



FILED
10-29-2020
CLERK OF WISCONSIN
COURT OF APPEALS

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October 29, 2020

Ms. Sheila T. Reiff
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Via Electronic Filing

Re: *State of Wisconsin v. Christopher W. Yakich*
Court of Appeals Case Nos. 2019AP001832-CR, 2019AP001833-CR

Dear Ms. Reiff:

On September 29, 2020, this Court ordered the parties to file letter briefs addressing: (1) the impact of 1989 Wis. Act 334 (“Act 334”) and its drafting history on the parties’ interpretation of the NGI statutes, and (2) the impact of 2001 Wis. Act 109 (“Act 109”) and its drafting history on the parties’ interpretation of the NGI statutes. Mr. Yakich’s brief is as follows:

APPELLANT’S SUPPLEMENTAL BRIEF

The statutory language of Wis. Stat. § 971.17 is clear and unambiguous; it does not grant courts the authority to run NGI commitments consecutively. “When committing a defendant, the court’s authority is derived solely from statute, just as it is when sentencing a defendant.” *State ex rel. Helmer v. Cullen*, 149 Wis. 2d 151, 164, 440 N.W.2d 790 (Ct. App. 1989) Both the statutory background of Wis. Stat. § 971.17(1) and the drafting history of Act 334 and Act 109 support this. The legislature explicitly authorized courts to run NGI commitments consecutively in 1989 by referencing Wis. Stat. § 973.15(2), the statute authorizing consecutive criminal sentences, in § 971.17(1). In 2001, the legislature removed all references to § 973.15(2), eliminating the court’s authority to order consecutive NGI commitments.

I. In drafting Act 334, the legislature explicitly authorized consecutive NGI commitments by referencing § 973.15(2).

The changes made to § 971.17(1) by Act 334 authorized courts to run NGI commitments consecutive to one another. In 1989, the Judicial Council Insanity Defense Committee redrafted the statutes related to the commitment of persons found not guilty by reason of mental disease or defect (“NGI”). The committee sought to clarify commitment procedures and codify existing case law. 1989 Wis. Act 334, Prefatory Note.

(App. 123).¹ Prior to the committee's work, the court of appeals held in *State v. C.A.J.*, that courts had the statutory authority to run NGI commitments consecutive to one another. 148 Wis. 2d 137, 434 N.W.2d 800 (Ct. App. 1988). According to the prefatory note to 1989 Wis. Act. 334, the committee intended to codify *C.A.J.*, 1989 Wis. Act 334 Prefatory Note. (App. 123).

The committee's intent to authorize consecutive NGI commitments was more explicitly stated in the judicial committee's committee notes.² At the committee's November 10, 1989, meeting, the committee specifically discussed "concerns about the question of concurrent versus consecutive commitments." Judicial Council Insanity Defense Committee Summary of Proceedings, Nov. 10, 1989, at 1. (App. 101). Several committee members expressed their desire to allow courts to impose consecutive NGI commitments. *Id.* (App. 101). To clarify that commitments could be run consecutively, the committee decided to reference § 973.15(2), the statute which authorizes courts to impose consecutive criminal sentences. *Id.* at 1-2. (App. 101-02).

The reference to § 973.15(2) was added to the committee's next draft of § 971.17(1). *Compare* Insanity Defense Draft A, Nov. 3, 1989, at 1 (App. 109), *with* Insanity Defense Draft B, Dec. 8, 1989, at 1. (App. 116). Ultimately, the reference to § 973.15(2) was included in the final bill and enacted as part of Act 334. 1989 Wis. Act 334 § 5. (App. 124).

Thus, until the amendments made by Act 109, § 971.17(1) read as follows: "When a defendant is found not guilty by reason of mental disease or defect, the court shall commit the person . . . for a specific period not exceeding two-thirds of the maximum term of imprisonment *that could be imposed under s. 973.15(2)* against an offender convicted of the same crimes." (emphasis added). This reference made clear that courts had the authority to run NGI commitments consecutive to one another.

II. In amending the NGI commitment statute in Act 109, the legislature affirmatively removed the reference to § 973.15(2), thereby removing the court's authority to run NGI commitments consecutive.

In 2001, several substantive changes to Wisconsin's criminal code were passed as part of Act 109.³ The purpose of these changes was to make various portions of the

¹ Available at <https://docs.legis.wisconsin.gov/1989/related/acts/334>.

² The committee's meeting notes can be found in their entirety in the LRB's drafting file for Act 334, on file at the Wisconsin Law Library. The relevant committee note is included in the appendix to this brief. *See* (App. 101-108).

³ Numerous assembly bills, acts, and Legislative Reference Bureau ("LRB") drafting documents will be cited in this section. To assist the reader, below is a list of which LRB documents are associated with each bill and act referenced:

- LRB-4509 is the draft which would become 1999 Assembly Bill 465 (not passed) and was the starting document in drafting LRB-1428/2001 Assembly Bill 3.
- LRB-1428 is the draft which would become 2001 Assembly Bill 3, later passed as part of 2001 Wis. Act 109.
- LRB-0041 is a draft which was never introduced as a bill. It was, however, converted into LRB-1855.
- LRB-1855 was originally included in 2001 Senate Bill 55, the executive budget proposal which was passed

criminal code consistent with the truth-in-sentencing (TIS) legislation that had been passed in 1998. *See* 1997 Wis. Act 283.⁴ These changes included an amendment to § 971.17(1) and the maximum permissible length of an NGI commitment. 2001 Wis. Act 109 §§ 1106-1108. (App. 169).⁵ Most relevant here, the amendment removed the reference to § 973.15(2). *Id.* (App. 169). As such, Act 109 removed the court's authority to impose consecutive NGI commitments.

The drafting history indicates the removal of the reference to § 973.15(2) was deliberate. Although the amendment to § 971.17(1) was ultimately passed as part of Act 109, the history of changes to § 971.17(1) goes back further, to when TIS was first enacted. *See* 1997 Wis. Act 283.⁶ The original TIS act created a criminal penalties study committee tasked with, among other things, addressing "issues relating to the implementation of the changes made" under TIS. 1997 Wis. Act 283 § 454. One such issue the committee addressed was amending § 971.17(1). *See* State of Wisconsin Criminal Penalties Study Committee, *Final Report*, Aug. 31, 1999, at 101. (App. 129).⁷ The committee's final report, dated August 31, 1999, recommended certain changes to the NGI commitment statute to harmonize it with the new truth-in-sentencing scheme. *Id.* It did not explicitly discuss whether commitments could be run consecutively. *Id.* at 101-02. (App. 129-130).

The committee's recommended changes, hereinafter referred to as the TIS trailer, were first introduced in 1999 Assembly Bill 465 ("Assembly Bill 465"). Consistent with the committee's recommendations, the bill made changes to how the maximum term of commitment was to be determined, tying it to the maximum term of initial confinement for the underlying charge under the new truth-in-sentencing scheme. 1999 Assembly Bill 465 §§ 733-735 (App. 132-135).⁸ The initial version of the bill still referenced § 973.15(2), indicating an initial intent to maintain the court's authority to run NGI commitments consecutively, even under the new truth-in-sentencing scheme.

Assembly Bill 465, however, never passed. During the next legislative session, the TIS trailer was re-introduced as 2001 Assembly Bill 3 ("Assembly Bill 3"). The drafting of what would become Assembly Bill 3 was requested in December of 2000 by then-representative Scott Walker. Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, Drafting Request, Dec. 11, 2000. (App. 135-142).⁹ However,

as 2001 Wis. Act 16. It was, however, removed prior to passage of 2001 Wis. Act 16, as can be seen by the fact that the Act makes no changes to § 971.17(1).

⁴ Available at <https://docs.legis.wisconsin.gov/1997/related/acts/283.pdf>.

⁵ Available at <https://docs.legis.wisconsin.gov/2001/related/acts/109.pdf>.

⁶ For a summary of the history of truth in sentencing in Wisconsin, *see* Michael B. Brennan, Thomas J. Hammer & Donald V. Latorraca, "Fully Implementing Truth-in-Sentencing," 75 Wis. Lawyer 10 (Nov. 2002), available at <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=75&Issue=11&ArticleID=259>.

⁷ Available at <https://www.wistatedocuments.org/digital/collection/p267601coll4/id/439/rec/2>.

⁸ Available at <https://docs.legis.wisconsin.gov/1999/related/proposals/ab465.pdf>.

⁹ Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0003/01_ab_3/01_1428df_pt01of21.pdf

Assembly Bill 3 differed from Assembly Bill 465 in several ways. Most relevant here, it did *not* include the reference to § 973.15(2) in any of the subsections of § 971.17(1). 2001 Assembly Bill 3 §§ 780-782. (App. 150-151).¹⁰ The reference was removed from the NGI statute in early January 2001, as part of the first draft of what would become Assembly Bill 3. *See* Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, LRB-1428/P1, at 179-80. (App. 144-145).¹¹ The provisions in Assembly Bill 3 were eventually included in and passed as part of 2001 Wis. Act. 109. Legislative Reference Bureau Drafting File for 2001 Wis. Act 109, Drafting Request, Dec. 31, 2001.¹²

It is evident the removal of references to § 973.15(2) was deliberate. First, when drafting the initial version of LRB-1428 (which would go on to be introduced as Assembly Bill 3), the drafter crossed out all references to § 973.15(2). Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, LRB-1428/P1, at 179-80. (App. 144-145). The drafter stated that these changes, as well as others, were made for several reasons: (1) on recommendation of members of the criminal penalties study committee, (2) to make the statute “clearer or more workable,” (3) to correct cross-references, and (4) to “make[] certain substantive changes that should have been made as a result of either legislation enacted last session or other changes within the bill itself.” Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, Drafter’s Note, Jan. 9, 2001, at 1 (App. 152).¹³

Second, at the same time Assembly Bill 3 was being drafted, the LRB was also drafting another version of the TIS trailer, LRB-0041. LRB-0041 was never introduced as stand-alone legislation, so the drafting file is not publicly available. *See* Wis. Stat. § 13.92(1)(c). However, drafts of LRB-0041 appear in two other drafting files. These files show that the deletion of the reference to § 973.15(2) was included in all the trailer bills, leading to the only reasonable conclusion that the deletion was deliberate.

- (1) **2001 Assembly Bill 3:** When the LRB created the initial draft of LRB-1428 (later introduced as Assembly Bill 3), it inserted language directly from a draft of LRB-0041. *See, e.g.*, Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, LRB-1428/P1, at 179-80. (App. 144-145) (handwritten note “blue insert 181/4”). The insert included in the drafting file is draft LRB-0041/P3. *See* Legislative Reference Bureau Drafting File for 2001 Assembly Bill 3, LRB-1428/P1 Insert Blue. (App. 146).¹⁴ The

¹⁰ Available at <https://docs.legis.wisconsin.gov/2001/related/proposals/ab3.pdf>.

¹¹ Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0003/01_ab_3/01_1428df_pt05.pdf.

¹² Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/budget_reform_bill_act_109_jr2_special_session_ab_1_vetoed_in_part/002_ab_1_jr2_includes_doa_compile/01_4866df_2_doa_compile_drafts_lrb_4695_lrb_4866/01_45_48df_pt01of16.pdf.

¹³ Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0003/01_ab_3/01_1428_1dn.pdf

¹⁴ Available at

language being inserted into LRB-1428 had nothing to do with § 971.17(1). However, the drafting pages of LRB-0041/P3 are included as part of the insert document, providing insight into the changes to § 971.17(1) being discussed as part of LRB-0041's drafting. In this draft of LRB-0041, the reference to § 973.15(2) is still included in § 971.17(1)(a), dealing with old-law felonies. However, that draft removed the § 973.15(2) reference in § 971.17(1)(b), dealing with truth-in-sentencing felonies. And, the drafters manually crossed out the § 973.15(2) reference in § 971.17(1)(d), dealing with truth-in-sentencing misdemeanors. *Id.* at 14-15. (App. 147-148). Thus, during the drafting of LRB-0041, there was discussion about whether to reference § 973.15(2) in some or all of the subsections of § 971.17(1) dealing with the length of NGI commitment statutes.

- (2) **2001 Senate Bill 55 (2001 Wis. Act 16):** When the executive budget was proposed in February of 2001, it included the TIS trailer provisions dealing with the deleted reference to § 973.15(2) from § 971.17(1).¹⁵ *See* 2001 Senate Bill 55 §§ 4000-4002.¹⁶ Specifically, the version of the TIS trailer included was LRB-1855, which was based on a version of LRB-0041, LRB-0041/P4. Legislative Reference Bureau Drafting File for 2001 Wis. Act 16, LRB-1855/1, at 1 (App. 161) (using draft "LRB-0041/P4" as initial version of LRB-1855/1).¹⁷ A copy of LRB-0041/P4 is, therefore available in the drafting file related to LRB-1855. By the time LRB-0041/P4 was drafted, all references to § 973.15(2) had been removed from § 971.17(1). *Id.* at 14-15. (App. 162-163). It is also clear from the drafting request for LRB-1855 that the original requestors of LRB-0041 were Judge Michael Brennan, who served as staff counsel for the criminal penalties study committee, and Ladd Wiley of the governor's office. Legislative Reference Bureau Drafting File for 2001 Wis. Act 16, Drafting Request, Jan. 7 2001. (App. 159).

This careful review indicates several things about the drafting history of § 971.17(1). First, between the introduction of Assembly Bill 465 and Assembly Bill 3, an intentional decision was made to remove the reference to § 973.15(2) from § 971.17(1). Second, there appears to have been at least two different re-drafts of the TIS trailer floating around in late 2000/early 2001. Based on the timing of the drafts (by January 9, 2001, for example, LRB-0041/P4 had removed all reference to § 973.15(2), and it had begun that process even earlier in a previous draft) and the fact that a later draft

https://docs.legis.wisconsin.gov/2001/related/drafting_files/assembly_intro_legislation/assembly_bills_not_enacted/2001_ab_0003/01_ab_3/01_1428df_pt07.pdf

¹⁵ The TIS trailer was ultimately removed from Senate Bill 55 and not passed as part of the executive budget 2001 Act 16.

¹⁶ Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/state_budget_act_16_sb_55_vetoed_in_part/002_sb_55_includes_doa_compile/01_2402_1.pdf

¹⁷ Available at

https://docs.legis.wisconsin.gov/2001/related/drafting_files/state_budget_act_16_sb_55_vetoed_in_part/002_sb_55_includes_doa_compile/01_2402df_2_doa_compile_drafts/01_1855df_pdf.pdf

of LRB-0041 was incorporated into the initial drafting of LRB-1428, changes to the NGI commitment statute appear to have been made during the drafting process of LRB-0041 and then incorporated into LRB-1428 (Assembly Bill 3). Third, LRB-0041 was originally requested by the staff counsel of the criminal penalties study committee and the governor's office. Presumably, these parties were key decision-makers as to the amendments to the TIS trailer bill, including the decision to remove the reference to § 973.15(2).

Unfortunately, without the full drafting file related to LRB-0041, it is impossible to pinpoint the exact reason why the reference to § 973.15(2) was removed. But given the fact that it was proposed in conjunction with other TIS-related changes, the logical conclusion is that the many changes made under TIS required the removal of courts' authority to run NGI commitments consecutive to one another. For example, TIS greatly increased the maximum penalties available for judges to impose. *See, e.g.*, 2001 Wis. Act 109 § 553 (increasing the maximum penalty available for a Class C felony from 15 years of imprisonment to 40-years). Given the already longer possible term of commitment, perhaps the drafters did not see the necessity in allowing judges to commit individuals even longer by allowing consecutive commitments.

Although the increased length of TIS sentences provides a logical reason for the legislature to remove courts' authority to impose consecutive NGI commitments, such speculation is not needed. When the legislative history contains no clear statement as to why a certain amendment was made, the statutory background of a statute ("previously enacted and repealed statutory provisions") is the most telling indication of the meaning of a statute. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶52 n.9, 271 Wis. 2d 633, 681 N.W.2d 110; *see also County of Dane v. Labor and Industry Review Commission*, 2009 WI 9, ¶27, 315 Wis. 2d 293, 759 N.W.2d 571. The reference was originally added to the NGI commitment statute in 1989 to codify *C.A.J.* and authorize courts to run NGI commitments consecutively. The legislature is presumed to have known this. *In re Commitment of West*, 2011 WI 83, ¶61, 329 Wis. 2d 710, 790 N.W.2d 543 ("The legislature is presumed to know the law, and to know the legal effect of its actions."). Its deliberate removal in Act 109 makes clear that the legislature intended to remove the courts' authority to run NGI commitments consecutively.

Any argument that the removal of the reference to § 973.15(2) was accidental or simply the removal of surplus language in the statute fails. The legislative history indicates that its removal was deliberated over multiple drafts. Further, the legislature explicitly added the reference to § 973.15(2) in order to authorize consecutive NGI commitments. It then deliberately removed it. The legislature thought the reference necessary to codify *C.A.J.* and authorize consecutive commitments; the language could not, therefore, have been superfluous.

The legislature explicitly referenced § 973.15(2) in order to give courts the authority to run NGI commitments consecutive to one another. Later, as part of TIS, the legislature removed the reference to § 973.15(2), thereby removing courts' authority to do so. Without reference to § 973.15(2), there is no language in the statutory text

authorizing consecutive NGI commitments. And without clear statutory language, courts lack the authority to impose consecutive NGI commitments. *See Cullen*, 149 Wis. 2d at 164. Thus, the statute is clear, and the legislative history supports, that NGI commitments may not be run consecutive to one another.

Sincerely,

Electronically signed by Cary Bloodworth
CARY BLOODWORTH
Assistant State Public Defender

Electronically signed by Katie R. York
KATIE R. YORK
Assistant State Public Defender

cc: Mr. Scott E. Rosenow (*Via Electronic Filing*)
Assistant Attorney General

Mr. Christopher W. Yakich, (*Via U.S. Mail*)

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief complies with the word limit established by this court's September 29, 2020, order regarding supplemental letter briefs. The length is 2,719 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated this 29th day of October, 2020.

Signed:

Electronically signed by Cary Bloodworth

CARY BLOODWORTH

Assistant State Public Defender