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DISTRICT II

January 9, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP1426-W Circuit Court for Fond du Lac County and the Honorable Robert J. Wirtz, presiding v. Gerald M. Turner, Jr. (L.C. #2018CI1)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

In January 2018, the State of Wisconsin filed a Wis. STAT. ch. 980 (2015-16)¹ petition in Fond du Lac County alleging that Gerald M. Turner is a sexually violent person. *See* Wis. STAT. § 980.02(1), (4)(a). On Turner's motion, the Fond du Lac County Circuit Court, the Honorable Robert J. Wirtz presiding, transferred responsibility for the case to the Dane County Circuit

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Court, the Honorable Richard G. Niess presiding. The State petitions for a supervisory writ seeking reversal of the order and asking this court to direct the Fond du Lac County Circuit Court to either return the case to Fond du Lac County or to preside over the matter in Dane County. Turner opposes granting the State's petition. We granted the State's motions to file a reply to Turner's response in opposition and to stay further circuit court proceedings pending disposition of this petition. Based on statutory changes since the State first sought Turner's commitment under ch. 980, we are persuaded by the State's position. We grant the writ.

Gerald M. Turner was convicted in Fond du Lac County Circuit Court in 1975 for the sexual assault and murder of a nine-year-old girl. In 1994, shortly before his release from prison after serving seventeen years of his thirty-eight year sentence, the State filed a petition in Fond du Lac County alleging that Turner was a sexually violent person subject to civil commitment. *See* WIS. STAT. §§ 980.01(6)(a), (b), (7) and 980.02(1)(a), (4)(a) (1993-94). The Fond du Lac County court sua sponte transferred the case to Dane County pursuant to its broad discretionary authority under WIS. STAT. § 801.52 (1993-94). The Dane County jury found that Turner did not meet the commitment criteria and the State's petition was dismissed.

In 2006, the legislature made extensive changes to WIS. STAT. ch. 980, made WIS. STAT. § 801.52 inapplicable to ch. 980, *see* § 801.52, and created WIS. STAT. § 980.034, entitled "Change of place of trial or jury from another county."

When Turner's parole was revoked in 2013, he was a Dane County resident. In January 2018, the State filed a new commitment petition against him in Fond du Lac County pursuant to WIS. STAT. § 980.02(4)(a). Turner moved to "return" the case to Dane County on grounds of issue preclusion. The doctrine of issue preclusion is "designed to limit the relitigation of issues

that have been contested in a previous action between the same or different parties.” *Michelle T. v. Crozier*, 173 Wis. 2d 681, 687, 495 N.W.2d 327 (1993). The State contended issue preclusion does not apply because Wis. STAT. ch. 980 now specifically directs change of venue; the revised Wis. STAT. § 801.52 expressly does not apply to a ch. 980 case; and, as the 1994 court sua sponte changed venue under the prior § 801.52, venue never actually was litigated. The court granted Turner’s motion and denied the State’s motion for reconsideration. This court denied the State’s petition for leave to appeal the circuit court’s decision.

The State now petitions for a supervisory writ. A party seeking a supervisory writ must show that an appeal is an inadequate remedy; grave hardship or irreparable harm will result; the duty of the trial court is plain and it must have acted or intended to act in violation of that duty; and the request for relief is made promptly and speedily. *State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, ¶26, 365 Wis. 2d 351, 875 N.W.2d 49. Whether or not to issue a supervisory writ rests within this court’s discretion and, as an extraordinary and drastic remedy, it is to be issued only upon some grievous exigency. *State ex rel. Dressler v. Circuit Court for Racine Cty.*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

The State argues that Wis. STAT. § 980.02(4) grants it, as petitioner, the right to select circuit court venue and that issue preclusion does not apply because the 1994 sua sponte transfer to Dane County was done pursuant to a statute that no longer applies, such that the matter never was litigated.

Under the current statutes, “[t]he circuit court in which a petition under [Wis. STAT. §] 980.02 is filed shall conduct all hearings under [Wis. STAT. ch. 980].” Wis. STAT. § 980.03(1). A respondent may move to have the case transferred to another county if concerned

about jury prejudice in the selected venue, WIS. STAT. § 980.034(1), a concern Turner did not allege. If the circuit court determines “that there exists in the county where the action is pending such prejudice that a fair trial cannot be had,” the court may “order that the trial be held in any county where an impartial trial can be had.” Sec. 980.034(3). “The judge who orders the change ... shall preside at the trial.” *Id.* After preliminary matters, the court either must preside over all of the proceedings in the second county or through jury selection, then return to the original county with the jurors from the second county. Sec. 980.034(3), (4).

The State also notes that, while defects in venue generally do not affect the validity of an order or judgment, *see* WIS. STAT. § 801.50(1), a specific statute controls over the general. *See Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶37, 302 Wis. 2d 358, 735 N.W.2d 30. WISCONSIN STAT. §§ 801.52 and 980.034 are specific statutes. The State argues that if venue were to be deemed improper on appeal, the judgment could be challenged as invalid for the lack of competency to proceed to judgment. *See Mueller v. Brunn*, 105 Wis. 2d 171, 178, 313 N.W.2d 790 (1982), *abrogated on other grounds by Village of Trempealeau v. Mikrut*, 2004 WI 79, 273 Wis. 2d 76, 681 N.W.2d 190.

We grant the State’s petition for a supervisory writ. Judge Wirtz either must re-venue the case in Fond du Lac County and preside over it there, *see* WIS. STAT. § 980.03(1) or, if the change of venue was made at least in part due to a concern that Turner could not receive a fair trial in Fond du Lac County, Judge Wirtz must preside over the case in Dane County (or if the analysis is conducted anew, “any county where an impartial trial can be had”), at least through jury selection and preside over the remainder of the trial in Fond du Lac County but with the jury chosen from the second county, *see* WIS. STAT. § 980.034(3) and (4).

Therefore,

IT IS ORDERED that the petition for a supervisory writ is granted, without costs.

IT IS FURTHER ORDERED that Judge Wirtz must preside over all of the proceedings as set forth in Wis. STAT. §§ 980.03(1) and 980.034(3), (4).

IT IS FURTHER ORDERED that the stay of proceedings in the circuit court is lifted.

Sheila T. Reiff
Clerk of Court of Appeals