COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 97-2508 & 98-0837

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

IN RE THE COMMITMENT OF MERVEL L. EAGANS, JR.:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

MERVEL L. EAGANS, JR.,

RESPONDENT-APPELLANT.

APPEALS from orders of the circuit court for Brown County: WILLIAM C. GRIESBACH, Judge. *Affirmed.*

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

HOOVER, J. Mervel Eagans, Jr., appeals an order finding him to be a sexually violent person under ch. 980, STATS., and an order denying his motion

for postconviction relief.[1] Eagans asserts that the trial court erred because he received ineffective assistance of counsel. Specifically, Eagans contends his trial counsel failed to: (1) challenge ch. 980 as unconstitutional when commitment is based on an adjudication of delinquency; (2) fully investigate and develop the evidence an expert witness presented; (3) argue that an antisocial personality disorder is not a sufficiently precise category for a person to be subject to a ch. 980 commitment; (4) challenge the term "substantially probable" as vague; (5) argue that ch. 980 violates the ex post facto clauses of the Wisconsin and United States Constitutions; and (6) challenge ch. 980 as unconstitutional and by violating his equal protection right. Eagans further argues that a new trial should be granted in the interest of justice because the real issue was not tried. We reject Eagans' claims and affirm the trial court's orders.

I. FACTS

Shortly before Eagans' release from Lincoln Hills School, and after he turned eighteen, the State filed a petition under ch. 980, STATS., alleging that Eagans was a sexually dangerous person. The petition alleged that Eagans was adjudicated delinquent for first-degree sexual assault of a seven-year-old child. The delinquency petition alleged that he inappropriately fondled the child when she was sitting on his lap while on a city bus.[2] The petition further contended that Eagans suffered from a mental disorder that predisposes him to engage in acts of

[1] Eagans filed two separate appeals, which were consolidated on April 16, 1998.

[2] The delinquency petition further alleged that Eagans touched the breasts and buttocks of a developmentally disabled girl; however, he was not charged with this incident. Moreover, Eagans was previously adjudicated delinquent for sexual assault based on the finding that at 14 years of age he had sexual intercourse with a 12-year-old female.

sexual violence and that it is substantially probable he will engage in future acts of sexual violence.

The case was tried to a jury. The State presented two witnesses, Dr. Meg Cho, a psychologist employed with the Department of Corrections, and Dr. Dennis Doren, a psychologist and administrator at the Mendota Health Institute. Cho testified that in her clinical judgment, Eagans suffers from antisocial personality disorder, which predisposes him to commit sexually violent acts. Cho's derived her opinion from a personal interview, a review of Eagans' reports and interviews with other professionals who have personally dealt with Eagans. Cho did not rely on any objective tests or studies in making her diagnosis. Doren testified that he, too, believed Eagans suffers from antisocial personality disorder and that this disorder predisposes him to commit sexually violent acts. Doren relied on a risk assessment process in forming his opinion. The risk assessment process involved looking at Eagans' personal characteristics along with statistical risk factors. In rebuttal, the defense called Eagans and his mother, Crystal Graham, to the stand. The defense did not offer any expert testimony, although trial counsel did cross-examine the State's witnesses regarding the reliability of their opinions.

The jury found that Eagans was a sexually violent person under ch. 980, STATS. In response, trial counsel filed a motion notwithstanding the verdict arguing that (1) ch. 980 is unconstitutional; (2) there was an absence of proof for the jury to find Eagans a sexually violent person beyond a reasonable doubt; and (3) the trial court erred by taking judicial notice of Eagans' adjudication of delinquency. The trial court denied Eagans' motions and ordered that he be committed to the custody of the Department of Health and Family Services for control, care, and treatment until such time as he is no longer sexually violent.

Eagans filed a motion for postconviction relief, alleging that he received ineffective assistance of counsel. The trial court held that Eagans did not receive ineffective assistance of counsel. Eagan appeals both the trial court's orders finding him to be a sexually violent person under ch. 980, STATS., and denying postconviction relief.

II. ANALYSIS

The primary issue on appeal is whether Eagans received ineffective assistance of counsel. Every defendant has a Sixth Amendment right to effective assistance of counsel. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In order to establish ineffective assistance of counsel, a defendant must prove that his lawyer's performance was deficient and the deficient performance prejudiced the defendant. ***State v. Fritz***, 212 Wis.2d 284, 292, 569 N.W.2d 48, 51 (Ct. App. 1997). Whether counsel's performance was deficient and prejudicial are questions of law that this court reviews de novo. ***State v. Moats***, 156 Wis.2d 74, 101, 457 N.W.2d 299, 311 (1990). The trial court's findings of fact will be upheld unless they are clearly erroneous. ***State v. Pitsch***, 124 Wis.2d 628, 634, 369 N.W.2d 711, 714 (1985).

To prove deficient performance, the defendant must show that his trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***State v. Johnson***, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847 (1990) (quoting ***Strickland***, 466 U.S. at 687). The defendant must overcome the strong presumption that his counsel acted within the professional norms. ***Id***. at 127, 449 N.W.2d at 847-48. To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." ***Id***. at 129, 449 N.W.2d at 848. A reasonable probability is defined as a "probability sufficient to undermine confidence in the outcome." ***Id***. If this court concludes that the defendant has not proven one prong, we need not address the other. ***Strickland***, 466 U.S. at 697.

1. Unconstitutionality of ch. 980, STATS.

Eagans first contends that his trial counsel was ineffective for failing to argue that ch. 980, STATS., is unconstitutional when commitment is based on an adjudication of delinquency because there is no definitive evidence that one who sexually offends as a juvenile is substantially probable to reoffend. In his argument, Eagans relies on the postconviction hearing testimony of Dr. John Hunter.[3] We conclude that Eagans' argument is flawed for several reasons. First, we reject the unprecedented and unsupported proposition that an element must be proven by "definitive" evidence. The statute requires proof beyond a reasonable doubt that recidivism is substantially probable. It does not mandate the type or character of relevant evidence that may be available or that the State may choose to utilize in an attempt to meet its burden. Second, the Wisconsin Supreme Court has unequivocally held that ch. 980 is, in its entirety, constitutional on both substantive due process and equal protection grounds. ***State v. Post***, 197 Wis.2d 279, 541 N.W.2d 115 (1995). In ***Post***, the court addressed Eagans' concerns regarding the uncertainty in predicting future dangerousness:

[3] John Hunter is a clinical psychologist. For the past 20 years, he has done clinical work and research in the area of clinical treatment, including the treatment of victims and perpetrators of sexual abuse, for the past 20 years. Hunter has conducted his own research and is familiar with others' research on the recidivism of juvenile sex offenders. He emphasized that based on preliminary statistical data, the sexual recidivism rate in juveniles tends to be relatively low as compared to adults. Hunter cited one study that found the recidivism rate of juvenile offenders who completed treatment to be 7-15% and those juveniles who did not complete treatment to be 40%.

> The Supreme Court has noted the uncertainty endemic to the field of psychiatry and held that particular deference must be shown to legislative decisions in that arena. The Court recognized that although predictions of future dangerousness may be difficult, they are still an attainable, in fact essential, part of our judicial process. Here, the Wisconsin Legislature has devised a statutory method for assessing the future danger posed by persons predisposed to sexual violence and we find it constitutionally sound.

Id. at 312-13, 541 N.W.2d at 126 (citations omitted). Because the supreme court has concluded that ch. 980 is constitutional despite the uncertainty associated with predicting the future, trial counsel was not ineffective for failing to challenge ch. 980's constitutionality based on an argument that rests essentially on the issue of predictability.[4]

Moreover, we agree with the trial court that Eagans confuses evidentiary issues with constitutional issues. The focus of Eagans' ch. 980, STATS., trial was not solely based on whether Eagans, as a juvenile sexual offender, is likely to reoffend, but whether Eagans, who was adjudicated delinquent for first-degree sexual assault, has at this time and as an adult a mental disorder that predisposes him to commit future sexually violent acts. What Eagans is actually challenging is the sufficiency of the evidence at trial to determine whether there was a substantial probability he would reoffend. In reviewing the sufficiency of the evidence to support a jury verdict, we must view the evidence in a light most favorable to the verdict. ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). We must affirm the verdict unless the evidence is so insufficient in probative value that it can be said as a matter of law that no trier

[4] As a side note, although not based upon a constitutional challenge, the Wisconsin Supreme Court has held that a juvenile adjudicated for a sexually violent offense may be subject to civil commitment as a sexually violent person. ***In re Hezzie R.***, 219 Wis.2d 849, 878, 580 N.W.2d 660, 670 (1998).

of fact acting reasonably could have not found ch. 980 commitment beyond a reasonable doubt. *See* ***id***.

We conclude that the evidence was sufficient and that a reasonable jury could find there was a substantial probability that Eagans would reoffend. The jury had the opportunity to hear the testimony of both Cho and Doren. Both psychologists concluded that Eagans suffers from antisocial personality disorder and that this disorder predisposes him to commit sexually violent acts in the future. Their conclusions were based on Eagans' history, as well as his current behavior at Lincoln Hills, including his impulsiveness, minimization and continued rationalizing of his offenses. Based upon the evidence presented by the State's experts, a reasonable jury could find that there was a substantial probability Eagans would reoffend.

2. John Hunter's Evidence

Eagans further argues that trial counsel was ineffective for failing to fully develop and investigate the type of evidence Hunter presented at the postconviction hearing. We disagree. In fact, trial counsel did develop evidence of the same character as that offered by Hunter through his cross-examination of the State's experts. Eagans' trial counsel did retain an expert to aid in his cross-examination.[5] In his cross-examination, Eagans' trial counsel established that antisocial personality disorder cannot be diagnosed in a person under eighteen years of age. He also stressed that much of the data on which the State's experts

[5] Eagans' trial counsel petitioned for an expert before trial. He did not call this expert as a witness at trial, but did assert in the postconviction motion that he utilized his expert in his cross-examination. We can only assume that trial counsel believed his expert would not be a beneficial witness.

relied was based on Eagans' behavior as a minor. Eagans' trial counsel addressed the uncertainty in predicting whether there is any correlation between antisocial personality disorder and the probability of reoffending through his cross-examination of the expert witnesses. Particularly, trial counsel emphasized the unpredictability of the risk factors recognized by current research and, further, that the studies on which Doren relied were based solely on the recidivism of adult males, which may not correlate with someone who has committed offenses as a juvenile. Moreover, trial counsel also presented to Doren a study that found a recidivism rate of 35% for adolescent male sex offenders.

In order to prove ineffective assistance of counsel, Eagans must show that the representation given was "so inadequate and of such low competence that it amounted to no representation at all and reduced the trial to a sham and a mockery of justice." *See* ***Whitmore v. State***, 56 Wis.2d 706, 714, 203 N.W.2d 56, 61 (1973). This standard is well below what Eagans proposed. It is not deficient performance to fail to develop sophisticated and complex legal arguments that are ultimately attributable only to experts in the field. Rather, there must be fundamental and critical error. In any event, trial counsel placed before the jury through his cross-examination of Cho and Doren evidence not inconsistent with Hunter's testimony. Counsel established that the studies suggest recidivism rates of adult sexual offenders may differ for adults who sexually offended as juveniles. We therefore conclude that Eagans' trial counsel's failure to investigate and present additional studies and evidence on the issue of juvenile recidivism rates does not amount to ineffective representation.

3. Sufficiently Precise Category

Before one may be committed under ch. 980, STATS., the State must prove that the person has a mental disorder that creates a substantial probability that he or she will engage in acts of sexual violence. Section 980.02(c), STATS. Eagans argues that trial counsel was ineffective for failing to assert that antisocial personality disorder is not a sufficiently precise category of mental disorder to support a ch. 980 commitment. He contends that a diagnosis of antisocial personality disorder cannot be the sole basis of commitment for a person who has sexually offended as a juvenile. Eagans, however, demonstrates neither an evidentiary basis nor legal authority for the proposition.[6] We fail to see how counsel can be ineffective for not raising an issue that, once raised, evidently cannot be supported. Indeed, we deem the issue, once again, to be evidentiary rather than constitutional.

The evidence was sufficient for a reasonable jury to conclude that Eagans had an antisocial personality disorder that made it substantially probable he would reoffend; both experts so testified. Trial counsel *did* challenge their findings, based on Eagans' age and that the diagnosis relied upon incidents that occurred while Eagans was a juvenile. He also challenged the State's claim that a diagnosis of antisocial personality disorder predisposed one to engage in acts of sexual violence. The weight and credibility of the evidence is not for the appellate court to evaluate, but for the fact-finder. ***Poellinger***, 153 Wis.2d at 506, 451 N.W.2d at 757. The trier of fact could either accept or reject the State's witnesses' testimony. We conclude that trial counsel adequately addressed the "mental

[6] This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

disorder" element and was not ineffective for failing to argue that a person cannot be subject to ch. 980, STATS., commitment based upon a diagnosis of antisocial personality disorder.

4. Substantially Probable

Eagans next asserts trial counsel was ineffective for not challenging the meaning of "substantially probable" and arguing that the term is impermissibly vague. We will not, however, hold counsel ineffective for failing to make arguments contrary to established law. In ***State v. Zanelli***, 212 Wis.2d 358, 374-76, 569 N.W.2d 301, 308 (Ct. App. 1997), we determined that the term "substantially probable" is not impermissibly vague. Although Eagans respectfully disagrees with our analysis, we are bound by the decisions of our own court. ***Cook v. Cook***, 208 Wis.2d 166, 189, 560 N.W.2d 246, 256 (1997). Thus, we conclude that trial counsel was not ineffective for failing to challenge the phrase "substantial probability" on the basis of vagueness.

5. Violation of Ex Post Facto Clause

Eagans further contends that his trial counsel was ineffective for failing to argue that ch. 980, STATS., violates the ex post facto clauses of the state and federal constitutions. Once again, however, the Wisconsin Supreme Court has held that ch. 980 is not an unconstitutional ex post facto law. ***State v. Carpenter***, 197 Wis.2d 252, 273-74, 541 N.W.2d 105, 113-14 (1995). In ***Carpenter***, the court emphasized:

> [W]e conclude the ch. 980 is aimed at protecting the public by providing concentrated treatment for convicted sex offenders who are at a high risk to reoffend based upon a mental disorder which predisposes them to commit acts of sexual violence. The focus of the statute is on the offender's current mental condition and the present danger

> to the public, not punishment. As we recognized in ***Theil***, the mere fact that a prior conviction is a predicate of the current sanction does not render the current sanction punishment for the past offense. ***Theil***, 188 Wis.2d at 703-05, 524 N.W.2d 641. The legislative aim is not punishment but regulation of the present situation.

Id. We are bound by the precedent of our supreme court. ***State v. Clark***, 179 Wis.2d 484, 493, 507 N.W.2d 172, 175 (Ct. App. 1993). Therefore, we conclude that trial counsel was not ineffective for failing to argue that ch. 980 violates the ex post facto clauses of the state and federal constitutions.

6. Equal Protection Challenge

Eagans contends that trial counsel was ineffective for failing to challenge ch. 980, STATS., on equal protection grounds. He views ch. 980 as punitive in that it fails to provide release provisions consistent with other civil committees. Eagans does not develop an argument to demonstrate that release procedures in discrete statutory actions must be the same, except to cite two United States Supreme Court decisions that deal with an unrelated equal protection challenge.

In ***Post***, the supreme court held that the indefinite release provisions of ch. 980, STATS., withstood equal protection challenge. ***Id***. at 326-28, 541 N.W.2d at 131-32. The ***Post*** court relied on ***Jones v. United States***, 463 U.S. 354 (1983), which upheld an indefinite commitment scheme of insanity acquittees. ***Post***, 197 Wis.2d at 327-28, 541 N.W.2d at 132. The Supreme Court reasoned that "because it is impossible to predict how long it will take for any given individual to recover—or indeed whether he will ever recover—Congress had chosen, as it has with respect to civil commitment, to leave the length of the commitment indeterminate, subject to periodic review of the patient's suitability

for release." ***Jones***, 463 U.S. at 368. Relying on ***Jones***, the court in ***Post*** emphasized that:

> Where, as here, one of the purposes of the commitment is to protect the public through incapacitation and treatment of dangerous mentally disturbed individuals who are substantially likely to engage in future acts of sexual violence, release properly hinges on the progress of treatment, rather than any arbitrary date in time. The commitment ends when this purpose is satisfied—when the committed person no longer poses a danger to the community as a sexually violent person.

Id. at 328, 541 N.W.2d at 132.

Chapters 51 and 980, STATS., are designed to effectuate different purposes. Although both chapters may share some features, they are wholly independent and separate actions. Accordingly, we conclude that trial counsel was not ineffective for failing to challenge ch. 980 as punitive for failing to provide release provisions consistent with other civil committees. Chapter 980 furthers the compelling legislative purpose of protection of the public from the dangerousness of sexually violent persons, which is wholly distinct from the purposes established in ch. 51. *See* ***Post***, 197 Wis.2d at 322-23, 541 N.W.2d at 130.

7. New Trial in the Interest of Justice

Eagans finally argues that he should be granted a new trial in the interest of justice. He asserts that the real issue regarding the constitutional application of the sexual predator statute to an adult who has sexually offended as a juvenile was not tried and, therefore, he should be entitled to a new trial. We disagree. As emphasized above, this issue was brought out factually through defense counsel's cross-examination of the State's experts. Trial counsel's examination stressed that the diagnosis of antisocial personality disorder was

based on incidents and behavior that occurred while Eagans was under eighteen years. He also brought out the fact that the State's experts relied on studies and statistics of solely adult sex offenders. Trial counsel even presented the State's expert with a study that found a juvenile sex offender recidivism rate of 35%. The evidence presented by trial counsel is consistent with Hunter's testimony. Consequently, we conclude that the real issues were fully tried and, therefore, will not grant a new trial in the interest of justice.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.