

2009 WL 127752

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

In the Matter of the Civil COMMITMENT OF F.T. SVP-416-05.

Submitted May 27, 2008. Decided Jan. 21, 2009.

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Change View

1Mental Health



Experts

Sufficient evidence existed for involuntary committee to be put in special treatment unit (STU) for care and treatment as a sexually violent predator (SVP). Experts indicated that involuntary committee suffered from paraphilia, nos, which predisposed him to commit acts of sexual violence. Based on evidence, involuntary committee posed a very high risk to sexually reoffend. N.J.S.A. 30:4-27.24 et seq.

Cases that cite this headnote



257AMental Health

257AIVDisabilities and Privileges of Mentally Disordered Persons

257AIV(E)Crimes

257Ak452Sex Offenders

257Ak460Evidence

257Ak460(2)Experts

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. SVP-416-05.

Attorneys and Law Firms

Ronald K. Chen, Public Advocate, attorney for appellant (Thomas G. Hand, Designated Counsel, on the brief).

Anne Milgram, Attorney General, attorney for respondent (Melissa H. Raksa, Deputy Attorney General, of counsel; Lisa Marie Albano, Deputy Attorney General, on the brief).

Before Judges COLLESTER and C.L. MINIMAN.

Opinion

PER CURIAM.

*1 F.T. appeals from the March 22, 2006 judgment entered by Judge Serena Perretti committing him to the Special Treatment Unit (STU) for care and treatment as a sexually violent predator (SVP) under the Sexually Violent Predator Act (SVPA), *N.J.S.A.* 30:4-27.24 to -27.18.

F.T.'s history of sexually violent behavior dates back to 1983 when he was seventeen years old. On December 2, 1983, F.T. was arrested on first-degree aggravated sexual assault after he and his co-defendant raped a woman in the back seat of a stolen car. He pleaded guilty on January

26, 1984 and was sentenced to an indeterminate term not to exceed ten years at the Youth Correctional Complex.

On October 7, 1993, F.T. was arrested for sexual assault in the second degree and terroristic threats in the third degree. The twenty-seven-year-old victim said F.T. choked her, forced her to have sexual intercourse, and said he would kill her if she told anyone. The State dismissed the sexual assault charge as the victim suffered a mental disorder. On July 22, 1994, F.T. pleaded guilty to terroristic threats and pursuant to a plea agreement, received a two-year term of probation with psychological and alcohol counseling.

While F.T. was still on probation, he was arrested on July 16, 1995 for burglary, aggravated sexual assault, sexual assault, endangering the welfare of a child, and resisting arrest. The child victim was twelve years old. F.T. broke into a neighbor's apartment when the girl's mother was out. He entered the girl's room while she was sleeping and began kissing and fondling her breasts and vaginal area. F.T. removed the girl's clothing and vaginally raped her. The child also reported that F.T. performed oral sex upon her. F.T. pleaded guilty to aggravated sexual assault and endangering the child's welfare on February 26, 1996. He was sentenced to fifteen years in State prison.

On November 5, 2003, F.T. was evaluated by Dr. Leland Mosby at the request of the Parole Board. Dr. Mosby reported that F.T. had poor judgment and impulse control as well as limited insight into his problems. He further found clear indication of antisocial personality issues and addiction problems. Dr. Mosby added that F.T. "minimizes his criminal history, past sex crimes and does not take personal responsibility for his actions." As a result, F.T. was denied parole.

Before the expiration of F.T.'s sentence, Dr. Richard Mucowski performed a pre-release risk assessment on July 1, 2004. During his evaluation, F.T. told Dr. Mucowski that his sexual offenses were actually consensual in nature, and he denied having been convicted of the 1984 offense. Dr. Mucowski concluded:

Given [F.T.'s] fragile intellectual processing capacity, his inability to control his libidinal urges and a compromise to his ability to understand the consequences of his poorly thought out choices, he is likely to reoffend.

Declaring F.T. a high risk, Dr. Mucowski referred him for commitment to the STU as a sexually violent predator. On September 14, 2005, F.T. was again evaluated by Dr. Norman Schaffer for a sexually violent predator screen and again referred for STU commitment.

*2 On December 12, 2005, the State filed a petition for a civil commitment of F.T. to the STU as a sexually violent predator under *N.J.S.A. 30:4-27*. F.T.'s initial commitment hearing was held on March 13 and March 22, 2006, before Judge Perretti. The State presented Dr. Vivian Shnaidman and Dr. Natalie Barone as witnesses.

Dr. Shnaidman testified she did not interview F.T. because he refused to speak with her. She prepared her report based on F.T.'s social, criminal, personal, educational and psychiatric history. Dr. Shnaidman explained that these sources are generally relied upon by experts when performing SVP evaluations. She diagnosed F.T. with paraphilia, nos, non consent and possible hebaphilia. She testified her diagnosis of paraphilia was due to F.T.'s history of repeated sexual offenses with unwilling victims. The finding of possible hebaphilia was based upon the offenses on the twelve-year-old victim. Dr. Shnaidman further diagnosed F.T. with antisocial personality disorder and explained that this disorder "interfaces" with paraphilia and "potentiates" paraphilia because F.T. lacks a clear sense of right and wrong and lacks insight into his behavior. She opined based on her diagnoses that F.T. was predisposed to sexually reoffend. She also based her opinion on actuarials that had been scored by previous evaluators indicating F.T. fell in a very

high range for sexual reoffense. Using a conservative approach and giving F.T. the benefit of all doubts, Dr. Shnaidman placed F.T. in the moderate to high and high risk category.

Dr. Shnaidman concluded that F.T. has very serious difficulty in controlling his sexually violent behavior based on F.T.'s lack of insight and lack of self-control, witnessed by the fact that he committed another sexual offense while under probation. He therefore presents a danger when there is the opportunity to sexually abuse an unwilling victim. Therefore, Dr. Shnaidman opined that F.T.'s risk to sexually reoffend is "very high."

Dr. Barone testified that she attempted to interview F.T. on two occasions, but he refused to submit to either interview. Her risk assessment of F.T. was based on institutional psychological and psychiatric evaluations, the clinical certifications, pre-sentence reports, and police reports. She determined that F.T.'s longstanding sexual pathology and perversion is part of his sexual orientation.

She said F.T.'s diverse victim pool, including both adults and children, is a significant risk factor in and of itself. She described him as having a "remarkable lack of conscience" and being "very exploitative." Moreover, the fact that he not only raped a stranger in the 1994 offense, but also watched his co-defendant rape her, "certainly kicks up the level of deviancy a notch." With regard to F.T.'s index offense against the twelve-year-old girl, Dr. Barone noted that F.T. knew of the neglectful circumstances under which the child was living and "not only ignored the child's trauma but actually used it for his own sexual gratification." Lastly, she found a level of compulsivity to F.T.'s sexual offending because the index offense was committed while F.T. was on probation for a previous sexual offense.

*3 Dr. Barone commented about F.T.'s extensive non-sexual criminal history supported by the diagnosis of antisocial personality disorder. She said that it was evident from F.T.'s criminal history alone that he has acted against societal norms since adolescence. Because the criminal behavior had an early onset, it was "behaviorally reinforced." She added that F.T.'s past criminal behavior exemplified how callous he can be, how impaired his judgment is, and how he has "few internal coping resources, if any." She diagnosed F.T. with an "extreme" antisocial personality disorder, paraphilia nos based upon his repeated deviant sexual behavior and forced sex with non-consenting partners, involving blatant force and committing sexual acts with a child. Dr. Barone concluded that her diagnoses predisposed F.T. to commit acts of sexual violence. Furthermore, the fact that F.T. began acting upon his deviant sexual urges at age seventeen, repeatedly demonstrated his inability to control deviant sexual desires, victimized a series of women, taken together with impaired personality structure and the lack of treatment for his sexual pathology led Dr. Barone to conclude that F.T. has serious difficulty controlling his sexually violent behavior, was at high risk to reoffend, and was therefore in need of confinement for treatment at the STU.

F.T. raises the following arguments on appeal:

POINT I-F.T.'S INVOLUNTARY COMMITMENT BY JUDGE [PERRETTI] WAS INCORRECT BECAUSE THE INITIAL CERTIFICATE OF DR. MOSHKOVICH ONLY FOUND F.T. TO BE LIKELY TO COMMIT A SEXUAL OFFENSE.

POINT II-F.T.'S INVOLUNTARY COMMITMENT UNDER THE SVPA VIOLATES THE UNITED STATES CONSTITUTION, ART. I, § 10, CLAUSE 1 AND NEW JERSEY CONSTITUTION, ART. IV, § 7, PARA 3 (EX POST FACTO CLAUSES) (NOT RAISED BELOW).

POINT III-THE COURT ERRED IN RELYING ON HEARSAY CONTAINED IN EXHIBITS AND THE TESTIMONY OF EXPERT WITNESSES TO MAKE FINDINGS OF FACT AND IN REACHING ITS DECISION TO INVOLUNTARILY COMMIT F.T.

POINT IV-THE STATE FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT F.T. SHOULD HAVE BEEN INVOLUNTARILY COMMITTED.

Persons who are deemed to be sexually violent predators may be civilly committed under the SVPA provided the State has established by clear and convincing evidence that the person has previously acted in a sexually violent manner and is highly likely to reoffend in the future as a result of a mental abnormality or personality disorder that affects the person's emotional, cognitive or volitional capacity. *In re Commitment of W.Z.*, 173 N.J. 109, 120, 801 A.2d 205 (2002); N.J.S.A. 30:4-27.26. Our scope of review of the determination by the reviewing judge is narrow. *In re Commitment of V.A.*, 357 N.J.Super. 55, 63, 813 A.2d 1252 (App.Div.), *certif. denied*, 177 N.J. 490, 828 A.2d 917 (2003). We are to give the "utmost deference" to the reviewing judge's conclusions on the appropriate balancing of societal interest and individual liberty. *In re Commitment of J.M.B.*, 395 N.J.Super. 69, 90, 928 A.2d 102 (App.Div.) (quoting *In re Commitment of J.P.*, 339 N.J.Super. 443, 459, 772 A.2d 54 (App.Div.2001)), *certif. granted*, 193 N.J. 222 (2007). The reviewing judge's determination in that regard is "subject to modification only where the record reveals 'a clear abuse of discretion.'" *In re Commitment of M.L.V.*, 388 N.J.Super. 454, 465, 909 A.2d 286 (App.Div.2006) (quoting *J.P.*, *supra*, 339 N.J.Super. at 459, 772 A.2d 54), *certif. denied*, 190 N.J. 255 (2007).

*4 Here, Judge Perretti found credible the opinions of the State's experts that F.T. suffers from paraphilia, nos, which predisposes him to commit acts of sexual violence and that he acts on these deviant urges because of his antisocial personality disorder. She also determined that, based on clear and convincing evidence supplied by the State, F.T. poses a very high risk to sexually reoffend. Judge Perretti's factual findings and conclusions are amply supported by the record. We therefore reject petitioner's argument that the proofs were insufficient for involuntary commitment to the STU under the SVPA. *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 2082, 138 L. Ed.2d 501, 515 (1997); *State v. Bellamy*, 178 N.J. 127, 138, 835 A.2d 1231 (2003); *Doe v. Poritz*, 142 N.J. 1, 42, 662 A.2d 367 (1995). The arguments are therefore without merit.

Petitioner also argues that Judge Perretti erred by relying on hearsay in rendering her decision. We first note that F.T. refused to make himself available to the State's experts so that the expert opinions were reasonably based on earlier reports and evaluations. To preclude the use of such evidence as hearsay would serve only to frustrate the purpose of the SVPA as well as the issue of whether F.T. was sexually dangerous and in need of commitment for treatment. Moreover, independent evidence need not be presented establishing the truth of out-of-court statements before an expert witness may refer to those statements in his or her testimony or report. *State v. Burris*, 298 N.J.Super. 505, 511, 689 A.2d 860 (App.Div.) *certif. denied*, 152 N.J. 187 (1997). Experts are permitted to rely on hearsay information in forming opinions as to the defendant's mental state. *See, e.g., State v. Krol*, 68 N.J. 236, 261, 344 A.2d 289 (1975); *State v. Maik*, 60 N.J. 203, 208, 287 A.2d 715 (1972); *State v. Whitlow*, 45 N.J. 3, 19, 210 A.2d 763 (1965); *State v. Lucas*, 30 N.J. 37, 79, 152 A.2d 50 (1959). Evaluating psychologists and psychiatrists are entitled to rely on presentence reports, police reports, as well as past psychological and psychiatric evaluations pursuant to N.J.R.E . 404(b). *State v. Eatman*, 340 N.J.Super. 295, 302, 774 A.2d 571 (App.Div.2001). This does not permit the wholesale admissibility of otherwise inadmissible evidence. *See State v. Rose*, 112 N.J. 454, 499-501, 548 A.2d 1058 (1988). But

evidence otherwise inadmissible relating to prior criminal acts is admissible if it is of a type experts in the field of practice rely on in arriving at their conclusions. *See Ryan v. KDI Sylvan Pools, Inc.*, 121 N.J. 276, 288-89, 579 A.2d 1241 (1990).

In her oral opinion, Judge Perretti was careful to delineate what she considered as substantive evidence from hearsay evidence considered as it related to the opinions of the testifying experts. She stated:

The court does not accept the inadmissible hearsay as substantive proof of the matters asserted therein, but merely as supporting or not supporting the diagnoses and permitting an evaluation of the credibility and persuasiveness of the psychiatrists opinion. She [Dr. Shnaidman] explained her use of the sources in order to get a picture of the respondent's behavior over a long term and to become acquainted with the official version of the respondent's criminal history. Although she reviews the diagnoses of others, she [Dr. Shnaidman] testified that she makes her own independent diagnosis; however, she considers prior examiners' opinions important as they reflect upon the respondent's condition at different times in the past.

*5 A trial court's evidentiary rulings are "entitled to deference absent a showing of an abuse of discretion." *State v. Brown*, 170 N.J. 138, 147, 784 A.2d 1244 (2001). We find no error in Judge Perretti's proper consideration of the evidence adduced before her.

The remaining issues raised by F.T. are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

In re Commitment of F.T., A-3825-05T2, 2009 WL 127752 (N.J. Super. Ct. App. Div. Jan. 21, 2009)