IN THE COURT OF APPEALS OF IOWA

No. 2-459 / 01-1375

Filed October 16, 2002

IN RE THE DETENTION OF DONALD ASHLOCK,

DONALD ASHLOCK,

Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Donald Ashlock appeals a district court finding that he is a sexually violent predator under Iowa Code chapter 229A (2001). **AFFIRMED.**

Mark Smith, First Assistant State Public Defender, and Catherine Johnson, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, and Andrew Prosser and Roxann Ryan, Assistant Attorneys General, for appellee.

Considered en banc.

HUITINK, J.

I. Background Facts and Proceedings.

On February 21, 2001 the State filed a petition requesting Ashlock's commitment as a violent sexual predator pursuant to Iowa Code sections 229A.4-229A.7 (2001). The petition recited Ashlock's multiple sexual abuse convictions and two mental abnormalities, pedophilia and antisocial personality, from which he was allegedly suffering. The petition also alleged that Ashlock was "predisposed to engage in future acts of sexual violence."

In a statement of probable cause the State set forth the particulars of Ashlock's prior sexual abuse convictions and mental abnormalities. This statement also summarized the results of a risk assessment completed by Dr. Dennis Doren, a forensic psychologist, indicating Ashlock was more likely than not to again commit a sexually violent act.

Based on this statement and the State's evidence offered at a subsequent probable cause hearing, the district court determined there was probable cause to believe Ashlock was a sexually violent predator. Ashlock was accordingly remanded to the custody of the Department of Correctional Services pending completion and discharge of his sentence for the offense for which he was incarcerated at the time the petition was filed. The court also ordered Ashlock's evaluation to determine if he was a sexually violent predator and set the time for trial on the merits of the petition.

Prior to trial Ashlock filed an Iowa Rule of Evidence 5.104(a) motion seeking exclusion of Dr. Doren's anticipated testimony indicating Ashlock was likely to commit future sexually violent acts. Ashlock argued the "underlying reasoning and methods relied upon by . . . Doren are unreliable and would not prove to be of any assistance to the jury." The court rejected Ashlock's supporting arguments and concluded Doren's testimony that Ashlock was likely to reoffend as well as Doren's assessment and related actuarial evidence were admissible.

The parties subsequently entered into a stipulation concerning the evidence supporting the State's petition. In addition to the parties' stipulation that Ashlock committed the requisite sexually violent offenses, the parties stipulated that if called to testify, Dr. Doren would state that Ashlock suffered from mental abnormalities which made him likely to engage in sexually violent offenses if not confined. The stipulation also recited the test and related results upon which Doren's opinion were based. Ashlock reserved the right to appeal based on any issue preserved for appeal.

On the date set for trial the court determined that Ashlock "wishe[d] to forego a trial . . . and submit to treatment as offered by the State of Iowa based upon facts stipulated to by the parties." The court, based on the content of the stipulation, found the State proved beyond a reasonable doubt all of the required elements necessary to determine that Ashlock was a sexually violent predator. Ashlock was accordingly committed to the custody of the Department of Correctional Services for appropriate placement.

On appeal Ashlock raises the following issues:

1. The district court abused its discretion in admitting expert testimony based on unreliable actuarial instruments for the purpose of establishing that the respondent is likely to reoffend in the future.
2. The district court violated respondent's constitutional right to due process by allowing the actuarial instrument evidence.
3. Iowa Code chapter 229A violates the respondent's right to substantive due process.
4. The State of Iowa did not possess subject matter jurisdiction over the respondent on February 21, 2001 as required for the filing of a petition to commit as a sexually violent predator under Iowa Code chapter 229A.
5. The district court erred in finding that probable cause existed to hold the respondent over for trial.
6. All persons committed under Iowa Code chapter 229A (2001) have the constitutional right to substantive due process.

II. Scope of Review.

This civil action was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.4; *In re Detention of Williams*, 628 N.W.2d 447, 451 (Iowa 2001). On constitutional issues, however, our review is de novo, in light of the totality of the circumstances. *In re Detention of Morrow*, 616 N.W.2d 544, 547 (Iowa 2000).

III. Subject Matter Jurisdiction.

Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the matter or proceedings belong, not merely the particular case before the court. *Smith v. Smith*, 646 N.W.2d 412, 414 (Iowa 2002); *Cargill, Inc. v. Conley*, 620 N.W.2d 496, 501 (Iowa 2000). Subject matter jurisdiction is conferred by constitutional or statutory power. *Hutcheson v. Iowa Dist. Ct.*, 480 N.W.2d 260, 263 (Iowa 1992). Subject matter jurisdiction does not depend on the merits of the claim advanced in the petition involving the court's subject matter jurisdiction. *Powell v. Khodari-Intergreen Co.*, 303 N.W.2d 171, 173 (Iowa 1981).

Ashlock's jurisdictional challenge is premised on his allegedly illegal conviction and confinement for "failure to register as a sex offender from Polk County." *See State v. Reiter*, 604 N.W.2d 662, 664 (Iowa 2000); *State v. Smith*, 601 N.W.2d 372, 373-74 (Iowa 1999) (failure to notify sheriff of change of address does not constitute a crime under Iowa Code section 692A.7(1)). He argues that the provision of section 229A.4 authorizing the filing of a sexually violent predator petition against a person presently confined is limited to a person *legally* confined.

Although *Smith* and *Reiter* hold a failure to report a change of address does not constitute a crime, there are nevertheless violations of section 692A.3 that do. In the absence of any record identifying the factual basis or the specific violation resulting in Ashlock's confinement, we decline to consider the merits of this issue. *See Rassmussen v. Yentes*, 522 N.W.2d 844, 846 (Iowa Ct. App. 1994) (we do not consider issues based on information outside the record)). We affirm on this issue.

IV. Probable Cause.

A. Ashlock claims the district court erred in finding probable cause to believe he was a sexually violent predator, as required by section 229A.5(1) as a preliminary requirement for his continued confinement pending trial. Relying on *Kansas v. Hendricks,* 521 U.S. 346, 357, 117 S. Ct. 2072, 2079, 138 L. Ed. 2d 501, 512 (1997), Ashlock argues the district court's probable cause determination was deficient because it was based on a finding of dangerousness alone without consideration of whether Ashlock suffered from a mental abnormality rendering him unable to control his behavior. We disagree.

Under our supreme court's interpretation of *Hendricks*, a State's "sexually violent predator statute does not violate substantive due process if it requires proof of a 'mental abnormality' that results in an inability to control sexually dangerous behavior." *In re Detention of Ewoldt,* 634 N.W.2d 622, 623 (Iowa 2001). The court also concluded *Hendricks* requires proof of a "degree of volitional impairment that results in a lack of control over one's own dangerousness, but does not require a showing of a complete lack of volitional control." *Id.* at 624. The United States Supreme Court recently concurred in this reasoning, stating "*Hendricks* set forth no requirement of *total* or *complete* lack of control." *Kansas v. Crane,* 534 U.S. 407, ___, 122 S. Ct. 867, 870, 151 L. Ed. 2d 856, 861-62 (2002). Because Iowa Code chapter 229A meets the *Hendricks* requirements, we reject Ashlock's argument that the district court erred by applying chapter 229A as written in making its probable cause determination. *Ewoldt,* 634 N.W.2d at 623; *see also In re Detention of Springett,* 641 N.W.2d 547, 550 (Iowa Ct. App. 2001).

B. Ashlock also claims the State did not present sufficient evidence to show that there was probable cause to believe he was a sexually violent predator. Section 229A.5(3), provides that for purposes of a probable cause hearing, "the state may rely upon the petition filed under subsection 1 but may also supplement the petition with additional documentary evidence or live testimony." The petition alone therefore may be sufficient to establish probable cause.

The State's petition must allege a person (1) was convicted of or charged with a sexually violent offense,

(2) suffers from a mental abnormality, and (3) is likely to engage in predatory acts constituting sexually violent offenses if not confined. Iowa Code § 229A.2(8); *Morrow,* 616 N.W.2d at 548. The petition in this case set forth all of the elements required by section 229A.2(8). Additionally, the petition attached a probable cause statement that included evidence that Ashlock suffered from a mental abnormality, was unable to control his behavior, and posed a risk of reoffending. We find this evidence provides sufficient support for the district court's probable cause determination and we affirm on this issue.

V. Actuarial Risk Assessment Evidence.

A. shlock filed a motion in limine seeking to exclude the expert testimony of Dr. Dennis Doren concerning the use of actuarial instruments to predict whether he would engage in future acts of a sexually violent nature. In assessing Ashlock, Dr. Doren utilized the Minnesota Sex Offenders Screening Tool-Revised (MnSOST-R), Hanson's Rapid Risk Assessment for Sex Offense Recidivism (RRASOR), and the Structured Risk Assessment (SRA). The MnSOST-R, RRASOR, and SRA are actuarial instruments which were developed to assess whether an individual in is an "at-risk" category to commit future sexually violent acts.[1] In ruling on this issue, the district court stated:

> The Court believes that the plaintiff's expert's testimony as to whether or not the respondents are likely to reoffend (which is based upon, in part, several types of assessments and tests) is admissible. The Court believes that such testimony will be very helpful to the trier of fact in these matters. Certainly it will assist the trier of fact in determining a crucial fact issue in this case, i.e., whether the respondent is more likely than not to reoffend. Any shortcomings in the grounds for the plaintiff's expert opinions can be challenged on cross-examination or through the respondent's own expert witness. As *Schlader v. Interstate Power Company,* 591 N.W.2d 10 (Iowa 1999) indicates, unless an expert's opinions and grounds are clearly outside the lines of scientifically accepted theories and techniques and/or are bizarre, a trial court is not abusing its discretion in admitting the proposed expert testimony.

Ashlock contends the district court abused its discretion by admitting actuarial instrument evidence.

In Iowa, we are committed to a liberal view on the admissibility of expert testimony. *Leaf v. Goodyear Tire & Rubber Co.,* 590 N.W.2d 525, 531 (Iowa 1999). The decision to admit or exclude opinion evidence rests within the sound discretion of the district court. *State v. Atwood,* 602 N.W.2d 775, 783 (Iowa 1999).

Our supreme court has noted that scientific evidence may be so novel or complex, that the court in its discretion, might require proof of acceptance of the theory or technique in the scientific community. *Leaf,* 590 N.W.2d at 534 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 593-94, 113 S. Ct. 2786, 2797, 125 L. Ed. 2d 469, 483 (1993)). Trial courts are not required to apply the *Daubert* analysis, but may find it helpful in complex cases to use one or more relevant *Daubert* considerations in assessing the reliability of expert testimony. *Mercer v. Pittway Corp.,* 616 N.W.2d 602, 628 (Iowa 2000). These considerations are:

> (1) whether the theory or technique is scientific knowledge that can be tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, and (4) whether it is generally accepted within the relevant scientific community.

Leaf, 590 N.W.2d at 533.

The proper test for admission of expert testimony in Iowa is set forth in Iowa Rule of Evidence 5.702. *Mercer,* 616 N.W.2d at 628. The evidence must be relevant. *Id.* Scientific or technical evidence is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Additionally, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. *Id.*

We determine the district court did not abuse its discretion in determining the actuarial instrument evidence was admissible. *See In re Commitment of R.S.,* 773 A.2d 72, 96 (N.J. Super. Ct. App. Div. 2001) ("Our research has revealed no state appellate court decision which has found actuarial instruments inadmissible at

SVP proceedings.").[2] We determine Ashlock's complaints go to the weight of the evidence, not its admissibility. *See Hunter v. Bd. of Trustees,* 481 N.W.2d 510, 520 (Iowa 1992); *Mercy Hosp. v. Hansen, Lind & Meyer, P.C.,* 456 N.W.2d 666, 671-72 (Iowa 1990).

B. Ashlock claims the district court violated his right to due process by allowing the actuarial evidence. He asserts the court's ruling prevented him from presenting a complete defense and a complete cross-examination of the State's expert on the underlying reasoning and methodology of actuarial instruments. He states Dr. Epperson, the creator of the MnSOST-R, refused to provide the raw data for the test to other experts for assessment.

We determine Ashlock failed to preserve this issue for our review. This due process issue was not addressed by the district court. We will only review an issue raised on appeal if it was first presented to and ruled on by the district court. *State v. Hernandez-Lopez,* 639 N.W.2d 226, 233 (Iowa 2002).

VI. Constitutionality of Chapter 229A.

Ashlock asserts chapter 229A violates substantive due process because it does not require a finding a person has serious difficulty in controlling his behavior. He also asserts chapter 229A violates his right to substantive due process because it permits commitment without evidence of a recent overt act. These issues were not raised before the district court. As already noted in this opinion, we will only review an issue raised on appeal if it was first presented to and ruled on by the district court. *Hernandez-Lopez,* 639 N.W.2d at 233. Because this constitutional claim was not asserted in district court, it will not be considered on appeal. *See State v. Leutfaimany,* 585 N.W.2d 200, 209 (Iowa 1998).

We affirm the decision of the district court.

AFFIRMED.

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[1] The actuarial instruments are used to assess whether a person is in an at-risk category looking at such factors as criminal history, treatment history, and social background.

[2] SVP stands for sexually violent predator.