

FILED

02-10-2020

CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Case Nos. 2019AP1832-CR & 2019AP1833-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CHRISTOPHER W. YAKICH,

Defendant-Appellant.

ON APPEAL FROM DECISIONS AND COMMITMENT
ORDERS IN WAUPACA COUNTY CIRCUIT COURT, THE
HONORABLE VICKI L. CLUSSMAN, PRESIDING

RESPONSE BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

TABLE OF CONTENTS

	Page
ISSUE PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	1
INTRODUCTION	1
STATEMENT OF THE CASE	1
STANDARD OF REVIEW	3
ARGUMENT	4
The circuit court properly ordered consecutive NGI commitments.	4
A. This Court has already held that consecutive NGI commitments are permissible.	4
B. Yakich’s argument ignores controlling case law and has no merit.	7
CONCLUSION.....	9

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Helmer v. Cullen</i> , 149 Wis. 2d 161, 440 N.W.2d 790 (Ct. App. 1989).....	4, 6
<i>State v. C.A.J.</i> , 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988).....	4, <i>passim</i>
<i>State v. Harr</i> , 211 Wis. 2d 584, 568 N.W.2d 307 (Ct. App. 1997).....	8
<i>State v. Mahone</i> , 127 Wis. 2d 364, 379 N.W.2d 878 (Ct. App. 1985).....	4

Page

<i>State v. Sanders</i> , 2018 WI 51, 381 Wis. 2d 522, 912 N.W.2d 16.....	6
<i>State v. Shoeder</i> , 2019 WI App 60, 389 Wis. 2d 244, 936 N.W.2d 172.....	3
<i>State v. Stanley</i> , 2012 WI App 42, 340 Wis. 2d 663, 814 N.W.2d 867.....	3

Statutes

2001 Wis. Act 109 § 1107.....	5, 6
Wis. Stat. § 973.15(2).....	5, 8
Wis. Stat. § 971.17	4, <i>passim</i>
Wis. Stat. § 971.17(1)(b)	5, 8
Wis. Stat. § 971.17(4) (1987–88)	4, 5, 6

ISSUE PRESENTED

May a circuit court impose consecutive commitment orders when a defendant is found not guilty by reason of mental disease or defect in multiple cases?

The circuit court answered “yes.”

This Court should answer “yes.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication because this appeal can be decided based on the briefs and well-established legal principles.

INTRODUCTION

The circuit court imposed consecutive commitments on Defendant-Appellant Christopher W. Yakich after it found him not guilty by reason of mental disease or defect in multiple criminal cases. Without acknowledging the controlling precedent that forecloses his claim, Yakich argues that consecutive commitment orders are impermissible. Because his argument is contrary to binding precedent, this Court should affirm.

STATEMENT OF THE CASE

In May 2018, Yakich called his mother on the phone and said “that he had a two foot pipe and a can of gas,” he was going to burn his brother’s house down, and he was going to beat up his brother so badly that his brother would have “to drink out of a straw.” (R. 1:2.)¹ Yakich told his mother to relay this message to his brother. (R. 1:2.) Yakich was on a

¹ This brief uses “R.” to cite documents in the court record for appeal number 2019AP1832-CR and uses “R2.” to cite documents in the court record for appeal number 2019AP1833-CR.

signature bond in a felony case when he made this threatening phone call. (R. 1:2.) As a result of this phone call, the State charged Yakich with one count of telephone harassment and one count of felony bail jumping in Waupaca County Circuit Court case number 2018-CF-169. (R. 1:1.)

In August 2018, Yakich called the Waupaca County Department of Health and Human Services on the phone, “was hysterical,” talked about suicide, and said he was having chest pains. (R2. 3:3.) Law enforcement officers went to Yakich’s apartment to check on his welfare. (R2. 3:3.) Officers asked Yakich to open the door, but he failed to do so. (R2. 3:3.) Officers were unable to enter the apartment after using a battering ram because Yakich had barricaded the front door with a headboard for a child’s crib. (R. 3:3–5.) Yakich exited “the trap door at the back of the apartment.” (R2. 3:3.) Officers handcuffed and searched Yakich, who “began yelling loudly” that an officer was sexually assaulting him. (R2. 3:4.)

Officers entered Yakich’s apartment to see if anyone was inside or injured. (R2. 3:3.) Yakich yelled and used profanities as officers tried to enter his apartment. (R2. 3:4.) After entering the apartment, officers saw drug paraphernalia and suspected illegal narcotics in plain view, so they obtained a warrant to search the apartment. (R2. 3:4.) Officers more thoroughly searched the apartment with a warrant and found drugs and drug paraphernalia. (R2. 3:5.) As a result, the State charged Yakich in Waupaca County Circuit Court case number 2018-CF-301 with two counts of felony bail jumping and one count each of misdemeanor bail jumping, telephone harassment, obstructing an officer, possession of THC, disorderly conduct, and possession of drug paraphernalia. (R2. 3:1–2.)

Yakich entered into a plea agreement to resolve both cases. He pled guilty to one count of felony bail jumping and one count of phone harassment in case number 2018-CF-169 and two counts of felony bail jumping in case number 2018-

CF-301. (R. 34:16–18.) The State did not contest that Yakich was not guilty by reason of mental disease or defect. (R. 34:9, 22.) The circuit court accepted Yakich’s guilty pleas, found him guilty, but then also found him not guilty by reason of mental disease or defect in both cases. (R. 34:22.)

The parties disputed how long Yakich’s commitment terms should be. Yakich recommended a maximum term of commitment, which he contended was three years. (R. 34:11, 27.) Yakich argued that NGI² commitments could not be run consecutively. (R. 34:24–27.) The State recommended a total commitment of five years. (R. 34:23.) The circuit court imposed a two-year commitment in case number 2018-CF-169 and a three-year commitment in case number 2018-CF-301, to run consecutively to one another. (R. 34:27–28.)

Yakich later petitioned for conditional release in May 2019. (R2. 14.) The circuit court found that Yakich was appropriate for conditional release from his custody at Mendota Mental Health Institute. (R. 21:1.)

Yakich appeals from his commitment order in each case. (R. 23; R2. 22.)

STANDARD OF REVIEW

“Statutory interpretation and the application of a statute to a given set of facts are questions of law that [this Court] review[s] de novo.” *State v. Shoeder*, 2019 WI App 60, ¶ 6, 389 Wis. 2d 244, 936 N.W.2d 172.

² “NGI” is shorthand for “not guilty by reason of insanity,” which under Wisconsin law is called not guilty “by reason of mental disease or defect.” *State v. Stanley*, 2012 WI App 42, ¶ 1, 340 Wis. 2d 663, 814 N.W.2d 867.

ARGUMENT

The circuit court properly ordered consecutive NGI commitments.

A. This Court has already held that consecutive NGI commitments are permissible.

Yakich's sole argument on appeal is that circuit courts have no authority to order consecutive NGI commitments under Wis. Stat. § 971.17. But this Court has "already held that the maximum period of commitment must be based on consecutive terms." *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 161, 162, 440 N.W.2d 790 (Ct. App. 1989) (citing *State v. C.A.J.*, 148 Wis. 2d 137, 141, 434 N.W.2d 800 (Ct. App. 1988)).

When *C.A.J.* was decided, the relevant statutory provision stated: "When the *maximum period for which a defendant could have been imprisoned if convicted* of the offense charged has elapsed, subject to s. 53.11 and the credit provisions of s. 973.155, the court shall order the defendant discharged" Wis. Stat. § 971.17(4) (1987–88) (emphasis added).

This Court in *C.A.J.* "conclude[d] that the maximum term of commitment must be based on consecutive terms under sec. 971.17(4)." *C.A.J.*, 148 Wis. 2d at 141. It agreed with the State's argument "that the statutory language demonstrates that the maximum period of commitment is defined by consecutive maximum terms." *Id.* at 140. This Court reasoned that "the legislature intended to prohibit a person found not guilty by reason of mental defect or disease from being committed any longer than the underlying offense." *Id.* (citing *State v. Mahone*, 127 Wis. 2d 364, 376, 379 N.W.2d 878 (Ct. App. 1985)). It further reasoned that, "[u]nder sec. 973.15(2), Stats., the sentencing court may impose in multiple offense situations consecutive sentences if it so desires." *Id.* This Court thus concluded that "[t]o construe

‘maximum period’ to include multiple offenses and the possibility of consecutive terms is consistent with the rules of statutory interpretation.” *Id.*

In 2002, the Legislature changed the statutory language that was relevant in *C.A.J.* without changing its meaning. The amended language provides that, when a person is found not guilty by reason of mental disease or defect for a felony committed after the effective date of this amendment,

“the court shall commit the person to the department of health and family services for a specified period not exceeding the *maximum term of confinement* in prison that could be imposed on an offender convicted of the same felony, plus imprisonment authorized by any applicable penalty enhancement statutes, subject to the credit provisions of s. 973.155.

2001 Wis. Act 109, § 1107 (emphasis added). The amendment put this language at Wis. Stat. § 971.17(1)(b). This language is still the same in the version of the statute that was in effect in 2018, when Yakich committed his crimes in this case. Wis. Stat. § 971.17(1)(b) (2017–18).

C.A.J. is thus still binding and controls here. Again, the statutory language at issue in *C.A.J.* authorized a commitment term equal to the “maximum period for which a defendant could have been imprisoned if convicted of the offense charged.” Wis. Stat. § 971.17(4) (1987–88). Similarly, the statute now authorizes a commitment term equal to “the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony.” Wis. Stat. § 971.17(1)(b) (2017–18). The substance of this current language is identical to the language at issue in *C.A.J.* By equating a maximum NGI commitment term with a maximum criminal sentence, section 971.17 implicitly refers to Wis. Stat. § 973.15(2), which allows a circuit court to impose consecutive sentences for criminal convictions. *See C.A.J.*, 148

Wis. 2d at 140. Section 971.17 therefore allows consecutive NGI commitments. *Id.* at 140–41.

When the Legislature amended section 971.17 in 2002, it implicitly approved of *C.A.J.*'s holding allowing consecutive commitments. "Legislative inaction following judicial construction of a statute, while not conclusive, evinces legislative approval of the interpretation." *State v. Sanders*, 2018 WI 51, ¶ 52, 381 Wis. 2d 522, 912 N.W.2d 16 (citation omitted). "Legislative inaction is more indicative of acquiescence to prior judicial interpretation when other provisions within the same section are amended without affecting the provision at issue." *Id.* The 2002 amendment made one substantive change but left intact *C.A.J.*'s holding that a maximum NGI commitment is equal to the maximum possible consecutive sentences.

Specifically, the 2002 amendment gave circuit courts authority to order an NGI commitment shorter than the maximum term of confinement in prison. In 1989, this Court held that section 971.17(4) did not allow a circuit court "to establish a maximum period of commitment." *Helmer*, 149 Wis. 2d at 164. In other words, a circuit court lacked "authority to limit the maximum length of commitment to a period which is shorter than" the maximum consecutive sentences for the underlying crimes. *Id.* at 163. The 2002 amendment negated that holding by requiring a circuit court to commit a person "*for a specified period* not exceeding the maximum term of confinement in prison that could be imposed on an offender convicted of the same felony." 2001 Wis. Act 109, § 1107 (emphasis added).

Significantly, though, the new statutory language still provided that the maximum allowable commitment term is equal to the maximum allowable criminal sentence. *See id.* The 2002 amendment gave circuit courts authority to order a commitment term shorter than the maximum, but it still

provided that the maximum commitment is the same as the maximum criminal sentence.

So, the Legislature implicitly approved of *C.A.J.*'s holding when it amended section 971.17 in 2002. Indeed, this Court in *C.A.J.* noted that the Legislature did not prohibit consecutive NGI commitments, although "it could easily have" done so in section 971.17. *C.A.J.*, 148 Wis. 2d at 140. The Legislature also easily could have done so when it amended the statute in 2002, but it didn't. The Legislature implicitly approved of consecutive NGI commitments because, when it amended the statute to give circuit courts flexibility over the length of commitment, it maintained the substance of the maximum-term language on which *C.A.J.* relied.

B. Yakich's argument ignores controlling case law and has no merit.

Yakich's contrary argument relies on case law that doesn't apply here. By analogy, he argues that consecutive NGI commitments are impermissible because case law holds that (1) a criminal sentence may not be consecutive to an NGI commitment, (2) probation terms may not be consecutive to one another, and (3) juvenile dispositions may not be consecutive to each other or to other forms of supervision. (Yakich's Br. 8–10.)

But none of those cases address the sole issue in Yakich's appeal: whether NGI commitments may be consecutive to one another. This Court already held that a maximum NGI commitment is the same as the maximum consecutive sentences for the underlying offenses. *C.A.J.*, 148 Wis. 2d at 140–41. Further, none of Yakich's cited cases hinge on section 971.17, which equates a maximum NGI commitment with a maximum criminal sentence.

Case law holding that a criminal sentence may not be consecutive to an NGI commitment is inapposite here. Under

Wis. Stat. § 973.15(2), a circuit court may impose a sentence “concurrent with or consecutive to *any other sentence* imposed at the same time or previously.” *State v. Harr*, 211 Wis. 2d 584, 587, 568 N.W.2d 307 (Ct. App. 1997) (emphasis in original). Because an NGI commitment is not a sentence, a court may not order a criminal sentence to run consecutively to an NGI commitment. *Id.*

Here, however, the circuit court did not order a criminal sentence to be consecutive to an NGI commitment. It instead ordered two NGI commitments to run consecutively to each other. (R. 34:27–28.) It was statutorily allowed to do so. As explained above, the controlling statutory language equates a maximum NGI commitment with the maximum sentence for the underlying offenses. Wis. Stat. § 971.17(1)(b). Because a maximum sentence considers the possibility of consecutive sentences, *see* Wis. Stat. § 973.15(2), NGI commitments may be consecutive to each other. *C.A.J.*, 148 Wis. 2d at 140–41.

In other words, when a court imposes a criminal sentence, it must treat a pre-existing NGI commitment as a non-sentence such that they may not be run consecutively. *See Harr*, 211 Wis. 2d at 587. But when a court orders an NGI commitment, it may run NGI commitments consecutively to each other as if they were sentences. *See* Wis. Stat. § 971.17(1)(b); *C.A.J.*, 148 Wis. 2d at 140–41.

Tellingly, Yakich does not mention *C.A.J.* anywhere in his appellate brief. He merely states that his appellate “[c]ounsel has found no case law which directly addresses whether circuit courts may run separate commitment orders consecutive to one another.” (Yakich’s Br. 8.)

In sum, the maximum NGI commitment terms under section 971.17 are equal to the maximum *consecutive* criminal sentences for the underlying offenses. *C.A.J.*, 148 Wis. 2d at 140–41. The statutory language on which the *C.A.J.* court relied has not changed in substance since *C.A.J.* was decided.

The circuit court thus had authority to order Yakich's NGI commitments to be consecutive to each other.

CONCLUSION

This Court should affirm the circuit court's commitment orders.

Dated this 10th day of February 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Scott E. Rosenow
SCOTT E. ROSENOW
Assistant Attorney General
State Bar #1083736

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3539
(608) 266-9594 (Fax)
rosenowse@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2257 words.

Electronically signed by:

s/ Scott E. Rosenow

SCOTT E. ROSENOW
Assistant Attorney General

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

I hereby certify that:

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

I further certify that:

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

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

Dated this 10th day of February 2020.

Electronically signed by:

s/ Scott E. Rosenow

SCOTT E. ROSENOW
Assistant Attorney General