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DISTRICT IV

February 11, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2013AP630

In re the commitment of Randy Poff: State of Wisconsin v. Randy Poff (L.C. # 2010CI1)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Randy Poff appeals a judgment committing him as a sexually violent person under WIS. STAT. ch. 980 (2013-14).¹ Poff argues the trial court violated his constitutional right to equal protection when it refused to apply WIS. STAT. § 907.02(1), which adopted the *Daubert*² reliability standard for expert testimony, at his December 2011 trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

disposition. We reject Poff's arguments, and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

On July 2, 2010, the State petitioned for Poff's ch. 980 commitment. The Legislature subsequently amended Wisconsin's expert witness statute to adopt the *Daubert* reliability standard. The statute applies to actions and special proceedings commenced on or after February 1, 2011. 2011 Wis. Act 2, § 45(5). An initial trial, held in June 2011, ended in a mistrial after two days of testimony. Another trial was scheduled for December 2011 and Poff moved to exclude the State's expert evidence under the heightened evidentiary standards of the *Daubert* statute. The trial court denied the motion. A jury ultimately found that Poff was a sexually violent person, and the court entered a judgment committing him under ch. 980. This appeal follows.

Poff argues that the trial court violated his right to equal protection when it refused to apply the *Daubert* evidentiary standard to the State's expert witnesses at trial. We conclude this case is controlled by our supreme court's decision in *State v. Alger*, 2015 WI 3, ___ Wis. 2d ___, ___ N.W.2d ___. In that case, Alger argued, in relevant part, that his right to equal protection was violated when the *Daubert* evidentiary standard did not apply to and thus bar the State's expert testimony in his ch. 980 discharge petition trial. *Id.*, ¶2. Before reaching the merits of Alger's argument, the court first determined which level of judicial scrutiny applied, ultimately concluding that rational basis review applied to the equal protection claim. *Id.*, ¶¶39, 48. This level of judicial scrutiny "is deferential to the legislature" and "[a] legislative classification satisfies rational basis review if any reasonably conceivable state of facts ... could provide a rational basis for the classification." *Id.*, ¶50 (internal quotations omitted).

Although Poff acknowledges that his ch. 980 action commenced before the *Daubert* statute's effective date, he asserts there is no rational basis for trying contemporaneous ch. 980 cases under different rules of evidence where the only distinction is the date on which the State filed the petition. Alger similarly argued that the failure to apply the *Daubert* statute to expert testimony in his discharge petition trial violated equal protection because it arbitrarily differentiated between discharge proceedings based upon when the underlying commitment proceedings began. *Id.*, ¶51. The *Alger* court recognized, however, that “[w]hen determining which cases will be subject to a new rule of evidence, the legislature is not constitutionally required to differentiate between various types of cases and retroactively apply the new rule to some types of cases and not others.” *Id.*, ¶57. Rather, “the legislature may differentiate between cases that were commenced before and after a particular date and may apply the new rule of evidence to only cases that were commenced after that date.” *Id.*

The court noted that the legislature's decision to utilize an effective date for application of the statute was rationally related to achieving the legitimate governmental interests of ensuring the fair treatment of litigants; preserving judicial resources; and avoiding confusion, difficulty and the disruption of pending litigation. *See id.*, ¶¶55-56. The court ultimately held that the legislature's decision to apply the *Daubert* evidentiary standard to actions or special proceedings commenced on or after February 1, 2011, satisfies rational basis review, thus passing constitutional muster. *Id.*, ¶55.

Poff attempts to distinguish *Alger*, arguing that *Alger* turned “largely on procedure,” whereas Poff's case focuses “on the unique attributes of ch. 980 trials as illustrated by the differing—and changing—expert testimony presented to Poff's jury.” We are not persuaded that

this purported distinction is grounds for distinguishing *Alger*. Consistent with *Alger*, we conclude Poff's equal protection claim fails and we affirm the judgment.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals