SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5294-13T2

IN THE MATTER OF THE CIVIL
COMMITMENT OF J.A., SVP-528-09.

Submitted February 16, 2017 – Decided March 24, 2017

Before Judges Hoffman, O'Connor and Whipple.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. SVP-528-09.

Joseph E. Krakora, Public Defender, attorney for appellant (Vincent J. Bochis, Designated Counsel, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Stephen Slocum, Deputy Attorney General, on the brief).

PER CURIAM

Appellant, who is now fifty-three years of age, appeals from a June 5, 2014 judgment continuing his involuntary commitment to the Special Treatment Unit (STU) pursuant to the New Jersey Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38. We affirm.

I.

We discern the following facts from the record.[1] Appellant's history of sexual misconduct began in the 1980s. First, on December 10, 1983, when appellant was twenty years old, his seventeen-year-old former girlfriend reported he sexually penetrated her against her will in his apartment. Shortly thereafter, on April 21, 1984, appellant reportedly pulled his car alongside a woman, D.B., and her four-year-old son and five-year-old daughter. Appellant exited his car and proceeded to grab the boy and pull him towards the vehicle; he also rubbed D.B.'s hair, breasts, and buttocks. On that same date, appellant stopped M.N., a fourteen-year-old girl, and asked her for directions. She entered appellant's car and he drove her to a cemetery where he pushed her down and attempted to unzip her jeans.

According to the State's 2009 petition for civil commitment, police charged appellant in April 1984 with three counts of sexual contact, unlawful possession of a weapon, kidnapping, and attempted sexual assault; appellant pled guilty to one count of sexual assault and one count of unlawful possession of a weapon.

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[1] For the most part, the pertinent facts are set forth in the State's petition and appellant's various psychiatric evaluations. These reports contain some slight factual inconsistencies, but none of significance.

Next, while he was in California and on probation, on March 30, 1994, police charged appellant with sexual battery, fraud, and annoying phone calls. According to Dr. Dean DeCrisce's 2010 report, appellant pled guilty to charges relating to fraud and the phone calls.

On August 23, 1995, K.O. reported to police in Bellevue, Washington that she met appellant at his apartment for a dinner date. Appellant attempted to kiss her, but she refused and struggled with him, during which time appellant fondled her breasts. When K.O. later attempted to leave, appellant followed her to the door and again fondled her. Shortly thereafter, on September 26, 1995, B.L., an adult woman, told police appellant asked her for a ride home from an Alcoholics Anonymous meeting. Appellant refused to leave her car when she arrived at his apartment and instead attempted to kiss her. He further tried to climb on her lap and fondled her breasts as they struggled. Appellant received two charges for "Indecent Liberties" for these incidents and was sentenced to a term of incarceration.

On January 6, 1997, appellant exposed himself to a hotel worker and attempted to restrain her from leaving his bathroom. Appellant pled guilty to lewdness for this incident.

Next, on or about January 3, 1998, appellant approached sixteen-year-old Z.Y. at an Atlantic City casino and

impersonated a security guard. Appellant brought Z.Y. to an elevator, where he attempted to grope her against her will. According to the State's petition, appellant was convicted of child abuse for this offense.

On September 16, 2001, twenty-one-year-old C.R. reported to police that appellant brought her to the dressing room of a store and inserted his finger in her vagina. Appellant was acquitted of all charges stemming from this incident.

On April 14, 2003, Q.K., a nineteen-year-old patient at Hampton Hospital, told a staff member that appellant went to her room after they watched television together. Appellant coaxed her into the bathroom where he locked the door and fondled her breasts. Police arrested appellant and charged him with criminal sexual contact; however, he was convicted of a downgraded charge of harassment.

Appellant also has a history of arrests, charges, and convictions for non-sexual offenses, including criminal mischief, disorderly conduct, resisting arrest, battery, disturbing the peace, and vandalism. He has a significant history of alcohol abuse. According to the psychological evaluations, appellant attributes most of his sexual offending to his alcohol use.

On March 9, 2008, appellant committed the "predicate offense" that led to his initial confinement in the STU. On this date, appellant approached a female patron at a casino in Atlantic City and told her he could help her obtain a new player's club card. The patron followed appellant to a stairwell where he forced her against a wall and digitally penetrated her vagina. Appellant pled guilty to fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), and the court sentenced him to eighteen months of incarceration.[2]

On May 8, 2009, prior to the expiration of appellant's criminal sentence, the State moved for appellant's civil commitment under the SVPA. The court entered a temporary order of commitment on May 13, 2009. In reviewing appellant's commitment, the court considered Dr. DeCrisce's 2010 evaluation, which noted that "a number of conditions might be placed upon [appellant] to reduce his risk below the highly likely [to re-offend sexually] threshold."

On July 6, 2010, Judge James F. Mulvihill entered a consent order creating a plan for appellant's conditional discharge. The parties agreed appellant was subject to commitment under the SVPA, but stipulated, "[W]ith the imposition of certain

[2] Appellant applied for post-conviction relief in 2010, which the court granted, vacating his conviction. Appellant then entered a new plea for criminal trespass.

conditions, he is not highly likely to reoffend and therefore does not require indefinite commitment to the [STU]." As such, the court required appellant to seek inpatient treatment for his alcoholism. Upon discharge from the STU or inpatient treatment, he was subject to "the functional equivalent of those conditions imposed under Parole Supervision for Life and which may include . . . electronic monitoring."

On October 26, 2010, the court entered a consent order[3] discharging appellant from the STU and sending him to reside at the America's Keswick facility (Keswick). The court reiterated the requirement that appellant "cooperate with and abide by Parole supervision, as if he were on Parole Supervision for Life."

On January 3, 2011, appellant returned to the STU after he engaged in a verbal confrontation with another Keswick resident. The court returned appellant to Keswick by order dated July 28, 2011. On February 14, 2012, Judge Mulvihill denied appellant's request to move to Philadelphia. Keswick discharged appellant to an outpatient program around March 2012. On April 10, 2012, the court entered a consent order, permitting appellant to live at any residence approved by parole. Appellant remained subject to parole conditions upon his release.

[3] The court entered an amended order on October 29, 2010.

On June 10, 2012, appellant cut the GPS monitoring device from his ankle and travelled to Atlantic City, where he became intoxicated. Police arrested him the next morning, and the court returned him to the STU on June 14, 2012. Appellant claims he removed the bracelet, in part, because of the "intense pain" it caused him.

Judge Philip M. Freedman conducted a review hearing of appellant's commitment on December 5 and 6, 2012. During the December 5 hearing, the judge noted the court had vacated appellant's March 2008 predicate offense for sexual contact, prompting him to ask counsel for a new predicate offense to justify appellant's commitment. The court then identified appellant's 1984 conviction for "two counts of sexual contact . . . [f]or which he pled guilty on June 18, 1984," as "the only one . . . that meets the definition of . . . a sexually violent offense" under N.J.S.A. 2C:30:4-27.26(a). The judge allowed the State to amend its petition to establish this conviction as the predicate offense.

The State presented testimony from Dr. DeCrisce and another expert. Dr. DeCrisce acknowledged his previous recommendation but said the Atlantic City incident changed his mind, stating, "[T]here's nothing . . . that can mitigate [appellant's] risk, other than institutionalization at this facility for intensive

treatment that addresses both the personality disorder and the substance abuse and the sexual offending." Appellant also presented expert testimony.

Judge Freedman rendered his oral findings on January 10 and 11, 2013. The judge found by clear and convincing evidence that appellant required commitment under the SVPA. The judge essentially agreed with Dr. DeCrisce's analysis, noting that appellant "cut off his GPS, went right back to the scene of the crime, so to speak, and started drinking. And there's no better evidence [that appellant cannot] be controlled in the community." As such, the court entered judgment on January 11, 2013, committing appellant to the STU. Appellant appealed, but he withdrew the appeal on July 9, 2013.

Prior to the entry of the judgment under review, Judge Freedman reviewed appellant's status at a hearing on May 28, 2014. At this hearing, the State presented expert testimony from Alberto M. Goldwaser, M.D., and psychologist Debra Roquet, Psy.D. Appellant presented expert testimony from Christopher P. Lorah, Ph.D., and presented lay testimony from Brian Nolan, an investigator from the Office of the Public Defender.

Dr. Goldwaser evaluated appellant on May 19, 2014, for approximately ninety minutes and prepared a report detailing his findings. He first testified regarding appellant's history of

sexual offenses, noting they were all "characterized as . . . very similar ways of behaving." Dr. Goldwaser noted appellant's "urge to proceed . . . in this particular sexual manner, is overwhelming to him. He cannot control it."

Dr. Goldwaser diagnosed appellant with "substance use disorder, alcohol, severe, currently in controlled environment." He said this substance use disorder does not cause appellant to commit sexual offenses by itself, but "decreases inhibitions" and "emboldens somebody to do whatever one wants to do." He noted substance abuse treatment is available at the STU. The doctor described the events leading to appellant's 2012 arrest in Atlantic City and noted appellant "has been doing really very poorly" since returning to the STU. He said appellant had not shown interest in addressing his sexual offenses or substance abuse issues.

Dr. Goldwaser further diagnosed appellant with "unspecified paraphilic disorder coercion non[-]consent in controlled environment" and antisocial personality disorder. He determined appellant experiences sexual urges "involving sexual arousal to person[s] who by virtue of his employed force or their age are unable to consent." Dr. Goldwaser said appellant's disorder was "chronic" and would not remit on its own.

Regarding the antisocial personality disorder, Dr. Goldwaser found appellant's behavior demonstrated a pattern of disregard for the rights of others. He found appellant failed to conform to social norms based on his "repetitively performing acts that are grounds for arrest" and that appellant demonstrated a lack of empathy or remorse. The doctor noted this condition "does not remit by itself."

Dr. Goldwaser found appellant was "highly likely" to re-offend unless confined to a secure facility for treatment. He based this conclusion on appellant's sex-offense history, his relapse after months of alcohol rehabilitation treatment, and his non-sexual offenses. He scored appellant as a seven[4] on the Static-99R test, an actuarial measure of relative risk for sexual offense recidivism, placing him on the high range for sexually re-offending.

Dr. Roquet interviewed appellant on October 8, 2013, as a member of the STU Treatment Progress Review Committee, reviewed prior records, and prepared a report of her findings. Dr. Roquet diagnosed appellant with sexual disorder NOS, alcohol dependence in a controlled environment, and antisocial personality disorder. Dr. Roquet found "similarities" in

[4] Dr. Goldwaser testified to a score of seven, but his report indicates he scored Appellant as an eight on the Static-99R test.

appellant's sexual offenses, noting, "Once he has the woman within his circle of control, he acts in a sexually aggressive manner." She noted appellant's substance abuse did not explain his sexual offenses, describing "a pattern of sexual behavior that is . . . a sexual pathology."

Dr. Roquet concluded appellant was a "[h]igh risk" to reoffend unless confined in a secure facility. She based this conclusion on appellant's violations of probation and supervision, including his incident involving the GPS bracelet, his antisocial personality, and his score of seven on Static-99R test.

Dr. Lorah interviewed appellant on January 8, 2014, for approximately ninety minutes and prepared a report of his findings. Doctor Lorah diagnosed appellant with alcohol dependence in sustained full remission in a controlled environment and bipolar II disorder. He declined to diagnose paraphilia or other sexual disorders, stating, "I believe that the majority of [appellant's] illegal sexual behavior is strongly attributable to his alcohol abuse."

Dr. Lorah found appellant did not demonstrate antisocial personality disorder because "he engages in this type of behavior when he drinks." He acknowledged appellant engaged in high-risk behavior by drinking in Atlantic City, but noted

appellant did not commit a sex offense during this incident. However, Dr. Lorah acknowledged that alcoholism does not cause sex offending and further identified appellant's alcohol abuse as a "contributing factor" for his sex offending "[a]s opposed to a causal factor."

Nolan testified regarding his investigation of appellant's discharge options. He said appellant's mother was willing to let appellant stay with her.

Based on the expert proofs, Judge Freedman found by clear and convincing evidence that appellant required continued commitment in the STU. The judge incorporated by reference his previous opinion from January 2013 and then reviewed the testimony presented during the current hearing. He determined both State witnesses were credible and rejected Dr. Lorah's testimony that appellant's sexual offenses were related to his alcohol use. The judge concluded appellant suffered from mental abnormalities predisposing him to engage in acts of sexual violence; if released, he would be highly likely to engage in sexually violent acts "within the reasonably foreseeable future."

Accordingly, Judge Freedman entered an order, continuing appellant's commitment in the STU. This appeal followed.

II.

The Legislature's purpose in enacting the SVPA was "to protect other members of society from the danger posed by sexually violent predators." In re Civil Commitment of J.M.B., 197 N.J. 563, 570-71 (citing N.J.S.A. 30:4-27.25), cert. denied, 558 U.S. 999, 130 S. Ct. 509, 175 L. Ed. 2d 361 (2009). Thus, the SVPA provides for the involuntary commitment of any person deemed by the court to be a sexually violent predator within the meaning of the statute. N.J.S.A. 30:4-27.32(a). The statute defines a sexually violent predator as:

> a person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense . . . and 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.
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> [N.J.S.A. 30:4-27.26.]

To warrant commitment of an individual under the SVPA, the State must prove "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, 132 (2002). The court must consider the individual's "present serious difficulty with control over

dangerous sexual behavior[,]" and the State must establish "by clear and convincing evidence . . . that it is highly likely that the person . . . will reoffend." Id. at 132-34 (emphasis in original).

Our review of a trial court's decision in a commitment proceeding under the SVPA is "exceedingly narrow." In re Civil Commitment of W.X.C., 407 N.J. Super. 619, 630 (App. Div. 2009) (citing In re Civil Commitment of J.M.B., 395 N.J. Super. 69, 89 (App. Div. 2007), aff'd, 197 N.J. 563 (2009); In re Civil Commitment of V.A., 357 N.J. Super. 55, 63 (App. Div.), certif. denied, 177 N.J. 490 (2003)), aff'd, 204 N.J. 179 (2010), cert. denied, 562 U.S. 1297, 131 S. Ct. 1702, 179 L. Ed. 2d 635 (2011). Further, we "must give the 'utmost deference' to the reviewing judge's determination of the appropriate balancing of societal interest and individual liberty." Ibid. (citing In re Commitment of J.P., 339 N.J. Super. 443, 459 (App. Div. 2001)). Modification is only proper on appeal when the record reveals a clear abuse of discretion. Ibid. (citing J.M.B., supra, 395 N.J. Super. at 90). Accordingly, the reviewing court has a responsibility to "canvass the record, inclusive of the expert testimony, to determine whether the findings made by the trial judge were clearly erroneous." Ibid. (citing In re D.C., 146 N.J. 31, 58-59 (1996)).

Appellant argues Judge Mulvihill established the "law of the case" with his 2010 consent order, finding appellant was a sexually violent predator who, "with the imposition of certain conditions[,] . . . is not likely to reoffend and therefore does not require indefinite commitment to the [STU]." Appellant raises several arguments based on this determination, challenging the court's findings prior to the June 5, 2014 judgment at issue on appeal.

Specifically, appellant argues the State, STU, and Dr. DeCrisce "abandoned" him by failing to arrange appropriate treatment services upon his conditional discharge. Appellant further contends his discharge violations for non-sexual behavior did not provide sufficient basis for the review courts to reject the "law of the case" and recommit him to the STU. See In re Civil Commitment of E.D., 183 N.J. 536, 551 (2005) (holding that "in order for the State to cause the recommitment of a committee who has been conditionally discharged, the State must establish by clear and convincing evidence that the committee is highly likely not to control his or her sexually violent behavior and will reoffend"). Appellant asserts the 2012 court erred by "blindly" accepting the opinions of the State's experts that he "morphed from an individual who could be

rehabilitated in the community to someone in need of involuntary civil commitment."

We reject these arguments. The "law of the case" doctrine "sometimes requires a decision of law made in a particular case to be respected by all other lower or equal courts during the pendency of that case." State v. Reldan, 100 N.J. 187, 203 (1985). However, this principal is not applicable to the instant matter. The purpose of a review hearing, including review hearings under the SVPA, is to evaluate a committee's "current condition." See State v. Fields, 77 N.J. 282, 310 (1978). All prior evidence remains relevant, but "[t]he reviewing judge must evaluate the current evidence submitted to him in light of all evidence adduced in earlier proceedings." Ibid.

Therefore, given our deferential standard of review in civil commitment matters, we find no basis to reverse the 2014 judgment continuing appellant's commitment. Substantial evidence in the record supports the judge's finding that appellant suffers from a mental abnormality making him highly likely to sexually reoffend. W.Z., supra, 173 N.J. at 132. Dr. Goldwaser diagnosed appellant with a paraphilic disorder due to the clear pattern of violent behavior in appellant's sexual offense history. He further diagnosed appellant with antisocial

personality disorder based on his failure to follow social norms and his lack of empathy or remorse. Both conditions do not spontaneously remit. Dr. Roquet similarly determined appellant had a sexual pathology that she could not solely attribute to his alcohol abuse. The experts determined appellant posed a high likelihood to reoffend due to his conditions, offending history, and relapse in Atlantic City. Based on the evidence in the record, the trial judge did not abuse his discretion by continuing appellant's commitment.

Next, appellant argues the 2012 review court erred by using his 1984 "sexual contact" convictions as the predicate offense to justify confinement under the SVPA. See In re Commitment of P.C., 349 N.J. Super. 569, 576 (App. Div. 2002) (noting predicate offense is necessary for confinement). Our statutes do not define "predicate offense"; instead, courts use this term to refer to the crimes that qualify as sexually violent offenses under N.J.S.A. 30:4-27.26(a) or (b). See, e.g., In re Civil Commitment of P.Z.H., 377 N.J. Super. 458, 460, 463 (App. Div. 2005). As noted, the record of appellant's 1984 convictions is unclear; although the State's petition says appellant pled guilty to sexual assault, Judge Freedman determined appellant was convicted of two counts of "sexual contact." However,

sexual assault and "criminal sexual contact" both constitute "sexually violent offenses" under N.J.S.A. 30:4-27.26(a).

Appellant's brief is inconsistent on this issue. In his statement of facts, appellant suggests the record is unclear whether he was actually convicted of "sexual contact" in 1984. He also asserts the SVPA does not list sexual contact as a predicate offense. Conversely, in his legal argument section, appellant acknowledges his sexual contact conviction but contends its "remoteness" should have precluded the court from using it as the predicate offense.

We conclude the record shows appellant was at least convicted of sexual contact in 1984, thereby placing him under the purview of the SVPA. See N.J.S.A. 30:4-27.26(a); State v. Bellamy, 178 N.J. 127, 140 (2003) (noting a conviction for "fourth-degree sexual contact" constitutes a predicate offense under the SVPA). Moreover, we find appellant's "remoteness" argument lacks merit. As appellant acknowledges, the SVPA and New Jersey case law do not set a time limit for consideration of predicate offenses. See In re Civil Commitment of R.Z.B., 392 N.J. Super. 22, 44 (App. Div.) ("Although we recognize that [the appellant's] New York offenses occurred in the 1980's, the passage of time does not eliminate their legal significance as eligible prior convictions under the SVPA."), certif. denied,

192 N.J. 296 (2007). Instead, commitment under the SVPA focuses on whether an individual poses a current threat; "[w]hile the remoteness of the last predicate act may be relevant to that inquiry, it also may be insignificant." P.Z.H., supra, 377 N.J. Super. at 466.

Here, although appellant's only clear conviction for a crime of sexual violence dates back to 1984,[5] both State experts reviewed his full history of sexual-offense arrests, noting that downgraded or dismissed offenses are still relevant to their clinical diagnoses. The experts concluded appellant was a current risk for reoffending, and the judge found their testimony credible. Therefore, we decline to reverse on this basis.

Appellant further argues that if his 1984 conviction must serve as the predicate offense, then the 2010 discharge conditions requiring him to wear a GPS ankle device violated the Ex Post Facto Clauses of the United States and New Jersey Constitutions. The Ex Post Facto Clause prohibits the

[5] During his oral opinion on January 10, 2013, Judge Freedman noted the Washington statute for "indecent liberties" contained similar elements to the New Jersey crime of sexual contact. N.J.S.A. 30:4-27.26(a) includes in its definition of sexually violent offenses "a criminal offense with substantially the same elements as any offense enumerated above." Judge Freedman determined appellant's 1995 offenses in Washington met the New Jersey definition of sexual contact, and therefore, we find these convictions could also serve as the predicate offense.

legislature from "increase[ing] the punishment for a crime after it has been committed." Riley v. N.J. State Parole Board, 219 N.J. 270, 274 (2014).

In Riley, our Supreme Court held the Ex Post Facto Clause barred the application of the Sex Offender Monitoring Act (SOMA), N.J.S.A. 30:4-123.89 to -123.95, which the Legislature passed in 2007, to an appellant's 1986 conviction for aggravated sexual assault. Specifically, the Court held the appellant's GPS ankle bracelet, which the Parole Board required he wear for the rest of his life shortly after release from prison, constituted an illegal additional punishment. Riley, supra, 219 N.J. at 274-75. Appellant urges the same result in the instant matter.

We reject this argument. In Riley, the Court specifically distinguished the SOMA from the SVPA, stating,

> Unlike the [SVPA], which permits for yearly review to determine whether the committee continues to pose a danger to the public and which allows for his release if he does not, N.J.S.A. 30:4-27.35 to -27.36, SOMA ensures that [the appellant's] future is static — he is condemned to wear the electronic monitoring device for the rest of his life.
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> [Id. at 294-95.]

Furthermore, under the SVPA, the trial court may impose discharge conditions "for the purpose of ensuring that the person . . . does not represent a risk to public safety."

N.J.S.A. 30:4-27.32(c)(2). "If 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." Ibid.

Therefore, unlike the circumstances in Riley, appellant's GPS bracelet was not a permanent punishment but a temporary condition that the court imposed to ensure the public's safety. Moreover, appellant agreed to conditions akin to parole supervision as part of the 2010 consent orders. Because we find Riley distinguishable, we decline to reverse on this basis.

Finally, appellant advances a public policy argument, asserting imposing indeterminate sentences on sex offenders through involuntary commitment does not serve the interests of justice under his circumstances. Appellant also reiterates his challenges to the State and Dr. DeCrisce's treatment, arguing we should notice plain error not raised below if it causes an unjust result. See R. 2:10-2.

These arguments lack merit. For the reasons discussed, appellant's continuing commitment is entirely appropriate and does not defy the interests of justice. We will not reverse on this basis. Moreover, any arguments we did not specifically address lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION