COURT OF APPEALS
DECISION
DATED AND FILED

April 6, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3568

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

IN RE THE COMMITMENT OF
CLAUDE LOWERY:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

CLAUDE LOWERY,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Claude Lowery appeals from a ch. 980, STATS., commitment order, adjudging him a sexually violent person and committing him to

a secured facility for treatment. Lowery claims: (1) the evidence was insufficient to support the commitment; and (2) ch. 980 was unconstitutionally applied to him. Because there was sufficient evidence to support the commitment and because ch. 980 was not unconstitutionally applied to him, we affirm.

I. BACKGROUND

In 1991, Lowery was convicted of fourth-degree sexual assault after pleading guilty. In 1993, Lowery was convicted of second-degree sexual assault after entering an ***Alford*** plea.[1] He was sentenced to forty-eight months in prison. In May 1995, the State filed a petition alleging that Lowery was a sexually violent person eligible for commitment under ch. 980, STATS. The petition was initially dismissed on the grounds that ch. 980 was unconstitutional. This ruling, however, was summarily reversed by this court following our supreme court's pronouncements to the contrary 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).

A bench trial took place in September 1996. The State presented testimony from two expert witnesses, psychologists Dr. Donald Hands and Dr. James LeClair. Both doctors testified that Lowery was "sexually violent." Based on this testimony, the trial court found that Lowery was still a sexually violent person in need of treatment. The trial court entered an order committing Lowery to a secured facility. Lowery now appeals.

[1] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

II. DISCUSSION

A. Insufficient Evidence.

Lowery first contends that the evidence adduced at trial was insufficient to support the commitment order. Specifically, he argues that Dr. Hands' testimony is infirm because it was inconsistent with the testimony Dr. Hands gave at the probable cause hearing. He argues that Dr. Hands was unable to state, to a professional degree of certainty, that Lowery was a sexual sadist at the probable cause hearing, but he did offer that opinion at trial. He also asserts that Dr. Hands admitted being biased toward the victims and that Dr. Hands failed to perform a number of diagnostic tests. For these reasons, Lowery contends that Dr. Hands' testimony is suspect and cannot form the basis for the commitment order.

Lowery further argues that Dr. LeClair's testimony was also problematic because he relied largely on Dr. Hands' reports and did not speak personally with Lowery. Finally, Lowery contends that the doctors' testimony should not be relied on because the two doctors contradicted each other. We are not persuaded by Lowery's contentions.

In reviewing a sufficiency of the evidence claim:

> [W]e reverse only if the evidence, viewed in the light most favorable to the verdict, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found [it substantially probable that the person will engage in acts of sexual violence] beyond a reasonable doubt.

State v. Kienitz, 221 Wis.2d 275, 301, 585 N.W.2d 609, 619 (Ct. App. 1998). There is sufficient evidence to support the commitment. Three elements need to be satisfied for a ch. 980, STATS., commitment: (1) that Lowery had been

convicted of a sexually violent offense; (2) that he suffered from a mental disorder, that is, a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence; and (3) that he is dangerous to others because he has a mental disorder which creates a substantial probability that he will engage in acts of sexual violence. *See* § 980.02(2), STATS.

The record contains sufficient evidence to support each element. The judgment of conviction satisfied the first element and the expert witnesses' testimony satisfied the remaining elements. Dr. Hands testified that Lowery suffers from mental disorders as defined in ch. 980, STATS.: sexual sadism, polysubstance dependence and antisocial personality disorder. Dr. Hands indicated that sexual sadism itself would predispose Lowery to re-offend and that the combination of polysubstance dependence and antisocial personality disorder would predispose Lowery to re-offend. Dr. Hands opined that Lowery is dangerous and at a high risk to re-offend.

Dr. LeClair diagnosed Lowery as suffering from sexual sadism and personality disorder not otherwise specified with antisocial personality features, both of which fit the ch. 980, STATS., definition of mental disorder. Dr. LeClair testified that Lowery was dangerous and that there was a substantial probability that he would commit sexually violent acts in the future.

Based on the foregoing, the record contains sufficient evidence to support the commitment. Lowery's complaints are an attack on the credibility of the doctors' testimony. The credibility determinations are a matter for the fact finder, not this court. *See* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). Whether Dr. Hands' opinions should be believed, given an

apparent "refinement" of diagnosis between the probable cause hearing and the trial, was for the trial court to determine. Likewise, whether Dr. Hands exhibited bias toward the victims or failed to perform diagnostic tests goes to the weight of his opinions. A similar conclusion applies in assessing Lowery's complaints regarding Dr. LeClair's testimony. Further, we are not persuaded by Lowery's claim that the testimony of the two experts was inconsistent as to which mental disorder Lowery suffered from and, therefore, there is insufficient evidence to support the commitment order. As noted by the State, both experts did diagnose Lowery as suffering from sexual sadism, but differed as to the type of personality disorder. Regardless, this discrepancy was for the fact finder to resolve and does not rise to such a level as to undermine our sufficiency of the evidence analysis. Accordingly, we reject Lowery's claim that the record is insufficient to support the commitment.

B. Constitutional Challenges.

Lowery also levels a series of constitutional attacks on ch. 980, STATS. Specifically, he contends that ch. 980 violates his rights against double jeopardy, cruel and unusual punishment, and substantive due process. He also alleges that the chapter is unconstitutional because it operated as an *ex post facto* law. We reject his constitutional attacks.

The constitutionality of a statute is a question of law that we review independently. *See* ***State v. Migliorino***, 150 Wis.2d 513, 524, 442 N.W.2d 36, 41 (1989). As noted, our supreme court upheld the constitutionality of ch. 980, STATS., in ***Post*** and ***Carpenter***. Our supreme court specifically held that ch. 980 does not violate constitutional provisions regarding double jeopardy or *ex post facto* clauses because it does not impose punishment, *see* ***Carpenter***, 197 Wis.2d

at 271-74, 541 N.W.2d at 112-14, and does not offend substantive due process because it is narrowly tailored to allow commitment of only the most dangerous sexual offenders, who are predisposed to re-offending, *see* ***Post***, 197 Wis.2d at 307, 541 N.W.2d at 124. Although our supreme court did not specifically address a claim that the law constitutes cruel and unusual punishment, such a conclusion is implicit in the ***Carpenter*** case. In ***Carpenter***, our supreme court ruled that a ch. 980 proceeding is a civil, not a criminal, proceeding and has a nonpunitive and remedial purpose. *See* ***id.*** at 271-74, 541 N.W.2d at 112-13. Therefore, a commitment that results under the chapter does not constitute punishment. *See* ***id.*** at 274, 541 N.W.2d at 113. It follows logically from this conclusion that if the commitment does not constitute punishment, it cannot constitute cruel and unusual punishment.

Lowery attempts to distinguish ***Post*** and ***Carpenter*** by alleging that the law is unconstitutionally applied. Specifically, he contends that ch. 980, STATS., is unconstitutional as applied because he never admitted his guilt and was never proven guilty beyond a reasonable doubt. As noted, his conviction was the result of an ***Alford*** plea. Further, he challenges the retroactivity of the law, arguing that because he entered a plea before the law was even passed, it would be unconstitutional to commit him because had he known about the commitment procedure, he may have exercised his right to a jury trial. We reject his claim that ch. 980 is unconstitutional as applied to him.

We are not convinced that a law, which our supreme court has found constitutional, somehow becomes unconstitutional when the defendant's conviction stems from an ***Alford*** plea rather than a guilty plea or a jury verdict. The consequences of a conviction following either type of plea or a jury verdict are the same. *See* ***Lee v. State Bd. of Dental Examiners***, 29 Wis.2d 330, 335, 139

N.W.2d 61, 63 (1966). "There is no difference in the nature, character or force of a judgment of conviction depending upon the nature of the underlying plea." *See* ***id.*** Further, the United States Supreme Court has found the Kansas equivalent of our ch. 980, STATS., to be constitutional. *See* ***Kansas v. Hendricks***, 117 S. Ct. 2072 (1997).

Lowery's claim that the law subjects him to a lifetime of confinement is erroneous. As noted by the Supreme Court in ***Hendricks***, "commitment under the Act is only potentially indefinite. The maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year." ***Id.*** at 2083. This is true under ch. 980, STATS., as well. *See* 980.07(1), STATS. The Supreme Court also rejected a claim similar to Lowery's that the retroactive effect of ch. 980 is unconstitutional, ruling that:

> the Act clearly does not have retroactive effect. Rather, the Act permits involuntary confinement based upon a determination that the person currently both suffers from a "mental abnormality" or "personality disorder" and is likely to pose a future danger to the public. To the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes. Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the Act does not violate the Ex Post Facto Clause.

Id. at 2086. Thus, we conclude that Lowery has failed to prove that ch. 980 is unconstitutional as applied to him, and we affirm the trial court's commitment order.

By the Court.—Order affirmed.

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