STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1618-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL A. KEISTER,

Defendant-Respondent.

ON APPEAL FROM A DECLARATORY JUDGEMENT THAT WIS. STAT. § 165.95 IS UNCONSTITUTIONAL, ENTERED IN THE IOWA COUNTY CIRCUIT COURT, THE HONORABLE ANDREW SHARP, PRESIDING

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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Contrary to Keister's assertion, the State does not agree that he is enrolled in the Iowa County Drug Treatment Court in connection with any criminal charges. (Keister's Br. 2.) As the State clearly outlined in its opening brief, Keister was a participant in the Iowa County Treatment Court, but not as an alternative to revocation, and, indeed, not relating to any charge in Iowa County. (State's Br. 4.) Rather, he submitted a *voluntary application* to the Treatment Court after he overdosed on heroin in early November 2015. (State's Br. 4 (citing R. 37:1; 44:2).)

Also contrary to Keister's assertion, the State has not changed its argument on appeal. (Keister's Br. 4.) Keister asserts that in the circuit court, the State argued that expulsion was automatic once a violent offense is charged. (Keister's Br. 2 (citing R. 37:1).) That is simply untrue. Keister cites to the "Background" section of the State's circuit court brief, which is not argument. More importantly, the State never even implied that expulsion was automatic:

> On August 8, 2016, Mr. Keister was involved in an incident in Sauk County that resulted in felony charges of substantial battery, strangulation and suffocation, and bail jumping in Sauk County Case No. 16-CF-302. Based on these new charges *and the forceful physical conduct underlying them*, the treatment court team *moved* to expel Mr. Keister from the Iowa County Drug Treatment Court. That motion, which was served upon Mr. Keister in September 2016, has *not yet been formally ruled upon by the presiding treatment court judge.*

(R. 37:1 (emphasis added).)

The State was clear that expulsion was a process that required a hearing and proof that Keister meets the definition of a violent offender. The State's argument was that the charging record contained that proof (R. 37:4), not

that expulsion was automatic from the filing of the criminal complaint. It was the circuit court that, incorrectly, concluded that the filing of the criminal complaint was sufficient for expulsion. (R. 44:12.)

Keister also asserts that it is inappropriate for the State to cite to the Iowa County Drug Treatment Court Handbook because it is not in the appellate record. (Keister's Br. 4.) While it is true that the Handbook is not in the record, the Handbook is akin, in many respects, to local court rules. Keister expressly acknowledges this. (Keister's Br. 8.) The circuit court also acknowledged the Handbook as defining Iowa County's program. (R. 44:8–9.) Thus, it is not a factual or historical element that must be within the record to be considered by this Court. Moreover, even if the Handbook is considered to contain "facts," this Court must take judicial notice of those facts. *See Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶ 11, 313 Wis. 2d 411, 756 N.W.2d 667 (citing Wis. Stat. § 902.01) ("[A] court must take judicial notice when, as material here: (1) the fact for which judicial notice is requested is 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned'; and (2) a party asks the court to take judicial notice and gives the court 'the necessary information.'").

Furthermore, Keister grossly misconstrues the State's argument as relying on the Handbook for legal authority or that the State is arguing that the handbook *itself* provides due process. (Keister's Br. 4–5.) The State has done no such thing. Rather, the State has argued that the Handbook *outlines* and *notices* the process for expulsion, which was followed in this case.

I. Keister does not have a fundamental liberty interest in participating in a state and county funded treatment court, especially when he has committed a violent crime, that would implicate substantive due process rights.

Keister asserts that he has a liberty interest in remaining in a drug treatment program once he is admitted. (Keister's Br. 11.) For substantive due process purposes, that is not an accurate definition of the interest at play. Rather, the question is whether an individual has a *fundamental* liberty interest in participating in a state and county funded treatment court when the person has been charged with a violent crime. The answer to the question is no.

Keister asserts that his interest is the same interest that is associated with probation, parole, or extended supervision. Even if Keister's status were equated to that of a probationer, substantive due process would not be implicated; only procedural due process protections would be at play. It is simply too plain for argument that a probationer does not have a fundamental right to continue on probation if he commits a violent crime while on probation. Keister appears to concede this point. (Keister's Br. 13.)

While Keister later argues that he is entitled to substantive due process protections (Keister's Br. 17–19), he completely ignores the relevant analysis for determining whether a fundamental liberty interest exists.

First, Keister conflates the distinction between substantive and procedural due process law. He assumes that if procedural due process protections apply, those protections relate to a substantive due process right. That is a grievous misunderstanding of the law. Like the circuit court, Keister erroneously applied a substantive due process analysis. The circuit court relied on *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Supreme Court in *Wolff* was concerned

with whether *procedural* due process applies when a liberty interest was statutorily created. *Wolff*, 418 U.S. at 556–58. Keister repeats that error by relying on *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Like *Wolff*, both of those cases concern procedural (the right to a hearing) and not substantive due process. *Morrissey*, 408 U.S. at 481; S*carpelli*, 411 U.S. at 782.

For procedural due process, the inquiry "is whether the regulation created a protect[a]ble liberty interest, thus entitling the holder of the interest to the minimum procedures that are appropriate under the circumstances and necessary to insure the interest is not arbitrarily abrogated." *State v. Steffes*, 2003 WI App 55, ¶ 22, 260 Wis. 2d 841, 659 N.W.2d 445 (citation omitted) (explaining the holding of *Wolff*). In contrast, substantive due process rights do not arise from statutory programs. Liberty interests "entitled to substantive due process protection . . . are 'created only by the Constitution.'" *Hawkins v. Freeman*, 195 F.3d 732, 748 (4th Cir. 1999) (quoting *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). Neither the United States' nor Wisconsin's constitution recognizes a constitutional liberty interest in participation in treatment courts.

Second, Keister ignores that treatment courts are a relatively new development, and thus, participation in a treatment court cannot be said to be "deeply rooted in our legal tradition." If there is no deeply rooted right to participate in a treatment court, then there can be no fundamental liberty interest implicated by an eligibility requirement. "The mere novelty of . . . [the] claim is reason enough to doubt that 'substantive due process' sustains it.'" *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (citation omitted).

Third, Keister does not address, and thus admits, that his plea agreement does not change the substantive due

process analysis. Keister was fully aware that he might be expelled from the program at the time the agreement was brokered, and his expulsion did not actually affect his sentencing exposure. Keister is not in the drug court program in connection with the crime for which he pled, and the sentencing court was not bound by the State's sentencing recommendation. *State v. Williams*, 2002 WI 1, ¶ 24, 249 Wis. 2d 492, 637 N.W.2d 733. The circuit court's belief that expulsion necessarily resulted in a change in Keister's sentence (R. 44:5) was wrong: Keister has yet to be sentenced (R. 68:13). Nothing requires the sentencing court to sentence him differently if he is no longer in the program.

Furthermore, the statute at issue here is a *grant program* and does not create a treatment court or a right to participate in one. This is where the State disagrees with Keister's assertion that participation in treatment courts is like probation, extended supervision, or parole. Wisconsin Stat. § 165.95 defines the Department of Justice's grant program for alternatives to incarceration, but it neither creates nor defines those programs. While recognizing that the State's argument is based upon the plain language reading of the statute and that the definition of the program is left up to the individual counties (Keister's Br. 7–8), Keister asserts that this Court should read language into the statute to find that it authorizes and creates treatment courts because, without funding, many counties would not be able to support such programs (Keister's Br. 8–9).

This Court should reject that argument as inconsistent with the mandate that statutory interpretation begins and ends with the language of the statute if the meaning of the statute is plain. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Wisconsin Stat. § 165.95 neither authorizes nor creates treatment courts. The only thing it authorizes and creates is the Department of Justice's grant program.

Keister's entire argument is based on the flawed premise that merely being charged with a particular type of offense will result in expulsion. (Keister's Br. 18.) A "violent offender" is defined not by an offense, but by the person's actions during the offense. Wisconsin Stat. § 165.95(1)(a), the provision at issue here, defines "violent offender" as:

> (a) The person has been charged with or convicted of an offense in a pending case and, *during the course of the offense*, the person carried, possessed, or used a dangerous weapon, the person used force against another person, or a person died or suffered serious bodily harm.

Thus, contrary Keister's argument, he cannot be expelled simply because a criminal complaint was filed. The plain language of the statute establishes that it is the details of the crime that matter, not the charge itself. Keister's argument overtly reads language in and out of the statute. His reading of the statute is "a person who is 'charged with . . . a [ ] [violent] offense in a pending case' 'is not eligible to participate in DTC.'" (Keister's Br. 20.) Such an argument should be flatly rejected. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal,* 271 Wis. 2d 633, ¶ 46.

Wisconsin Stat. § 165.95(1)(a) does not define violent offender by the offense charged. It defines a violent offender by conduct committed *during the course of the offense.* And Wis. Stat. § 165.95(3) does not render a violent offender ineligible to participate. Rather, Wis. Stat. § 165.95(3) provides that a *county* will not be eligible for *grant funding* if the program allows violent offenders to participate.

However, even if it could be said that Wis. Stat. § 165.95 does more than define a grant program, there is a rational basis for excluding violent offenders, *yet to be convicted*, from the program. Keister admits that the State has offered reasonable considerations (e.g., a rational basis)

for excluding violent offenders from treatment courts. (Keister's Br. 18.) When, as in this case, a statute does not implicate a fundamental liberty interest, the rational basis test for evaluating constitutionality applies. *In re Jeremy P.*, 2005 WI App 13, ¶ 18, 278 Wis. 2d 366, 692 N.W.2d 311.

Keister's argument that the statute is unconstitutional because it labels someone as a violent offender before a person is convicted is unpersuasive because there is a rational basis for excluding violent offenders, yet to be convicted, from the program. As addressed more fully in the State's opening brief, a treatment court is focused on rehabilitation and these formalized alternatives to incarceration programs are resource intensive. There are limited resources and thus limited space for participants.

Participation in treatment court involves frequent drug testing, treatment or counseling sessions, and meetings with treatment court staff. *See* Handbook at 11–14. (A-App. 129–32.) These individuals may have chosen to serve the court in treatment and testing roles with the understanding that they will not be exposed to violent offenders. The State has an interest in protecting their safety, and also in ensuring that it can retain the human resources needed for these programs. Additionally, violent offenders are likely to have treatment and supervision needs that exceed those of nonviolent offenders. As a result of limited resources, nonviolent offenders who, as a matter of public policy, are viewed as more deserving of community-based treatment, could be denied admission for the lack of resources if treatment courts were forced to accept and retain violent offenders in the program.

Keister's argument regarding the presumption of innocence is unavailing. The presumption of innocence is a legal right associated with the burden of proof at a criminal trial. He offers no support for the proposition that it applies

to one's ability to participate in various types of government programs.

There is a significant rational basis for treating violent offenders differently from nonviolent offenders when considering their eligibility for treatment courts. That rational basis is not tied to a conviction. Rather, the reasons for excluding violent offenders are tied to the individual's behavior and the risks and treatment needs associated with it. Having a rational basis to exclude "violent offenders," Wis. Stat. § 165.95 is not unconstitutional as applied to Keister.

II. Procedural due process need not be defined by statute, and Keister has been and will be afforded the full protections of procedural due process before he is expelled from treatment court.

Like the circuit court, Keister looks for a definition or roadmap for procedural due process instead of looking at whether Keister was actually afforded due process. That is a flawed analysis. As far as the State is aware, there is nothing that would establish that a procedural due process violation occurs simply if a procedure is not defined by statute or other means.

The issue before this Court is not whether Keister was afforded due process, but whether Wis. Stat. § 165.95 is unconstitutional as applied to Keister. That is a very different inquiry. To that end, *State v. Shambley*, 795 N.W.2d 884 (Neb. 2011), and *State v. Rogers*, 170 P.3d 881 (Idaho 2007), are inapposite. Those cases concern only whether the process provided before expulsion was adequate. Keister has not been expelled and will have a process in the Iowa County Treatment Court. No advance advisory opinion from this Court is needed to review that process.

"A claim that a person has been deprived of life, liberty or property without the procedural protections required by due process arises only if and when the state fails to provide the requisite procedures." *Thorp v. Town of Lebanon*, 225 Wis. 2d 672, 687, 593 N.W.2d 878 (Ct. App. 1999), *aff'd*, 2000 WI 60, 235 Wis. 2d 610, 612 N.W.2d 59 (citation omitted). To prove a procedural due process violation, there must be a "recognized right" and the deprivation of that right must have occurred without "process commensurate with the deprivation." *Milewski v. Town of Dover*, 2017 WI 79, ¶ 20, 377 Wis. 2d 38, 899 N.W.2d 303 (citation omitted).

Keister has not been deprived of anything at this point. And there is no reason to assume, as Keister does, that he will not be afforded a process commensurate with expulsion from Treatment Court. As the State pointed out in its opening brief, the Iowa County Treatment Court has an expulsion process. It includes an expulsion conference by the treatment team, notice to the participant, and a hearing in front of the treatment court judge. If there is any right not to be expelled from a treatment court program without due process, the Iowa County Treatment Court has afforded (and will afford) Keister due process.

This Court should reject Keister's request for an advisory opinion declaring a violation of due process unless the Treatment Court follows a particular procedure and imposes particular burdens of proof at the yet-to-be-held expulsion hearing. (Keister's Br. 24.) "Courts act only to determine actual controversies—not to announce principles of law or to render purely advisory opinions." *State v. Robertson*, 2003 WI App 84, ¶ 32, 263 Wis. 2d 349, 661 N.W.2d 105.

An advisory opinion would be inappropriate especially because due process is flexible in scope. "It has been said so often by [the Supreme] Court and others as not to require citation of authority that due process is flexible and calls for

such procedural protections as the particular situation demands." *Morrissey*, 408 U.S. at 481. "Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure." *Id.*

Keister's expulsion hearing has been on hold, but the fact remains that a hearing would occur before he could be expelled. Expulsion does not flow directly from the filing of the criminal complaint, and at the expulsion hearing Keister will be able to present arguments as to why he should not be expelled, including that the charges relating to his violent conduct were dismissed after the expulsion process began.

CONCLUSION

For the foregoing reasons, and the arguments presented in the State's opening brief, this Court should reverse the judgment of the circuit court.

Dated this 5th day of February, 2018.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2892 words.

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TIFFANY M. WINTER
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 5th day of February, 2018.

_____
TIFFANY M. WINTER
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