

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal Nos. 01-2606 and 01-2607

Cir. Ct. No. 00-JV-71

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF THOMAS Z. P.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

THOMAS Z. P.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County:
GUY D. REYNOLDS, Judge. *Affirmed.*

¶1 ROGGENSACK, J.¹ Thomas Z.P. seeks a *de novo* dispositional hearing and placement determination based on his contentions that: (1) the circuit

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (1999-2000). In addition, all references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

court erroneously received into evidence over a hearsay objection a therapist's written report from a court-ordered assessment and (2) the circuit court relied on materially inaccurate information in the original dispositional proceedings. We affirm the circuit court's order denying Thomas's motion because we conclude that the circuit court acted within its discretion in admitting the therapist's written report and because we conclude that Thomas has not shown that the therapist's written report is inaccurate.

BACKGROUND

¶2 On December 4, 2000, Thomas was adjudged delinquent based on his plea of no contest to an amended count of fourth-degree sexual assault. The circuit court ordered one year of supervision. The dispositional order incorporated numerous conditions that were recommended by the prosecutor and unchallenged by Thomas, including a requirement that Thomas complete a psychosexual assessment with therapist Lorrie Roller.

¶3 Roller's assessment of Thomas was based on clinical interviews, his family and social background, his juvenile record, his lack of a response to previous rehabilitative interventions, as well as the results of three "actuarial assessment tools."² In a written report furnished after the assessment, Roller concluded that "Thomas currently displays a propensity for justifying his sexual offenses and other aggression towards others as suitable behaviors that meet his needs and remain out of his control. He further completely externalizes the

² The assessment tools are tests that yield results on particular measured scales. For Thomas's evaluation, Roller used the Juvenile Sexual Offender Assessment Protocol (JSOAP), the Sexual Offender Risk Appraisal Guide (SORAG) and the Violence Risk Appraisal Guide (VRAG).

responsibility of his behaviors to extraneous circumstances.” Roller’s overall recommendation for treatment explained that because Thomas “appears to completely lack the motivation for treatment regarding his criminal thinking patterns, sexual offending behaviors, and impulse control issues,” he was in need of “external controls to regulate his behavior and to protect community safety.” In particular, she concluded that he would “likely best benefit from a longer term secure setting either in [a] residential treatment program or a correctional facility.”

¶4 After receiving Roller’s assessment, Thomas’s social worker, Bonnie Bullion, filed a petition seeking a change in placement to a secured correctional facility. At the February 14, 2001 hearing on her petition, Bullion testified that, based on her own experiences with Thomas, she concurred in Roller’s evaluation and in Roller’s recommendation for a secured placement. In conjunction with Bullion’s testimony, the State sought to introduce Roller’s written report as an exhibit. Thomas’s attorney objected, arguing that the report was hearsay and did not fall within any recognized exception to the hearsay rule. After Bullion provided further foundational testimony for the report, the circuit court overruled the objection and received the report. The court reasoned that although Roller’s report was clearly hearsay, it was accompanied by sufficient circumstantial guarantees of trustworthiness to be received.

¶5 Based on Roller’s report and Bullion’s testimony, the circuit court revised the dispositional order, placing Thomas at Lincoln Hills School, a secured correctional facility. Thomas moved to vacate the order. He argued that Roller’s written report should have been excluded from evidence at the change of placement hearing because it lacked circumstantial guarantees of trustworthiness. He also argued that the circuit court’s decision to change his placement violated

his due process rights because the court relied on allegedly inaccurate information contained in Roller's report.

¶6 At the hearing held on his motion, Thomas presented evidence showing that Bullion had erroneously testified that Roller completed an internship with a particular person, while she had attended only training seminars given by that person's office. Thomas also presented an expert witness who challenged Roller's methodology and conclusions. Among the expert's critiques of Roller's report was that Roller had used and relied on actuarial tools that had not been validated for juvenile assessments. Finally, Thomas's attorney cross-examined Roller, who testified in person and explained her adjustment of the assessment tools she used.

¶7 The circuit court determined that the discrepancy regarding Roller's credentials would not have affected its decision to receive the report and that Thomas had not shown that Roller's report was materially inaccurate. Accordingly, the circuit court denied his motion. Thomas appeals.

DISCUSSION

Standard of Review.

¶8 The appropriate disposition and placement of a juvenile is committed to the sound discretion of the circuit court. *State v. Terry T.*, 2002 WI App 81, ¶6, 251 Wis. 2d 462, 643 N.W.2d 175; *State v. James P.*, 180 Wis. 2d 677, 682, 510 N.W.2d 730, 732 (Ct. App. 1993). We also review a circuit court's decision to admit evidence under the erroneous exercise of discretion standard. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. We will sustain a circuit court's discretionary decision if the court logically interpreted

the facts, applied the proper legal standard and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. ***Crawford County v. Masel***, 2000 WI App 172, ¶5, 238 Wis. 2d 380, 617 N.W.2d 188.

¶9 The question of whether a defendant’s right to due process has been violated is a question of law that we review *de novo*. ***State v. Littrup***, 164 Wis. 2d 120, 126, 473 N.W.2d 164, 166 (Ct. App. 1991).

Evidentiary Issue.

¶10 Thomas’s first argument is that the circuit court committed reversible error by receiving Roller’s written report into evidence. Thomas objected to the report based on hearsay. He argued that it does not meet any exception to the hearsay rule under ch. 908. The juvenile justice code, however, provides that neither the common law nor statutory rules of evidence are binding at dispositional or postdispositional hearings. *See* WIS. STAT. § 938.299(4)(b). Instead, the statute directs that the court “shall admit all testimony having reasonable probative value” and that hearsay “may be admitted if it has demonstrable circumstantial guarantees of trustworthiness.” *Id.*

¶11 The circuit court recognized and applied the proper standard, “demonstrable circumstantial guarantees of trustworthiness,” in receiving the evidence.³ When the court overruled Thomas’s objection and received Roller’s report, the relevant information known about the report was that: (1) the circuit court had ordered Thomas to complete a psychosexual evaluation by Roller; (2)

³ Relying on WIS. STAT. § 938.299(4)(b), the circuit court had earlier ruled that the common law and statutory rules of evidence did not apply to the postdispositional hearing for a change in placement. Thomas does not challenge that ruling on appeal.

Thomas had not objected to the selection of Roller as the therapist to do his evaluation; and (3) Thomas's social worker provided foundational testimony for the report, including explaining her familiarity with Roller's background and Roller's work. Under these circumstances, the State made at least a *prima facie* showing of "circumstantial guarantees of trustworthiness."

¶12 Furthermore, Thomas's broadly-stated objection did not provide any concrete reason for doubting the trustworthiness of the report. While he raised several concrete concerns about Roller's methodology and conclusions after the fact, those reasons were not articulated for the circuit court's consideration during Bullion's testimony at the February 14, 2001 hearing. In addition, although Thomas has identified a discrepancy between Roller's actual credentials and the credentials recited by Bullion, the circuit court found that the discrepancy was not material to the trustworthiness of the report. That finding is not clearly erroneous. Accordingly, we conclude that the circuit court did not erroneously exercise its discretion when it chose to rely on the report. *See J.G. v. State*, 119 Wis. 2d 748, 760-62, 350 N.W.2d 668, 675-76 (1984) (holding in the context of a waiver proceeding that where evidence is supported by a *prima facie* showing of reliability, it becomes the juvenile's burden to make a specific assertion of unreliability and to offer to support that assertion).⁴

⁴ Considering the objection before the trial court at the February 14, 2001 hearing, Thomas's claim of evidentiary error would make sense only if we were to adopt a rule that all written reports from court-ordered psychological assessments are to be excluded as untrustworthy hearsay because the trustworthiness of such reports cannot be properly assessed without testing the expert's credentials, methods and judgment on cross-examination. We conclude that in setting forth the standard for admission of hearsay in WIS. STAT. § 938.299(4)(b), the legislature did not intend to exclude all such reports as *per se* untrustworthy. In particular, we note that under WIS. STAT. § 938.33(1)(b), the appropriate agency is required to submit a report to the court that contains, among other information, a recommended plan of treatment and care that is based on the investigation conducted by the agency and any report resulting from a court-ordered

(continued)

Inaccurate Information.

¶13 Thomas next contends that his due process rights were violated because the circuit court's order changing his placement was based on inaccurate information that appeared in Roller's report. In particular, Thomas contends that Roller's report failed to accurately explain that three assessment tools used by Roller had not been scientifically validated for assessments of juveniles.

¶14 Thomas's due process claim relies on a body of law developed in the context of criminal sentencing. Those cases hold that a criminal defendant has a due process right to be sentenced based on materially accurate information. *See, e.g., State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912, 925 (1998). In order to vacate a sentence on this ground, a criminal defendant is required to show both that the information provided at sentencing was inaccurate and that the circuit court relied on the inaccurate information. *Id.*

¶15 We agree with Thomas that a juvenile dispositional order based on materially inaccurate information raises due process concerns, and we will assume *arguendo* that the criminal sentencing cases supply the relevant standard. In this case, however, we conclude that the alleged inaccuracies are instead in the nature of attacks on the weight that should be given to Roller's conclusions and recommendations. That is, the fact that the testing instruments used by Roller had not been validated by the scientific community for use with juveniles may be treated as a reason to discount Roller's conclusions, but it does not amount to a

examination or assessment. Because an agency is expressly permitted to rely on reports from court-ordered assessments in forming its recommendation for the court, we conclude that such reports are not *per se* untrustworthy.

showing that her conclusions are inaccurate or that the written report misrepresents Roller's opinions. Further, we agree with the circuit court's analysis that although Roller's report might have more fully addressed the limitations of the tests as applied to juveniles, the report did acknowledge that there are limitations, and it did not affirmatively state that the tests had been scientifically validated for use with juveniles. Accordingly, we conclude that Thomas has not met his burden to show that Roller's report is inaccurate.

CONCLUSION

¶16 We affirm the circuit court's order denying Thomas's motion because we conclude that the circuit court acted within its discretion in admitting the therapist's written report and because we conclude that Thomas has not shown that the therapist's written report is inaccurate.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.

