

**State of Wisconsin
Court of Appeals
District 2
Appeal No. 2011AP000933**

State of Wisconsin,

Petitioner-Respondent,

v.

Dennis Thiel,

Respondent-Appellant.

On appeal from an order of the Fond du Lac County Circuit Court, The Honorable Robert Wirtz, presiding, granting the appellant's petition for supervised release from a Chapter 980 Commitment

Defendant-Appellant's Brief and Appendix

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Statement on Oral Argument and Publication

The issues presented by this appeal appear to be of first impression in Wisconsin. Therefore, the appellant recommends both oral argument and publication.

Statement of the Issues

1. Whether the conditions of supervised release, which appear to permit the the Department of Community Corrections, or the Department of Human Services, to unexpectedly “transport” Thiel back to Sand Ridge Secure Treatment Facility at any time, and hold him there, for the purpose of polygraphs or other testing, are reasonable and consistent with the requirement of the statutes that the conditions be as “least restrictive” as possible.

Answered by the trial court: Yes

2. Whether the condition of supervised release, which apparently permits the Department to place Thiel into a “correctional facility” upon a suspected rule violation, is reasonable and consistent with the requirement of the statutes that the conditions be “least restrictive” as possible.

Answered by the trial court: Yes

Summary of the Argument

The trial court abused its discretion in setting the conditions of supervised release that are at issue here. Firstly, the conditions that would arguably permit the Department to unexpectedly detain Thiel, and return him to Sand Ridge for testing, are wholly inconsistent with the statutory requirement that the release plan be the least restrictive as possible. There was no explanation in the record as to why the polygraph examiner could not travel to Thiel's location to conduct the tests required by Rule 16.

Additionally, Rule 13 seems to suggest that Thiel may be placed in a "correctional facility" upon a suspected rules violation. Term "correctional facility" includes all of the state prisons. By statute, a person on supervised release may not be placed in a state prison upon a rules violation.

Statement of the Case

The appellant, Dennis Thiel (hereinafter "Thiel"), had been committed for a number of years under Chapter 980. In 2009, Thiel filed a petition for supervised release pursuant to Sec. 980.08, Stats.

On November 19, 2009, the court granted Thiel's petition, and ordered the Department to prepare a release plan. (R:431-

10, 11)

Ultimately, the case was called for a release hearing on March 15, 2010. The Department's release plan and proposed rules of supervision were presented to the court. Thiel had numerous objections to the release plan, as well as to the rules of supervision. At issue in this appeal, though, Thiel objected to the combination of conditions that appeared to permit the Department to "transport" him at any time, and detain him at Sand Ridge for testing. Supervised Release Rule No. 16 (Appendix B), requires him to submit to various tests including a polygraph examination. Additionally, the treatment plan permits the Department to "transport" Thiel from time-to-time (Appendix B, p. 2) Specifically, Thiel explained that he objected to being unexpectedly transported back the Sand Ridge, and held there for several days, while the Department conducts polygraph tests, and other tests, on him. (R:433-8) Thiel had heard from other patients who were on supervised release that they were subjected to this process, which took several days, and it caused them to lose their employment. (R:433-24) The representative of the Department, Kimberly Knapp, did confirm for the court that, "Persons on supervised release are subject to testing. That does occur at Sand Ridge Secure Treatment Center throughout the individual's term on supervised release." (R:433-9). Later, Knapp explained that the testing must occur at Sand Ridge because the polygrapher is an "expert" (R:433-54)

Thiel also objected to Rule 13 insofar as it appears to permit the Department to detain Thiel in a correctional facility upon a mere rule violation (as opposed to an arrest for a criminal offense). Knapp explained to the court that the reason Thiel might be detained in a correctional facility upon a suspected rule violation is mere “proximity.” (R:433-40)

Regarding Thiel’s objection to being unexpectedly transported back to Sand Ridge and held there for testing, the court ruled:

[H]aving to do with transport, that DCC or DHS will transport Mr. Thiel. It’s my understanding that would be for those activities noted in the paragraph or excuse me the sentence right before, employment, religious activities, or activities that meet Mr. Thiel’s daily living needs such as shopping or employment. . .

Is the purpose of this rule so that transportation isn’t done in an unsupervised manner and that a person could go off on a, you know, some time of their own and do something that the department would find dangerous?

MS. KNAPP: That is correct.

THE COURT: All right. I think that that is reasonable provision in the supervised release plan. It makes sense.

(R:433-31-32). The court did not specifically address Thiel’s objection to being suddenly detained at Sand Ridge for several days for the testing, except to say:

Well, Mr. Thiel also complained that he didn’t want to be taken to one of those facilities for a PPG for something else because it might-- he might lose his job. Now he’s complaining that he isn’t being taken there [to Sand Ridge] and he’s being taken to the

closest detention spot. I mean how many ways do you want it?

Yeah . . .

(R:433-40)

Thus, the court overruled Thiel's objection on the issue of transportation back the Sand Ridge for testing.

The court said:

No. 16 had to do with the polygraph and whether that's taken at Sand Ridge. And I don't have a problem with imposing 16 if they want to take it where they have the facility to take it. I'm not going to force them to take it at some other place.

(R:433-54).

Similarly, the trial court also overruled Thiel's objection to Rule 13, which appears to permit him to be placed in a "correctional facility" upon a suspected rule violation. (R:433-54). In so doing, the judge incorporated comments he had made earlier concerning the difference between civil and criminal commitments. In that discussion, the judge said:

I think that there are some practical reasons why the department has the decision they've made. I don't think that the incarceration is a significantly long period in the jail before back to Sand Ridge if that's where he's going to go.

And frankly in the large scheme of things, that incarceration in the court jail versus a confinement at Sand Ridge is still at its base level a deprivation of liberty. And I think maybe there's-- there's more of an academic point made here that someone because one is a civil and the other is a criminal proceeding that, you know, I should get-- I should put a real fine point on this issue of where someone ought to be.

(R:433-41-42).

Thiel timely filed a notice of intent to pursue

postconviction relief. Thiel then filed a timely notice of appeal.

Argument

I. The trial court abused its discretion in approving of a plan, and conditions of release, that permit the Department to transport Thiel to Sand Ridge, and to hold him there while polygraph and other testing is conducted.

The combination of conditions that would arguably permit the Department to unexpectedly detain Thiel, and to return him to Sand Ridge for testing, are wholly inconsistent with the statutory requirement that the release plan be the least restrictive as possible. There was no explanation in the record as to why the polygraph examiner could not travel to Thiel's location to conduct the tests required by Rule 16.

A. Standard of Appellant Review

Whether to grant a petition for supervised release pursuant to Sec. 980.08, Stats., where to place the respondent, and the conditions of release are all matters that rest within the discretion of the trial court. Therefore, on appeal, the conditions of supervise release are reviewed for an abuse of discretion. See, e.g., *State v. Seibert*, 220 Wis. 2d 308, 314 (Wis. Ct. App. 1998).

B. Conditions of release must be consistent with the treatment needs of the patient, the safety of the community, and must be as least restrictive as possible.

Concerning the conditions of supervised release, several statutory provisions appear to control. Sec. 980.08(4)(g), Stats., provides that, “The court shall review the plan submitted by the department under par. (cm). If the details of the plan adequately meet the treatment needs of the individual and the safety needs of the community, then the court shall approve the plan and determine that supervised release is appropriate.” Additionally, Sec. 980.08(6m), Stats., provides in pertinent part:

The department shall arrange for control, care and treatment of the person *in the least restrictive manner consistent with the requirements of the person and in accordance with the plan for supervised release approved by the court under sub. (4) (g)*. A person on supervised release is subject to the conditions set by the court and to the rules of the department.

Thus, reading the statutory provisions together, the conditions of supervised release must take into account both the remaining treatment needs of the patient as well as the safety of the community. Any condition must be imposed “in the least restrictive manner” that is consistent with the patient’s treatment needs and the safety of the community.

As mentioned above, the conditions of release are left to

the vast discretion of the trial court; the appellate court must affirm discretionary decisions if the circuit court reaches a reasonable, articulated decision based on the facts of record and proper application of the law. *State v. Keding*, 2002 WI 86, P13, 254 Wis. 2d 334, 646 N.W.2d 375.. However, a trial court abuses its discretion if the court does not consider the proper factors, or if proper exercise of discretion is not apparent from the record, and no reasonable basis exists for its decision. *McCleary v. State*, 49 Wis.2d 263, 277-78, 282, 182 N.W.2d 512, 519-20, 522 (1971).

C. The trial court abused its discretion because it did not consider the proper statutory factors in approving the condition that permits the Department to unexpectedly transport Thiel to Sand Ridge for testing.

Here, the trial court approved of the combination of conditions that appeared to permit the Department to unexpectedly detain Thiel and transport him to Sand Ridge for the testing required by Rule 16 (polygraph, etc.).

The record, however, does not contain a cogent consideration of the proper statutory factors that were considered by the court. Rather, the court simply found that, generally, permitting the Department to provide transportation for Thiel was reasonable. (R:433-31). However, the context of the court's remarks make it clear that the judge was referring to the transportation that is necessary to permit Thiel to conduct

his daily errands. The judge did not specifically address Thiel's objection to being transported back to Sand Ridge for testing, except where the judge remarked that Thiel objected to being transported back to Sand Ridge, but also objected to being held in a correctional facility. (R:433-40).¹

Thus, the record does not reflect that the trial court considered the proper factors in exercising its discretion on this point. The next step, then, is to determine whether the record contains sufficient information for the appellate court to determine that the trial court's decision could have been based upon proper factors.

The only reason offered by the Department for transporting Thiel back to Sand Ridge for testing was that the person who conducts the polygraph is an expert in that field (R:433-54, 55) The Department did not tell the court that this expert maintains an office at Sand Ridge; nor did the Department offer any explanation as to why this expert could not travel to Thiel's location to conduct the testing.

The stated reason, then, appears to be wholly inconsistent with the statutory mandate that the release plan employ the "least restrictive" means possible. In the absence

¹This comment by the trial judge suggests that, perhaps, the court did not fully understand the nature of Thiel's objections. Thiel objected to being transported to Sand Ridge for routine testing. Thiel also objected to be held in a correctional facility upon suspicion of a mere rules violation. These two objections are not inconsistent nor unreasonable. Put simply, Thiel never wants to be put into a correctional facility. If there is a rules violation, Thiel wants to be returned to Sand Ridge; however, Thiel does not think it is reasonable for him to be transported back to Sand Ridge for the routine testing required by Rule 16.

of some better explanation, the least restrictive means of conducting the tests required by Rule 16 would appear to be for the examiner to travel to Thiel's location.

II. The statutes do not permit Thiel to be held in a "correctional facility" upon suspicion of a mere rules violation.

Rule 13 seems to suggest that Thiel may be placed in a "correctional facility" upon a suspected rules violation. The term "correctional facility" includes all of the state prisons. By statute, a person on supervised release may not be placed in a state prison upon a rules violation.

Once again, the record does not reflect that the trial judge considered the proper statutory factors. The reason stated by the Department for placing Thiel in a correctional facility was mere proximity. (R:433-40). The court approved of the condition because, in the judge's estimation, Thiel was being unreasonable and inconsistent in his objections. That is, Thiel objected to going back to Sand Ridge (for testing), and he also objected to being placed in a correctional facility.

Thus, the appellate court must examine the record to determine whether there are factors present that would sustain the trial court's discretionary determination.

Once again, there are no such factors present. The issue here is strictly one of imprecise language in Rule 13. The law

does not permit a person on supervised release to be placed in a state prison (which is a correctional facility) upon a suspected rules violation.

Upon violation of the rules of supervision, Sec. 980.08(7)(c), Stats., provides that, “Pending the revocation hearing, the department may detain the person in a jail or a facility described under s. 980.065.”²

Rule 13, though, suggests that Thiel may be placed in a “correctional facility”. The term “correctional facility” includes many state prisons and other institutions. *See, generally*, 302.01, Stats.

As mentioned above, a person who is placed on supervised release may not, in fact, be placed into a state prison upon a suspected rules violation. For this reason, the trial court abused its discretion in approving of this condition.

Conclusion

It is respectfully requested that the Court of Appeals reverse that portion of the trial court’s judgment approving of the two conditions of release at issue here; and to remain the matter for correction of the conditions of release.

² Sec. 980.065(1), Stats., provides, “The department shall place a person committed under s. 980.06 at the secure mental health facility established under s. 46.055, the Wisconsin resource center established under s. 46.056 or a secure mental health unit or facility provided by the department of corrections under sub. (2).”

Dated at Milwaukee, Wisconsin, this _____ day of July,
2011.

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Certification as to Length and E-Filing

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 2366 words.

This brief was prepared using *Google Docs* word processing software. The length of the brief was obtained by use of the Word Count function of the software

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

Dated this _____ day of _____, 2011:

Jeffrey W. Jensen

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State of Wisconsin,

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v.

Dennis Thiel,

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Defendant-Appellant's Appendix

A. Record on Appeal

B. Order granting supervised release (with plan & rules attached)

C. Excerpt of trial court's bench ruling on the conditions

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

I further certify that if this appeal is taken from a

circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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

Dated this ____ day of July, 2011.

Jeffrey W. Jensen