

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5002-14T2

IN THE MATTER OF THE
CIVIL COMMITMENT OF C.B.,
SVP-317-03.

Submitted July 5, 2017 – Decided September 27, 2017

Before Judges Simonelli and Carroll.

On appeal from the Superior Court of New
Jersey, Law Division, Essex County, Docket No.
SVP-317-03.

Joseph E. Krakora, Public Defender, attorney
for appellant C.B. (Patrick Madden, Assistant
Deputy Public Defender, on the brief).

Christopher S. Porrino, Attorney General,
attorney for respondent State of New Jersey
(Melissa H. Raksa, Assistant Attorney General,
of counsel; Ragner Jaeger, Deputy Attorney
General, on the brief).

PER CURIAM

Appellant C.B. appeals from the June 29, 2015 Law Division
judgment, which denied his motion to remove discharge conditions
imposed under the Sexually Violent Predator Act (SVPA), N.J.S.A.
30:4-27.24 to -27.38. For the following reasons, we affirm.

I.

A pedophile, C.B. has a history in 1995 and 1996 of sexually assaulting multiple girls aged four to fourteen on multiple occasions. See In re Civil Commitment of C.B., Docket No. A-3513-07 (App. Div. June 23, 2008) (slip op. at 4). C.B. is a self-described alcoholic who admitted to being sexually aroused by girls between the ages of twelve and fourteen.

The offenses in 1995 and 1996 involved both attempted and completed oral and vaginal penetration, and breast and other fondling. Ibid. On March 27, 1999, C.B. pled guilty to various charges, including aggravated sexual assault. Ibid. He received an aggregate ten-year sentence at the Adult Diagnostic and Treatment Center and is subject to Megan's Law community supervision for life (CSL). Ibid.

In 2003, after serving his sentence, C.B. was civilly committed to the Special Treatment Unit (STU) under the SVPA. Ibid. On June 21, 2004, the court ordered C.B.'s conditional discharge from the STU. Id. at 5. His discharge conditions included complying with the rules and regulations of the Division of Parole (Parole), submitting to random urine and drug testing, attending sex offender specific treatment and drug and alcohol treatment, and residing at and complying with the rules of Hill's Boarding House (Hill). Ibid. In addition, the court ordered C.B.

to submit to Global Position System (GPS) monitoring as a condition of discharge.

While C.B. initially complied with his discharge conditions, he later became non-complaint. Id. at 6. By the spring of 2006, he regularly began to miss curfew, skip appointments and the treatment and day programs at Hill, and generally failed to abide by the conditions of his discharge. Ibid. In August 2006, New Hope Behavioral Health Center, one of C.B.'s treatment providers, notified the STU case manager that C.B. had not been attending the program for two months. Id. at 6-7.

C.B.'s habit of skipping appointments, treatment and programs, and missing curfew at his boarding home improved considerably in early 2007, but dramatically worsened by mid- and late-2007 when he became involved with a girlfriend. Id. at 7. C.B. engaged in high-risk behavior that heightened his risk to reoffend, and from September 2007 to October 2007, he attended none of the programs he was required to attend under his conditional discharge. Id. at 7-8. In August 2009, C.B. was found after curfew in a vehicle with his girlfriend, two former STU residents, and ten bags of marijuana.

With the exception of a brief period between December 12, 2008, and February 17, 2009, C.B. was on conditional discharge

since 2005. On January 20, 2015, he filed a motion to remove all of the discharge conditions.

Judge Philip M. Freedman presided over this case since 2005, and had extensive knowledge of C.B. and his compliance history. The judge conducted a hearing, at which two psychological experts testified: Rosemarie Vala Stewart, Ph.D., for the State; and Timothy P. Foley, Ph.D., for C.B.

Stewart testified that C.B. had substantial prior deviations from his treatment program and a history of poor decision-making. She diagnosed C.B. with Pedophilic Disorder, non-exclusive type, sexually aroused to females, but not limited to incest, mild mental retardation, intellectual deficits, and fetal alcohol syndrome. She reviewed C.B.'s nonsexual and sexual offending history and expressed concern about additional incidents. For example, while on conditional discharge in 2008 and 2009, C.B. was found through GPS monitoring to be staying overnight with his girlfriend who had an underage child in the home; in 2009, C.B. was found in a car past curfew and marijuana was found in the car. Stewart also testified that in 2011, C.B.'s attendance was inconsistent for twelve to eighteen months, and, most recently, he only attended sex offender therapy twice a month and no longer attended substance abuse treatment.

Stewart observed that C.B. had too much unstructured time on his hands and insufficient time with a professional who could provide professional supervision. She noted that C.B.'s parole officer and outpatient therapist were also concerned about him having too much free time that could allow him to engage in high risk behavior. These individuals both agreed with Stewart's conclusion that C.B. needed more supervised structure to prevent him from rebounding back into trouble. Stewart testified that C.B. exercised poor judgment, and his free time enabled him to engage in high risk behavior.

Stewart testified that C.B.'s therapist from an outpatient sex offender program advised her that C.B. failed to attend group therapy steadily, and when he attended, did not use the sessions productively, and on one occasion, seemed inebriated at group therapy. C.B. admitted to his therapist that he had consumed a beer, but later told Stewart that he drank the beer "accidentally" while out with his friends who were drinking beer.

Stewart opined that the totality of the circumstances indicated the discharge conditions currently in place should remain, and Parole would be unable to trace C.B.'s whereabouts without GPS monitoring. Stewart observed that in the past, GPS monitoring proved valuable, as it revealed C.B.'s deceptive statements and high risk behavior.

Stewart opined that C.B. required more accountability and supervision than CSL could provide, and should remain under conditional discharge. She emphasized that the additional structure, support, and supervision the discharge conditions provided would ensure better case coordination, maintenance of GPS monitoring, and the opportunity for additional support and professional contact, which seemed especially important given the inordinate amount of free time C.B. had.

Stewart also expressed concern over C.B.'s continued difficulties in complying with conditions and dealing with potential external factors, such as outside relationships, which could lead to psychological decompensation and unpredictable behavior. Stewart concluded that while the discharge conditions may lessen at some point, some level of supervision was necessary over the long term due to C.B.'s chronic emotional and intellectual developmental difficulties.

Foley diagnosed C.B. with Pedophilic Disorder and alcohol abuse. He concluded, based on the combination of C.B.'s low risk and significant compliance with conditions, that C.B. no longer required STU monitoring. Foley focused on C.B.'s ability to function in daily life, which in his opinion was the main justification for attempts to commit C.B. in the first place. Foley commented that C.B. showed the ability to attend treatment,

pay rent, and form and maintain healthy interpersonal relationships. When asked about concerns Parole and the STU had with C.B.'s ability to adjust to independent living, Foley opined that continued Parole monitoring under CSL would be enough to keep C.B. out of trouble.

Foley admitted, however, that C.B. was recently reported as intoxicated and missed curfew on several occasions. Nevertheless, Foley determined that C.B. should have less structure and supervision. Foley also testified that C.B. required supportive counseling and sex offender specific treatment, and this could be achieved by Parole ordering this as part of CSL.

Foley also admitted that C.B. struggles at times because of his limited intellectual resources, and these struggles allowed C.B. to comply with discharge conditions only seventy-five percent of the time. Having diagnosed C.B. with alcohol abuse, Foley conceded that while on conditional discharge, C.B. consumed alcohol, attended therapy while intoxicated, and missed scheduled treatment sessions. Foley agreed with Stewart that C.B. had too much unsupervised time on his hands. Foley also conceded that a GPS monitoring device would help determine C.B.'s location after curfew and whether he was in violation of the curfew requirement.

Foley acknowledged that someone could take advantage of C.B. due to his limited intellect. He recommended that structural

safeguards be implemented for C.B. by ordering more counseling. In addition to sex offender treatment, Foley recommended that C.B. engage in supportive counseling sessions because he needed someone with whom he could develop a therapeutic relationship and who could assist him in some judgment issues he may encounter. Ultimately, Foley concluded that C.B. was less than highly likely to reoffend even if the discharge conditions were removed.

In a June 29, 2015 oral opinion, Judge Freedman found that C.B. had involved himself in dangerous activities, including surrounding himself with drugs and alcohol. The judge rejected Foley's opinion that CSL was sufficient to monitor C.B. Crediting Stewart's opinion, the judge found that CSL alone was insufficient for C.B. because it does not offer the same protections as conditional discharge. The judge determined that continued supervision was necessary.

Judge Freedman found that C.B. was highly likely to reoffend if under CSL only. He observed that Parole officers who supervise individuals on conditional discharge are able to devote more time and attention to C.B. than he would receive if only under CSL and C.B. needs that additional time and attention. He reasoned that C.B. has "a deviant arousal . . . [h]e's been able to control with the supervision that he has, and . . . continues to need . . . conditional discharge supervision." He found that if only under

CSL, C.B. ran the risk of being charged with violations and sent to jail for the same behavior he exhibited while on conditional discharge. He also found the record supported continued GPS monitoring. He entered an order on June 29, 2015 memorializing his decision, and directing a discharge review occur by November 5, 2015.

II.

On appeal, C.B. first argues the discharge conditions should be removed because the State failed to show by clear and convincing evidence that he was highly likely to commit a sexually violent offense in the foreseeable future. We disagree.

Our scope of review of orders entered under the SVPA is extremely limited. In re Civil Commitment of R.F., 217 N.J. 152, 179 (2014). The 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)). "The final decision whether a person previously convicted of a sexually violent offense is highly likely to sexually reoffend 'lies with the courts, not the expertise of psychiatrists and psychologists. Courts must balance society's interest in protection from harmful conduct against the individual's interest in personal liberty and autonomy.'" Ibid. (citation omitted). Our task is to determine

"whether the findings made by the trial judge were clearly erroneous." In re Civil Commitment of W.X.C., 407 N.J. Super. 619, 630 (App. Div. 2009) (citation omitted), cert. denied, 562 U.S. 1297, 131 S. Ct. 1702, 179 L. Ed. 2d 635 (2011).

We give "the 'utmost deference' to the commitment judge's determination of the appropriate balancing of societal interests and individual liberty." In re Civil Commitment of R.Z.B., 392 N.J. Super. 22, 36 (App. Div. 2007) (quoting In re Commitment of J.P., 339 N.J. Super. 443, 459 (App. Div. 2001)), certif. denied, 192 N.J. 296 (2007). In doing so, the ultimate determination of whether an offender will re-offend "is reserved to the sound discretion of the trial court." In re Registrant G.B., 147 N.J. 62, 79 (1996).

The SVPA authorizes the trial court to conditionally release individuals from the STU if, among other things, "the court finds that the person will not be likely to engage in acts of sexual violence because the person is amenable to and highly likely to comply with a plan to facilitate the person's adjustment and reintegration into the community." N.J.S.A. 30:4-27.32(c)(1). Conditional discharge is reserved for individuals who are highly likely to comply and avoid engaging in acts of sexual violence through a transition plan designed to "facilitate the person's adjustment and reintegration into the community so as to render

involuntary commitment as a sexually violent predator unnecessary for that person." Ibid. "Conditions imposed on the person shall be specific and shall be for the purpose of ensuring that the person participates in necessary treatment and that the person does not represent a risk to public safety." N.J.S.A. 30:4-27.32(c)(2).

To allow a person who has been committed as a sexually violent predator to be released without conditions "may, in certain circumstances, place the safety and security of the public at risk. This risk of harm to society may be reduced by the person's mandatory compliance with conditions upon release." In re Civil Commitment of E.D., 353 N.J. Super. 450, 456-57 (App. Div. 2002). When imposing conditions, the trial court should consider conditions "that would substantially reduce the likelihood of future acts of sexual violence." IMO the Commitment of J.J.F., 365 N.J. Super. 486, 501 (App. Div.), certif. denied, 179 N.J. 373 (2004). To continue discharge conditions, the State must show the conditions are required so the person: (1) "participates in necessary treatment;" and (2) "does not represent a risk to public safety." N.J.S.A. 30:4-27.32(c)(2).

We have considered C.B.'s argument in the light of the record and applicable legal principles and conclude it is without sufficient merit to warrant discussion in a written opinion. R.

2:11-3(e)(1)(E). We affirm substantially for the reasons Judge Freedman expressed in his oral opinion. We are satisfied the record amply supports the judge's findings that C.B. is highly likely to reoffend if under CSL only, and continuation of conditional discharge is necessary to assure C.B. participates in treatment and does not represent a risk to public safety.

III.

C.B. next argues that the court's retroactive application of the Sex Offender Monitoring Act (SOMA), N.J.S.A. 30:4-123.91(a)(2)(a), to impose the GPS monitoring condition violated State and federal constitutional proscription against ex post facto laws. This contention lacks merits.

The court imposed the GPS monitoring condition under the SVPA, specifically N.J.S.A. 30:4-27.32(c)(2), not SOMA. Thus, C.B.'s reliance on SOMA and Riley v. N.J. State Parole Bd., 219 N.J. 270 (2014) (finding SOMA violated State and federal prohibitions against ex post facto laws) is misplaced.

In addition, our Supreme Court has rejected ex post facto challenges to the SVPA. See In the Matter of the Civil Commitment of J.M.B., 197 N.J. 563, 600-01, cert. denied, 558 U.S. 999, 103 S. Ct. 509, 175 L. Ed. 2d 361 (2009). The Court also rejected a challenge based on the argument that the SVPA unconstitutionally imposes additional punishment on sex offenders. State v. Bellamy,

178 N.J. 127, 138 (2003). In each case, the Court emphasized that the SVPA is not a penal statute. J.M.B., supra, 197 N.J. at 599; Bellamy, supra, 178 N.J. at 138; see also In the Matter of the Civil Commitment of W.X.C., 204 N.J. 179, 188 (2010) (reaffirming that the SVPA is a civil, not a penal statute), cert. denied, 562 U.S. 1297, 131 S. Ct. 1702, 179 L. Ed. 2d 635 (2011).

Further, Riley is distinguishable. Riley was subject to lifetime GPS monitoring under SOMA. 219 N.J. at 294. C.B. is not subject to lifetime GPS monitoring under the SVPA. The SVPA requires periodic review of C.B.'s conditional discharge status and discharge conditions, including GPS monitoring. See N.J.S.A. 30:4-27.32(c)(2) (providing that "[i]f the court imposes conditions for a period exceeding six months, the court shall provide for a review hearing on a date the court deems appropriate but in no event later than six months from the date of the order"). Accordingly, there must be a review hearing, at which time the court will determine whether to continue the conditional discharge or remove discharge conditions.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION