

Appeal No. 2015AP157-CR

Cir. Ct. No. 2013CF98

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ERIC L. LOOMIS,

DEFENDANT-APPELLANT.

FILED

SEP 17, 2015

Diane M. Fremgen
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

We certify this appeal to the Wisconsin Supreme Court to decide whether the right to due process prohibits circuit courts from relying on COMPAS¹ assessments when imposing sentence. More specifically, we certify whether this practice violates a defendant's right to due process, either because the proprietary nature of COMPAS prevents defendants from challenging the COMPAS assessment's scientific validity, or because COMPAS assessments take gender into account. Given the widespread use of COMPAS assessments, we believe that prompt supreme court review of the matter is needed.

¹ "COMPAS stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" *State v. Samsa*, 2015 WI App 6, ¶1 n.1, 359 Wis. 2d 580, 859 N.W.2d 149 (WI App 2014), *review denied*, 2015 WI 47, __ Wis. 2d __, 862 N.W.2d 899.

In addition, if the right to due process prohibits reliance on COMPAS assessments at sentencing, the issue arises whether our decision in *State v. Samsa*, 2015 WI App 6, 359 Wis. 2d 580, 859 N.W.2d 149 (WI App 2014), *review denied*, 2015 WI 47, ___ Wis. 2d ___, 862 N.W.2d 899, must be modified or overruled. In *Samsa*, we approved of a circuit court’s reliance on a COMPAS assessment at sentencing, albeit not in the face of due process arguments like those made here. *See id.*, ¶13.

Background

COMPAS assessments are used for correctional purposes throughout Wisconsin, as well as in other jurisdictions. The circuit court here observed that Wisconsin judges receive training on the use of COMPAS in sentencing.²

As summarized in a report that we referenced in *Samsa*, a COMPAS assessment includes a “risk” portion and a “needs” portion:

² During the post-sentencing proceedings in this case, the circuit court made a number of findings and observations regarding COMPAS, including the following:

La Crosse and several other counties across the state, has—and I’m talking about the judges and prosecutors and defense and [J]ustice Sanctions and Justice Support Services Department, has invested quite a bit in evidence based practices, and the COMPAS has been a significant part of that. And we have been trained in the fact that COMPAS is to be a tool that’s utilized at sentencing in determining the need for community supervision. And when I weigh that question as to whether someone should be placed on probation or given some sort of alternative sentence that doesn’t include probation, the COMPAS is something that is used to determine risk levels.... We utilize the COMPAS and we consistently get training to make decisions about prison incarceration versus community supervision, to make decisions about bond, the risk that an individual may pose if given a signature bond versus the need for a cash bond. All of those things.

The COMPAS is a Risk and Needs Assessment tool utilized by the Wisconsin Department of Corrections as a means to identify an offender's risk as well as his or her treatment and programming needs. Risk levels (Low, Medium, or High) are meant to assist corrections professionals in deciding the level of supervision an offender requires. The [criminogenic] Needs scales are designed to highlight areas in which the offender may need correctional services (i.e. treatment and programming).

See *Samsa*, 359 Wis. 2d 580, ¶10.

Here, at Loomis's sentencing, the circuit court relied on Loomis's COMPAS assessment as one of several factors when deciding Loomis's sentence.

As part of its explanation for the sentence, the circuit court stated:

You're identified, through the COMPAS assessment, as an individual who is at high risk to the community.

In terms of weighing the various factors, I'm ruling out probation because of the seriousness of the crime and because your history, your history on supervision, and the risk assessment tools that have been utilized, suggest that [you're] extremely high risk to re-offend.³

Discussion

Loomis argues that the sentencing court's reliance on the COMPAS assessment violates his due process rights for several reasons. However, for purposes of certification, we think Loomis's most significant arguments relate to the proprietary nature of COMPAS, and to COMPAS's apparent use of gender.

³ In post-sentencing proceedings, the State argued that the circuit court did not rely on the COMPAS assessment as a factor at sentencing. However, the State has abandoned that argument on appeal. Regardless of the State's position on the topic, we think the most reasonable reading of the sentencing transcript is that the circuit court relied on the COMPAS assessment.

Proprietary Nature

Loomis frames his primary challenge to COMPAS in terms of sentencing based on inaccurate information, but we perceive the important underlying question to be whether the proprietary nature of COMPAS unfairly prevents defendants from challenging the COMPAS assessment's scientific validity. As the circuit court observed, there is a compelling argument that judges make better sentencing decisions with the benefit of evidence-based tools such as COMPAS. Yet, if those tools lack scientific validity, or if defendants cannot test the validity of those tools, due process questions arise.

Loomis asserts that COMPAS assessments were developed for use in allocating corrections resources and targeting offenders' programming needs, not for the purpose of determining sentence. Loomis also asserts that the company that developed and owns COMPAS maintains as proprietary the underlying methodology that produces assessment scores. Loomis backs up these assertions with expert testimony. Loomis argues that, when circuit courts make sentencing decisions relying on COMPAS assessments, the courts are relying on "a secret non-transparent process."

For the most part, the State does not seem to dispute Loomis's description of the evidence. Rather, the State's position appears to be that Loomis's evidence, taken at face value, fails to show that a COMPAS assessment contains or produces inaccurate information.

Based on the parties' arguments and the record, we perceive the fundamental question to be whether the proprietary nature of COMPAS, and thus the apparent limited ability of defendants to investigate the tool, unfairly prevents defendants from challenging the COMPAS assessment's scientific validity. We

observe that the fact that COMPAS was not developed for sentencing purposes does not, by itself, appear to be problematic. But we are uncertain whether the proprietary nature of COMPAS's underlying methodology presents a due process problem. The lack of transparency regarding COMPAS appears to present a unique sentencing situation and, therefore, is suitable for supreme court review.

Use Of Gender

In *State v. Harris*, 2010 WI 79, 326 Wis. 2d 685, 786 N.W.2d 409, our supreme court held that “race and gender are improper factors [and] they may not be relied upon—at all—in the imposition of a sentence.” *Id.*, ¶3 (emphasis added); see also *id.*, ¶33 (defendants have a due process right not to be sentenced on the basis of race or gender).

Our understanding, based on the evidence Loomis submitted, is that COMPAS assessments include general scales administered to both men and women, as well as separate scales administered only to women. Consistent with our understanding, the State concedes that “COMPAS has a different automated risk and needs assessment specifically for women offenders.” So far as we can tell, the fact that the scales are different depending on gender means that, all other facts being equal, assessment results will differ between men and women based on gender alone.⁴

⁴ The record indicates that the COMPAS scales specific to women did not become available until sometime after January 2009, but likely before March 2010. Although the record does not disclose when Wisconsin started using the scales specific to women, the State does not suggest that Loomis's COMPAS assessment pre-dates the use of the scales specific to women.

Once again, the State does not seem to dispute the gist of Loomis’s evidence. Rather, the State argues that “[s]imply having two different risk scales does not mean that the COMPAS assessment improperly considers gender.” The State further asserts that “Loomis does not explain how the two different assessments work.”

We have difficulty understanding the basis for the State’s position, which appears to implicate the previous question regarding the proprietary nature of COMPAS. That is, it seems unclear how Loomis could “explain how the two different assessments work” absent access to COMPAS’s underlying proprietary methodology. And, we fail to understand the basis for the State’s assertion that COMPAS does not “improperly” consider gender.

Regardless, the important question in need of prompt final resolution is whether a sentencing court’s reliance on a COMPAS assessment runs afoul of *Harris*’s prohibition on gender-based sentencing. We believe this question further warrants supreme court review.⁵

Our Decision In Samsa

That brings us to our decision in *Samsa*. In *Samsa*, we said that a COMPAS assessment is one of the many tools available to the circuit court at sentencing, and we further stated that a sentencing court has discretion to rely on some portions of the COMPAS assessment while rejecting other portions. *Samsa*, 359 Wis. 2d 580, ¶13. Thus, if the right to due process prohibits reliance on

⁵ Loomis raises other COMPAS-related arguments and an additional issue relating to the circuit court’s use of read-in charges at sentencing. Those topics appear straightforward and, absent the issues that we have discussed in the text, would not warrant certification.

COMPAS assessments when imposing sentence, the issue arises whether *Samsa* must be modified or overruled.

In sum, we certify this case to the supreme court for resolution of these COMPAS-related due process issues.

