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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT IV

Case Nos. 2019AP001832-CR and 2019AP001833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant.

Appeal from Decisions and Commitment Orders
in Waupaca County Circuit Court,
the Honorable Vicki L. Clussman, Presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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ISSUE PRESENTED

When a defendant has been found not guilty by reason of mental disease or defect in two separate cases and is subject to two separate commitment orders, does the circuit court have the authority to run the terms of commitment consecutive to one another?

Circuit Court Answer: Yes.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Yakich requests publication as this case involves the enunciation of a new rule of law. *See* Wis. Stat. (Rule) 809.23(1)(a)1. Mr. Yakich welcomes oral argument if the court would find it helpful.

STATEMENT OF THE CASE

This case presents a novel question of statutory interpretation¹: whether the circuit court can run two separate NGI² commitment orders consecutive to one another. Mr. Yakich was found not guilty by reason of mental disease or defect in two separate cases and is, therefore, subject to two separate commitment orders. Each commitment order specifies a different term of commitment. The circuit court ran the terms of commitment consecutive to one another over Mr. Yakich's objection and without citing legal authority to do so. Because there is no legal authority to do so, this court should reverse.

On May 20, 2018, the Waupaca County Sheriff's Department responded to a complaint about a telephone threat. (1:1).³ Mr. Yakich's mother reported that while she was on the phone with Mr. Yakich, he made threats to harm his brother.

¹ Because Mr. Yakich challenges the circuit court's construction of a statute, he has served copies of this brief on the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader pursuant to Wis. Stat. § 893.825. *See* attached cover letter.

² "NGI" is an acronym that refers to instances where criminal defendants are found not guilty by reason of mental disease or defect and subsequently committed under Wis. Stat. § 971.17.

³ This is a consolidated appeal of two separate cases. Unless otherwise noted, all citations to the record refer to the record in 2019AP001832.

(1:2). Mr. Yakich was arrested and charged in Case No. 18-CF-169 with phone harassment, in violation of Wis. Stat. § 947.012(1)(a), and felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b).⁴ (1:1). He was subsequently released on a signature bond. (2:1).

On August 20, 2018, the Waupaca Police Department responded to Mr. Yakich's residence in order to perform a welfare check. (2019AP001833, 3:3). A crisis worker at the Waupaca County of Health and Human Services had called 9-1-1 stating that she was on the phone with Mr. Yakich and that he was talking about having chest pains and suicide. (2019AP001833, 3:3). When officers knocked, Mr. Yakich did not answer the door. (2019AP001833, 3:3). As officers attempted to break into the front door of the apartment, Mr. Yakich exited the back door and surrendered to officers. (2019AP001833, 3:4). Officers then searched Mr. Yakich's apartment, where they found marijuana and drug paraphernalia. (2019AP001833, 3:5). Mr. Yakich was arrested and charged in Case No. 18-CF-301 with two counts of felony bail jumping, in violation of Wis. Stat. § 946.49(1)(b); one count of misdemeanor bail jumping, in violation of Wis. Stat. § 946.49(1)(a); unlawful use of a telephone/threatening harm, in violation of Wis. Stat. § 947.012(1)(a); resisting or obstructing an officer, in violation of Wis. Stat. § 846.41(1); possession of THC, in violation of

⁴ At the time, Mr. Yakich was on bond in another case, giving rise to the bail jumping charge.

Wis. Stat. § 961.41(3g)(e); disorderly conduct, in violation of Wis. Stat. § 947.012(1); and possession of drug paraphernalia, in violation of Wis. Stat. § 961.573(1). (2019AP001833, 3:1-2).

Mr. Yakich ultimately entered a plea agreement resolving both cases, as well as two other cases that pre-dated these. With regard to these two cases, Mr. Yakich entered a bifurcated plea: He pled guilty to one count of felony bail jumping and one count of phone harassment in 18-CF-169 and two counts of felony bail jumping in 18-CF-301. (34:10; App. 122). He also pled not guilty by reason of mental disease or defect as to those counts.⁵ (34:10; App. 122). The state did not contest that Mr. Yakich was not guilty by reason of mental disease or defect. (34:9; App. 121). The court accepted Mr. Yakich's guilty and not guilty by reason of mental disease or defect pleas in both cases. (34:22; App. 134).

The parties disagreed on the appropriate length of the commitment periods. The state requested a total of five years' commitment, a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another. (34:12-14, 23; App. 124-26, 135). Mr. Yakich objected, arguing that separate commitment orders could not be run consecutively. (34:24-27; App. 136-

⁵ As part of the global plea agreement, Mr. Yakich also pled no contest to one count of disorderly conduct in Waupaca County Case No. 15-CM-10 and one count of assault by a prisoner in Waupaca County Case No. 17-CF-140.

39). The court disagreed and ordered a two-year term of commitment in 18-CF-169 and a three-year term of commitment in 18-CF-301, to run consecutive to one another and to any other term of commitment. (34:27-28; App. 139-40).

After a predisposition investigation report was conducted, the court ordered institutional placement. (35:8). After six months, Mr. Yakich petitioned for conditional release. (21:1). On September 3, 2019, the court found that Mr. Yakich was appropriate for conditional release. (22:1).

ARGUMENT

The circuit court should have run Mr. Yakich's two commitment orders concurrent to one another.

This case requires the court to decide whether circuit courts have the authority to run two separate commitment orders, entered in different cases based on separate conduct, consecutive to one another. The trial court's authority to commit an individual found not guilty by reason of mental disease or defect derives from statute. *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161, 164, 440 N.W.2d 790 (Ct. App. 1989). As such, the question is one of statutory interpretation, which this court reviews de novo. *Landis v. Physicians Ins. Co. of Wisconsin, Inc.*, 2001 WI 86, ¶13, 245 Wis. 2d 1, 628 N.W.2d 893.

- A. There is no statutory authority permitting circuit courts to run separate commitment orders consecutive to one another.

When a criminal defendant is found not guilty by reason of mental disease or defect, the circuit court is required to commit the individual to the department of health and human services. Wis. Stat. § 971.17. This is a statutorily-created two-step process. First, the circuit court enters an order for commitment, in which the court enters a formal finding of not guilty by reason of mental disease or defect and determines the maximum time period for which the individual may be subject to the commitment order. Wis. Stat. § 971.17(1).

Second, the court determines the appropriate placement for the individual during his term of commitment. Wis. Stat. § 971.17(3). The court may order institutional care or conditional release. *Id.* If an individual is placed in institutional care, he has the opportunity to petition for conditional release every six months. Wis. Stat. § 971.17(4)(a). If an individual is placed on conditional release, he has the opportunity to petition for early termination of the commitment order every six months. Wis. Stat. § 971.17(5).

This appeal involves the court's statutory authority in the first step of this process, determining the appropriate term of commitment. In interpreting a statute, this court first looks to its plain language.

Landis, 245 Wis. 2d 1, ¶14. If the language of the statute “clearly and unambiguously sets forth the legislative intent,” this court should not look beyond the language. *Id.* In examining the language of a statute, this court does not look at the language in isolation but rather interprets its meaning in the context of related statutes. *Id.* ¶16.

The circuit court’s authority to commit individuals who have been found not guilty by reason of mental disease or defect stems from Wis. Stat. § 971.17, which requires the circuit court to enter a commitment order “as soon as practicable after the judgment of not guilty by reason of mental disease or defect is entered.” Wis. Stat. § 971.17(2)(a). The statute specifically instructs courts on how to determine the maximum term of commitment for a single commitment order. *See* Wis. Stat. § 971.17(1)(a)-(d). However, the statute is silent on whether courts can run two separate commitment orders consecutively. In fact, nowhere in the statutes has the legislature authorized the circuit court to run separate commitment orders consecutive to one another or consecutive to any other form of supervision, like a criminal sentence or term of probation. Without such statutory authorization, the court may not do so. *See, e.g., Grobarchik v. State*, 102 Wis. 2d 461, 467, 307 N.W.2d 170 (1981) (“If the authority to fashion a particular . . . disposition exists, it must be derived from the statutes.”).

It is clear that the legislature knows how to authorize circuit courts to impose consecutive terms of supervision when it wants to. For example, circuit courts are authorized to run criminal sentences consecutive to one another. *See* Wis. Stat. § 973.15(2) (“[T]he court may . . . provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.”). The legislature has also explicitly authorized courts to run a term of probation consecutive to a criminal sentence. Wis. Stat. § 973.09(1)(a) (“The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.”). No parallel statute exists in the context of NGI commitments, indicating the legislature’s intent that NGI commitments not run consecutively.

Counsel has found no case law which directly addresses whether circuit courts may run separate commitment orders consecutive to one another. However, this court has examined whether NGI commitments may be run consecutive to other forms of supervision and has concluded that they may not. For example, in *State v. Harr*, this court considered whether NGI commitments and prison sentences may be run consecutively. 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997). The court concluded that Wis. Stat. § 973.15, which authorizes consecutive criminal sentences, does not apply to NGI commitments because a commitment is not a “sentence” within the meaning of the statute. *Id.*

Because neither Wis. Stat. § 973.15 nor § 971.17 authorize the running of NGI commitments consecutive to criminal sentences, the court concluded that the court lacks the authority to do so. *Id.* The state has been on notice since this court's decision in *State v. Harr* that the language of Wis. Stat. § 973.15 and § 971.17 does not authorize courts to run NGI commitments consecutively. Despite several revisions to Wis. Stat. § 971.17 since then, the legislature has not added language granting circuit courts the authority to run NGI commitments consecutive to one another or to other forms of supervision.

This court has also examined whether other analogous forms of supervision may be run consecutive to one another, and the court's holdings in those situations support the conclusion that NGI commitments may not be run consecutively. For example, probation is similar to NGI commitments in that both impose supervision and other conditions on an individual but are not "sentences." *State v. Gereaux*, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983). Chapter 973, which governs sentencing and probation procedures, lacks any explicit authority for courts to impose a term of probation consecutive to another term of probation. *State v. Schwebke*, 2001 WI App 99, ¶¶27-29, 242 Wis. 2d 585, 627 N.W.2d 213. *affirmed on other grounds*, 2002 WI 55, 253 Wis. 2d 1, 644 N.W.2d 666. Lacking such statutory authority, this court has held that circuit courts may not run probation terms consecutive to one another. *Id.*

Another analogous example is that of juvenile dispositions, which also are not considered “sentences.” *State v. Woods*, 173 Wis. 2d 129, 137-38, 496 N.W.2d 144 (Ct App. 1992). Because they are not considered sentences, Wis. Stat. § 973.15 does not authorize courts to impose juvenile dispositions and other forms of supervision consecutive to one another. *See id.* And Chapter 938, which governs the juvenile justice system, provides no similar authority for courts to run juvenile dispositions consecutive to one another. *Id.* Thus, this court has concluded that juvenile dispositions may not be run consecutively. *Id.*; *see also In re Commitment of Wolfe*, 2001 WI App 136, ¶15, 246 Wis. 2d 233, 631 N.W.2d 240. (“[T]he concept of consecutive sentences is foreign in the context of juvenile adjudications and dispositions.”).

NGI commitments are analogous to probation and juvenile dispositions in that while they involve government-imposed restraint on liberty, they are not “sentences” and therefore not governed by Wis. Stat. § 973.15. There is no other statutory authority for running them consecutively. As in the case of probation and juvenile dispositions, the lack of statutory authority establishes that the legislature did not intend them to run consecutive to one another.

B. The court should remand with instructions to the circuit court to modify the commitment orders to reflect that they run concurrent to one another.

The proper remedy in this case is for this court to reverse and direct the circuit court to amend the commitment orders in 18-CF-169 and 18-CF-301 to reflect that they run concurrent to one another. Wisconsin Statute § 973.13 provides that where a penalty is imposed in excess of what is permitted by law, the excess portion is void and proper remedy is commutation without further proceedings. Although this statutory provision refers to sentences, it applies to other periods of supervision that are not technically “sentences” under the law. *See Schwebke*, 242 Wis. 2d 585, ¶31 (applying Wis. Stat. § 973.13 to an improper imposition of consecutive terms of probation and instructing the circuit court to impose the terms concurrently without further proceedings).

CONCLUSION

The circuit court in this case only had the authority to fashion Mr. Yakich’s dispositions as authorized by the legislature. Given the clear lack of any statutory authority to run Mr. Yakich’s two commitment orders consecutive to one another, the circuit court erred in doing so. The plain language of the statutes, which is silent as to any authority to run NGI commitments consecutively, and analogous case law support this conclusion. As such, Mr. Yakich

respectfully requests that this court reverse the circuit court's imposition of consecutive terms of commitment in 18-CF-169 and 18-CF-301 and remand to the circuit court with instructions to amend the commitment orders to reflect that they run concurrent to one another.

Dated this 10th day of December, 2019.

Respectfully submitted,

Electronically signed by Cary Bloodworth

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,338 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted electronic copies of this brief and appendix, which complies with the requirements of § 809.19(12) and the Interim Rule for Wisconsin Electronic Appellate Filing Pilot Project.

Copies of the brief and appendix will be electronically served on the court and all opposing parties per the Interim Rule for Wisconsin's Electronic Appellate Filing Pilot Project.

Dated this 10th day of December, 2019.

Signed:

Electronically signed by Cary Bloodworth
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CERTIFICATION AS TO APPENDIX

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 one or more initials or other appropriate pseudonym or designation 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.

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