STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

In re the commitment of Michael L. McGee:

State of Wisconsin,

Petitioner-Respondent,

District: 2
Appeal No. 2016AP01082
Circuit Court Case No. 2003CI000001

County of Kenosha,

Intervenor-Appellant-Cross-Respondent,

v.

Michael McGee,

Respondent-Respondent-Cross-Appellant,

Appeal from Circuit Court for Racine County
The Honorable Allan B. Torhorst, Presiding
Case No. 03-CI-000001

INTERVENOR-APPELLANT-CROSS RESPONDENT'S BRIEF

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STATEMENT OF THE ISSUES

1. Was the Supervised Release Plan appropriate and did the Court consider the risk to the community in approving the proposed residence?

***Trial Court Answer*: Yes.**

2. Did Department of Human Services ("DHS") follow the statutory requirements set forth in Wis. Stat. § 980.08(4) in light of recent legislative changes?

***Trial Court Answer*: Yes.**

STATEMENT ON ORAL ARGUMENT

The Intervenor-Appellant-Cross Respondent does not request oral argument because the legal issues presented are straightforward and the facts are undisputed.

STATEMENT ON PUBLICATION

According to the criteria of Wis. Stat. § 809.23(1)(a), publication of this case is justified. This is a case of substantial and continuing public interest since it involves the release of a sexually violent person previously committed under Chapter 980 of the Wisconsin Statutes. Moreover, resolution of this case will clarify what is required by DHS and the Trial Court when releasing an individual on a Supervised Release Plan and attempting to place the offender out of county, especially in light of recent legislative changes. There are few reported cases in Wisconsin addressing the statutory requirements of Chapter 980 and no cases addressing how 2015 Wisconsin Act 156 is intended to be interpreted and applied. Accordingly, this presents an opportunity for the Court to enunciate, modify or clarify the law.

STATEMENT OF THE CASE

This case involves Chapter 980 of the Wisconsin Statutes and DHS' proposed placement and Supervised Release Plan of a sexually violent person. Specifically, in May of 2015, Kenosha County was notified that Michael McGee ("McGee"), a Racine County resident and sexually violent person committed under Chapter 980 of the Wisconsin Statutes, was scheduled to be released and placed in Kenosha County. Kenosha County reviewed the proposed Supervised Release Plan and had significant concerns about the proposed placement and the steps DHS took before making this placement determination.[1] (R. 38.)

Kenosha County intervened in the action and asked that approval of the Supervised Release Plan be rescinded. (R. 38.) The Circuit Court granted Kenosha County's request for intervention and set the matter for an evidentiary hearing. (R. 81 at 37-38.)

Kenosha County asked for the Supervised Release Plan to be rescinded because it placed the community at risk. (R. 38.) McGee was convicted of second degree sexual assault. (R. 1, R. 31, R. 82 at 48.) After he was released, his parole was revoked for sexually molesting a ten-year-old boy. (R. 82 at 58; R. 53; A. App. at 116.)

[1] In citing the record on appeal, this brief refers to docket entries in the record with the abbreviation R.__ at __. Citations to the Intervenor-Appellants' Appendix are referred to as A.App. at __.

DHS described McGee's targeted victim as "Adult females; prepubescent males." (R. 82 at 58, A. App. at 116.) Nonetheless, DHS was proposing to place McGee in a residence located right next door to a one-year-old male child. (R. 82 at 59; R. 37, A. App. at 110.) There were no fences or barriers between these residences. (R. 82 at 81; R. 37.) Kenosha County asserted that this presented a substantial risk to the community and warranted rescission of the Supervised Release Plan. (R. 38.)

In addition, DHS and Racine County failed to meet their obligations under the statutes. There was no evidence that the Racine County Trial Court or DHS considered or applied the recent legislative changes made to Wisconsin Statute § 980.08(4) by 2015 Wisconsin Act 156 *before* attempting to move forward with the placement. Contrary to the new statutory requirements, DHS did not consult with local law enforcement in Kenosha County about the proposed placement of McGee. (R.40, A. App. 145-146; R. 41, A. App. 147-151; R.82 at 11-12, 27-28.) DHS did not consult with the Victim Witness Coordinator for Kenosha County before approving the placement of McGee. (R. 39, A. App. 154-155; R. 82 at 36-40.) Moreover, Judge Torhorst did not have a "good cause" hearing after the law changed, even though DHS urged the Court to review the Order for placement in light of new legislative changes. (R. 31, A. App. at 107.) The proposed placement

was also within 1,500 feet of a Kenosha County Bike Trail which is considered a "park" under Kenosha County Ordinance § 10.01(3). (R. 34, A. App. at 156-157; R. 82 at 22-23; R. 48.)

The parties participated in an evidentiary hearing on May 24, 2016. (R. 82.) That very same day, Judge Torhorst issued a written decision denying Kenosha County's motion to rescind the Supervised Release Plan and ordered placement of McGee to occur within ten (10) days of the decision. (R. 57, A. App. at 119-125.)

Kenosha County filed a Motion to Stay the decision pending the appeal with Racine County on May 26, 2016. Judge Torhorst heard and denied this motion on May 31, 2016. (R. 68, A. App. at 126-144.) Kenosha County also filed an ex parte emergency motion to stay with the Court of Appeals and the stay was temporarily granted on May 31, 2016. After additional briefing, the stay was granted by the Court of Appeals on July 6, 2016. Kenosha County now asks this Court to review the findings and rescind approval of the Supervised Release Plan.

STATEMENT OF FACTS

McGee is considered a violent sex offender. McGee was convicted of Second Degree Sexual Assault, in Racine County Circuit Court, under case number 87-CF-436. (R. 1; R. 31; R. 82 at 48.) He broke into an adult female stranger's residence, threatened and raped

her. (R. 82 at 58; R. 53; A. App. 116.) McGee then violated his conditions of release (parole) by sexually fondling a ten-year-old male. (Id.)

Specifically, it was reported that McGee's parole was revoked for the following offense: "while intoxicated and under the influence of drugs, offender fondled a 10-year-old male related to him." (R. 53, A. App. 116; R. 82 at 58). His targeted victims spanned gender and ages and were described as "[a]dult females; prepubescent males." (R. 53, A. App. 116; R. 82 at 58.) McGee was further subject to a Civil Commitment proceeding, under Racine County Case Number 03-CL-00001, whereby he was found to be a Sexually Violent Person as defined under Wisconsin Statutes § 980. (R. 1.)

In November 2013, McGee petitioned for discharge. (R. 3.) The State contested his request for discharge for several years. In March of 2015, the State and McGee eventually reached a stipulation. (R. 74.) McGee withdrew his petition for discharge and agreed to have six months of counseling at Sand Ridge Treatment Facility. (Id.) He then agreed to be discharged on Supervised Release. (Id.)

The parties had a status conference on June 22, 2015. (R. 76.) During this time, McGee's counsel informed the Court that there was no housing available in Racine County. (Id.) McGee's counsel stated there was housing available in Kenosha and asked the Court to allow

DHS to look at Kenosha County for placement. (Id.; R. 19, A. App. 101-102.) When Judge Torhorst questioned the appropriateness of placing in other counties, District Attorney W. Richard Chiapete explained it was necessary "because of the ordinances that a number of the counties have." (R. 76 at 4.) Judge Torhorst signed the order giving DHS authority to look for housing in both Kenosha County and Racine County. (R. 19; A. App. 101-102.)

At a status conference held on October 5, 2015, the parties again went before Judge Torhorst. (R. 77 at 1-5.) During this time, District Attorney Chiapete expressed that the State needed more time to find a placement. McGee's attorney stated there were "issues right now with finding placements as a result of these local zoning ordinances." (R. 77 at 2.)

On January 14, 2016, Judge Torhorst ordered the Racine County Department under Wis. Stat. § 51.42 to prepare a report identifying potential residential options for community placement of McGee and to forward this report to DHS. (R. 27, A. App. at 103-104.) Racine County and DHS proposed a residence in Kenosha County. Specifically, DHS proposed to place McGee at 32200 Geneva Road, Wheatland, Wisconsin, located in Kenosha County (hereinafter referred to as the "Wheatland Property.") (R. 31, A. App. at 110.)

The Wheatland Property is within 1,500 feet of a Kenosha County Bike Trail. (R. 34, A. App. at 156-157; R. 82 at 22-23.) This bike path is considered a "park" under Kenosha County Ordinance § 10.01(3). (R. 48; R. 82 at 23.) This area is also frequented by children. (R. 34, A. App. 156-157; R. 37, A. App. 152-153; R. 82 at 23.) There is also a fishing area near the Wheatland Property which is frequented by families. (R. 34, A. App. 156-157; R. 82 at 22-23.)

The Wheatland Property is also directly adjacent to the residence of Mark Smith-Rogers. (R. 37; A. App. 152-153; R. 82 at 81.) Mark Smith-Rogers has a one-year-old male child that resides with him at the residence. (R. 37, A. App. 152-153; R. 82 at 82.) There are no physical barriers between his home and the Wheatland Property. (R. 82 at 81.) There are also children ranging from age eight to fifteen staying at his home on a regular basis. (R. 37; A. App. 152-153; R. 82 at 82.) No one from DHS contacted Mark Smith-Rogers about McGee's proposed placement at any time before making the placement decision. (R. 37, A. App. 152-153, R. 82 at 83.)

On April 22, 2016, after the law changed, Ms. Angie Serwa from DHS, sent correspondence to Judge Torhorst, along with a copy of the Supervised Release Plan. (R. 31, A. App. 106-115; R. 52.) In this correspondence, DHS specifically asked the Court to revisit the issue of "good cause" and stated the following:

> Given the new requirements under Act 156, which include a narrower definition of 'good cause' for out of county placements, the DHS respectfully requests the Court to determine whether the Court's previous order for a statewide search is still valid. If the Court maintains the order for a statewide search, the DHS has attached an SR plan and rules to this letter proposing the residence in Kenosha County for Mr. McGee.

(Id.) Despite this request and the statements regarding the change in the law, Judge Torhorst failed to revisit the issue of "good cause." There is no evidence in the record that any type of hearing was conducted after DHS sent this request or that any additional evidence was collected. To the contrary, Judge Torhorst stated "that there does not have to be another good cause hearing simply based on the enactment of the Act." (R. 75 at 15; A. App. at 140.)

In the Supervised Release Plan, DHS represented that the Sheriff's Department was advised of McGee's placement and asked to share any concerns. (R. 31; A. App. 106-107, 110-111; R. 52) Specifically, DHS stated as follows:

> As outlined in Act 156, the Sheriff's Department was requested to submit a report to DHS to **provide any information or concerns they may have regarding Mr. McGee's potential placement.** The Sheriff's Department submitted its report on April 1, 2016.

(Id.)(Emphasis added.) DHS stated that the Sheriff Department's report "did not oppose the residence, but did supply information regarding the occupants in the adjacent house." (Id.)

The April 1, 2016 report that DHS referred to was completed by Detective David Smith from the Kenosha County's Sheriff's

Department. (R. 41, A. App. 147-151; R. 82 at 9-13; R. 47; R. 50.) The Department of Corrections asked Detective Smith to evaluate the residence for another potential sexual offender (T. Johnson). (Id.) It had nothing to do with the proposed placement of McGee. (Id.) In this report, however, Detective Smith did inform the Department of Corrections that the home adjacent to the Wheatland Property had a minor child living at the residence. (Id.) At no time did anyone from the Sheriff's Department prepare a report with regard to the placement of McGee at the Wheatland Property. (Id.)

The Supervised Release Plan that was filed with the Trial Court did not state that a one-year-old male child lived in the residence right next door to the Wheatland Property. (R. 31, A. App. 106-115; R. 52; R. 82 at 59.) The Supervised Release Plan did not state that the April 1, 2016 report was for a different sex offender. (R. 31; A. App. 106-115; R. 52.) In the Supervised Release Plan, DHS did not mention or refer to the Kenosha County Bike Path which was located near the residence or the fishing area. (R. 31; R. 52.) Relying on the Supervised Release Plan, with the omissions and misrepresentations, Judge Torhorst signed the Order for Supervised Release on May 4, 2016. (R. 32; A. App. 105.)

Kenosha County was subsequently notified that McGee, a Racine County resident and registered sex offender under Chapter 980

of the Wisconsin Statutes, was scheduled to be released and placed in Kenosha County. Along with the Town of Wheatland, Kenosha County filed a motion to intervene in the Racine County action, requested the Court rescind approval of the Supervised Release Plan and halt placement of McGee in the residence proposed by DHS in the Town of Wheatland, Kenosha County. (R. 38.) The Court denied the Town of Wheatland's motion, but granted Kenosha County's motion to intervene on May 18, 2016 and scheduled an evidentiary hearing on May 24, 2016. (R. 81 at 37-38.)

Before the start of the evidentiary hearing, Racine County District Attorney Chiapete objected to the Supervised Release Plan. (R. 82 at 5-6; R. 59, A. App. 117-118.) He stated that his office was not informed that DHS' proposed placement for McGee was adjacent to a residence with a one-year-old child. (Id.) Given his history with the case and McGee, District Attorney Chiapete stated, both on the record and in written correspondence filed with the Court, that he did not believe the plan adequately met the safety needs of the community as required under Wis. Stat. § 980.08(4)(g). (Id.)

At the hearing, Kenosha County called several witnesses. Detective David Smith testified about the report he authored on April 1, 2016. (R. 82 at 10.) He explained that he was asked by the Department of Corrections to look at the Wheatland Property with

regard to the placement of a different sex offender (T. Johnson), not McGee. (R. 82 at 11). Detective Smith was asked a very specific question with regard to the property. Specifically, he was asked "to determine if any persons under 18 years of age lived in neighboring houses as certain restrictions are in place regarding age." (R. 82 at 18-19; R. 41, R. 47, A. App. 147-151.) Based on this limited question, Detective Smith checked on the two homes that were adjacent to the Wheatland Property. He reported to the Department of Corrections that there was a one-year-old child living in the home adjacent to the Wheatland Property. (Id.)

No one from DHS ever contacted Detective Smith and asked him to weigh in or share any concerns or opinions he had with regard to the placement of McGee. (R. 82 at 11; R. 41) If he had been asked to give his opinion about McGee's placement, Detective Smith would have also looked more closely at the surrounding areas to highlight if there were recreational areas or other things of that nature involved. (R. 82 at 19.) Detective Smith also would have given his opinion that this home was not appropriate for McGee in light of the one-year-old child living next door. (R. 82 at 11-12.)

Sheriff David Beth also testified about the proposed placement of McGee in the Town of Wheatland. (R. 82 at 21-35.) He stated that the residence was near the Fox River and a County Bike Path that the

Sheriff Department patrols. (R. 82 at 22-23.) The Fox River area is a fishing area for locals and families which is a few hundred feet from the Wheatland Property. (R. 82 at 22-23.) The County Bike Path is considered a "park" under Kenosha County Ordinances. (R. 82 at 23; R. 48.)

Sheriff Beth testified that no one from DHS ever consulted with him with regards to the placement of McGee. (R. 82 at 27.) No one from DHS asked him to share any concerns he had with regards to the placement of McGee. (R. 82 at 27.) If Sheriff Beth had been asked to share his concerns, he would have said the placement was inappropriate in light of the bike trail, the fishing area and the one-year-old child living next door. (R. 82 at 28.)

Heather Beasy, the Victim Witness Coordinator for Kenosha County, also testified at the evidentiary hearing. (R. 82 at 37.) As the Victim Witness Coordinator, she must work with the Department of Corrections with regard to the placement of registered sex offenders. (R. 82 at 38.) She notifies any victims before an offender is being released into the community and may work with the community in a variety of ways depending on the offender's level of supervision required. (R. 82 at 38.) She was not notified until May 6, 2016, that McGee was going to be released in Kenosha County. (R. 82 at 38.)

Heather Beasy has never been given the names of any of McGee's victims. (R. 82 at 40.)

Angie Serwa, from DHS, testified about her correspondence and the Supervised Release Plan. (R. 82 at 50-51; R.52, A. App. 106-115; R. 31.) She acknowledged that there was no hearing conducted before Judge Torhorst about the out of county placement after the law changed. (R. 82 at 55.)

Angie Serwa was aware that the proposed placement was next to a one-year-old child and that the male-child fit the description of one of McGee's victims. (R. 82 at 59.) She did not, however, advise the Court that the residence was next to a one-year-old child. (R. 82 at 59.) She did not include the information in the report because she did not believe it was statutorily required. (R. 82 at 61.) She also did not notify the District Attorney's Office that a one-year-old child was living next door to the residence. (R. 82 at 64-65.) She stated that while she asked the Sheriff's Department about the "physical placement" of McGee, DHS was not statutorily required to inform the Sheriff's Department of a specific offender being released. (R. 82 at 63.)

Dr. Steven Kopetskie testified for McGee. Dr. Kopetskie testified about the search efforts made by DHS to find potential residences. DHS examined a number of online databases and contacted

vendors. (R. 82 at 95.) He stated it was difficult to find a place in Racine County because of the statewide restrictions put into place by 2015 Wisconsin Act 156. (R. 82 at 96.) He acknowledged that DHS has not updated any of their lists or postings since February of 2016 since the staff member responsible for this task resigned. (R. 82 at 109.) Dr. Kopetskie testified that they had the Wheatland Property in mind before 2015 Wisconsin Act 156 was published and he sent an email about placing McGee there the day after Act 156 was published. (R. 82 at 108.)

With regards to McGee's victims, Dr. Steven Kopetskie testified that while DHS was aware that McGee was revoked for sexually molesting a child, DHS did not consider that "relevant" in terms of placement because the definition of a serious child sex offender indicates that only convictions should be considered. (R. 82 at 98.) Although he was the supervisor of the unit making the placement recommendation, he did not know what crime McGee was convicted of. (R. 82 at 112.) He did not know any of the details of the alleged crime. (R. 82 at 111.)

He testified that DHS notifies local law enforcement and requests a residence review. (R. 82 at 104.) This is done to ensure that DHS is "aware of any potential circumstances regarding neighbors that might affect….the viability of the placement." (R. 82 at 104.) He

further stated that DHS welcomes any information that law enforcement can provide that would suggest the placement is inappropriate. (R. 82 at 104.) He contended, however, that it was not necessary for law enforcement to know who was going to be placed there. (R. 82 at 115.)

Following the evidentiary hearing, Judge Torhorst took the matter under advisement. Later that same day, he authored a written decision denying Kenosha County's motion and ordering placement of McGee to occur within ten (10) days, which was June 3, 2016. (R. 57, A. App. 119-125.)

Kenosha County timely filed a Motion to Stay the decision pending the appeal with Racine County Circuit Court on May 26, 2016. This motion was heard and denied on May 31, 2016. (R. 75, A. App. 126-144; R. 68.) Kenosha County also filed an ex parte emergency motion to stay with the Court of Appeals and this stay was granted on May 31, 2016. This Court ordered Kenosha County to supplement its motion with the Circuit Court's reasoning for denying the stay and with further argument about the standard of review. The motion to stay was granted by the Court on July 6, 2016.

STANDARD OF REVIEW

This Court is presented with several questions for consideration. The Court needs to examine what was required in light of the new

legislative changes to Wis. Stat. § 980.08 (4) and whether DHS followed the statutory requirements. This includes what level of cooperation was required with law enforcement and the victim witness coordinator in the county of intended placement. The Court also needs to determine whether Racine County was required to have a new "good cause" hearing after the statute was changed. Statutory interpretation and the application of a statute to specific facts are questions of law that are reviewed *de novo*. *See* State v. Stenklyfit, 2005 WI 71, ¶ 7, 281 Wis. 2d 484, 697 N.W.2d 769, *see also* Marotz v. Hallman, 2007 WI 89, 302 Wis. 2d 428, 734 N.W.2d 411.

There are also mixed questions of fact and law for this Court to review. In addition to determining what was required by the statute, this Court needs to determine if DHS met these standards and if the Court was wrong to move forward with the Supervised Release Plan in light of all the facts known. The standard of review of mixed questions is to apply the great weight/clearly erroneous standard to the factual part, while independently reviewing the conclusion of law. Department of Revenue v. Exxon Corp., 90 Wis. 2d 700, 713, 281 N.W.2d 94 (1979), aff'd, 447 U.S. 207 (1980).

ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE SUPERVISED RELEASE PLAN WAS APPROPRIATE AND IT SHOULD BE RESCINDED.

The safety of the community is paramount when the Court approves a supervised release plan. Wisconsin Statute § 980.08(4)(g) states that the court shall review the plan submitted by the department and if the details of the plan "adequately meet the treatment needs of the individual and the safety needs of the community." Furthermore, "[i]f the details of the plan do not adequately meet the treatment needs of the individual or the safety needs of the community, then the court shall determine that the supervised release is not appropriate or direct the preparation of another supervised release plan to be considered by the court." Id. Here, there is no question that the Supervised Release Plan is not appropriate and does not adequately address the safety needs of the community.

McGee was convicted of second degree sexual assault. (R. 31, R. 82 at 48.) When he was released, he was revoked for sexually molesting a ten-year-old boy. (R. 53; A. App. 116, R. 82 at 58.) Specifically, the Sex Offender Special Bulletin Notice states that McGee's parole was revoked for the following offense, "while intoxicated and under the influence of drugs, offender fondled a 10-year-old male related to him." (R. 53, A. App. 116.) Furthermore,

when discussing McGee's targeted victims, DHS notes it includes "Adult females; prepubescent males." (Id.)

Despite these known facts, DHS suggested, and the Trial Court approved, a residence right next door to a one-year-old male child. (R. 31, A. App.106-115; R. 82 at 59.) And, this residence has children ranging from the age of eight to fifteen years of age staying at the home on a regular basis. (R. 37; A. App. 152-153, R. 82 at 82.) DHS was aware of these facts and yet failed to disclose it to the Court and the District Attorney**.** (R. 82 at 59, 60-61, 64-65.) Instead, DHS chose its words very carefully and omitted any reference to the one-year-old child in the Supervised Release Plan. (R. 31, A. App. 106-115.) This was a glaring omission on the part of DHS staff and standing alone this warrants that the approval of the plan be rescinded.

The Trial Court, DHS and counsel for McGee have repeatedly stated that the fact that a one-year-old child was living next door was not relevant under the statutes. They rely on Wis. Stat. § 980.08(4)(f)4 when making this argument.

Wisconsin Statute § 980.08(4)(f)4 states that the supervised release plan should ensure that a person's placement is into a residence that is not within 1,500 feet of a property where a child's primary residence exists if the person is a "serious child sex offender." A "serious child sex offender" is defined as "a person who has been

convicted, adjudicated delinquent or found not guilty or not responsible by reason of insanity or mental disease, defect or illness for committing a crime specified in s. 948. 02 (1) or (2), 948.025(1) or 948.085 against a child who has not attained the age of 13 years." Wis. Stat. § 980.01(4m).

Contrary to DHS' position and the conclusion of the Trial Court, the question of whether or not McGee was "convicted" of a crime against a child sufficient to implicate Wis. Stat. § 980.08(4)(f)4 is not dispositive of the issue. Yes, if the person is a "convicted" child sex offender DHS needs to consider the residency restriction. But, this does not in any way imply that DHS and the Court are *precluded* from considering information if there was no conviction. This is especially true in light of the Trial Court's obligation to ensure that the supervised release plan adequately addresses the safety needs of the community. *See* Wis. Stat, § 980.08(4)(g).

DHS and the Trial Court are proposing to place a violent sexual offender, who undisputedly molested a young boy, right next door to a young male child. Even more disturbing, the Supervised Release Plan does not even mention the presence of a one-year-old child. There is nothing in the Supervised Release Plan that suggests that this situation was considered by DHS when determining if the placement was appropriate.

Mark Smith-Rogers testified that no one from DHS ever contacted him or alerted him that McGee was going to be placed in the home. (R. 82 at 83.) He found out from the District Attorney for Kenosha County. (R. 82 at 82.) How is the safety of the community being adequately addressed when the residents living right next door, the Trial Court and the prosecuting attorney are not given all the relevant facts? This was a significant oversight, especially considering McGee's history and DHS' own description of his targeted victims. DHS should have considered the presence of the one-year-old child and DHS should have made that fact known before obtaining approval of the Supervised Release Plan.

Upon receipt of this information, the District Attorney withdrew his support of the Plan and stated he would not have supported this placement had he known the residence right next door had a one-year-old child. (R. 59; A. App. 117-118; R. 82 at 5-6.) He based this on his knowledge of McGee's history and his involvement with the underlying case. (Id.) The Trial Court could have, and should have, reached the same conclusion and it was an erroneous exercise of discretion to simply move forward with McGee's release.

II. DHS FAILED TO FOLLOW THE STATUTORY PROCEDURES SET FORTH IN WIS. STAT. 980.08(4).

The resolution of this case also turns, in part, on the interpretation and application of newly enacted statutory amendments to Wis. Stat. § 980.08(4). Statutory interpretation begins with the statute's text and courts apply the common, ordinary and accepted meaning. State v. Milwaukee County (In re Morford), 2006 WI App 229, ¶ 21, 297 Wis. 2d 339, 724 N.W.2d 916, citing State ex rel. Kalal v. Circuit Court for Dane County, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W. 2d 110. Statutory language must be viewed "in the context in which it is used, not in isolation, but as part of a whole, in relation to the language of surrounding or closely related statutes, and reasonably as to avoid absurd or unreasonable results." Id. at ¶ 26, *citing* Kalal, 2004 WI 58, ¶ 46. In addition, when interpreting a statute courts must give effect to every word so no portion of the statute is rendered superfluous. Marotz, 2007 WI 89, ¶ 18, *citing* Janssen v. State Farm Mut. Auto. Ins. Co., 2002 WI App 72, ¶ 13, 251 Wis. 2d 660, 643 N.W.2d 857.

"Courts must also consider the scope, context, and purpose of the statute insofar as they are ascertainable from the text and structure of the statute itself." Id. (internal citations omitted). With regard to Chapter 980 cases, courts have recognized that the principal purpose is

"the protection of the public and the treatment of convicted sex offenders who are at a high risk to reoffend in order to reduce the likelihood that they will engage in such conduct in the future." State v. Carpenter, 197 Wis. 2d 252, 271, 541 N.W.2d 105 (1995). This purpose must be kept in mind when evaluating the statutory scheme and requirements.

As set forth above, the legislature recently amended Chapter 980 of the Wisconsin Statutes in 2015 Wisconsin Act 156 and added additional requirements and factors to consider before placing violent sex offenders in a community. The new statutory scheme requires DHS to *consult* with local law enforcement and the victim witness coordinator before placement. It also contains location restrictions and it requires the court to revisit the issue of "good cause." DHS and the Racine County Trial Court did not meet these requirements.

A. DHS Failed To Consult With Law Enforcement Regarding The Placement Of Michael McGee.

DHS failed to comply with the explicit statutory requirements set forth in Wis. Stat. § 980.08(4). Specifically, the Legislature amended Chapter 980 in 2015 Wisconsin Act 156. This change was enacted on February 29, 2016 and published on March 1, 2016. This proceeded the authorization for McGee's supervised release. In this amendment, section 980.08(4)(em) was created to read as follows:

> 980.08(4)(em) The department shall **consult** with a local law enforcement agency having jurisdiction over any prospective residential option identified under par. (e) **and** shall request the law enforcement agency to submit a written report that provides information relating to the prospective residential option.

Wis. Stat. § 980.08(4)(em)(emphasis added). These statutory changes are applicable to anyone who had applied for supervised release under Wis. Stat. § 980.08(4) before the effective date and whose supervised release was not yet authorized. 2015 Wisconsin Act 156.

At the evidentiary hearing, one of the central issues was what was required by DHS under this provision of the statute. It is undisputed that Kenosha County Law Enforcement did not have any conversation with DHS about placing McGee at the Wheatland Property before the Supervised Release Plan was approved. (R. 40; R. 41; R. 82 at 11, 27-28.) Nonetheless, DHS (through its various representatives) repeatedly stated that it met its statutory obligations with regard to its interactions with law enforcement. Specifically, Angie Serwa stated she was only required to ask law enforcement about the "physical placement" and she was not statutorily required to inform the Sheriff Department of a specific resident. (R. 82 at 62-63.) The same opinion was echoed by Dr. Steven Kopetski. (R. 82 at 104-105.) There are several problems with this position.

First, it ignores the plain language of the statute. Wisconsin Statute § 980.08 (4)(em). The new statutory language requires two

things of DHS. DHS is required to both **consult** with the law enforcement agency **and** to request law enforcement to submit a written report that provides information relating to the proposed residence. To "consult" means "to ask advice of; seek the opinion of; apply to for information or instruction". *See* Webster's 3rd New International Dictionary, 490 (3rd. Ed. 1971). In the alternative, it means to "talk to someone with (someone) in order to make a decision" or "to look for information." Id. How can law enforcement be "consulted" and provide a thorough opinion if they are not even told who is going to be placed or given any information about the offender's background? This language requires DHS to work with law enforcement and solicit law enforcement's opinion about a proposed placement before the Supervised Release Plan is approved.

In addition, if DHS' assertion that it was not required to even inform law enforcement who is going to be placed is upheld, it would essentially render the statutory language meaningless. Specifically, how is DHS "consulting" with law enforcement if they are not required to give them any specific information? It would also ignore one of the central purposes of Chapter 980 which is to provide protection to the public. Law enforcement in the county of intended placement is obligated to protect the public, but they have to be given information first. This Court should therefore find that DHS is required to

"consult" with local law enforcement and, at a minimum, this means telling local law enforcement who is going to be placed and giving law enforcement the opportunity to share any concerns about placing this individual in the community.

The new law requires DHS to "consult" with law enforcement. DHS was likely aware of this requirement as illustrated by its own words. DHS implied to the Court that the Sheriff's Department was given the opportunity to weigh in on McGee's placement. Specifically, DHS represented as follows:

> As outlined in Act 156, the Sheriff's Department was requested to submit a report to DHS to **provide any information or concerns they may have regarding Mr. McGee's potential placement.** The Sheriff's Department submitted its report on April 1, 2016.

(R. 31; R. 52.) This statement is simply false.

As Sheriff Beth and Detective Smith testified, they were never told about McGee's placement and they were never asked to share any concerns or problems they had with the proposed placement before the decision by DHS was made. (R. 40; R. 41; R. 82 at 11, 27-28.) Furthermore, at no time did Sheriff Beth or anyone from his department prepare a report with regard to the placement of McGee at the Wheatland Property. (R. 82 at 10; R. 40; R. 41.)

Moreover, both Sheriff Beth and Detective Smith testified that they would have provided additional information if they had been given information about McGee's background and history. (R. 82 at 11-12,

19, 28.) They would have highlighted the fact that there was a one-year-old male child living next door. (R. 82 at 11-12, 28.) They would have said there were not any physical barriers between this house and the Wheatland Property. They would have commented that there was a fishing area and bike trail within 1,500 feet of the proposed residence. But, they were not given this opportunity since DHS never "consulted" with them or asked them to prepare a report about McGee. DHS failed to meet its obligation under the statutes and it was error to simply move forward with the proposed residential option.

In its decision, the Trial Court failed to reach any conclusions on what DHS was, or was not, obligated to do with regard to consulting local law enforcement in the county of intended placement. (R. 57, A. App. 119-125.) The Trial Court then erroneously said that Kenosha County's position in this regard was predicated solely on the Court not being advised that a one-year-old child resided next door and this information was not required to be disclosed under the statute. (R. 57 at 5-6, A. App.119-125.) While this was part of Kenosha County's argument, it was not the only argument.

Chapter 980 of the Wisconsin Statutes deals with the commitment and release of violent sex offenders. It is imperative that the appropriate steps are followed and, if DHS fails to follow the statutory guidelines, it calls into question the entirety of the Supervised

Release Plan and the overall risk to the community. The Trial Court simply decided to forward with the release of McGee without any ramifications to DHS and without providing any clarity regarding what was required with regard to local law enforcement. This was an erroneous exercise of discretion.

B. DHS Failed To Consult With Kenosha County's Victim Witness Coordinator.

Under the new changes in the law, DHS was also required to consult with the victim witness coordinator in the county of intended placement. Specifically, 2015 Wisconsin Act 156 also changed Wis. Stat. § 980.08(4)(f) and amended it to read as follows:

> **The department shall** search its victim database, and **consult** with the office of victim services in the department of corrections, the department of justice, **and the county coordinator of victims and witnesses services in the county of intended placement**, the county where the person was convicted, and the county of commitment to determine the identity and location of known and registered victims of the person's acts.

(Emphasis added.) While there is no authority interpreting this provision as of yet, one can surmise that the purpose is to make sure any known victims of the sex offender are notified. Furthermore, victim witness coordinators provide general services and protection to victims of abuse anytime a sex offender is placed in the community.

In the present case, it is undisputed that the victim witness coordinator for Kenosha County, Heather Beasy, was not notified about the placement of McGee before the Supervised Release Plan was

approved. (R. 39; R. 82 at 38.) In fact, to this day, she has not been given the names of any of McGee's victims. (R. 82 at 40.)

DHS did not dispute this at the evidentiary hearing. Moreover, Attorney William Peterson suggested that McGee's cases were so old that the names of his victims were not entered into the system and that should end the inquiry. (R. 82 at 44.) The parties can debate what, if any, impact it would have had if Heather Beasy had been notified of the names of any victims or of McGee's intended placement. Again, however, it shows a failure on the part of DHS to abide by the statutory requirements. DHS is not given the choice of notifying the victim witness coordinator of the county of intended placement. The statute says DHS "shall" notify and this should have been done before the Supervised Release Plan was approved. *See* Wis. Stat. § 980.08(4)(f).

Similar to above, the Trial Court failed to address this argument or clarify how the victim witness coordinator needs to be consulted. (R. 57.) Because it was undisputed that DHS did not contact Kenosha County's Victim Witness coordinator, DHS should have been held accountable and the approval of the Supervised Release Plan should have been rescinded.

C. DHS And The Circuit Court Failed To Have A Good Cause Hearing After Enactment Of 2015 Wisconsin Act 156.

Under the new law, counties cannot easily send its violent sex offenders to other counties. As discussed above, the law surrounding placements of sexually violent persons under Chapter 980 of the Wisconsin Statutes changed on March 1, 2016. Specifically, under the new requirements of 2015 Wisconsin Act 156, there is now a narrower definition of "good cause" for out of county placements. The explicit language of Wis. Stat. § 980.08(4)(cm) now states that "[a]n actual or alleged lack of available housing for the person within a county because of an ordinance or resolution in effect or proposed by the county or by a city, town or village within the county, may not constitute good cause to select another county under this paragraph."

In the present case, it is clear from the entirety of the record, that DHS and the parties initially asked the Court for permission to look outside of Racine County *because* of local ordinances that were in effect. Specifically, on June 22, 2015, District Attorney Chiapete explained to the Trial Court that it was necessary to look outside of Racine County "because of the ordinances that a number of counties have." (R. 76 at 4.) Similarly, on October 5, 2015, Attorney Peterson stated that there were "issues right now with finding placements as a result of these local zoning ordinances." (R. 77 at 2.) Based on these

statements, Judge Torhorst signed an order giving DHS the authority to look for housing in both Kenosha and Racine County. (R. 19, A. App.101.)

After the law changed, DHS acknowledged a problem with the Order and asked the Court to revisit the issue of "good cause." (R. 31; R. 52; R. 82.) The Court did not revisit the issue of "good cause" at that time. Instead, Judge Torhorst stated he did not believe another good cause hearing was needed and approved the placement. (R. 75 at 15, A. App.140.) Similarly, as evidenced by the Supervised Release Plan, DHS was more than content to move forward with the placement it had previously found in Kenosha County. (R. 31, A. App. 106-115.)

It was not until Kenosha County intervened, and participated in an evidentiary hearing, that DHS and Racine County attempted retroactively to demonstrate good cause for the out of county placement. (R. 82 at 95-98.) This was an improper way to proceed under the statute and again shows a disregard by DHS and the court of the procedures and steps involved when releasing a violent sex offender into another community.

Kenosha County does not dispute that Attorney Peterson had a representative from DHS (Dr. Steven Kopetskie) testify at the evidentiary hearing about the various problems DHS has when placing individuals on a Chapter 980 commitment. (R. 82 at 95-96.) Dr.

Steven Kopetskie testified about the search efforts made by DHS to find placements. (R. 82 at 95.) Importantly, however, at no time, did Dr. Steven Kopetskie explain how DHS changed or modified its search habits after the passing of the new legislation. Furthermore, at no time did he talk about any specific efforts to find a residence in Racine County. He also admitted that DHS has not updated any of their lists or postings since February 2016 since a staff member in their office had resigned. (R. 82 at 109.) He conceded that they had the Wheatland Property in mind for the placement of McGee and they sent an email about placing him there the day after 2015 Wisconsin Act 156 was published. (R. 82 at 108.)

The undisputed facts suggest that DHS and the Court failed to take any reasonable action to find housing in Racine County. To the contrary, DHS knew it had a proposed location in Kenosha County and simply asked the Court for permission to move forward with this proposed location. (R. 31, A. App. 106-107.) The Trial Court was more than eager to oblige and to order the placement of a Racine County resident in Kenosha County. (R. 32, A. App. 105.) This fails to meet the spirit and intent of the new statute and the Trial Court.

Furthermore, the Trial Court erroneously interpreted the law and concluded that "2015 Act 156, while addressing specific portions of Sec. 980.08 Wis. Stats., did not provide for a subsequent good cause

hearing." (R. 57 at 4; A. App. 122.) The statutory changes are applicable to anyone who had applied for supervised release under Wis. Stat. § 980.08(4) before the effective date and whose supervised release was not yet authorized. 2015 Wisconsin Act 156. This included McGee when the Order for placement in Kenosha County was signed.

A new hearing should have been held before proceeding with the residence in Kenosha County and the Trial Court, not Kenosha County, should have pushed DHS to more fully explore how the passage of new legislation created new residential options in Racine County.

D. The Proposed Residence For Michael McGee Also Violates Wis. Stat. § 980.08(4)(f) Since It Is Within 1,500 Feet Of A Park.

Wisconsin Statute 980.08(4)(f) contains certain requirements for the supervised release plan. In particular, Wis. Stat. § 980.08(4)(f)2. states that the supervised release plan must "[e]nsure that the person's placement is into a residence that is not less than 1,500 feet from any school premises, child care facility, **public park**, place of worship, or youth center." (Emphasis added.) "Public park" is defined under the statute as "a park or playground that is owned or maintained by the state or by a city, village, town or county." Wis. Stat. § 980.01(3g). No additional definition is contained in Chapter 980 of the Wisconsin Statutes.

Here, the Wheatland Property is within 1,500 feet of the Kenosha County Fox River Bike Trail. (R. 34, A. App. 156-157; R. 82 at 22-23.) This bike trail is maintained by Kenosha County. (R. 82 at 22-23.) As testified to by Sheriff David Beth, this "bike trail" is considered a "park" in accordance with Kenosha County Ordinance § 10.01(3). (R. 82 at 23.) The Fox River area is also a fishing area for locals and families. (R. 82 at 22-23; R. 34; R. 37.) DHS failed to mention the bike path in the Supervised Release Plan. (R. 31, A. App. 106-115.) This fact standing alone makes the placement inappropriate.

The trial court erroneously disagreed with this fact and found that the "clear meaning of 'park' or 'county park' means land within the boundaries designated by the lot line of such a location." (R. 57 at 6, A. App. 124.) Further, the Trial Court held that while a bike trail may go through a park, a bike trail under Kenosha County ordinance will not be construed by this Court to be a park. (Id.) This was clearly an erroneous decision in light of the plain language of the relevant statutes.

If one were to look at both the definition of "public park" set forth in Wis. Stat. § 980.01(3g) and the definition of a "park" set forth in Kenosha County Ordinance § 10.01(3), there is no question that the Fox River Bike Path is a park. Kenosha County Ordinance § 10.01(3) defines park as follows:

> "Park" or "Parks" means all land, waters and property heretofore and here-after acquired by the county for park or recreational purposes and placed under the jurisdiction of the Parks Division of the Kenosha County Department of Public Works and **shall include**, without limitation, parks, beaches, parkways…**bicycle trails** and privately owned land, the use of which has been granted to the county for parks, recreation and like purposes.

(Emphasis added.) Here, the Fox River Bike Path is maintained and operated by Kenosha County. It is near a fishing area where locals and families visit. Without citing any legal authority, Judge Torhorst simply disregarded Kenosha County's ordinance. This was erroneous. The proposed residence violates Wis. Stat. § 980.08(4)(f)2 and the Supervised Release Plan should be rescinded based solely on this fact.

CONCLUSION

The uncontested evidence in this case demonstrates that DHS failed to follow the new statutory requirements contained in Wis. Stat. § 980.08. Specifically, DHS failed to consult with local law enforcement, they failed to consult with the victim witness coordinator for Kenosha County and DHS and the Trial Court failed to hold a timely "good cause" hearing after the change in the law occurred. DHS' failure to abide by these requirements undermines confidence in the system and warrants the rescission of the Supervised Release Plan. Alternatively, based on all the facts currently known, this Court should reverse the Trial Court's approval of the Supervised Release Plan and

order DHS to find a new placement and one that does not present a risk to the community or the one-year-old child living next door.

Dated this 12th day of September, 2016.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 7,839 words.

Dated this 12th day of September, 2016.

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

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Dated this 12th day of September, 2016.

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CERTIFICATION OF THIRD-PARTY

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I certify that on September 6, 2016, this brief or appendix was delivered to a third-party commercial carrier for delivery to the Clerk of the Court of Appeals within 3 calendar days. I further certify that the brief or appendix was correctly addressed.

Dated this 12th day of September, 2016.

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