

STATE OF WISCONSIN
COURT OF APPEALS
Appeal No. 205AP2959

In re the commitment of Dennis R. Thiel,

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS THIEL,

Defendant-Appellant.

APPEAL FROM A FINAL ORDER DENYING THE
APPELLANT'S PETITION FOR DISCHARGE FROM A
CHAPTER 980 COMMITMENT, THE HON. ROBERT J.
WIRTZ, PRESIDING

APPELLANTS BRIEF AND APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is one that is governed by well-settled law and, therefore, neither oral argument nor publication are recommended by the appellant.

STATEMENT OF THE ISSUES

Whether Thiel is entitled to a new hearing on his petition for supervised release for the reason that the trial court failed to appoint a "court expert" pursuant to Sec. 980.08(3), STATS despite the fact that the provisions of the statute are mandatory and the Court of Appeals, in an opinion on an interlocutory appeal, ordered the trial court to appoint such an expert.

ANSWERED BY THE TRIAL COURT: Not directly answered by the trial court.

SUMMARY OF THE ARGUMENT

In an opinion on an interlocutory appeal in this case the Court of Appeals found that the provisions of Sec. 980.08(3), STATS are mandatory and require the court to appoint an expert "for the court." The Court of Appeals directly ordered the trial court to appoint such an expert. However, on remand, the trial court once again did not appoint an expert for the court. The matter proceeded to hearing and the court denied Thiel's petition for supervised release.

Because the provisions of the statute are mandatory the court's error is plain and it is not subject to a harmless error analysis. Moreover, Thiel cannot be accused of waiver for not demanding

that the trial court do what it was already ordered to do. To the extent that any waiver occurred, the Court of Appeals should nonetheless address the issue because the error is plain and it affects Thiel's substantial rights. Specifically, the experts who did testify were evenly split in their opinions. The court-appointed expert could have meaningfully assisted the trial judge in understanding and in evaluating the competing expert opinions.

STATEMENT OF THE CASE¹

The respondent-appellant, Dennis Thiel ("Thiel"), filed in 1999 a petition pursuant to Sec. 980.08(1)², STATS for supervised release from his Chapter 980 commitment. The petition followed a long and tortuous procedural path.³ Among other issues, Thiel wrangled with the trial court over the appointment of experts. The Court of Appeals granted Thiel's petition for leave to appeal the trial court's non-final order appointing an expert and, on November 17, 2004, the Court of Appeals issued an opinion that reversed the order of the trial court. The Court wrote:

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- 1 The issue presented by this appeal is primarily procedural in nature. Therefore, for the sake of clarity and brevity the procedural background and the factual background will be combined.
 - 2 (1) Any person who is committed under s. 980.06 may petition the committing court to modify its order by authorizing supervised release if at least 18 months have elapsed since the initial commitment order was entered or at least 6 months have elapsed since the most recent release petition was denied or the most recent order for supervised release was revoked. The director of the facility at which the person is placed may file a petition under this subsection on the person's behalf at any time.
 - 3 The situation was complicated somewhat by the fact that Thiel had simultaneously pending a petition for discharge (the so-called "yearly review") on which he had waived counsel and was proceeding *pro se*.

We conclude that the circuit court must appoint an examiner for the court under WIS. STAT. § 980.08(3) regardless of whether the court also appointed an examiner for the petitioner under WIS. STAT. § 980.03(4). We further conclude that an indigent party petitioning for supervised release under § 980.08 is not entitled to an examiner of his or her choice under § 980.03(4), but is entitled to a “qualified and available” court-appointed examiner. Finally, we conclude that the court’s appointment of Dr. Kotkin as Thiel’s examiner was an erroneous exercise of discretion. *The matter is hereby remanded to the circuit court for appointment of an examiner for the court pursuant to § 980.08(3) and for appointment of a § 980.03(4) examiner who is qualified to opine on the PCL-R evaluation tool and the revised scoring policy.*

(Court of Appeals opinion, 2003AP2659; Appendix B; emphasis provided).

When the matter was remanded to the trial court, though, the court appointed Patricia Coffey as Thiel's expert pursuant to Sec. 980.03(4), STATS but, for some reason not placed on the record, the trial court ignored the order of the Court of Appeals to appoint a court expert pursuant to Sec. 980.08(3), STATS⁴. (R:248-12)

The case proceeded to a supervised release hearing on September 2, 2005. The State called two experts, David Warner and Lloyd Sinclair, both of whom offered the opinion that Thiel was still a sexually violent person and that he was not appropriate for supervised release (R:252-7; R:252-31). Thiel, on the other hand, also

4 (3) Within 20 days after receipt of the petition, the court shall appoint one or more examiners having the specialized knowledge determined by the court to be appropriate, who shall examine the person and furnish a written report of the examination to the court within 30 days after appointment. The examiners shall have reasonable access to the person for purposes of examination and to the person's past and present treatment records, as defined in s. 51.30 (1) (b), and patient health care records, as provided under s. 146.82 (2) (c). If any such examiner believes that the person is appropriate for supervised release under the criteria specified in sub. (4) (b), the examiner shall report on the type of treatment and services that the person may need while in the community on supervised release. The county shall pay the costs of an examiner appointed under this subsection as provided under s. 51.20 (18) (a).

called two experts, Patricia Coffey and Hollida Wakefield. Both Coffey and Wakefield testified that Thiel was appropriate for treatment in the community. (R:252-59 to 65; R:252-88)

The trial court found that State's experts to be more "convincing" and denied the petition for supervised release. (R:252-109)

ARGUMENT

I. APPOINTMENT OF A COURT EXPERT IS MANDATORY IN CHAPTER 980 PROCEEDINGS AND THE TRIAL COURT'S FAILURE TO APPOINT SUCH AN EXPERT REQUIRES A NEW TRIAL.

Where a petition for supervised release is filed Sec. 980.08(3), STATS requires in mandatory terms that the court appoint its own expert to evaluate the defendant. As if the mandatory terms of the statute were not compelling enough, the Court of Appeals in this case directly ordered the trial court to appoint a "court expert" pursuant to Sec. 980.03, STATS. Still, the trial court appointed no such expert and the matter proceeded to hearing. The failure to follow a mandatory statute is clear error and the error cannot be harmless. Moreover, Thiel never waived this issue on appeal.

A. It was clear and reversible error for the trial court to fail to appoint a court expert.

Sec. 980.08(3), STATS provides, in pertinent part, "Within 20 days after receipt of the petition, the court *shall* appoint one or more examiners having the specialized knowledge determined by the

court to be appropriate, who *shall* examine the person and furnish a written report of the examination to the court within 30 days after appointment." (emphasis provided) The use of the word "shall" in a statute generally indicates that the provision is mandatory. See *Mucek v. Nationwide Communications, Inc.*, 252 Wis. 2d 426, 643 N.W.2d 98 (Ct. App. 2002). But, if there were any doubt in this case about whether the statute is mandatory the Court of Appeals cleared that up for the trial court. In its opinion on Thiel's interlocutory appeal the court wrote, "The parties agree that the language of WIS. STAT. § 980.08(3) requires the circuit court to appoint an examiner for the court, and we concur." (App. B p. 8) In its conclusion, then, the Court of Appeals ordered that, "The matter is hereby remanded to the circuit court *for appointment of an examiner for the court pursuant to § 980.08(3) . . .*" (emphasis provided; App. B p. 14)

Significantly, the Court of Appeals cannot apply the doctrine of harmless error to excuse the failure to comply with a mandatory statute. See *D.F.R. v. Juneau County, Dep't of Soc. Servs.*, 147 Wis.2d 486, 499, 433 N.W.2d 609 (Ct.App. 1988). There, the court wrote:

Whether substantial compliance with a statute is sufficient is a question of law. *Midwest Mut. Ins. Co. v. Nicolazzi*, 138 Wis.2d 192, 196-202, 405 N.W.2d 732, 734-37 (Ct.App. 1987). If a statute is mandatory, its observance is usually said to be imperative. *Id.* at 198, 405 N.W.2d at 735. We conclude that substantial compliance with sec. 48.356(2), Stats., is insufficient. We consider that this conclusion is required by *In re Termination of Parental Rights to M.A.M.*, 116 Wis.2d 432, 342 N.W.2d 410 (1984).

Thus, the failure of the trial court to appoint an expert for the court was plain error and it cannot be harmless.

B. Thiel did not waive the error

The State may argue that Thiel waived the appointment of a court expert by not specifically reminding the trial court to accomplish what the Court of Appeals had already ordered it to do and by then proceeding to the hearing without the court expert having been appointed.

Firstly, it must be emphasized that the parties cannot waive the provisions of a mandatory statute. *See, e.g. Uebele v. Oehmsen Plastic Greenhouse Mfg.*, 125 Wis.2d 431, 373 N.W.2d 456 (Ct.App. 1985)

To preserve an issue for appeal, though, the circuit court must be apprised of a party's objection and the basis for it. *See Coston v. Joseph P.*, 222 Wis.2d 1, 19-20, 586 N.W.2d 52 (Ct.App. 1998). The purpose of requiring objections to be made before the circuit court is to give the court an opportunity to correct its error. *Bavarian Soccer Club, Inc., v. Pierson*, 36 Wis.2d 8, 15, 153 N.W.2d 1 (1967). When objections to procedure are not made before the fact-finding tribunal, the trier of fact does not have the opportunity to correct possible errors. *See State ex rel. Olson v. City of Baraboo Joint Review Bd.*, 252 Wis.2d 628, 643 N.W.2d 796 (Ct. App. 2002).

Here, it is not reasonable to suggest that it is Thiel's obligation to remind the trial court to comply with a mandate already issued by the Court of Appeals. Thus, no waiver ought to be found.

Nonetheless, even if the Court finds that Thiel should have objected to proceeding to the contested hearing unless and until the court expert is appointed, the doctrine of plain error permits the Court of Appeals to address this issue.

In, *State v. Neuser*, 191 Wis.2d 131, 140, 528 N.W.2d 49 (Ct.App. 1995) the Court of Appeals explained:

However, we may overlook waiver where the error is so plain or fundamental as to affect the substantial rights of the defendant. See *Vollmer v. Luetz*, 156 Wis.2d 1, 21 n. 5, 456 N.W.2d 797, 806 (1990). We may grant a new trial in the interests of justice pursuant to § 752.35, STATS., where the real controversy has not been fully tried or there is a substantial degree of probability that a new trial will likely produce a different result. *State v. Von Loh*, 157 Wis.2d 91, 102, 458 N.W.2d 556, 560 (Ct.App. 1990).

Here, the error is clearly plain. The only question is whether the error affects Thiel's substantial rights. Once again, the answer to this question is found in the earlier opinion of the Court of Appeals. The court explained, "Because the two examiners clearly serve different purposes, we conclude that the appointment of Thiel's examiner under § 980.03(4) did not satisfy the mandate of § 980.08(3); therefore, the circuit court erred when it refused to appoint an examiner for the court." (App. B p. 8)

In this case, the experts were equally divided. The two doctors for the State testified that Thiel could not be safely treated in the community and Thiel's two doctors testified that he could. Certainly one of the purposes of the court appointed expert is to assist the judge in weighing the competing opinions of the parties' experts. The court-appointed expert is, presumably, a person whose credentials and opinions the judge trusts. The court-appointed expert seems less likely to (consciously or unconsciously) shade his or her opinions in favor of the adversary party who has retained them. Finally, the court appointed expert can help the judge, who is after all usually a layperson when it comes to matters of psychology and psychiatry, better understand and evaluate the

testimony of the partisan experts.

Here, the trial court had none of these benefits in what was a very close call. Thus, the plain error affected a substantial right of Thiel's.

CONCLUSION

For these reasons the Court of Appeals should reverse the order of the trial court denying Thiel's petition for supervised release and, once again, remand the matter with instructions to appoint a court expert and to then conduct a new hearing.

Dated at Milwaukee, Wisconsin this ____ day of _____, 2006.

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CERTIFICATION

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 2810 words.

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

Dated this ____ day of _____, 2006:

Jeffrey W. Jensen

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APPENDIX

A. Record on Appeal

B. November 17, 2004 opinion of court of appeals

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: (1) a table of contents; (2) relevant trial court record entries; (3) the findings or opinion of the trial court; and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

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 at Milwaukee, Wisconsin, this ____ day of April, 2006.

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