Daubert* applied.

Carter's attorney did not perform deficiently by not objecting to the circuit court's use of the *Daubert* analysis for a completely proper purpose. Nor was Carter prejudiced by his attorney's declination to object because the court's use of the *Daubert* analysis was completely proper in this case.

Carter failed to prove that his attorney was ineffective for failing to object where the court did apply present § 974.02(1) or the rule of the *Daubert* case incorporated in this statute to determine that any evidence was not admissible in this case.

II. Carter failed to prove that the recent revision of the statute relating to petitions for discharge is unconstitutional.[2]

A statute may be challenged as unconstitutional either on its face or as applied. *Tammy W.G. v. Jacob T.*, 2011 WI 30, ¶ 46, 333 Wis. 2d 273, 797 N.W.2d 854.

Carter does not specifically say whether he is challenging the recent amendments to Wis. Stat. § 980.09 on their face or as applied to him. But the nature of his argument seems to be that

[2] The constitutionality of the current version of Wis. Stat. § 980.09 is also being challenged on slightly different grounds in *In re the commitment of David Hager, Jr., State of Wisconsin v. David Hager, Jr.*, Case No. 2015AP330 (District III).

the revisions are unconstitutional as applied to everyone, i.e., that they are unconstitutional on their face.

Besides, a claim that the present statute is unconstitutional as applied would have been forfeited by failing to raise it in the circuit court before the entry of the order appealed from. *See State v. Bush*, 2005 WI 103, ¶ 17, 283 Wis. 2d 90, 699 N.W.2d 80; *State v. Cole*, 2003 WI 112, ¶ 46, 264 Wis. 2d 520, 665 N.W.2d 328.

A facial constitutional challenge attacks the law itself, claiming it is unconstitutional from beginning to end, and cannot be constitutionally applied under any circumstances. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46; *Society Ins. v. LIRC*, 2010 WI 68, ¶ 26, 326 Wis. 2d 444, 786 N.W.2d 385.

A facial challenge is extraordinarily difficult because it requires the challenger to establish that the statute is unconstitutional in all its applications, and that there is no situation where the law would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *State v. Pocian*, 2012 WI App 58, ¶ 6, 341 Wis. 2d 380, 814 N.W.2d 894; *State v. Smith*, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90; *State v. Radke*, 2002 WI App 146, ¶ 4, 256 Wis. 2d 448, 647 N.W.2d 873, *aff'd*, 2003 WI 7, 259 Wis. 2d 13, 657 N.W.2d 66.

On a facial challenge, it is presumed that the statute is constitutional. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46; *Society Ins.*, 326 Wis. 2d 444, ¶ 26. The challenger has a heavy burden to overcome this presumption. *Tammy W.G.*, 333 Wis. 2d 273, ¶ 46. He must establish that the statute is unconstitutional beyond a reasonable doubt. *Dane County DHS v. Ponn P.*, 2005 WI 32, ¶¶ 16-18, 279 Wis. 2d 169, 694 N.W.2d 344; *Cole*, 264 Wis. 2d 520, ¶¶ 11, 17 (and cases cited). A court must indulge every presumption and resolve every doubt in favor of sustaining the law. *Ponn P.*, 279 Wis. 2d 169, ¶ 17; *Cole*, 264 Wis. 2d 520, ¶ 11.

Carter's primary claim is that the change in the standard of proof a sexually violent person must meet to get a trial on a petition for discharge violates due process. Although he does not clearly delineate the distinction, Carter appears to be arguing that this change violates both procedural and substantive due process.

Any procedural due process claim is easily disposed of by a footnote in *Alger*.

As the court stated, under a procedural due process analysis, a court must determine whether a person has a liberty interest of which he has been deprived, and if so, whether the procedures used to deprive him of his interest were constitutionally sufficient. *Alger*, 360 Wis. 2d 193, ¶ 39 n.15.

Although Carter may have a protectable liberty interest in freedom from restraint, he has no protectable interest in the procedures used to deprive him of that interest, including a trial. *Trinity Petroleum*, 302 Wis. 2d 299, ¶¶ 57-62. *See Alger*, 360 Wis. 2d 193, ¶ 43.

In any event, the standard of proof now imposed by § 980.09, a likelihood of success, is essentially the same one that applies in any case where a person in confinement wants an evidentiary hearing in a proceeding challenging his restraint.

An evidentiary hearing is not required if the motion presented by the defendant does not allege facts sufficient to show that he would be entitled to relief, or if the record conclusively shows that he is not entitled to relief. *Balliette*, 336 Wis. 2d 358, ¶ 18; *Allen*, 274 Wis. 2d 568, ¶¶ 9-12, 15. *See also, e.g., Beidel v. Sideline Software, Inc.*, 2013 WI 56, ¶¶ 33-35, 348 Wis. 2d 360, 842 N.W.2d 240 (a motion for summary judgment must make a prima facie case by showing a defense that would defeat the plaintiff); *State v. Salmon*, 163 Wis. 2d 369, 375, 471

N.W.2d 286 (Ct. App. 1991) (a petition for leave to appeal a nonfinal order must show that there is a likelihood of success on the merits).

The change in the standard of proof necessary to get a hearing on a discharge petition presents no procedural due process problem.

A substantive due process claim is governed by the principles discussed in *Alger.*

A substantive due process claim is analyzed under the rational basis test unless the challenged legislation implicates a fundamental right or discriminates against a protected class. *Alger*, 360 Wis. 2d 193, ¶ 39.

Sexually violent persons are not a protected class. And the procedures available for a trial in a civil commitment proceeding do not implicate a fundamental right, so the rational basis test applies. *Alger*, 360 Wis. 2d 193, ¶¶ 42-44.

Under a rational basis review, legislation will be upheld unless it is patently arbitrary and has no rational relationship to a legitimate government interest. *Alger*, 360 Wis. 2d 193, ¶ 39. This deferential test is satisfied if any reasonably conceivable state of facts could provide a rational basis for the law, regardless of whether the legislation was actually based on that reason. *Alger*, 360 Wis. 2d 193, ¶ 50.

Carter has the burden to prove beyond a reasonable doubt that there is no rational basis for the change in the standard of proof made by 2013 Wisconsin Act 84, §§ 21, 23. *Alger*, 360 Wis. 2d 193, ¶ 50. *See Ponn P.*, 279 Wis. 2d 169, ¶ 16-18; *Cole*, 264 Wis. 2d 520, ¶¶ 11, 17.

The old standard of proof, which entitled a committed person to a trial if a trier of fact "may" conclude that the person's condition had changed, was next to no standard at all. A court was required to order a discharge trial if the petition for discharge alleged any facts that would support a finding in favor of the person seeking discharge. *Arends*, 325 Wis. 2d 1, ¶¶ 41-43.

A sexually violent person like Howard Carter could just toot and come on into a trial at any time, time after time, *see* Wis. Stat. § 980.09(1), even when it was highly unlikely that a jury would ever decide in his favor. So a person who was peeved about his commitment could file repeated petitions for discharge and repeatedly get potentially lengthy trials just to harass the state, putting undue pressure on the judicial system for no good reason.

By requiring a committed person to show that he had a likely chance of success, the legislature gave courts a tool to weed out unmeritorious petitions, and to save them from having to hold numerous trials that would be just a waste of time and resources. *See* Wisconsin Legislative Council, *Joint Legislative Council's Report of the Special Committee on Supervised Release and Discharge of Sexually Violent Persons*, JLCR 2013-03 (Feb. 19, 2013).

Ensuring the fair treatment of all litigants, avoiding the disruption of litigation, and preserving judicial resources are legitimate government interests. *Alger*, 360 Wis. 2d 193, ¶ 55.

Therefore, the "mere limitation of a committed person's access to supervised release [or discharge] does not impose a restraint to the point where it violates due process." *State v. Rachel*, 2002 WI 81, ¶ 66, 254 Wis. 2d 215, 647 N.W.2d 762.

Carter also asserts that the change in the standard of proof violates his right to access the courts, but never develops this claim separately from his due process claim. Indeed, Carter fails to show how he was denied access to the courts when he filed a petition for discharge and numerous other papers in the circuit court, had three hearings on his petition in the circuit court, filed an appeal in this court, filed a brief in support of his appeal, and was actually granted supervised release by the circuit court. *See State ex rel. LeFebre v. Israel*, 109 Wis. 2d 337, 341, 325 N.W.2d 899 (1982).

So this court may decline to consider this claim separately. *State v. West*, 179 Wis. 2d 182, 195-96, 507 N.W.2d 343 (Ct. App. 1993), *aff'd*, 185 Wis. 2d 68, 517 N.W.2d 482 (1994); *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992); *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980).

CONCLUSION

It is therefore respectfully submitted that the order of the circuit court should be affirmed.

Dated: November 9, 2015.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,312 words.

Dated this 9th day of November, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 9th day of November, 2015.

_____

Thomas J. Balistreri
Assistant Attorney General