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DISTRICT II

February 20, 2013

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

2012AP743 In re the commitment of Theodore K. Sanderfoot: State of Wisconsin v. Theodore K. Sanderfoot (L.C. #2009CI1)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Theodore K. Sanderfoot appeals from a judgment committing him as a sexually violent person under WIS. STAT. ch. 980 (2011-12).[1] He contends that the circuit court erroneously exercised its discretion in admitting certain testimony at trial. He further contends that he was denied equal protection under the law. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We affirm the judgment of the circuit court.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

In 2009, the State filed a petition alleging that Sanderfoot was a sexually violent person. Before trial, Sanderfoot filed a motion asking the circuit court to bar testimony and comments: (1) "impl[ying] increased risk to commit future acts of sexual violence based on alleged unreported sex offenses;" and (2) "regarding future risk of committing future acts of sexual violence that is extrapolated or otherwise not based on empirical data." The motion was aimed at preventing the State from offering expert testimony extrapolating the re-offense rates on the Static-99R actuarial instrument in its evaluations of Sanderfoot.

Following an evidentiary hearing on Sanderfoot's motion, the circuit court concluded that such testimony was admissible. Accordingly, at trial, the State produced expert testimony explaining the limitations of the Static-99R[2] and extrapolating the estimated re-offense rates for Sanderfoot. The jury subsequently found Sanderfoot to be a sexually violent person, and the circuit court entered a judgment committing him. This appeal follows.

On appeal, Sanderfoot first contends that the circuit court erroneously exercised its discretion in admitting expert testimony regarding the extrapolation of the Static-99R's re-offense rates. Sanderfoot argues that such evidence was not sufficiently reliable to be probative.

The admissibility of expert opinion testimony is committed to the circuit court's sound discretion. ***State v. Fischer***, 2010 WI 6, ¶15, 322 Wis. 2d 265, 778 N.W.2d 629 (citation

[2] According to the State expert who testified at the evidentiary hearing on Sanderfoot's motion, there are two limitations to the Static-99R which lead to extrapolation of its re-offense rates: (1) the Static-99R rates go out only ten years and WIS. STAT. ch. 980 requires a determination of likelihood to reoffend over an offender's lifetime and (2) a disparity exists between detected recidivism and undetected recidivism which is not reflected in the actuarial rates. According to the expert, the professional psychological community generally agrees that the rate of actual recidivism exceeds the rate of reported recidivism.

omitted). We will uphold a circuit court's discretionary decision if it "examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion." ***Martindale v. Ripp***, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698.

WISCONSIN STAT. § 907.02 (2009-10), which governed Sanderfoot's trial, provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[3] Under this provision, expert testimony was admissible if relevant and would be excluded only if the testimony was superfluous or a waste of time. ***State v. Walstad***, 119 Wis. 2d 483, 516, 351 N.W.2d 469 (1984).

Applying this standard to the present case, we are satisfied that the circuit court properly exercised its discretion in admitting the testimony in question. This court has previously upheld a circuit court's admission of actuarial instrument data as relevant in determining whether a person is more likely than not to commit another sexually violent offense. *See, e.g.*, ***State v. Tainter***, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538. Given the limitations of that data as discussed above, the testimony regarding extrapolation was relevant to assessing Sanderfoot's risk to reoffend.

[3] The legislature has since renumbered this provision as WIS. STAT. § 907.02(1) and added language requiring the proponent of expert testimony to show that it is based upon sufficient facts or data, that it is "the product of reliable principles and methods, and that the witness has applied the principles and methods reliably to the facts of the case." Sanderfoot concedes that this new language does not apply to his case.

Sanderfoot next contends that he was denied equal protection under the law. Specifically, he complains that the State should have been required to meet the new requirements of WIS. STAT. § 907.02(1) before offering testimony about extrapolation against him.

Sanderfoot concedes that he did not raise his equal protection argument in the circuit court. Accordingly, we decline to consider it now. *See, e.g.*, ***State v. Huebner***, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727 (issues not preserved at the circuit court generally will not be considered on appeal).

Upon the foregoing reasons,

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

Diane M. Fremgen
Clerk of Court of Appeals