Appeal No. 2005AP810 **Cir. Ct. No. 2004CI3**

WISCONSIN COURT OF APPEALS
DISTRICT IV

IN RE THE COMMITMENT OF SCOTT R. NELSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

SCOTT R. NELSON,

RESPONDENT-APPELLANT.

FILED

MAR 02, 2006

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Dykman and Vergeront, JJ.

This appeal raises an important issue of first impression regarding the constitutionality of a recent amendment to the civil commitment procedure set forth in Chapter 980 of the Wisconsin Statutes. Specifically, the primary question presented is whether the new definition of a "sexually violent person" as one who is "likely" (rather than "substantially probable") to commit future acts of sexual violence violates substantive due process.[1] Resolution of this question will require

[1] Nelson also challenges the amendment as impermissibly retroactive and violative of equal protection. We believe that both of those issues may be resolved based on existing case law, however, either by the supreme court or by this court on remand. *See* ***State v. Tabor***, 2005 WI App 107, 282 Wis. 2d 768, 699 N.W.2d 663; ***State v. Post***, 197 Wis. 2d 279, 541 N.W.2d 115 (1995). We therefore do not address the merits of those claims in this certification.

further refinement and articulation of what degree of certainty about future dangerousness is constitutionally required to justify the involuntary and indefinite civil commitment of a sexually violent person. Because the resolution of this issue will have statewide effect, we certify the appeal to the Wisconsin Supreme Court for its review and determination pursuant to WIS. STAT. RULE 809.61 (2003-04).[2]

As a threshold matter, the State contends that Nelson has waived his due process challenge by failing to raise it in the trial court. However, because a facial challenge to the constitutionality of a statute implicates subject matter jurisdiction, such issues may be raised for the first time on appeal. ***State v. Bush***, 2005 WI 103, ¶19, 283 Wis. 2d 90, 699 N.W.2d 80. Furthermore, because this case involves a facial challenge to the statute, we do not recite the particular facts of Nelson's commitment, but instead immediately proceed to describe the legal issue.

In ***Kansas v. Hendricks***, 521 U.S. 346 (1997), the United States Supreme Court held that substantive due process requires proof of some link between a person's mental illness and his or her dangerousness before the person can be civilly committed as a sexual offender. ***Id.*** at 357-58. The Court concluded that a Kansas statute allowing confinement of a person charged with or convicted of a sexually violent offense who "'suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence'" satisfied substantive due process because it "narrows the class of persons eligible for confinement to those who are unable to control their

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

dangerousness." ***Id.***; KAN. STAT. ANN. § 59-29a02(a) (1994). In the follow-up case of ***Kansas v. Crane***, 534 U.S. 407 (2002), the Court clarified that ***Hendricks*** does not require "*total* or *complete* lack of control." ***Crane***, 534 U.S. at 411. Rather, the Court explained, it is sufficient to show that a person's mental disorder leads to "serious difficulty in controlling behavior." ***Id.*** at 413.

In ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, the Wisconsin Supreme Court held that Wisconsin's civil commitment statute for sexually violent persons satisfied the ***Crane*** standard for substantive due process. ***Laxton***, 254 Wis. 2d 185, ¶¶21-22. The court reasoned that the definition in WIS. STAT. § 980.01(7) (2001-02) of a sexually violent person as one who is "'dangerous *because* he or she suffers from a *mental disorder* that *makes it substantially probable that the person will engage in acts of sexual violence*'" implicitly required "proof that the person's mental disorder involves serious difficulty for such person in controlling his or her behavior." ***Laxton***, 254 Wis. 2d 185, ¶¶22-23.

After the decision in ***Laxton***, the Wisconsin legislature amended the definition of a "sexually violent person" to one who is "likely," rather than "substantially probable," to engage in future acts of sexual violence. 2003 Wis. Act 187, § 2 (effective April 22, 2004). The term "likely" is further defined in the revised statute as "more likely than not." WIS. STAT. § 980.01(1m). Nelson contends that proof that a person is merely "more likely than not" to commit a future act of sexual violence is insufficient to show that his or her mental disorder involves "serious difficulty" in controlling sexually violent behavior, as required by ***Hendricks*** and ***Crane***.

We note that the statute at issue in both ***Hendricks*** and ***Crane*** also used the term "likely" in reference to the probability that a person would commit future sexually violent acts, but the Supreme Court's attention was not focused on the meaning of that term. The Kansas statute did not define "likely" as meaning "more likely than not" but, rather, as meaning that "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(c). It is not apparent whether the "likely" standard recently adopted in Wisconsin is equivalent to the Kansas standard. In any event, as noted, the Court in neither ***Hendricks*** nor ***Crane*** was focused on the term "likely" in the Kansas definition of a sexually violent predator. The emphasis of both opinions was on the need for a nexus between a mental disorder and dangerousness, not specifically on what degree of probability was required.

The court's discussion in ***Laxton*** does not shed much light on the requisite probability because the focus of that opinion was also on another issue—namely, whether Chapter 980 failed to require a sufficient nexus because it did not define the term "mental disorder" in terms of a person's volitional capacity. The court reasoned that the issue of volitional capacity was part and parcel of a determination that a person's mental disorder predisposed him or her to engage in acts of sexual violence. ***Laxton***, 254 Wis. 2d 185, ¶22. While the court went on to conclude that a showing that a person is "substantially probable" to commit future acts of sexual violence due to a mental disorder was sufficient to establish that the person's mental disorder involves "serious difficulty in controlling his or her sexually dangerous behavior," the court did not explain whether or how Wisconsin's use of the "substantially probable" standard was necessary to its determination. *See* ***id.***, ¶23.

There was little reason for the court in ***Laxton*** to expound upon the requisite probability that an offender would engage in future acts of sexual violence as a measure of "serious difficulty" in controlling sexually violent behavior because it was fairly apparent that—no matter how "likely" was defined in the Kansas statute approved in ***Hendricks*** and ***Crane***—Wisconsin's former "substantially probable" standard was at least as high. *See* ***State v. Curiel***, 227 Wis. 2d 389, 406, 597 N.W.2d 697 (1999) (construing "substantially probable" to mean "much more likely than not"). The legislature's recent changes in this standard, however, now require attention to this issue.

It is now an open question whether Wisconsin has redefined the requisite probability of reoffending below the constitutionally permissible standard for substantive due process. Past cases upholding Wisconsin's Chapter 980 civil commitment scheme have stated that it was narrowly tailored to achieve the state's compelling interest. *See, e.g.,* ***Bush***, 283 Wis. 2d 90, ¶39; ***Laxton***, 254 Wis. 2d 185, ¶22. The legislative change at issue here seems to significantly broaden the number of people subject to involuntary commitment, arguably undermining the narrow tailoring of the statute. Because this is a recurring issue of significant statewide importance, we believe it is appropriately addressed to the Wisconsin Supreme Court.