COURT OF APPEALS DECISION DATED AND FILED

January 13, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP1312

Cir. Ct. No. 2006CI2

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

IN RE THE COMMITMENT OF STEVEN YOUNG:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

STEVEN YOUNG,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Steven Young appeals a judgment adjudicating him a sexually violent person. Young argues the real controversy was not fully and fairly tried because the circuit court erroneously excluded evidence of the

reason he was denied re-entry to the sex offender treatment program and improperly admitted evidence from his sex offender assessment report. We disagree and affirm.

BACKGROUND

¶2 In October 1999, Young was convicted of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2)[1], as a repeater. While in prison, Young entered a sex offender treatment program; however, he was removed from the program for failing to maintain appropriate boundaries with other inmates. Later, he was re-admitted to the program, but was again terminated for similar behavior. Young requested to enter the program a third time, but his request was denied because there was not enough time left in his sentence to complete the program.

¶3 Shortly before Young was scheduled to be released, the State filed a WIS. STAT. ch. 980 petition, alleging Young was a sexually violent person. The petition stated Dr. Christopher Snyder diagnosed Young with "mental disorders which predispose [him] to engage in acts of sexual violence, specifically[,] Paraphilia, Not Otherwise Specified (NOS) and Borderline Intellectual Functioning." The petition defined Paraphilia NOS as "recurrent and intense fantasies, urges, and/or behavior involving sexual arousal to something other than consensual sexual behavior with an age peer…."

[1] All references to the Wisconsin Statutes are the 2005-06 version unless otherwise noted.

¶4 Prior to the trial, Young pointed out that the Department of Corrections (DOC) incorrectly calculated his release date, and that he would have had enough time to complete the treatment program had his sentence been calculated correctly. He argued he should be permitted to introduce the error as evidence that he was improperly deprived of the opportunity to complete the treatment program. The circuit court denied his request, concluding the DOC's error was irrelevant.

¶5 At the jury trial, Dr. Snyder testified he diagnosed Young with Paraphilia NOS, in part, by "look[ing] at his criminal history … other collateral information, psychological testing that had been done with Mr. Young and other types of inappropriate sexual behavior that's been reported in the documents that I reviewed…." One of these documents was a sex offender assessment program report by Dr. Robert DeYoung, a clinical psychologist with the DOC, prepared shortly after Young was incarcerated. The report stated that Young had disclosed sexual arousal to scenes depicting frotteurism, exhibitionism, and rape. The report was admitted into evidence, and Snyder explained he relied on the statement about Young's disclosures, "because often in correctional or forensic settings individuals are very reluctant to report what's really going on with them in terms of their sexual behavior, their thoughts, fantasies and so forth." Young did not object to the admission of this evidence at trial.

¶6 The jury returned a verdict finding that Young (1) has been convicted of a sexually violent offense; (2) has a mental disorder that predisposes him to engage in acts of sexual violence; and (3) is dangerous to others because he has a mental disorder that makes it more likely than not that he will engage in future acts of sexual violence. Young now appeals.

DISCUSSION

¶7 Young argues that we should exercise our discretion to reverse the judgment and order a new trial. We may reverse a judgment in the interest of justice "if it appears from the record that the real controversy has not been fully tried." WIS. STAT. § 752.35. The exercise of this discretion "is to be done infrequently and judiciously." ***State v. Ray***, 166 Wis. 2d 855, 874, 481 N.W.2d 288 (Ct. App. 1992).

¶8 Our cases have articulated two factually distinct ways in which the real controversy may not have been fully tried, both of which Young contends are implicated here:

> (1) when the jury was erroneously not given the opportunity to hear important testimony that bore on an important issue of the case; and (2) when the jury had before it evidence not properly admitted which so clouded a crucial issue that it may be fairly said that the real controversy was not fully tried.

State v. Hicks, 202 Wis. 2d 150, 160, 549 N.W.2d 435 (1996) (citation omitted).

Exclusion of Sentence Miscalculation Evidence

¶9 Young first argues that the real controversy was not fully tried because the jury should have heard testimony that his request to re-enter the treatment program was denied due to a sentence calculation error. He contends this evidence is relevant because it counters the evidence the State presented about the reasons he was twice terminated from the program.

¶10 We conclude the circuit court correctly determined the sentence computation error was irrelevant. A sexually violent person, under WIS. STAT. § 980.01(7), is "a person who has been convicted of a sexually violent offense …

and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence." Thus, as the court pointed out, "the issues in a Chapter 980 trial to be decided by the jury are whether the respondent has a requisite mental disorder and whether that disorder makes it more likely than not the respondent will commit an act of sexual violence."

¶11 Contrary to Young's evidence of why he was denied re-admission to the program, the State's evidence of the reasons he was terminated was relevant to the issues involved in a WIS. STAT. ch. 980 case. The State elicited testimony from Robert Kolinski, a treatment social worker at the program, who testified Young was terminated from the program because of his persistent lack of progress in treatment. Among other things, Young signaled to other inmates he was sexually available, expressed interest and curiosity in having sexual contact with a male, and had to be reminded by program staff that the sexual offender treatment program was not a place to experiment sexually. Kolinski further testified that, according to DOC reports, Young "consistently failed to complete homework assignments on time, did not disclose details about his sexual offenses, … admitted that he had a pattern of lying[,] … would not follow through with treatment recommendations[,] … [and] expressed an attitude that he did not see himself as a sex offender."

¶12 This evidence bears directly on the issues in the case because it shows Young is likely to engage in acts of sexual violence. However, as the circuit court correctly observed, the program's denial of Young's request for re-admission because of a sentence calculation error does not "make it more or less likely [Young] will commit an act of sexual violence."

Admission of DOC Report

¶13 Young next argues that the real controversy was not fully tried because the jury was improperly presented with evidence from the DOC's assessment report that he disclosed an interest in frotteurism, exhibition, and rape. Young argues this is highly prejudicial, inadmissible hearsay evidence. He relies on ***State v. Watson***, 227 Wis. 2d 167, 595 N.W.2d 403 (1999), to argue that while Dr. Snyder could use the statements in the report to form his opinion, the statements themselves are inadmissible.

¶14 In ***Watson***, our supreme court held that an expert may rely on inadmissible evidence contained in a presentence investigation report (PSI) in forming an opinion. However, this case is inapposite because the DOC's assessment report was admissible evidence under the public records exception. WIS. STAT. § 908.03(8). As we observed in ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997):

> Probation and parole files compiled by the DOC fall within the definition of public records, an exception to hearsay under § 908.03(8), STATS. Moreover, since ch. 980 is a civil proceeding, the records may be used to establish factual findings made during investigations, as well as activities or observations made by DOC personnel. (Citations omitted.)

Young argues this holding conflicts with ***Watson*** because the statements in ***Watson*** and ***Keith*** both involved "documents produced by DOC setting forth its activities or observations of its agents." He contends ***Watson*** compels the conclusion that Young's assessment report did not fit within any hearsay exception. This characterization is inaccurate.

¶15 First, Young's analysis is premised on his incorrect categorization of the ***Watson*** decision as holding that PSI reports are, in general, inadmissible hearsay. In fact, ***Watson*** referred favorably to a decision that held a PSI report admissible, noting that such reports "'may contain information highly relevant' to a commitment proceeding." ***Watson***, 227 Wis. 2d at 194-95 (quoting ***State v. Zanelli***, 212 Wis. 2d 358, 378, 569 N.W.2d 301 (Ct. App. 1997). ***Watson*** did not hold that PSIs are categorically inadmissible; it held only that expert opinions may be based on inadmissible hearsay, which in that particular case was contained within a PSI.

¶16 Further, Young appears to interpret ***Watson*** and ***Keith*** as implicating paragraph (b) of WIS. STAT. § 908.03(8), which grants an exception for "records, reports, statements, or data compilations … setting forth … matters observed pursuant to duty imposed by law." However, ***Watson*** did not involve an exception to the hearsay rule, and the ***Keith*** court relied on paragraph (c), which permits "in civil cases … factual findings resulting from an investigation made pursuant to an authority granted by law." The hearsay at issue in ***Watson*** was the victim's allegation in her written statement of what the defendant had said while perpetrating the crime. Although PSIs generally include a statement from the victim, such narratives are neither "matters observed pursuant to a duty imposed by law," nor "factual findings resulting from an investigation made pursuant to an authority granted by law." By contrast, the parole and probation files in ***Keith*** were factual findings resulting from DOC investigations.

¶17 Likewise, Young's sex offender assessment program report contains factual findings resulting from an investigation made pursuant to an authority granted by law. Therefore, it falls within the public records exception to hearsay under WIS. STAT. § 908.03(8) and was properly admitted as evidence.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.