

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0357-15T5

IN THE MATTER OF THE
CIVIL COMMITMENT OF
D.M.B., SVP-337-03.¹

Submitted December 12, 2017 – Decided February 7, 2018

Before Judges Yannotti and Leone.

On appeal from Superior Court of New Jersey,
Law Division, Essex County, Docket No. SVP-
337-03.

Joseph E. Krakora, Public Defender, attorney
for appellant D.M.B. (Nancy C. Hayes,
Designated Counsel, on the brief)

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

PER CURIAM

D.M.B. appeals from a judgment entered by the Law Division
on July 2, 2015, pursuant to the Sexually Violent Predators Act

¹ In the notice of appeal, D.M.B. refers to himself as D.B.; however, he has been referred to as D.M.B. in prior proceedings.

(SVPA), continuing his civil commitment to the Special Treatment Unit (STU) for custody, care, and treatment. We affirm.

I.

On July 15, 1994, D.M.B. knocked on the door to B.G.'s apartment and asked if he could use the bathroom. B.G. knew D.M.B. and let him in. After he entered the apartment, D.M.B. wrapped a sock around B.G.'s throat, choked her, and threw her on the bed. D.M.B. ordered B.G. to remove her clothing and said he would kill her if she failed to do so. She complied. D.M.B. maintained a stranglehold on B.G. and she lost consciousness. D.M.B. then raped her. Before he left the apartment, D.M.B. took cash from B.G.'s purse. On June 23, 1995, D.M.B. pled guilty to first-degree sexual assault and first-degree attempted murder. On September 22, 1995, the court sentenced D.M.B. to fifteen years of imprisonment on each count, to run concurrently.

D.M.B. was scheduled to be released from prison on October 1, 2003. On September 24, 2003, the State filed a petition for D.M.B.'s civil commitment under the SVPA. The trial court entered an order dated October 1, 2003, temporarily committing D.M.B. to the STU pending a final hearing. After an evidentiary hearing, the judge found that the State had established by clear and convincing evidence that D.M.B. was a sexually violent predator subject to commitment under the SVPA. The judge entered an order dated March

8, 2004, committing D.M.B. to the STU. D.M.B. appealed and we affirmed the trial court's order. In re Civil Commitment of D.M.B., SVP-337-03, No. A-3896-03 (App. Div. Feb. 15, 2006) (slip op. at 2).

On November 3, 2008, after an annual review hearing, the judge rendered an oral decision finding that D.M.B. remained a sexually violent predator, with a high risk of reoffending, who was in need of civil commitment under the SVPA. The judge noted that D.M.B. had not participated to any significant degree in sex-offender-specific treatment. The judge stated that D.M.B. was "a treatment refuser."

The judge found that D.M.B. clearly suffers from "abnormal mental conditions and [a] personality disorder that influence his cognitive, emotional and volitional functioning, so as to predispose him to commit sexually violent acts." The judge stated that D.M.B. "has serious difficulty controlling his sexually violent behavior, as he so clearly demonstrated in the community."

The judge determined that D.M.B. was highly likely to commit additional sexually violent offenses within the foreseeable future if not committed to the STU for further treatment. The judge memorialized her decision in an order dated November 3, 2008, continuing D.M.B.'s civil commitment. He appealed from that order

and we affirmed. In re Civil Commitment of D.M.B., SVP-337-03, No. A-4406-08 (App. Div. Sept. 23, 2009) (slip op. at 2).

In December 2011, after another review hearing, the judge found that the State had established with clear and convincing evidence that D.M.B. remained a sexually violent predator in need of commitment under the SVPA. The judge determined that D.M.B. continued to suffer from a mental abnormality or personality disorder that made him highly likely to commit further acts of sexual violence if not confined to a secure facility for control, care, and treatment. The judge found that D.M.B.'s treatment had been "static" and he remained highly likely to reoffend.

The judge entered an order dated December 12, 2011, ordering D.M.B.'s continued commitment to the STU for control, care, and treatment. D.M.B. appealed from the order and we affirmed. In re Civil Commitment of D.M.B., SVP-337-03, No. A-2128-11 (App. Div. July 24, 2014) (slip op. at 2).

In May 2015, Judge Philip Freedman conducted an annual review hearing. At the hearing, the State presented expert testimony by psychiatrist Roger Harris, M.D. and psychologist Dr. Laura Carmignani, Psy.D. D.M.B. did not present any expert testimony. He testified, however, that he attends the Alcoholics Anonymous/Narcotics Anonymous self-help group at the STU. He stated that he had submitted a remedy form seeking removal from

Treatment Refusal (TR) status and placement in a process group, but never received a response.

On July 2, 2015, the judge placed an oral decision on the record, finding that the State had established the criteria for D.M.B.'s continued civil commitment with clear and convincing evidence. The judge credited the testimony of the State's experts and found that "[D.M.B.] does, in fact, suffer from a mental abnormality in the form of a paraphilia and antisocial personality disorder [ASPD], as well as substance abuse disorders."

The judge determined that the "paraphilia and/or the [ASPD] affect [D.M.B.] emotionally, cognitively and volitionally so as to . . . clearly increase his risk [to recidivate]." The judge stated that "the risk would even be higher" if alcohol and drugs are added "to the mix."

The judge found that because of his predisposition, D.M.B. "would have a serious difficulty controlling his sexually violent behavior" and would be "highly likely to engage in acts of sexual violence" in the reasonably foreseeable future. The judge added that with the impact of alcohol, D.M.B.'s "recidivism would be almost immediate."

The judge concluded that D.M.B.'s commitment to the STU should continue. The judge entered an order dated May 8, 2015, which

stated that D.M.B. shall be committed to the STU for custody, care, and treatment. This appeal followed.

II.

On appeal, D.M.B. argues that the State failed to prove by clear and convincing evidence that he remains a sexually violent predator in need of civil commitment pursuant to the SVPA. We disagree.

Review of a trial court's decision following a commitment hearing 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)). A trial judge's ruling in a commitment hearing should be modified only when "the record reveals a clear mistake." Id. at 175 (quoting D.C., 146 N.J. at 58).

Moreover, the trial court's findings of fact should not be disturbed so long as they are supported by "sufficient credible evidence present[ed] in the record." Ibid. (quoting State v. Johnson, 42 N.J. 146, 162 (1964)). Deference to the findings of the trial judge is warranted because the trial judge had the "opportunity to hear and see the witnesses and to have the 'feel' of the case, which a reviewing court cannot enjoy." Id. at 174 (quoting Johnson, 42 N.J. at 161). Furthermore, "special deference" is given to the findings of judges who hear SVPA cases because of their expertise in such matters. Ibid. (citing In re

Civil Commitment of T.J.N., 390 N.J. Super. 218, 226 (App. Div. 2007)).

The SVPA requires a court to find "by clear and convincing evidence that the person needs continued involuntary commitment as a sexually violent predator." N.J.S.A. 30:4-27.32(a). Under the SVPA, a "sexually violent predator" is defined as

a person who has been convicted, adjudicated delinquent or found not guilty by reason of insanity for commission of a sexually violent offense, or has been charged with a sexually violent offense but found to be incompetent to stand trial, 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.

[N.J.S.A. 30:4-27.26 (emphasis added).]

The SVPA defines a "mental abnormality" as "a mental condition that affects a person's emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence." Ibid. The SVPA does not, however, define the term "personality disorder."

"To be committed under the SVPA an individual must be proven to be a threat to the health and safety of others because of the likelihood of his or her engaging in sexually violent acts." In re Commitment of W.Z., 173 N.J. 109, 132 (2002). "[T]he State must prove that threat 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." Ibid.

III.

On appeal, D.M.B. argues that the State failed to prove by clear and convincing evidence that he suffers from a "mental abnormality." He also contends the State failed to prove that it is highly likely he will engage in acts of sexual violence if not confined in a secure facility.

Here, the State presented expert testimony from Dr. Harris, who diagnosed D.M.B. with, among other things, "Other Paraphilia Disorder, Coercion." He explained this diagnosis means D.M.B. "has an arousal to force women to submit to him for his sexual gratification, [and] that the process is arousing to him." Dr. Harris based this diagnosis on D.M.B.'s 1995 conviction for sexual assault and attempted murder, as well as other sexual acts, which D.M.B. was accused of committing but did not result in formal charges or convictions.

The State also presented testimony from Dr. Carmignani, who is a member of the STU's Treatment Progress Review Committee. She diagnosed D.M.B. with "Other Specified Paraphilic Disorder (non-consent)." She explained that this is "a chronic condition that is characterized by intense, sexually arousing fantasies, sexual

urges, or behaviors involving sexual arousal to partners who, by virtue of force, are unable to consent." She said D.M.B. met the criteria for this diagnosis based on his 1995 convictions. She noted that D.M.B. had admitted that he committed certain uncharged sexual offenses in 1990 and 1994.

In addition, both Dr. Harris and Dr. Carmignani diagnosed D.M.B. with ASPD, as well as alcohol and substance abuse disorders, which they explained increased D.M.B.'s risk of reoffending in a sexually violent manner. Dr. Harris explained that D.M.B. has a deviant arousal, strong antisocial attitudes and behaviors, poor cognitive problem-solving, and poor self-regulation. Dr. Harris stated that D.M.B. "remains a high risk to sexually reoffend and continues to meet the criteria for civil commitment" under the SVPA. He opined that D.M.B. is "highly likely to sexually reoffend if placed in a less restrictive setting."

Dr. Carmignani stated that an ASPD diagnosis is appropriate when a person exhibits a pervasive pattern of disregarding and violating the rights of others. She noted that D.M.B. had demonstrated a chronic pattern of behavioral problems since childhood. He also has a history of involvement with the criminal justice system, and a lack of cooperation with supportive efforts. Dr. Carmignani said D.M.B.'s personality structure is "heavily based on poor impulse control, disrespect for the law, aggression,

lack of remorse, reckless disregard for the wellbeing of others, and failure to conform to social norms with respect to lawful behaviors." The doctor found that D.M.B.'s ASPD increases his risk to reoffend.

Dr. Carmignani further testified that substance abuse may increase D.M.B.'s impulsivity and lower his inhibitions. She explained that substance use raises the risk of reoffending when combined with a deviant sexual interest. She stated that "there continues to be no significant mitigating factors to adjust the level of risk for sexual reoffending." The doctor also noted that D.M.B. had been in treatment refusal status for a year, and his "lack of engagement in treatment is a significant factor to this as well as his stagnation in treatment." She opined that it was highly likely D.M.B. would sexually reoffend if released from the STU.

Thus, there is sufficient credible evidence to support the judge's finding that D.M.B. suffers from a mental abnormality or personality disorder that makes him highly likely to commit acts of sexual violence if not confined in a secure facility. Defendant's arguments on this point lack sufficient merit to warrant further discussion. R. 2:11-3(e)(1)(E).

IV.

D.M.B. also argues that the record does not support the trial court's finding that he poses a high risk of reoffending because it was based in part on his score on the Static-99R risk assessment. Here, D.M.B. scored a four on the Static-99R risk assessment, which placed him in the moderate to high risk category of reoffending sexually. He asserts that the Static-99R was scored erroneously because it was based in part on the sexual offenses for which he was not indicted and convicted. Again, we disagree.

The Static-99R is an actuarial tool that is used to assess the risk of recidivism by sex offenders. In re Commitment of R.S., 339 N.J. Super. 507, 545-46 (App. Div. 2001). However, as the Court explained in In re R.S., 173 N.J. 134, 137 (2002), a trial court should "regard the actuarial assessment information . . . as simply a factor to consider, weigh, or even reject, when engaging in the necessary factfinding under the SVPA."

Here, D.M.B.'s Static-99R score was only a factor that Dr. Harris and Dr. Carmignani used in formulating their opinions on whether it was highly likely D.M.B. would reoffend in a sexually violent manner if released from the STU. Dr. Harris testified that D.M.B.'s score on the Static-99R was only "a piece of data." He explained that it is "not a full estimate for risk to reoffend sexually." He noted that "dynamic factors such as [D.M.B.'s]

deviant arousal, strong antisocial attitudes and behavior, [and] his poor cognitive problem solving [also] . . . increase his risk."

Dr. Carmignani testified that, in addition to D.M.B.'s Static-99R score, there were several "additional dynamic risk factors" that increased his risk of reoffending. Those factors included his "history of substance abuse, the diagnosis ASPD and the lack of any protective factors" because he has not engaged in treatment.

We reject D.M.B.'s contention that his score on the Static-99R was erroneous because it was based in part on the offenses for which he was not charged or convicted. Dr. Harris explained that he gives such offenses less weight in his analysis because they are not convictions.

Moreover, Dr. Carmignani stated that although such offenses provide evidence of a pattern of behavior, she gave them less weight in reaching her diagnoses and determining the risk of recidivism. She noted, however, that the record shows that in 1995 D.M.B. admitted to committing two offenses that did not result in charges or convictions, specifically, a rape in 1990 and an unlawful sexual contact in 1994.

Thus, the record does not support D.M.B.'s contention that his score on the Static-99R was erroneous. However, even if D.M.B. had been scored lower on the Static-99R, that is not dispositive

on the issue of his risk of reoffending sexually. As the experts explained, the scores were only one factor in their respective risk analyses.

V.


D.M.B. further argues that the State failed to prove by clear and convincing evidence that he should remain confined in the STU because in 2003, when he was first committed, the State relied upon two clinical certificates that incorrectly indicated the doctors who prepared the certificates had personally interviewed him. The contention lacks sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).

We note, however, that although in 2003, both doctors checked the box on the certificate indicating they had interviewed D.M.B., he had refused to be interviewed by either doctor. Of course, D.M.B. may not "benefit from his unjustified refusal to cooperate" with a psychological examination. In re Commitment of A.H.B., 386 N.J. Super. 16, 30 (App. Div. 2006).

In any event, the inadvertent incorrect notations on the certificates that were completed in 2003 are irrelevant. They have no bearing on whether the State has proven, in this latest review hearing, that D.M.B.'s civil commitment under the SVPA should continue.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION