COURT OF APPEALS
DECISION
DATED AND FILED

January 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. 01-0002, 02-0131 **Cir. Ct. No. 00-CV-675**

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

IN RE THE COMMITMENT OF
ARISTOLE E. FARMER, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ARISTOLE E. FARMER, JR.,

RESPONDENT-APPELLANT.

APPEALS from a judgment and orders of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

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

¶1 PETERSON, J. Aristole Farmer, Jr., appeals a judgment finding him a sexually violent person, an order committing him to institutional care

pursuant to WIS. STAT. ch. 980,[1] and an order denying post-trial relief. Farmer argues: (1) ch. 980 violates due process because it does not require a separate finding of serious difficulty in controlling behavior; (2) the jury instructions misled the jury and violated his due process rights; (3) an antisocial personality disorder does not qualify Farmer for ch. 980 commitment; (4) the primary actuarial instrument used to show Farmer is a sexually violent person is not statistically predictive; and (5) changes to ch. 980 violate equal protection. We conclude that issues one and two are controlled by our supreme court's decision in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, and reject both arguments. Further, we conclude that Farmer's antisocial personality disorder does qualify him for civil commitment. We also conclude that the jury's verdict was not based solely on the use of actuarial instruments. Finally, we reject Farmer's claim in issue five because it is controlled by our decision in ***State v. Williams***, 2001 WI App 263, 249 Wis. 2d 1, 637 N.W.2d 791. Accordingly, we affirm the trial court's judgment and orders.

BACKGROUND

¶2 The State sought to commit Farmer pursuant to WIS. STAT. ch. 980 in July 2000. At trial, Dr. Richard McKee testified that Farmer had an antisocial personality disorder. Although he did not believe Farmer was impulsive, the condition would affect Farmer's emotional and volitional capacities and would predispose Farmer to engage in acts of sexual violence. Dr. McKee found a moderate risk on the RRASOR, and a high risk on the Static 99, MnSOST and

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

MnSOST-R. He also stated that it was substantially probable that Farmer would engage in acts of sexual violence in the future.

¶3 Dr. Craig Monroe testified that antisocial personality disorder would affect a person's emotional or volitional capacity. Dr. Monroe stated that "they want what they want and they're going to take it without concern for others—somebody else. They're certainly not going to have inhibitory influences on their behavior or their desires. They're just going to go out and get what they want." He also noted that some people with antisocial personality disorder would show a great deal of impulsivity. Dr. Monroe found Farmer was a moderate risk to reoffend sexually on the RRASOR and Static 99, and a high risk on the MnSOST-R.

¶4 The jury found Farmer to be a sexually violent person and the court ordered his commitment. Farmer brought a post-trial motion challenging the sufficiency of the evidence. He also asked for a new trial because the real controversy was not fully tried due to insufficiency of the jury instructions regarding his ability to control his behavior. The court denied these motions.

¶5 Finally, Farmer filed a motion for relief from judgment, challenging the reliability of the MnSOST-R. Farmer based the motion on a report and testimony of Dr. William Grove of the University of Minnesota, who had been studying the accuracy of the MnSOST-R. At the hearing on Farmer's motion, Grove testified that there were problems with the design of the MnSOST-R that caused him to question its accuracy. He stated that the study was retrospective in that the researchers looked at recidivists and nonrecidivists and worked backward to attempt to predict recidivism. Additionally, the sample was of 256 people, which Grove claimed was not large enough. He also determined there was an

overestimation of the accuracy rate of the test, possibly by as much as 25%. As a result, the MnSOST-R failed to meet conventional levels of statistical significance in prediction of recidivism. Farmer claimed this was new information not available at the time of his trial. The circuit court denied the motion.

¶6 After appeal, Farmer filed a motion with this court for remand for a hearing on whether Act 9 was violative of Farmer's constitutional rights. We denied the motion for remand on this issue, but retained jurisdiction for appeal.[2]

DISCUSSION

I. Due Process

¶7 Farmer claims that WIS. STAT. ch. 980 violates due process because it does not require a separate finding that the person being committed has substantial difficulty controlling his or her behavior. He argues this finding is required by the United States Supreme Court's decision in ***Kansas v. Crane***, 534 U.S. 407 (2002), where the Court considered Kansas' sexually violent persons' commitment statute. In ***Crane***, the Court concluded due process requires a finding that persons being committed have a serious inability to control their behavior. ***Id.*** at 412-13.

¶8 Our supreme court's decision in ***Laxton*** controls our resolution of this issue. In ***Laxton***, the court determined WIS. STAT. ch. 980 satisfied the due process requirements of ***Crane***. ***Laxton***, 2002 WI 82 at ¶¶22-23. The court said

[2] We granted Farmer's motion to permit the filing of a postcommitment motion regarding an ineffective assistance of counsel claim. On remand, the trial court determined there was no ineffective assistance. That holding is not raised on this appeal.

ch. 980's requirement of proving a nexus between the mental disorder and an individual's dangerousness implicitly involves proof that the person has serious difficulty controling his or her behavior. ***Id.*** The court specifically determined ch. 980 does not require a separate finding of the person's inability to control his or her behavior. ***Id.*** at ¶2. Consequently, we reject Farmer's claim.

II. Jury Instruction

¶9 ***Laxton*** also controls Farmer's claim that the jury instruction given in his case misstated the law and violated his due process rights. The court gave the pattern jury instruction regarding the commitment of sexually violent persons, WIS JI—CRIMINAL 2502. Farmer argues this instruction did not properly reflect the United States Supreme Court's decision in ***Crane***. Our supreme court, however, rejected the same argument in ***Laxton***, concluding the jury instruction accurately tracked the statute and because the statute complied with due process, the jury instruction was proper. ***Id.*** at ¶27.

III. Antisocial Personality Disorder

¶10 Farmer argues that his antisocial personality disorder does not qualify him for WIS. STAT. ch. 980 commitment—one of the narrow class of most dangerous offenders not properly dealt with in the criminal justice system. Specifically, Farmer maintains that because 40-60% of the male prison population is diagnosed with antisocial personality disorders, he is no more dangerous than the typical recidivist.

¶11 We conclude, however, that Farmer's antisocial personality disorder does qualify him for commitment under WIS. STAT. ch. 980. Certainly, not everyone with antisocial personality disorder would be subject to commitment. In

State v. Adams, 223 Wis. 2d 60, 68, 588 N.W.2d 336 (Ct. App. 1998), we held that it is possible for one person with a personality disorder to be committed under ch. 980 while another with the same diagnosis may not qualify. The key is whether the diagnosis causes the person to be a sexually violent person. ***Id.***

¶12 Here, the State's experts determined that Farmer's antisocial personality disorder affected his emotional and volitional capacity and predisposed him to commit acts of sexual violence. Based on this testimony, the jury found Farmer to be sexually violent and that it was substantially probable Farmer would commit sexually violent acts in the future. In this way, the jury determined that Farmer was distinguished from the typical recidivist. Farmer is therefore subject to commitment under WIS. STAT. ch. 980.

IV. Actuarial Instruments

¶13 Farmer argues that he is entitled to a new trial for two reasons. First, Farmer requests relief under WIS. STAT. § 806.07(1)(h), which allows a court to consider "any other reasons justifying relief from the operation of a judgment." He argues that it was substantially unfair that a major factor in his commitment was his score on the MnSOST-R, which he claims to be not properly predictive.

¶14 Our review of the record, however, reveals other evidence sufficient to allow the jury to infer Farmer would reoffend because of his mental disorder. Both of the State's experts stated that it was significant that Farmer never completed the recommended sex offender treatment. Dr. McKee stated that Farmer's lack of motivation to get treatment increased Farmer's risk of reoffense. These opinions were not merely based on the actuarial instruments, but also on review of Farmer's record and interviews with him. Viewing the testimony in a light most favorable to upholding the commitment and allowing the jury to weigh

the evidence and assess witness credibility, we determine a reasonable jury could have found Farmer sexually violent beyond a reasonable doubt.

¶15 Farmer also requests relief under WIS. STAT. § 806.07(1)(c), which allows for a new trial based on newly discovered evidence. However, there is no new information that would make a new trial necessary. The relevant factors for determining whether a new trial is necessary due to newly discovered evidence are: (1) whether the evidence, in fact, is new; (2) whether the evidence came to the moving party's attention after trial following due diligence; (3) whether the evidence is material or simply cumulative of other evidence presented at trial; and (4) whether the new evidence would probably change the result of the trial. ***State v. Williams***, 2001 WI App 155, ¶11, 246 Wis. 2d 722, 631 N.W.2d 623.

¶16 First, Dr. Grove's study is not in fact new evidence coming to Farmer's attention after trial. A new expert opinion based on facts available to the trial experts is not newly-discovered evidence. ***State v. Fosnow***, 2001 WI App 2, ¶26, 240 Wis. 2d 699, 624 N.W.2d 883. Grove's testimony is simply another expert opinion of evidence already available at Farmer's trial.

¶17 Second, the evidence is merely cumulative of evidence presented at trial. The defense questioned the credibility of the MnSOST-R during its cross-examination of the State's experts. The answers this questioning elicited regarding the test population for the MnSOST-R and its reliability were no different from Grove's later testimony. There is therefore no evidence that was unavailable during the trial.

¶18 Finally, we are not convinced the result of the trial would have changed in light of Grove's testimony. As we have already noted, the jury's

decision was based on all the facts in the record, not just the results of the MnSOST-R. There is therefore no reason to award Farmer a new trial.

V. Equal Protection

¶19 Finally, Farmer argues the legislature's changes to WIS. STAT. ch. 980 by 1999 Wis. Act 9 violate his right to equal protection. Among these changes is a requirement that persons committed under ch. 980 be institutionalized and not be allowed to petition for release for at least eighteen months. Farmer claims this violates his right to equal protection because persons committed under other procedures, such as WIS. STAT. ch. 51, are not subject to the same restrictions.

¶20 Farmer acknowledges we rejected these arguments in ***Williams***. At the time he filed his brief, however, the supreme court was considering a petition for review in ***Williams***. The supreme court has since denied the petition. Consequently, we reject Farmer's equal protection argument.

By the Court.—Judgment and orders affirmed.

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