COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 00-3231 **Cir. Ct. No. 99-CI-2**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

IN RE THE COMMITMENT OF JOHN A. ASCHENBRENER:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

JOHN A. ASCHENBRENER,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. John A. Aschenbrener appeals a WIS. STAT. ch. 980[1] judgment and commitment order. Aschenbrener argues that: (1) in order to be constitutional, ch. 980 must require a finding of lack of volitional control, and the trial court erred when it refused to instruct the jury on this issue; (2) the State did not show that an expert's opinion was independent of suppressed statements; (3) the changes made to ch. 980 by 1999 Wis. Act 9 violate Aschenbrener's right to equal protection. We reject these arguments and affirm the judgment and order.

BACKGROUND

¶2 On December 6, 1999, the State filed a WIS. STAT. ch. 980 petition alleging that Aschenbrener, a diagnosed pedophile who also suffers from a psychotic disorder, was a sexually violent person. The Department of Corrections form attached to the petition stated that Aschenbrener's mandatory release date was December 8.

¶3 The court conducted a jury trial in October 2000. During psychologist Anthony Jurek's testimony, the defense requested to have his testimony excluded because Jurek incorrectly advised Aschenbrener. Jurek stated that he had told Aschenbrener that he had a right to refuse to participate in his evaluation, that a refusal could be used as part of the assessment, and that the report would be completed whether he participated or not. Aschenbrener participated in the evaluation. Jurek then determined that there was a high probability that Aschenbrener would sexually reoffend.

[1] References to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The defense argued that Aschenbrener was intimidated and coerced by Jurek's statements, negating the voluntary nature of Aschenbrener's consent. The court determined that a WIS. STAT. ch. 980 respondent has a right not to make incriminating statements, and the exercise of that right cannot be used against the individual. The court held that Aschenbrener's statements were coerced and ordered that the statements could not be used at trial. However, the court allowed Jurek to testify after Jurek indicated that he could form an opinion without using Aschenbrener's statements.

¶5 The defense also argued for an instruction that the jury must find Aschenbrener suffered from volitional impairment rendering him dangerous beyond his control. The court denied this request, stating that the standard instruction was sufficient. The jury found Aschenbrener to be a sexually violent person. The court then entered a judgment and order of commitment to the Department of Health and Family Services. Aschenbrener appeals.

DISCUSSION

I. Volitional Control

¶6 Aschenbrener argues the necessity of a finding of lack of volitional control. This argument has recently been addressed by our supreme court's decision in ***State v. Laxton***, 2002 WI 82, ¶¶23-26, 254 Wis. 2d 185, 647 N.W.2d

784. Citing ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867 (2002),[2] Aschenbrener argues that ***Laxton*** does not control in this case and that a separate finding of serious difficulty in controlling behavior is required. We disagree. We conclude that ***Laxton*** definitively rejects Aschenbrener's contention.

¶7 In ***Laxton***, the court concluded that "civil commitment under WIS. STAT. ch. 980 does not require a separate factual finding that an individual's mental disorder involves serious difficulty for such person in controlling his or her behavior." ***Id.*** at ¶30. Rather, the court determined that the required proof of lack of control may be established "by evidence of the individual's mental disorder and requisite level of dangerousness, which together distinguish a dangerous sexual offender who has serious difficulty controlling his or her behavior from a dangerous but typical recidivist." ***Id.*** at ¶21. Proof that a mental disorder makes a person substantially probable to engage in acts of sexual violence "necessarily and implicitly includes proof that the person's mental disorder includes serious difficulty in controlling his or her sexually dangerous behavior." ***Id.*** at ¶23. Therefore, ch. 980, in requiring the nexus between mental disorder and dangerousness, satisfies due process and is narrowly tailored to meet compelling state interests. ***Id.*** The findings already necessary for a commitment under

[2] In ***Kansas v. Crane***, 534 U.S. 407, 122 S.Ct. 867, 871 (2002), the Supreme Court held that in the area of mental illness, constitutional safeguards are "not always best enforced through precise bright-line rules." It rejected an "absolutist approach" that would require proof of "total or complete lack of control," but concluded that a dangerous sexual offender cannot be committed "without any lack-of-control determination." ***Id.*** at 870. The Court requires "proof of serious difficulty in controlling behavior … sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." ***Id.***

ch. 980 are sufficient to satisfy due process and no other findings of fact are necessary. ***Id.***[3]

¶8 Aschenbrener also argues that the jury instructions misstated the law, misled the jury and violated due process because they didn't include the term "serious inability to control behavior." However, a similar argument was rejected in ***Laxton***. ***Id.*** at ¶27. Therefore, we must also reject the argument. ***Cook v. Cook,*** 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

II. Dr. Jurek's Testimony

¶9 Aschenbrener contends that the State did not prove that Jurek's opinion was independent of Aschenbrener's suppressed statements. Aschenbrener particularly focuses on testimony by Jurek that once something is known, it is difficult to "unlearn" it. Aschenbrener therefore argues that allowing Jurek to testify constituted prejudicial error.

¶10 The decision whether to admit expert testimony is a matter of trial court discretion. ***State v. Friedrich***, 135 Wis. 2d 1, 15, 398 N.W.2d 763 (1987). Our review of the trial court's decision is limited to determining whether the trial court erroneously exercised its discretion. ***State v. Pittman***, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993), cert. denied, 510 U.S. 845 (1993). The trial court did not erroneously exercise its discretion if it examined the relevant facts, applied a

[3] Aschenbrener also claims that he has been denied due process because ***Laxton*** does not address the difference between emotional and volitional control. However, Aschenbrener was diagnosed with pedophilia. Expert testimony established that his pedophilia affects both his emotional and volitional capacity, he is predisposed to engage in acts of sexual violence, and he is much more likely than not to engage in such acts.

proper legal standard, and used a rational process to reach a reasonable decision. ***Id.***

¶11 After the trial court determined that Jurek could not consider Aschenbrener's statements, the court conducted a hearing to determine whether Jurek could form an opinion based solely on other sources. Jurek assured the court that he could, and testified that his diagnosis was "already proven by [Aschenbrener's] record without any interview." Based on this, we cannot say that the trial court erroneously exercised its discretion by allowing Jurek to testify.

III. Amendments to WIS. STAT. ch. 980

¶12 Aschenbrener contends that changes made to WIS. STAT. ch. 980 by 1999 Wis. Act 9 violate his right to equal protection.[4] However, in ***State v. Williams***, 2001 WI App 263, ¶20, 249 Wis. 2d 1, 637 N.W.2d 791, we determined that ch. 980 does not violate equal protection.

¶13 In ***Williams***, we acknowledged that for equal protection purposes, persons committed as sexually violent under WIS. STAT. ch. 980 are similarly situated to those civilly committed under WIS. STAT. ch. 51 and those committed after being acquitted by reason of mental disease or defect under WIS. STAT. § 971.17. ***Williams***, 2001 WI App 263 at ¶10. "Equal protection does not require

[4] Aschenbrener initially argued that the charges violated his right to due process. We ordered rebriefing after the Wisconsin Supreme Court issued its decision in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784. In ***State v. Rachel***, 2002 WI 81, ¶68, 254 Wis. 2d 215, 647 N.W.2d 762, our supreme court held that WIS. STAT. ch. 980 does not violate due process. In ***Rachel***, the court also determined that ch. 980 is not criminal or punitive in nature and does not violate the double jeopardy or ex post facto clauses of the Wisconsin or the United States Constitutions. ***Id.*** at ¶18. Presumably in light of ***Rachel***, Aschenbrener has abandoned his due process argument in his replacement brief.

that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made." ***Id.*** at ¶11 (quoting ***State v. Post***, 197 Wis. 2d 279, 321, 541 N.W.2d 115 (1995)). Applying the "strict scrutiny" standard, we concluded that the application of ch. 980 does not violate the right to equal protection of the laws. ***Williams***, 2001 WI App 263 at ¶20. The legislature imposed more stringent standards in ch. 980 because it deemed sexually violent persons, as a class, more dangerous than those subject to § 971.17 and ch. 51. *See* ***id.*** at ¶18. The stricter procedures are narrowly tailored to promote a compelling government interest.

By the Court.–Judgment and order affirmed.

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