

IN THE COURT OF APPEALS OF IOWA

No. 1-185 / 00-0887

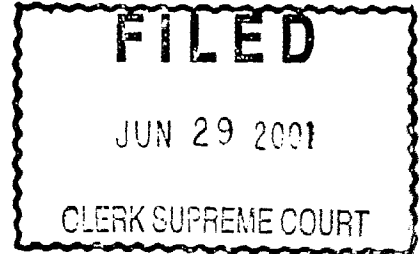
Filed June 29, 2001

IN RE THE DETENTION OF ELWOOD THOMPSON

STATE OF IOWA,
Petitioner-Appellee,

vs.

ELWOOD THOMPSON,
Respondent-Appellant.



Appeal from the Iowa District Court for Wapello County, E. Richard Meadows, Jr., Judge.

On appeal from a jury's finding that he is a sexually violent predator, the respondent argues chapter 229A is a punitive statute, violates the federal and state constitutional prohibitions against ex post facto laws, violates the Double Jeopardy Clauses of the state and federal constitutions, violates his right to substantive due process, and violates the Equal Protection Clauses of the state and federal constitutions. The respondent argues he was denied due process when the district court refused to give his requested instruction regarding the meaning of the term "likely to engage in predatory acts of a sexual nature." He also claims he was denied due process when the court refused to give an instruction allowing the jury to consider less restrictive alternatives. The respondent contends the court incorrectly ruled the proper jury size under chapter 229A is eight people, and he claims the court erred in admitting evidence

of his prior bad acts when he was willing to stipulate to his prior convictions.

AFFIRMED.

Thomas J. Gaul, Assistant Public Defender, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Scott D. Brown and Roxann M. Ryan, Assistant Attorneys General, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MILLER, J.

Elwood Thompson appeals from a jury determination that he is a sexually violent predator under Iowa Code chapter 229A (1999). Thompson argues chapter 229A is a punitive statute subject to constitutional analysis as a criminal statute, violates federal and state constitutional prohibitions against ex post facto laws, violates the double jeopardy clauses of the state and federal constitutions, violates his right to substantive due process of law, and violates the equal protection clauses of both the federal and state constitutions. He further argues he was denied due process of law when the district court refused to give his requested jury instruction regarding the meaning of the statutory phrase "likely to engage in predatory acts of a sexual nature" and when the court refused to give his requested instruction allowing the jury to consider less restrictive alternatives. Thompson contends the court incorrectly ruled the proper jury size under chapter 229A is eight people, in violation of his right under the Iowa Constitution to a twelve-person jury. He asserts the trial court erred in admitting evidence of his prior bad acts when he was willing to stipulate to his prior convictions. We affirm.

I. BACKGROUND FACTS

Elwood Thompson has a history of over twenty-five years of sex offenses, beginning when he was fourteen years old when he plead guilty to a juvenile crime of sexual abuse in Florida in 1969. He was convicted again of a sexual offense involving a nine-year-old girl in 1982 in Florida. In 1983 he was convicted of injury to a child in Texas, an incident which involved mutual touching of the genital area with a thirteen-year-old boy, and served two years in prison in Texas for this crime. Thompson moved to Ottumwa, Iowa several years after he

was released from prison for this offense. He was convicted in Iowa of sexual abuse in the third degree in 1995 based on similar contacts with a thirteen-year-old boy.

On November 3, 1999 the State filed a petition alleging Thompson to be a sexually violent predator under Iowa Code chapter 229A (1999). The district court found the State met its burden under chapter 229A to show probable cause existed to believe Thompson was a "sexually violent predator who would likely repeat that offense if not confined in a secure facility." A jury trial was demanded. Thompson brought several issues before the court prior to jury trial, including filing a motion to dismiss and a motion in limine. The court denied Thompson's motion to dismiss and his motion in limine. The court further ruled that under chapter 229A eight persons was the proper size for the jury, the verdict must be unanimous, and Thompson could be called as a witness by the State. The court granted the State's motion in limine.

Trial commenced on May 2, 2000 and the jury returned a verdict determining Thompson was a sexually violent predator. Thompson appeals from this determination.

II. STANDARDS OF REVIEW

Constitutional issues, including claimed violations of ex post facto provisions, double jeopardy, due process of law, and equal protection of the law are presented here. We review such constitutional issues de novo in light of the totality of the circumstances. *State v. Kotlers*, 589 N.W.2d 736, 738 (Iowa 1999); *State v. Veal*, 564 N.W.2d 797, 802 (Iowa 1997). Our supreme court recently

discussed specifically the principles governing our review of constitutional challenges to chapter 229A.

This court reviews constitutional claims *de novo*. Statutes are cloaked with a strong presumption of constitutionality and, thus, a party challenging a statute “carries a heavy burden” of rebutting this presumption. “ ‘A person challenging a statute must negate every reasonable basis upon which the statute could be upheld as constitutional.’ ”

In re Detention of Garren, 620 N.W.2d 275, 278 (Iowa 2000) (quoting *In re Detention of Morrow*, 616 N.W.2d 544, 547 (Iowa 2000)).

Trial court rulings concerning admissibility of evidence are generally discretionary, in which case we review for an abuse of discretion. *City of Dubuque v. Fancher*, 590 N.W.2d 493, 495 (Iowa 1999); *State v. Hubka*, 480 N.W.2d 867, 868 (Iowa 1992). We do so here.

III. MERITS

.. This appeal presents issues identical to those previously resolved by our supreme court’s decisions in *Garren*, 620 N.W.2d 275 and *In re Detention of Williams*, ___ N.W.2d ___ (Iowa 2001). Thompson raises nine issues on appeal. Thompson argues: (1) chapter 229A is a punitive statute and as such is subject to constitutional analysis as a criminal statute; (2) chapter 229A violates federal and state constitutional prohibitions against *ex post facto* laws; (3) chapter 229A violates the double jeopardy clauses of the state and federal constitutions; (4) chapter 229A violates his right to substantive due process of law; (5) chapter 229A violates the equal protection clauses of both the federal and state constitutions; (6) he was denied his due process right to a fair trial when the district court refused to give his requested jury instructions regarding the meaning of the statutory phrase “likely to engage in predatory acts of a sexual

nature;" (7) he was denied his due process right to a fair trial when the trial court refused to give his proposed jury instruction allowing the jury to consider less restrictive alternatives; (8) the trial court incorrectly ruled the proper jury size under chapter 229A is eight persons instead of twelve; and (9) the trial court erred in admitting evidence of his prior bad acts.

Thompson's first four claims were rejected by our supreme court in *Garren*. His fifth through ninth claims were similarly rejected in *Williams*. Because these prior opinions address all of the arguments advanced by Thompson, they are dispositive of this appeal. We will nevertheless briefly address each of Thompson's claims.

In *Garren* the court held that Iowa Code chapter 229A was civil in nature, not criminal. *Garren*, 620 N.W.2d at 283. Based on this finding the court rejected the appellant Garren's claims that chapter 229A violated the constitutional prohibitions against ex post facto laws, because they apply only to penal or criminal actions, and his claims that chapter 229A violated guarantees against double jeopardy, because they apply only in criminal cases. *Id.* For the same reasons Thompson's similar claims in this appeal must fail.

Additionally, the supreme court rejected Garren's claims that chapter 229A violated his substantive due process right because it did not provide for a less restrictive placement. *Garren*, 620 N.W.2d at 285. Thompson makes an almost identical argument here, alleging chapter 229A violates his substantive due process right because it does not provide for a less restrictive alternative to prison. The court in *Garren* noted it had previously stated, in *In re B.B.*, 516 N.W.2d 874, 879 (Iowa 1994), that "if institutional custody is constitutional, it

does not become unconstitutional just because there may be a more desirable form." *Garren*, 620 N.W.2d at 285. The court went on to state:

Even if such a [constitutional right to the least restrictive form of institutional placement] did exist, it is not a "fundamental" right. Therefore, substantive due process demands, at the most, that there be a reasonable fit between the governmental purpose and the means chosen to advance that purpose.

Id. (citation omitted). The court held there is a reasonable fit between the State's purpose of protecting society from persons who have been determined to be likely to reoffend if not placed in a secure facility and their placement in such a facility and therefore *Garren* had failed to show a substantive due process violation. *Id.* For the same reasons as set forth in *Garren*, Thompson's claim that Iowa Code chapter 229A violates his substantive due process rights because it does not provide for a less restrictive alternative to prison must fail.¹

... Thompson next asserts that Iowa Code chapter 229A violates his federal and state rights to equal protection because it "treats mentally ill sexual offender commitments differently than other mentally ill civil commitments." In *Williams* our supreme court, dealing with an identical claim, held that the appropriate level of scrutiny was "rational basis," rather than "strict scrutiny." *Williams*, ____ N.W.2d at _____. It went on to further hold:

Because the legislative scheme of chapter 229A is rationally related to the State's interest in protecting the public while effectively treating those with this particular mental disorder, the statute does not violate equal protection under either the federal or Iowa Constitution.

¹ Contrary to Thompson's assertion, neither the statute nor the court's order results in him being placed in "prison." Rather, he is "committed to the custody of the director of the department of human services," Iowa Code § 229A.7(3), to "be kept in a secure facility," Iowa Code § 229A.7(4), and is not committed to the custody of the director of the department of corrections.

Williams, ____ N.W.2d at _____. For the same reasons we conclude chapter 229A did not violate Thompson's right to equal protection under either the federal or state constitution.

Claims six and seven deal with two jury instructions requested by Thompson, the denial of which he alleges violated his due process right to a fair trial. First, Thompson challenges the district court's refusal to instruct the jury that "likely to engage in predatory acts of sexual violence" means "*highly likely* to engage in acts of a sexually violent nature in the future if released."

Second, Thompson argues that he could be prevented from engaging in predatory acts constituting sexually violent offenses by confinement in something less than a secure facility. As such, he asserts the district court should have instructed the jury on this claimed defense and allowed a special verdict form in which the jury would have determined if the State had proven "beyond a reasonable doubt that [Elwood Thompson] must be kept only in a secure facility to prevent him from engaging in predatory acts constituting sexually violent offenses?". These arguments must also fail as they were both recently addressed and rejected in *Williams*. See *Williams*, ____ N.W.2d at _____.

First, the supreme court in *Williams* held that defining the statutory term "likely" as "more likely than not" or "more probable than not" does not diminish the high level of proof by which the statute requires the State to prove the elements of its case, "beyond a reasonable doubt," and an instruction so defining the term comports with the statutory definition as well as due process requirements. *Id.* at _____.

Additionally, the court determined that Williams' proposed instruction was not a correct statement of the law. The court stated:

Essential to any finding that an accused is a sexually violent predator is a finding that the person's mental abnormality makes him "likely to engage in predatory acts constituting sexually violent offenses, *if not confined in a secure facility.*" Iowa Code §229A.2(9) (Supp. 1999) (emphasis added). The "secure facility" issue is part and parcel of the SVP [sexually violent predator] finding under the statute, not a separate issue addressed *after* determining the respondent is a sexually violent predator.

Id. at _____. The court further noted that the statute simply does not contemplate placement in a less-restrictive facility. *Id.* Here, as in *Williams*, any evidence Thompson presented to show he could be kept from reoffending by placement somewhere other than in a secure facility was evidence for the jury to consider in determining whether the State had proven all of the elements of its case, but it did not place a burden on the State to prove beyond a reasonable doubt that no less-restrictive alternative treatment facilities were available. *See id.* For all of the reasons set forth above and in *Williams*, Thompson's sixth and seventh claims are without merit.

Thompson also argues the jury should have consisted of twelve persons and the trial court incorrectly ruled that the proper jury size in a trial under chapter 229A was eight persons. Chapter 229A is a civil statute. *Garren*, 620 N.W.2d at 283. The Iowa Rules of Civil Procedure govern practice in all Iowa courts unless otherwise provided by statute. *Williams*, ____ N.W.2d at ____ (citing Iowa R. Civ. P. 1). Rule 187(1) provides for an eight-person jury in civil jury trials. We presume the legislature intended the rules of civil procedure to apply in chapter 229A actions unless the statute specifically states otherwise. *Id.*

The district court did not err in deciding an eight-person jury was sufficient under the Iowa Constitution in this chapter 229A proceeding. *Id.*

Thompson's final claim is that the trial court erred in admitting evidence of his prior bad acts, in violation of Iowa Rule of Evidence 404(b). The court allowed the State to question Thompson as well as other State's witnesses regarding Thompson's prior criminal sexual acts. Thompson's sole argument is that because he had offered to stipulate to one prior conviction, and that was all the evidence the State needed to prove an element of the offense that required he have been convicted of or charged with a sexually violent offense, the trial court abused its discretion in admitting evidence of Thompson's other previous crimes and any evidence admitted beyond what he was willing to stipulate to was irrelevant and more prejudicial than probative in violation of rule 404(b).

.. This issue was previously addressed in *Williams*. There the court held that proof of William's prior qualifying convictions was essential and therefore relevant to the State's case, and Williams' willingness to stipulate to the *convictions* did not prevent the State from tendering evidence on the issue. *Williams*, ___ N.W.2d at _____. Similarly, the evidence in question was relevant here, and Thompson's willingness to stipulate to *one conviction* did not prevent evidence on the issue.

Furthermore, Thompson's own testimony relating to his prior crimes was incomplete, he repeatedly alleged he had a poor memory, and he stated he could "hardly remember stuff." Thus, there was a need for additional evidence concerning his prior crimes and the further testimony by the other State's witnesses was relevant as well as highly probative on Thompson's likelihood to

reoffend. See *State v. Ward*, 720 N.E.2d 603, 608 (Ohio Ct. App. 1999) (holding that prior convictions can often be a reliable indicator of future conduct and thus serve a useful function as a factor in a sexual predator determination). We conclude the evidence of Thompson's prior crimes was relevant and its probative value was not substantially outweighed by any danger of unfair prejudice. The trial court did not abuse its discretion in allowing such testimony.

IV. CONCLUSION

The Iowa Supreme Court's opinions in *In re Detention of Garren*, 620 N.W.2d 275 (Iowa 2000), and *In re Detention of Williams*, _____ N.W.2d _____ (Iowa 2001) are dispositive of the issues presented in this appeal. Based on these prior decisions we conclude the commitment of Elwood Thompson as a sexually violent predator as ordered by the district court based on the jury's verdict should be affirmed.

AFFIRMED.

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