

## RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-2404-15T5

IN THE MATTER OF THE CIVIL  
COMMITMENT OF E.B. — SVP-724-15.

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Submitted October 10, 2017 — Decided November 17, 2017

Before Judges Accurso and O'Connor.

On appeal from Superior Court of New Jersey,  
Law Division, Essex County, Docket No. SVP-  
724-15.

Joseph E. Krakora, Public Defender, attorney  
for appellant E.B. (Nancy C. Hayes,  
Designated Counsel, on the brief).<sup>1</sup>

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(Melissa H. Raksa, Assistant Attorney  
General, of counsel; Amy Beth Cohn, Deputy  
Attorney General, on the brief).

PER CURIAM

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<sup>1</sup> E.B. filed a supplemental "pro se" brief a week after the State filed its brief. We have not considered this brief because it was neither authorized under our Court Rules, see Rule 2:6-11(d), nor by order.

E.B. appeals from the January 16, 2016 judgment committing him to the Special Treatment Unit (STU) pursuant to the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38. Following our review of the record and applicable legal principles, we reverse and remand for a new hearing.

I

In 1992, E.B. pled guilty to second-degree sexual assault, N.J.S.A. 2C:14-2(c)(1). He was sentenced to an eight-year term of imprisonment, subject to a four-year period of parole ineligibility. In addition, he was sentenced to Community Supervision for Life (CSL) and ordered to register under Megan's Law. During the plea colloquy, E.B. stated he, along with other men, participated in a gang attack upon a group of young girls at a public swimming pool. E.B. admitted he vaginally penetrated one of the girls in the pool. The victim was less than sixteen but older than thirteen years of age; E.B. was twenty-two years old at the time.

In 2002, E.B. pled guilty to second-degree sexual assault, N.J.S.A. 2C:14-2(b). It is not disputed E.B. fondled the breasts and buttocks of an eleven-year old female and engaged in several sexually-explicit telephone conversations with her. He was sentenced to a ten-year term at the Adult Diagnostic and Treatment Center (ADTC), subject to a five-year period of parole

ineligibility. At the time of his sentence, he had been convicted of ten indictable offenses, including the two sexual offenses to which he pled guilty.

In 2008, E.B. was released from ADTC. In an ADTC "Termination Report," two psychologists stated E.B. understood his deviant arousal pattern and offending dynamics, and had developed coping mechanisms to deal with high risk situations. An addendum to the "Termination Report" stated that although objective testing suggested E.B. was at high risk for reoffending, from a clinical perspective his overall risk of committing a sexual offense was substantially reduced by the significant gains he had achieved in treatment, indicating he had adequate resources to avoid sexually reoffending. The psychologists recommended that upon his discharge, E.B. "avoid" children.

There is reference in the record to E.B. being charged with violating the terms of CSL in 2010, for which he was sentenced to an eighteen-month term of imprisonment. The record does not reveal how he violated the terms of CSL, but he was not convicted of a sexual offense. There is also reference to his violating the terms of CSL in 2011. Again, the record does not reflect how he violated the terms of CSL or the disposition of

this violation, but there is no indication the violation was related to committing a sexual offense.

In 2015, the State filed a petition seeking to have E.B. involuntarily committed under the SVPA because various police reports indicated E.B. contacted or attempted to have contact with eight adolescent girls from October 2009 to April 2014. According to these reports, the alleged victims told the police E.B. followed or approached them as they walked down the street, and attempted to engage them in conversation. He posed questions to some victims, which included asking their name, age, telephone number, whether the girl was a virgin, engaged in oral sex, or would have sex with him. Some complained he drove up to and cut off their path in order to speak to them.

In July 2014, E.B. pled guilty to violating CSL on the grounds he initiated contact with one of the girls and for failing to notify the police of a change of address. The record is somewhat unclear, but it appears E.B. admitted he was in a van and called out to a girl on a sidewalk from his vehicle, stating, "Yo little girl, come here, come here." The girl did not allege E.B. engaged in conduct different from what he admitted. Defendant was sentenced in the aggregate to eighteen months in prison. Defendant was not convicted of any other

offense in connection with his alleged contacts with underage females after his release from the ADTC.

While serving his sentence, E.B. submitted to a psychological examination, and scored a +6 on the "Static-99" test. According to the evaluator, this score indicated E.B. was at high risk for committing a sexual offense. The evaluator recommended E.B. be referred to the appropriate deputy attorney general to assess whether he should be recommitted as a sexually violent predator.

Following a civil commitment hearing in January 2016, the court entered an order involuntarily committing E.B. to the STU. At the hearing, a psychiatrist and psychologist testified on behalf of the State. In addition, various documents, including the written reports of the psychiatrist and psychologist, were admitted. Defendant did not call any witnesses or seek to introduce any documentary evidence. The principal testimony by psychiatrist Roger Harris, M.D. is as follows.

In addition to interviewing E.B. for an hour, Harris testified he reviewed presentence reports, clinical certificates, ADTC reports, and prior forensic evaluations; however, Harris did not state he relied upon any of these documents to form his opinions. But, as addressed below, Harris relied on the aforementioned police reports to form his opinion

E.B. is afflicted with antisocial personality disorder and is at high risk for reoffending and, thus, should be involuntarily committed.

Harris acknowledged that, in 2008, the ADTC determined E.B. could be released from the STU, but in Harris's opinion E.B.'s conduct after he was released, as reflected by the subject police reports, was inconsistent with the ADTC's finding he was at low risk for reoffending. According to Harris, the police reports revealed E.B. pursued teenage girls after his release from the ADTC and attempted to "lure them, attempt[ed] to have contact with them, and [was] sexually explicit with them[.]" Harris noted that, even though E.B. was unsuccessful in attaining any physical contact with any of the girls,

I don't think it was his intent to fail . . . . So the fact [he] did not end up, that we know of, having contact, I don't think is the . . . decisive issue at all when he has already been convicted for underage girls and he is engaging in the behavior to gain access. . . . The intent, I think, is clearly to have sexual contact with them, not to . . . just have a conversation with them and drive off.

Harris acknowledged E.B. denied engaging in any of the conduct alleged in the police reports, except for the one incident when he called out to the girl on a sidewalk and stated, "Yo little girl, come here, come here."

Harris diagnosed E.B. with paraphilia for teenage girls because, despite his two convictions for sexual assault and the sanctions resulting from such convictions, he continued to pursue young girls for sexual purposes after his release from the ADTC, as documented in the subject police reports. In his opinion E.B. took "great risks" when he pursued these girls, which is evidence E.B. has "very strong deviant arousal" that he cannot control.

Harris further opined E.B. has severe antisocial personality disorder, a diagnosis Harris based upon E.B.'s prolonged inability to conform his conduct to societal norms, as evidenced by all of his convictions, not just those which were sexually related. In addition, Harris noted E.B. had a score of six on the Static-99 test. According to Harris, this score, his anti-social personality disorder, and paraphilia for teenage girls makes it highly likely E.B. will sexually reoffend unless confined to a STU.

Nicole Paolillo, Psy.D., also testified. She interviewed E.B. for an hour and appears to have reviewed the same documents as Harris, including the police reports pertaining to E.B.'s contacts with the subject teenage girls after his discharge from the ADTC. Paolillo testified she found E.B.'s "sexual offending behavior" significant because of its duration and persistence,

commenting such behavior started in 1991 and last occurred in 2014. She stated the fact he is afflicted with antisocial personality disorder and experiences deviant arousal increases the risk he will reoffend. The "Psychopathy Checklist-Revised" test she administered to him revealed E.B. is in the "high range of psychopathic traits," and his Static-99 score also indicates he is at high risk for committing a sexual offense.

Paolillo testified the treatment E.B. received at the ADTC was ineffective, "otherwise he wouldn't have so many new charges for committing sexually . . . deviant acts or behaving in a way that was expressing a desire to act upon a deviant arousal." In her report, admitted into evidence, she stated given his conduct with underage girls after his release from ADTC, E.B. "continues to fall victim to his deviant arousal and antisocial thinking."

Paolillo also diagnosed E.B. as having paraphilic disorder because of his arousal to teenagers, antisocial personality disorder, and cannabis use disorder. She opined E.B. is predisposed to commit sexually violent acts and, based upon the record and her interview of him, is highly likely to engage in future deviant sexual acts if released into the community.

Based upon the experts' testimony, the court determined there was clear and convincing evidence E.B. suffers from a mental abnormality (paraphilia), antisocial personality



disorder, and a substance abuse disorder. The court found these afflictions, either individually or in combination, put E.B. at high risk for engaging in acts of sexual violence and, thus, E.B. had to be committed.

The court explained it took into account the 1992 and 2002 convictions for sexual offenses, "the conduct relied on by the experts in making their opinions[,]" and the admissions E.B. made to his probation officer. These admissions are those E.B. made when he pled guilty to violating the terms of CSL in 2014.

## II

On appeal, E.B. asserts the following argument for our consideration:

POINT I: THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT [E.B.] IS A SEXUALLY VIOLENT PREDATOR AND THAT THE RISK OF FUTURE RECIDIVISM IS AT A SUFFICIENTLY HIGH LEVEL TO JUSTIFY CONTINUED CIVIL COMMITMENT UNDER THE CURRENT TREATMENT PLAN

In his brief, E.B. clarifies his primary argument is Harris and Paolillo's opinions are based upon incompetent evidence, specifically, the subject police reports. E.B. notes the allegations in the police reports were never substantiated, except for the claim in which he admits he yelled to a girl in the street, "Yo, little girl, come here, come here." Therefore, E.B. contends, the court erred when it found the State provided

sufficient proof to justify his commitment. E.B. also argues the bases for the experts' conclusion he suffered from antisocial personality disorder were inadequate.

Under the SVPA, an involuntary civil commitment may be ordered following an offender's service of a sentence, or other criminal disposition, if he or she "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." N.J.S.A. 30:4-27.26. At a commitment hearing, the State must prove by clear and convincing evidence the individual poses:

a threat to the health and safety of others because of the likelihood of his or her engaging in sexually violent acts[,] . . . by demonstrating that the individual has serious difficulty in controlling sexually harmful behavior such that it is highly likely that he or she will not control his or her sexually violent behavior and will reoffend.

[In re Commitment of W.Z., 173 N.J. 109, 130 (2002); see also In re Civil Commitment of J.H.M., 367 N.J. Super. 599, 608 (App. Div. 2003), certif. denied, 179 N.J. 312 (2004); N.J.S.A. 30:4-27.32(a).]

Our Supreme Court recently emphasized an appellate court's review of a commitment under the SVPA "is extremely narrow." In re Civil Commitment of R.F., 217 N.J. 152, 174 (2014) (quoting In re D.C., 146 N.J. 31, 58 (1996)). We must "give deference to

the findings of our trial judges because they have the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'

Ibid. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)).

Moreover, "[t]he judges who hear SVPA cases generally are 'specialists' and 'their expertise in the subject' is entitled to 'special deference.'" Ibid. (quoting In re Civil Commitment of T.J.N., 390 N.J. Super. 218, 226 (App. Div. 2007)).

Therefore, a trial court's determination is accorded substantial deference, and may "be modified only if the record reveals a clear mistake." D.C., supra, 146 N.J. at 58.

Under the SVPA, "[i]f the court finds by clear and convincing evidence that the person needs continued involuntary commitment as a sexually violent predator, it shall issue an order authorizing the involuntary commitment of the person to a facility designated for the custody, care and treatment of sexually violent predators." N.J.S.A. 30:4-27.32(a). Three requirements must be satisfied to classify a person as a sexually violent predator:

- (1) the individual has been convicted of a sexually violent offense;
- (2) he suffers from a mental abnormality or personality disorder;
- and (3) as a result of his psychiatric abnormality or disorder, "it is highly likely that the individual will not

control his or her sexually violent behavior and will reoffend."

[R.F., supra, 217 N.J. at 173 (citations omitted) (quoting W.Z., supra, 173 N.J. at 130); see also N.J.S.A. 30:4-27.26 (enumerating the three requirements).]

There is no dispute E.B. has been convicted of a sexually violent offense. He pled guilty to second-degree sexual assault in 1992 and in 2002. The question is whether he has antisocial personality disorder and, as a result of this disorder, is highly likely to engage in sexually violent behavior and reoffend. E.B. contends because the experts largely base their opinions upon the unproven allegations contained in the police reports, the State has failed to prove he is highly likely to reoffend. We agree.

To the extent an expert's opinion rests on inaccurate or disputed facts, the expert's reliance is unreasonable. In re Civil Commitment of A.E.F., 377 N.J. Super. 473, 489-91 (App. Div.), certif. denied, 185 N.J. 393 (2005). When an expert relies on such information, the expert undermines the foundation for and, therefore, the evidential worth of his or her opinion. Williams v. N.J. State Parole Bd., 336 N.J. Super. 1, 8-9 (App. Div.), certif. denied, 165 N.J. 523 (2000).

For that reason, in In re A.E.F., this court noted serious questions would be raised if an expert's opinion supporting a

commitment depends upon unproven allegations of sexual offenses. 377 N.J. Super. at 490. We noted if an unproven allegation provides "a significant building block" in an expert's opinion, "it would present a troubling issue since significant state action, such as SVPA commitment, cannot and should not be based on unproven allegations of misconduct." Ibid.

Here, the record demonstrates unproven allegations served as "significant building blocks" in both experts' opinions. Specifically, their opinions finding E.B. had antisocial personality disorder and a present propensity to commit acts of sexual violence if not committed to the STU were based on unproven allegations of E.B.'s contact with teenage girls after his discharge from the ADTC. Both accorded considerable weight to the victims' allegations despite the absence of evidence verifying such claims, with the exception of the one in which E.B. admitted calling out to a girl on a sidewalk in the manner described above. As to this one proven allegation, there is no evidence the experts believed E.B.'s conduct on this one occasion was sufficient to conclude he was highly likely to reoffend.

Accordingly, the trial court's conclusion the State proved by clear and convincing evidence commitment is warranted under the SVPA is unsupported by the record. The experts' opinions

are not supported by competent evidence, a deficiency warranting a remand and a new hearing to assess E.B.'s current condition and risk of sexual violence.

The January 16, 2016 judgment is reversed and the matter remanded for further proceedings consistent with this opinion.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION