COURT OF APPEALS
DECISION
DATED AND FILED

March 10, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1181 **Cir. Ct. No. 2001CI1**

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

IN RE THE COMMITMENT OF ERIC JAMES HENDRICKSON:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

ERIC JAMES HENDRICKSON,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Marathon County: GREGORY B. HUBER, Judge. *Affirmed.*

Before Lundsten, Higginbotham and Blanchard, JJ.

¶1 LUNDSTEN, J. Eric Hendrickson was committed as a sexually violent person under WIS. STAT. ch. 980. This appeal concerns a subsequent

discharge hearing at which the circuit court found that there was sufficient evidence to continue Hendrickson's commitment. Hendrickson argues that, regardless whether the proof at his discharge hearing satisfied the elements in the pattern jury instruction defining a sexually violent person, case law additionally requires proof that the person has a mental disorder involving serious difficulty controlling behavior. He argues that proof of serious difficulty controlling behavior was lacking and, therefore, his continued commitment is illegal. We conclude that ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, requires rejection of Hendrickson's argument. Accordingly, we affirm the circuit court.

Background

¶2 Hendrickson was committed as a sexually violent person under WIS. STAT. ch. 980 in 2002. In 2007, following an independent examination requested by Hendrickson, the circuit court determined, under WIS. STAT. § 980.09(2)(a) (2003-04), that there was probable cause to hold an evidentiary hearing on whether Hendrickson still met the commitment standards.

¶3 After various delays, a discharge hearing was held in July 2009. Both the State and Hendrickson presented witnesses. For purposes of this appeal, it is sufficient to note that the State's only expert witness testified that he could not speak to the level of Hendrickson's "serious difficulty" controlling his behavior because the witness knew of no definition for that concept and had no "scientific standard by way to measure serious difficulty controlling behavior."

¶4 The circuit court denied discharge, finding that the State had proven that Hendrickson is still a sexually violent person because he has a mental disorder

that predisposes him to engage in acts of sexual violence and makes him more likely than not to commit acts of sexual violence. Hendrickson appeals.

Discussion

¶5 Hendrickson argues that the evidence presented at his discharge hearing, held under WIS. STAT. ch. 980, was insufficient to support a finding that he is a sexually violent person. More specifically, Hendrickson contends there was no direct evidence that he had serious difficulty controlling his behavior and, without that, there was insufficient evidence that he had the requisite "mental disorder." We are not persuaded. Rather, we agree with the State that Hendrickson's argument is inconsistent with ***Laxton***, 254 Wis. 2d 185.

¶6 Hendrickson summarizes the three seminal cases on this topic: ***Kansas v. Hendricks***, 521 U.S. 346 (1997); ***Kansas v. Crane***, 534 U.S. 407 (2002); and ***Laxton***. He contends that, collectively, these cases establish that a ch. 980 commitment requires proof that a person is different from the typical criminal recidivist and that this difference is a particular type of mental disorder, a mental disorder that causes the person to have serious difficulty controlling behavior. It follows, according to Hendrickson, that the State needed to produce evidence specifically proving that he had serious difficulty controlling his behavior.

¶7 Just as important as what Hendrickson argues is what he does not argue. Hendrickson does not argue that there was insufficient evidence to support a finding on each of the three sexually-violent-person elements in the pattern jury

instruction, WIS JI—CRIMINAL 2506.[1] In particular, as to the second element, Hendrickson does not argue that there was insufficient evidence to support a finding that he had a "mental disorder," defined as "a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence." *See* ***id.*** at 1. As to the third element, Hendrickson does not argue that there was insufficient evidence that he is dangerous to others because his mental disorder "makes it more likely than not that he will engage in future acts of sexual violence." *See* ***id.*** at 2 (footnote omitted). Instead, Hendrickson effectively argues that case law requires more—it requires direct evidence of serious difficulty controlling behavior. Hendrickson contends that this evidence was lacking at his discharge hearing.

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[1] WISCONSIN JI—CRIMINAL 2506, titled "Discharge Of A Sexually Violent Person Under Chapter 980, Wis. Stats.," sets forth the following elements: 1) that the respondent has been convicted of a sexually violent offense; 2) the respondent currently has a mental disorder; and 3) the respondent is dangerous to others because the mental disorder makes it more likely than not that s/he will engage in future acts of sexual violence. The jury instruction defines mental disorder as follows:

> "Mental disorder" means a condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence and causes serious difficulty in controlling behavior. Mental disorders do not include merely deviant behaviors that conflict with prevailing societal standards. Not all persons who commit sexually violent offenses can be diagnosed as suffering from a mental disorder. Not all persons with a mental disorder are predisposed to commit sexually violent offenses or have serious difficulty in controlling behavior.

WIS JI—CRIMINAL 2506, at 1-2 (footnotes omitted).

Hendrickson accepts that the law applied in this case by the circuit court was the law set forth in the pattern jury instruction, WIS JI—CRIMINAL 2506 (2005). And, Hendrickson does not argue that differences between the pattern jury instruction used here and the one discussed in ***State v. Laxton***, 2002 WI 82, 254 Wis. 2d 185, 647 N.W.2d 784, matter. *See, e.g.*, ***State v. Nelson***, 2007 WI App 2, ¶¶3-6, 298 Wis. 2d 453, 727 N.W.2d 364 (Ct. App. 2006) (discussing the change from "substantially probable" to "likely").

¶8 Turning to the specifics of his discharge hearing, Hendrickson argues that the absence of "serious difficulty" evidence is glaring because the State's only expert witness testified that the law does not define "serious difficulty" and he, the expert, had no "scientific standard by way to measure serious difficulty controlling behavior." Thus, the expert did not opine that Hendrickson had serious difficulty controlling his behavior and did not otherwise provide direct evidence on this topic. And, as Hendrickson notes, there was no evidence on this specific topic from any other source. It follows, according to Hendrickson, that there was insufficient evidence to support his continued commitment.

¶9 We must reject Hendrickson's analysis because it amounts to a challenge to the underpinning of ***Laxton***'s central holding: that evidence supplying sufficient evidence under the pattern jury instruction "necessarily and implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her behavior." ***Laxton***, 254 Wis. 2d 185, ¶2. Our explanation of why this is true begins with a summary of the majority and dissenting opinions in ***Laxton***.

¶10 The focus in ***Laxton*** was on the holdings in ***Hendricks*** and ***Crane*** requiring "'proof of serious difficulty in controlling behavior.'" ***Laxton***, 254 Wis. 2d 185, ¶15 (emphasis deleted) (quoting ***Crane***, 534 U.S. at 413). Laxton argued that WIS. STAT. ch. 980 violated substantive due process protections because "the provisions of the chapter do not require a jury to determine that the person has a mental disorder that involves serious difficulty in controlling his or her behavior." ***Id.***, ¶1. The ***Laxton*** majority rejected that argument, concluding that a ch. 980 "commitment does not require a *separate* finding that the individual's mental disorder involves serious difficulty for such person to control his or her behavior."

Id., ¶2 (emphasis added). The ***Laxton*** majority reasoned that "evidence showing that the person's mental disorder predisposes such individual to engage in acts of sexual violence, and evidence establishing a substantial probability that such person will again commit such acts [something that ch. 980 does require], necessarily and implicitly includes proof that such person's mental disorder involves serious difficulty in controlling his or her behavior [something constitutionally required under ***Crane***]." ***Id.***; *see also* ***id.***, ¶¶22-23. The majority stated that such evidence distinguishes a sexually violent person "from the dangerous but typical recidivist." ***Id.***, ¶2; *see also* ***id.***, ¶¶23, 27.

¶11 Thus, the ***Laxton*** majority clearly, albeit implicitly, rejected Laxton's claim that the statute was unconstitutional because the statutory requirement—a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence—is not the equivalent of the constitutionally required proof that a person has serious difficulty controlling behavior. *See* ***id.***, ¶18.

¶12 In a brief discussion tracking the logic of its statutory analysis, the ***Laxton*** majority rejected Laxton's argument that the pattern jury instructions used in his case violated substantive due process protections. Laxton contended that the instructions were constitutionally defective because they did not require proof that he had the kind of mental disorder required under ***Hendricks*** and ***Crane***, one that involves serious difficulty controlling his dangerous behavior. ***Laxton***, 254 Wis. 2d 185, ¶24. In reasoning that tracked its analysis of the constitutionality of the underlying law, the ***Laxton*** majority explained that, when Laxton's jury found, as the instruction required, that Laxton had a mental disorder and that his mental disorder created a substantial probability that he would engage in acts of sexual violence, the jury necessarily found that Laxton had the required type of mental

disorder, one involving serious difficulty in controlling his behavior. *See* ***id.***, ¶27. Accordingly, there was no instructional error. ***Id.***

¶13 The dissenting justices in ***Laxton*** took issue with the majority's jury instruction analysis. The dissenters rejected the view that a finding that Laxton had a mental disorder that created a substantial probability that he would engage in acts of sexual violence necessarily involved a finding that Laxton had a mental disorder that involved serious difficulty controlling his behavior. ***Id.***, ¶¶39, 42-47 (Abrahamson, C.J., dissenting). The ***Laxton*** dissenters wrote:

> To a jury, a mental disorder "affect[ing] an individual's emotional or volitional capacity," as the jury instruction states, does not equate to a mental disorder that causes serious difficulty in controlling behavior. To a jury, a "mental disorder that ... predisposes the person to engage in acts of sexual violence," as the jury instruction states, means a tendency, a predilection, or a susceptibility to commit an act of sexual violence, not an interference with free will, not a "serious difficulty" in controlling behavior. To a jury, "a mental disorder which creates a substantial probability that he will engage in acts of sexual violence," as the jury instruction states, does not require the jury, as ***Crane*** directs, to "distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."

Id., ¶46 (Abrahamson, C.J., dissenting). In essence, this analysis is a rejection of the ***Laxton*** majority's belief that a fact finder following the pattern jury instruction—which does not require a finding on whether the respondent has a mental disorder involving serious difficulty controlling behavior—necessarily and sufficiently covers exactly that issue.

¶14 The ***Laxton*** dissenters framed their disagreement in terms of a missing "link" in the jury instructions "between the mental disorder and a serious

difficulty in controlling behavior." ***Id.***, ¶45 (Abrahamson, C.J., dissenting). So too is Hendrickson's argument based on there being a missing link with respect to serious difficulty. But Hendrickson simply bypasses the instructions and argues that case law requires direct evidence of serious difficulty controlling behavior. The simple answer is that it does not.

¶15 ***Laxton*** plainly holds that the "serious difficulty" requirement of ***Hendricks*** and ***Crane*** is met by proof of a mental disorder and "proof that due to a mental disorder it is substantially probable that the person will engage in acts of sexual violence." ***Laxton***, 254 Wis. 2d 185, ¶23. And, we repeat here, Hendrickson does not argue that proof was lacking that he had a mental disorder that made it substantially probable that he would engage in acts of sexual violence or, in the words of the current jury instruction, that Hendrickson has a "mental disorder [that] makes it more likely than not that he will engage in future acts of sexual violence." *See* WIS JI—CRIMINAL 2506, at 2 (footnote omitted).

¶16 Finally, we note that we do agree with Hendrickson's assertion that the State's responsive brief incorrectly states that serious difficulty controlling behavior has been rendered irrelevant by ***Laxton***. Plainly, under ***Crane***, serious difficulty controlling behavior must be proven, and the ***Laxton*** majority accepts this requirement as a given. It is the way the ***Laxton*** majority deals with that requirement that is at the heart of the dispute in ***Laxton***, as it is here. The ***Laxton*** majority does not say or imply that this requirement is irrelevant. Rather, the ***Laxton*** majority takes the view that this proof requirement is necessarily met when the State proves that a WIS. STAT. ch. 980 respondent has a mental disorder that makes it substantially probable—now "more likely than not"—that he or she will engage in acts of sexual violence. Thus, the point of ***Laxton*** is not that

"serious difficulty" is irrelevant but, rather, that "serious difficulty" is adequately addressed by a differently worded requirement.

Conclusion

¶17 For the reasons above, we affirm the circuit court.

By the Court.—Order affirmed.

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