COURT OF APPEALS
DECISION
DATED AND RELEASED

MARCH 18, 1997

No. 96-0696

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

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

RUVEN SEIBERT,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Ruven Seibert appeals a judgment of commitment and an order for placement in a secure mental health facility under ch. 980, STATS. Seibert argues that the trial court erred because (1) ch. 980 is unconstitutional; (2) it refused his evidence impeaching his underlying conviction, and (3) he was denied due process because the psychologist who prepared the predisposition report had testified on behalf of the State at trial and did not present evidence of any less restrictive placement options. We reject these arguments and affirm the conviction.

Seibert was convicted in 1986 after a jury trial of two counts of second-degree sexual assault. In 1995, when he was scheduled for mandatory release from prison, the State filed a petition under ch. 980, STATS., alleging that he was a sexually violent person. After the jury found Seibert to be a sexually violent person as alleged in the petition, the trial court ordered commitment to the Department of Health and Social Services. It ordered a predisposition investigation and, after the dispositional hearing, ordered that Seibert be placed in a secure mental health facility because the public could not be adequately protected without a secure placement.

1. CONSTITUTIONAL CLAIMS

Seibert argues that ch. 980, STATS., is unconstitutional, while acknowledging that his constitutional challenges have been considered and rejected by the Wisconsin Supreme Court in ***State v. Carpenter,*** 197 Wis.2d 252, 541 N.W.2d 105 (1995), and ***State v. Post,*** 197 Wis.2d 279, 541 N.W.2d 115 (1995). We are bound by supreme court decisions. ***State v. Lossman***, 118 Wis.2d 526, 533, 348 N.W.2d 159, 163, (1984).

2. EVIDENTIARY RULING

Next, Seibert argues that the trial court erroneously refused evidence to impeach his underlying sexual assault conviction. Seibert offered exculpatory evidence to show that the underlying sexual assault convictions were "faulty." He argues that the evidence was relevant to the third element of the sexual predator law, whether there is a substantial probability that the person will engage in acts of sexual violence. *See* § 980.01(7), STATS. He argues that he was denied the opportunity to diffuse the element of dangerousness implied by his conviction and show that there was significant evidence indicating he did not in fact commit the crime.

Seibert's offer of proof was insufficient. Before the trial court, and also on appeal, Seibert does not identify the claimed exculpatory evidence. Error may not be predicated upon a ruling excluding evidence unless the substance of the evidence was made known to the judge. Section 901.03(1)(b),

STATS. Because his offer of proof was insufficient, Seibert failed to preserve his claim of error.[1]

Also, the record suggests Seibert offered the evidence to challenge the first element, that the person must have been previously convicted of a sexually violent offense. Section 980.01(7), STATS. Seibert's counsel stated that "there would be witnesses that could testify that the underlying conviction was not a fair conviction. It was not a true conviction in that there is quite a bit of exculpatory evidence." He further stated that he was "not asking to be in front of the jury on that impeachment of that judgment of conviction," but that the trial court should consider the issue before the sexual predator trial took place. To the extent his motion was to "impeach" the underlying conviction before the trial court, it was properly denied. Chapter 980 does not contemplate a retrial of the underlying conviction. *See* § 980.05, STATS. Seibert does not challenge the trial court's ruling that the prior conviction is res judicata.

3. PREDISPOSITION REPORT

Finally, Seibert argues that he was denied due process to a fair disposition hearing because the predisposition investigation and report was prepared by a psychologist who testified on behalf of the State at trial and did not consider a less restrictive placement option. We disagree.

A predisposition report may be ordered to provide the court with sufficient information to make a determination for commitment, and the report shall be prepared in accordance with the procedure used for presentence investigations for criminal cases under §§ 972.15 and 980.06(2)(a), STATS.

The trial court ordered that DHSS perform the investigation. Craig Monroe, Ph.D., who testified at trial, conducted the investigation and prepared the report.

[1] The record reflects that the claimed exculpatory evidence was not available on the day of trial, because Seibert stated that although the jury had been sworn, "I guess we'd be asking for a very long continuance in this matter."

Seibert presented evidence of a less restrictive placement through testimony of an individual who would employ Seibert and provide him a place to live in his trailer park if Seibert were granted supervised release. The probation and parole agent testified that he attempted to find community based placements at halfway houses, but that the staff at the halfway houses had rejected the placements. The agent said that a motel room was also considered, but that it was not a secure placement. He stated that a secure placement was advisable to protect the community.

We conclude that the report's lack of discussion of less restrictive placements did not deprive Seibert his due process rights. Seibert cites no authority that the report itself must contain a discussion of a less restrictive placement. Our review of the applicable statutory sections reveals no such requirement.

We note that § 980.06(2)(b), STATS., provides: "The department shall arrange for control, care and treatment of the person in the least restrictive manner consistent with the requirements of the person and in accordance with the court's commitment order." This section, however, does not require that the predisposition report under § 980.06(1) contain the arrangements. Further, the trial court heard testimony concerning availability of less restrictive placements, including halfway house placement, and placement at a friend's trailer park. Consequently, information concerning less restrictive placements was before the court to consider in making the commitment order.

Finally, our review of the record discloses that Seibert objected to Monroe's report because it was based on unsupported information and did not consider a less restrictive placement. He did not object on the basis that Monroe had previously testified for the State. A reviewing court will not address an issue when "the appellant has failed to give the trial court fair notice that it is raising a particular issue and seeks a particular ruling." ***State v. Gilles***, 173 Wis.2d 101, 115, 496 N.W.2d 133, 139 (Ct. App. 1992). As a result, Seibert failed to preserve the claim that he was denied due process because Monroe had previously testified on behalf of the State.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.