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State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP000005

In re the commitment of Kenneth William Jaworski

State of Wisconsin,

Petitioner-Respondent,

v.

Kenneth William Jaworski,

Respondent-Appellant.

On appeal from a judgment of the Milwaukee County Circuit Court, The Honorable Timothy Witkowiak and The Honorable Dennis Cimpl, presiding

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Respondent-Appellant's Brief and Appendix

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Table of Authority

Arizona v. Youngblood, 488 U.S. 51 (1988) ……. 13

In re Commitment of Virlee, 259 Wis. 2d 718, 657 N.W.2d 106 (2003) 11

State v. Allen, 274 Wis. 2d 568, 682 N.W.2d 433 (2004) ……... 10

State v. Becker, 74 Wis. 2d 675, 247 N.W.2d 495 (1976) 12

State v. Lettice, 205 Wis. 2d 347, 556 N.W.2d 376 (Ct. App. 1996) 13

State v. Love, 2005 WI 116 (Wis. 2005) ……. 11

Table of Contents

Statement on Oral Argument and Publication …… 3

Statement of the Issue …… 3

Summary of the Argument …… 4

Statement of the Case …… 5

Argument …….. 9

The circuit court erred in denying Jaworski's postjudgment motion without an evidentiary hearing because the motion alleged sufficient detailed facts which, if true, would support the conclusory allegation the DOC acted in bad faith when it recalculated Jaworski's release date.

Conclusion …….. 17

Certification as to Length and E-Filing

Appendix

Statement on Oral Argument and Publication

The issue presented by this appeal is unique, and it is not squarely controlled by existing case law. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issue

I. Whether the circuit court erred in denying Jaworski's postjudgment motion, without an evidentiary hearing, where Jaworski made a conclusory allegation that the Department of Corrections deliberately manipulated his release date from prison so as to give the state additional time to file a petition under Chapter 980; and then substantiated that conclusory allegation with factual allegations that the "recalculation" was done as Jaworski neared the end of his sentence, that the recalculation was done contrary to the DOC's own policy, and that the DOC ignored Jaworski's objections to the recalculation.

Answered by the circuit court: The circuit court denied the motion without an evidentiary hearing. The judge acknowledged that the motion alleged that the DOC deliberately miscalculated Jaworski's release date in order to manipulate the deadline for filing the Chapter 980 petition, but, according to the circuit judge, the motion does not, "[G]ive me any-- any

reason to believe that allegation, and that's what I need. I need some reason to believe that allegation."

Summary of the Argument

This case involves a Sexually Violent Person petition that pended against Jaworski for some eight years. For much of that time, Jaworski filed various pleadings with the circuit court, and also with the appellate courts, alleging that the Department of Corrections (DOC) deliberately miscalculated his release date in order to manipulate the time for filing the SVP petition. For the most part relying on *State v. Virlee*, the circuit court never conducted an evidentiary hearing into Jaworski's claim.

Finally, in a postjudgment motion, Jaworski made the specific conclusory allegation that the DOC, in bad faith, miscalculated his release date in order to manipulate the time for filing the SVP petition. Jaworski's motion further alleged various facts to support the conclusory allegation. He claimed that the recalculation was done near the end of his sentence, which made timing suspect. He alleged that the "miscalculation" was not a math error, but done contrary to the DOC's own policy. Finally, Jaworski alleged that the DOC ignored his objections to the recalculation. Taken together, these specific factual allegations are sufficient to support the conclusory allegation that the DOC acted in bad faith.

Nonetheless, the circuit court denied Jaworski's postjudgment motion without conducting an evidentiary hearing, reasoning the allegations of the motion do not give the court any reason to believe that Jaworski's claim that the DOC acted in bad faith is true.

As will be set forth in more detail below, the supporting factual allegations are sufficient to support the conclusory allegation that the DOC acted in bad faith.

Statement of the Case[1]

On March 24, 2006, the state filed a petition alleging that the respondent-appellant, Kenneth Jaworski (hereinafter "Jaworski") was a sexually violent person ('SVP") under Chapter 980, Stats. (R:3) Probable cause was found. Jaworski denied the allegations of the petition, and he demanded a jury trial.

On May 20, 2008, Jaworski filed a motion to dismiss the SVP petition, alleging that the Department of Corrections had miscalculated his release date from prison, and that by the time the SVP petition was filed, he had actually passed his mandatory release date. (R:21)[2] Thus, according to Jaworski, the SVP petition was untimely filed. In his various filings, the

[1] The issue on this appeal is primarily procedural. Thus, the brief will not set forth a separate statement of the facts. The facts, as necessary for an understanding of the issue, will be set forth as needed.

[2] § 980.02(1m) currently provides that a sexually violent person petition must be filed before the person is released from prison.

theme developed that the DOC had deliberately miscalculated Jaworski's release date in order to manipulate the time for filing the SVP petition.

On June 5, 2008, the circuit court denied Jaworski's motion to dismiss. (R:184-5, 6) According to the circuit judge, regardless of whether Jaworski's release date was miscalculated, in deciding when to file the SVP petition, the state has the right to rely upon the release date that was actually set. Nevertheless, on June 23, 2008, the prosecutor informed the court that she had obtained a letter from Carole Briones, the person who was responsible for calculating Jaworski's release date, confirming that the DOC did, in fact, miscalculate Jaworski's release date. (R:185-3) The error resulted in Jaworski being held in prison longer than he should have been. Thus, it was true that Jaworski should have been released prior to the filing of the SVP petition.

Jaworski sought leave to appeal this non-final order, which was denied by the court of appeals. Later, Jaworski petitioned the court of appeals for *habeas corpus* relief, raising the same issue. On April 22, 2009, the court of appeals denied the petition (R:43). Significantly, though, the court of appeals wrote that, "Jaworski's petition raises numerous factual issues that this court cannot resolve. (internal citation omitted) (appellate court is constitutionally precluded from finding facts). Consequently, the basic premises of Jaworski's petition

requires fact-finding in the circuit court." [3]

Jaworski continued in his attempts to have the court schedule the issue for an evidentiary hearing, but no hearing was ever conducted.

Ultimately, Jaworski waived his right to a jury trial (R:147), and the matter proceeded to a bench trial beginning on April 7, 2014. By this time, Jaworski was proceeding *pro se* with standby counsel. After two days of testimony, the court found that the State had proved that Jaworski was a sexually violent person, and ordered him committed for treatment. (R:149)

During trial, Jaworski sought to call Carol Briones[4] as a witness. Jaworski told the court, though. that he was unable to subpoena her for trial. Attempts were made to have Briones testify by telephone, but the judge indicated that the clerk had received a message that Briones was not available to testify by telephone either. (Tran. 4-7-14 p.m. p. 115). Significantly, though, the circuit court ruled:

> The problem is that you can't bring up, I should have been released earlier. That's not relevant based upon these two decisions now . . .
>
> So the testimony of Ms. Briones I don't know would be relevant to the hearing anyway, because what I'm hearing from you is your concern was that she calculated that you should have

[3] Jaworski attempted to employ other means of seeking appellate review of this decision. For the sake of clarity, those means will not be set forth. Jaworski also attempted to raise the issue again before the circuit court. Again, for sake of clarity, it is sufficient to indicate that the circuit court continued to deny Jaworski's motion.

[4] Recall that Briones was the employee of the DOC who wrote a letter to the court documenting the fact that Jaworski's release date was improperly calculated, and that the Department's own procedures were not followed.

been released earlier. That's not relevant.

(Tran. 4-7-14 p. 118). Thus, Jaworski was again thwarted in his effort to create a factual basis for his claim.

On June 3, 2014, Jaworski-- still proceeding *pro se*-- filed a notice of appeal, which was ultimately construed by the court of appeals to be a notice of intent to pursue post-judgment relief. (R:150)[5] Jaworski sought, and was appointed, counsel for post-judgment and appellate proceedings.

On November 2, 2015, Jaworski filed a postjudgment motion seeking a due process hearing into his claim that the state deliberately manipulated his release date in order to allow more time to file a SVP petition. (R:166; Appendix B). In sum, Jaworski alleged that he had been continuously asserting this issue throughout the course of the proceedings, but that the court had never conducted an evidentiary hearing to resolve Jaworski's factual claims. This, Jaworski pointed out, was despite the fact that the court of appeals had noted in its order denying his petition for *habeas corpus* that a factual basis is necessary in order to decide Jaworski's claim.

The state filed no written response to Jaworski's motion.

The circuit court set the postjudgment motion for a scheduling hearing on December 10, 2015. At this hearing, the State orally asserted that Jaworski's postjudgment motion failed to allege sufficient facts to warrant an evidentiary hearing, and,

[5] By order dated July 9, 2014, the court of appeals dismissed the appeal, and ordered that the notice of appeal be considered a notice of intent to pursue post-judgment relief.

therefore, moved to deny the motion without hearing. (Tran. 12-10-15, pp. 2, 3; Appendix C) Jaworski objected to the court ruling on the State's motion without granting Jaworski time to respond to the State's oral request. The court denied this request. *Id.*

Thereafter, the court ruled:

> [Y]our motion doesn't give me allegations to pass the smell test. I mean, you make allegations that they deliberately miscalculated his release date in order to manipulate the deadline for filing a Chapter 980 petition, but you don't give me any-- any reason to believe that allegation, and that's what I need. I need some reason to believe that allegations. So if you haven't got any reason, I'm going to deny your motion.

(Tran. 12-10-15 p. 4; Appendix C)

Argument

I. The circuit court erred in denying Jaworski's postjudgment motion without an evidentiary hearing because the motion alleged sufficient detailed facts which, if true, would support the conclusory allegation the DOC acted in bad faith when it recalculated Jaworski's release date.

Jaworski's postjudgment motion alleged that the DOC in bad faith miscalculated his release date so as to manipulate the time for filing the SVP petition. Jaworski supported that conclusory allegation with specific factual allegations that the time of the recalculation was suspect, the recalculation was

done contrary to the DOC's own policy, and the DOC ignored Jaworski's objections to the recalculation. Taken together, these specific factual allegations are more than sufficient to obligate the circuit court to conduct an evidentiary hearing.

A. Standard of appellate review.

The standard for resolving Jaworski's claim that the circuit court improperly denied his postjudgment motion without conducting an evidentiary hearing is set forth in *State v. Allen,* 2004 WI 106, P9, 274 Wis. 2d 568, 682 N.W.2d 433:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First, we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. [*State v.] Bentley,* 201 Wis. 2d 309-10, 548 N.W.2d 50. [682 N.W.2d 433 (1996)] If the motion raises such facts, the circuit court must hold an evidentiary hearing. Id. at 310; *Nelson v. State*, 54 Wis. 2d 489, 497, 195 N.W.2d 629 (1972). However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing. *Bentley*, 201 Wis. 2d at 310-11; *Nelson*, 54 Wis. 2d at 497-98. We require the circuit court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." *Nelson,* 54 Wis. 2d at 498. S*ee Bentley*, 201 Wis. 2d at 318-19 (quoting the same). We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard. *In re the Commitment of Franklin*, 2004 WI 38, P6, 270 Wis. 2d 271, 677 N.W.2d 276;

Bentley, 201 Wis. 2d at 311.

(emphasis provided) *See, also, State v. Love*, 2005 WI 116, P27 (Wis. 2005).

B. Jaworski's claim is not controlled by Virlee

The State and the circuit court have consistently contended that this issue is resolved by, *In re Commitment of Virlee*, 2003 WI App 4, ¶ 16, 259 Wis. 2d 718, 727, 657 N.W.2d 106, 11. In *Virlee,* the circuit court modified *Virlee's* sentence after the Chapter 980 petition had already been filed. The court of appeals held that this did not deprive the court of competency to proceed on the Chapter 980 petition. Significantly, though, there was no allegation in *Virlee* that the DOC, or any other state agency, acted in bad faith. Here, Jaworski claims that the DOC did act in bad faith in miscalculating his release date. If this is true, it would violate due process to permit the State take advantage of such misconduct. Thus, a rote application of *Virlee* does not decide the issue.

Here, Jaworski has repeatedly made the claim that the DOC acted in bad faith, and with intent to manipulate the deadline for filing a Chapter 980 petition, in miscalculating his release date. This claim has never been adjudicated by the circuit court. If it is true that the DOC acted in bad faith and with intent to manipulate the deadline for filing a Chapter 980

petition, it would certainly violate due process to permit the State to take advantage of such misconduct.

In every other area of the law, seemingly benign conduct by the state, done in bad faith and with intent to manipulate the system, has been found to violate due process.

For example, where an offense is committed by a juvenile, but the state files charges only after the defendant has turned seventeen[6], the court must conduct a due process hearing to determine whether the delay in filing charges was done in bad faith.

> [W]here the filing is 'delayed in order to avoid juvenile court jurisdiction,' the circuit court can maintain jurisdiction only after a due-process hearing.
>
> We conclude that the hearing referred to in Miller is the hearing to determine whether the delay in charging was in fact occasioned by a deliberate effort to avoid juvenile court jurisdiction. . . .
>
> In *Miller, supra*, the district court stated:
>
> 'Administrators of a state juvenile system may not manipulate administrative procedures so as to avoid state and constitutional procedural rights and meant to protect juveniles.' (at 766)
>
> It is this manipulation of the system for the purpose of avoiding the juvenile court that is proscribed. Miller does not address itself to situations where the juvenile system is not manipulatively avoided.

State v. Becker, 74 Wis. 2d 675, 677, 247 N.W.2d 495, 496 (1976)

[6] In other words, after the Children's Court lost jurisdiction

Similarly, where the state has failed to preserve evidence[7] in a criminal case, if the defendant proves that the state agents acted in bad faith, with intent to manipulate the system, due process requires that the case be dismissed. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 337, 102 L. Ed. 2d 281 (1988).

Finally, where, on the eve of trial, the state charges a defendant's lawyer with crimes in order to deprive the defendant of effective assistance of counsel, due process is violated. *State v. Lettice,* 205 Wis. 2d 347, 351, 556 N.W.2d 376, 378 (Ct. App. 1996)

A common thread that runs through each of these cases is that the state's conduct is seemingly legal and benign. However, because of the serious consequences to the defendant, the court requires a due process hearing to ensure that the state's behavior was not done in bad faith and with an intent to manipulate the system.

In Jaworski's case, an honest mistake in calculating Jaworski's release date would bring the case squarely within the holding of *Virlee*. However, Jaworski's motion alleges that this *was not an honest mistake* by the DOC. Thus, the court must conduct a due process evidentiary hearing to determine whether the state-- through any of its agencies-- acted in bad faith in calculating Jaworski's release date. If so, due process

[7] This is to be distinguished from the failure to preserve exculpatory evidence, which automatically violates due process.

requires the case to be dismissed with prejudice.

C. The factual allegations of Jaworski's motion are sufficient to support the conclusory allegation that the DOC acted in bad faith.

Jaworski's motion is attached as Appendix B. It is not necessary to restate each of the factual allegations. The important allegations of the motion are that Jaworski's release date was improperly calculated, and this was substantiated by the letter from Carol Briones; that had Jaworski's release date been properly calculated, the filing of the Chapter 980 petition would have been untimely; and, finally, Jaworski alleged that the DOC did this deliberately in order to manipulate his release date so as to make the filing of the Chapter 980 petition timely. Admittedly, this last claim is a conclusory allegation. Under *Allen,* a conclusory allegation must have sufficient supporting factual details alleged to support an inference that the conclusory allegation may be true.

To substantiate his claim that the DOC acted deliberately and in bad faith, Jaworski alleged that the improper recalculation was done as he reached the end of this sentence, and, when Jaworski objected to the recalculated, and pointed out the error, the D.O.C. ignored him. Additionally, Jaworski referred to the Briones letter in which it was stated that, "[T]he Department of Corrections' policy on good time wasn't

followed."

Certainly, these detailed factual allegations, considered together and taken to be true, permit an inference that the DOC acted in bad faith. The timing of the recalculation is suspect. That is, it occurred as Jaworski reached the end of his sentence; which, coincidentally, is also the time when the State must make the decision whether to proceed with the filing of a SVP petition. Moreover, the DOC did not follow its own policy in calculating Jaworski's release date. This fact demands an inference that the DOC acted deliberately. It was not merely a math error. Further, when Jaworski objected to the recalculation, his objections were ignored. Again, this fact demands an inference that the DOC was acting in bad faith. They had not followed their own procedure and, when this was pointed out to them, they refused to correct it.

Certainly, then, the allegations of Jaworski's motion, if taken to be true, are sufficient to support his conclusory allegation that the DOC. acted in bad faith. Under *Allen*, it was mandatory that the circuit court conduct an evidentiary hearing.

C. Additionally, the circuit judge did not assume the factual allegations of Jaworski's motion to be true, and, therefore, the order denying the motion was also based on a mistake of law.

In deciding whether to set a postjudgment motion for

hearing, the circuit judge is required to assume that the allegations of the motion are true. Recall that, in *Allen*, *supra*, the court made clear that the judge must, "[D]etermine whether the motion on its face alleges sufficient material facts that, *if true,* would entitle the defendant to relief. This is a question of law that we review de novo.." *Allen,* 2004 WI 106, ¶ 9.

In denying Jaworski an evidentiary hearing, the circuit judge said, "[Y]ou make allegations that they deliberately miscalculated his release date in order to manipulate the deadline for filing a Chapter 980 petition, but you don't give me any-- any reason to believe that allegation, and that's what I need. I need some reason to believe that allegation."

Under the law, though, Jaworski is not required to give the judge a reason to believe his factual allegations. Rather, in deciding whether to set a postjudgment motion for hearing, the judge is required to assume that the factual allegations of the motion are true.

Perhaps what the circuit judge meant to say-- but did not-- is that Jaworski was required to make more than a conclusory allegation that the DOC. acted in bad faith. As set forth in the preceding section, though, Jaworski did allege sufficient detailed fact which, if taken as true, would support the conclusory allegation that the DOC acted in bad faith.

Thus, the circuit court denied Jaworski an evidentiary hearing based on a mistake of law.

Conclusion

For these reasons it is respectfully requested that the court of appeals reverse the circuit court's order denying Jaworski's post-judgment motion, and remand the matter to the circuit court with instructions that the circuit court shall conduct a hearing into Jaworski's post-judgment motion. .

Dated at Milwaukee, Wisconsin, this _____ day of March, 2016.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 3836 words.

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I hereby certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this _____ day of March, 2016:

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Jeffrey W. Jensen

State of Wisconsin
Court of Appeals
District 1
Appeal No. 2016AP000005

In re the commitment of Kenneth William Jaworski

State of Wisconsin,

Petitioner-Respondent,

v.

Kenneth William Jaworski,

Respondent-Appellant.

Respondent-Appellant's Appendix

A. Jaworski's postjudgment motion
B. Transcript of circuit court's bench decision denying the motion without a hearing
C. Order of commitment

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning

regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this ____ day of March, 2016.

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Jeffrey W. Jensen