IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM MARBERRY,

Petitioner, OPINION AND ORDER

v. 04-C-809-C

STEVEN WATTERS, Director, Sand Ridge Secure Treatment Facility,

Respondent.

This is an application for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2254. William Marberry, who is presently confined at the Sand Ridge Secure Treatment Facility in Mauston, Wisconsin, is serving an indefinite term of confinement under Wisconsin's sexually violent person civil commitment provision, Chapter 980. His custody is the result of a final order entered by the Circuit Court for Dane County on July 15, 1998. Petitioner has paid the five dollar filing fee. The petition is before the court for preliminary consideration under Rule 4 of the Rules Governing Section 2254 Cases.

Petitioner contends that the Wisconsin Department of Health and Family Services violated his rights to due process by failing to provide him with an initial re-examination within six months of his initial confinement, as required by Wis. Stat. § 980.07. It appears that petitioner has exhausted his state court remedies and filed his petition within the one-

year statute of limitations. However, as will be explained below, the petition is moot because petitioner has now been re-examined. Accordingly, the petition will be dismissed.

BACKGROUND

On July 15, 1998, the Circuit Court for Dane County entered an order committing petitioner for institutional care in a secure mental health unit or facility under Wisconsin's sexually violent person civil commitment statute, Chapter 980. The order further directed that "[t]he Department [of Health and Family Services] shall conduct a reexamination pursuant to Section 980.07, Wis. Stats., within six months of the date of this order." At the time, § 980.07(1) read as follows:

> If a person has been committed under s. 980.06 and has not been discharged under s. 980.09, the department shall conduct an examination of his or her mental condition within 6 months after an initial commitment under s. 980.06 and again thereafter at least once each 12 months for the purpose of determining whether the person has made sufficient progress to be entitled to transfer to a less restrictive facility, to supervised release or to discharge. At the time of a reexamination under this section, the person who has been committed may retain or, if he or she is indigent and so requests, the court may appoint a qualified expert or a professional person to examine him or her.

On June 15, 1999, petitioner filed a petition for a writ of habeas corpus in the circuit court for Winnebago County. Petitioner sought release from confinement because the department had failed to conduct a periodic examination of his mental condition within six months of the initial confinement order, as required by Wis. Stat. § 980.07(1) and the circuit court order. The circuit court denied petitioner's request for release, but ordered the

department to "promptly conduct" the periodic exam. Approximately 10 months later, on June 29, 2000, the department conducted the periodic examination and found that petitioner remained a sexually violent person.

Meanwhile, petitioner filed an appeal to the Wisconsin Court of Appeals challenging the circuit court's failure to order his release. On August 2, 2000, the state appellate court certified the case to the Wisconsin Supreme Court; that court granted certification on August 29, 2000. However, on March 13, 2001, after briefing and oral argument, the supreme court vacated its order accepting certification and remanded the case to the court of appeals for further proceedings.

The court of appeals concluded that the language of § 980.07 indicated that the legislature had intended to impose a mandatory duty on the department to conduct a periodic re-examination of a ch. 980 committed person within six months of his initial confinement. State ex rel. Marberry v. Macht, 2002 WI App 133, ¶¶ 12-14, 254 Wis. 2d 690, 648 N.W. 2d 522. Finding that the department's failure to provide Marberry with an examination for nearly two years after his initial commitment was egregious, the court concluded that Marberry's release was the only appropriate remedy. Id. at ¶ 37.

The Wisconsin Supreme Court accepted review. All six justices who decided the case agreed with the court of appeals that the initial re-examination specified in Wis. Stat. § 980.07 was mandatory. State ex rel. Marberry v. Macht, 2003 WI 79, 62 Wis. 2d 720, 665 N.W. 2d 155. However, the court concluded unanimously that release was not the

appropriate remedy for the department's breach of its duty. Three justices held that release was not the appropriate remedy for Marberry's situation because he had not demonstrated that other available remedies were inadequate, including filing a petition for supervised release under Wis. Stat. § 980.08, or seeking mandamus and contempt. Id. at ¶¶ 22-33. The other three justices agreed that immediate release was not appropriate, but would have held the case open for a two-year period so that the department could file reports showing that it was complying with its statutorily mandated duties in a timely manner. Id. at ¶¶ 58-59.

After the United States Supreme Court denied his petition for a writ of certiorari, petitioner filed this habeas petition.

OPINION

Petitioner contends that his custody is unlawful because the Department of Health and Family Services failed to conduct a periodic examination of his mental condition within six months of the commitment order, as required by Wis. Stat. § 980.07(1). Petitioner contends that he has a due process right to a timely periodic review and that release is the only remedy that can meaningfully protect his constitutional rights.

Even assuming that the department's delay in providing petitioner with a timely re-examination under Wis. Stat. § 980.07(1) amounted to a denial of due process of law, petitioner is not entitled to federal habeas relief. The habeas statute provides that a district

court shall entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); see also Preiser v. Rodriguez, 411 U.S. 475, 486 n.7 (1973) ("traditional meaning and purpose of habeas corpus [is] to effect release from illegal custody"). On June 29, 2000, the department finally conducted a re-examination of petitioner's mental health under Wis. Stat. § 980.07 and it appears that it has continued to re-examine him on a regular basis since that time. Petitioner does not contend that the department's delay in re-examining him impaired the accuracy of the department's eventual conclusion that his condition had not improved so as to warrant discharge or a less restrictive confinement. Nor does he claim that any errors of constitutional magnitude occurred during the proceedings that led to the initial July 15, 1998 order of commitment. Petitioner simply argues that ordering release as a remedy is necessary to give teeth to Chapter 980's guarantees of periodic re-examination and judicial review.

Petitioner's argument is akin to that made by the petitioner in Allen v. Duckworth, 6 F.3d 458 (7th Cir. 1993), who contended that the state supreme court had violated his right to due process by taking more than four years to decide his appeal of his conviction. Shortly after petitioner filed a federal habeas petition, the state supreme court issued a decision in which it affirmed petitioner's conviction, although it reduced petitioner's sentence by 10 years. The Court of Appeals for the Seventh Circuit rejected petitioner's

suggestion that the court should reduce his sentence further as a remedy for the more stringent conditions of confinement to which he was subject while awaiting the decision on appeal, explaining:

> Habeas corpus is not a compensatory remedy. The object is not to make whole someone who has suffered a loss; it is to determine whether a person is being confined in violation of basic norms of legality. It is conceivable that delay in processing an imprisoned defendant's appeal might make his continued imprisonment unlawful, but once the delay ends with an appellate decision not claimed to be invalid by reason of delay, as in this case, any ground for ordering him released evaporates. The petitioner was duly convicted, and the conviction upheld, if belatedly, in an appellate decision not claimed to be infected by any error that would justify his release on habeas corpus. He should serve his time. Any harm is collateral, and is redressable, in principle at least, by a civil rights suit for damages.

Allen, 6 F.3d at 460.

Like the petitioner in Allen, petitioner has now been provided with the procedural due process of which he was deprived at the time he first sought habeas relief in state circuit court. He does not challenge the validity of his initial confinement or make any serious argument that he would have been placed on supervised release or discharge had the department conducted a timely re-examination of his mental condition. Petitioner's argument in favor of release is essentially a request that he be compensated for the delay. As the court explained in Allen, compensation is not the purpose of habeas corpus.

Alternatively, petitioner's argument amounts to a disagreement with the state supreme court about how best to interpret and enforce Chapter 980's procedural protections. Ordinarily, habeas relief does not lie for errors of state law, although there may be an

exception "if an error of state law could be sufficiently egregious to amount to a denial of equal protection or of due process of law." Pulley v. Harris, 465 U.S. 37, 41 (1984). See also Barclay v. Florida, 463 U.S. 939, 957-58 (1983) (plurality opinion) ("[M]ere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution."). Petitioner suggests that the Wisconsin Supreme Court violated his right to equal protection when it failed to find that the trial court lost jurisdiction over him as a result of the department's failure to comply with the mandatory statutory time frame for re-examining him under Wis. Stat. § 980.07. (The state supreme court found it unnecessary to decide the issue in light of its conclusion that habeas corpus relief in the form of release or discharge was not warranted. See 2003 WI 79, ¶ 2.) Petitioner points out that the Wisconsin courts have held that failure to comply with certain mandatory time limits in proceedings under Chapters 51 and 55, Wisconsin's other civil commitment statutes, deprives the trial court of competency to exercise jurisdiction over the person who is the subject of the proceeding. Petitioner argues that "there is no rational basis for denying persons committed under Chapter 980 a similar guarantee of timely periodic review." Pet., dkt. #1, at 15.

The problem with petitioner's argument is that neither the Wisconsin legislature nor the supreme court "denied" persons committed under Chapter 980 a right of timely periodic review. To the contrary, the court held that such persons were guaranteed that right; it merely held that release was not a remedy for a deprivation of that right. Although couched

in terms of equal protection, petitioner's argument is really just a claim that the state courts erred in failing to extend their own case law interpreting Chapters 51 and 55 to the Chapter 980 context. This is a garden-variety state law claim that is not cognizable on federal habeas review.

In sum, although the petition makes out a viable due process claim, petitioner's claim is moot. Accordingly,

ORDER

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, IT IS ORDERED that the petition of William Marberry for a writ of habeas corpus under 28 U.S.C. § 2254 is DISMISSED WITH PREJUDICE.

Dated this 16th day of November, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge