Supreme Court No. 91152-5

Court of Appeals No. 450305

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

In RE Detention of Jerrod Stoudmire:

STATE OF WASHINGTON, Respondent

v.

JERROD D. STOUDMIRE, Appellant

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Jerrod D. Stoudmire, asks this Court to accept review of the Court of Appeals decision terminating reviewing, designated in Part II of this petition.

II. COURT OF APPEALS DECISION

The Petitioner seeks review of the Court of Appeals decision filed on November 13, 2014, which affirmed his commitment under RCW 71.09. A copy of the Court's unpublished opinion is attached as an Appendix. This petition is timely for review.

III. ISSUES PRESENTED FOR REVIEW

To commit an individual under RCW 71.09, and thus "significantly curtail his or her rights, due process requires the State to prove that the alleged SVP is mentally ill and currently dangerous." *In re Det. of Moore,* 167 Wn.2d 113, 124, 216 P.3d 1015 (2009); RCW 71.09.020(18). Where the respondent challenges the link between a mental abnormality and serious difficulty in controlling behavior, that is, current dangerousness, must the State show more than historical information?

IV. STATEMENT OF THE CASE

In 1993 Jerrod Stoudmire pleaded guilty to charges of child rape second and third degree and statutory rape in the second degree. Other charges, to which he initially also pleaded guilty, were vacated by the Washington Supreme Court. (CP3, 9-11). He was incarcerated for 198 months. (CP 11). In 2010, the State filed a petition seeking involuntary commitment under RCW 71.09 (CP 2-4). He remained at the Special Commitment Center slightly over 3 years before his trial. (5/22/13 RP 47).

While at Twin Rivers Correctional Center, DOC records showed that Mr. Stoudmire participated in sex offender beginning in 2006. He successfully completed the treatment, which consisted of Cognitive Behavioral Therapy, Relapse Prevention and Arousal Reconditioning. (5/29/13 RP 27;90;94;100-101). Treatment providers prepared weekly progress notes and cited that he had done quite well in treatment. Id.

Using the DSM-IV TR manual, the State's expert, Dr. Hoberman, diagnosed Mr. Stoudmire with pedophilia/hebephilia.

(5/28/13 RP 94-95)[1]. At trial, Dr. Hoberman testified that the DSM-IV TR manual described pedophilia as chronic and life-long. (5/28/13 RP 110). When questioned as to how the evaluator could know if Mr. Stoudmire currently suffers from pedophilia, he stated all the information was from Mr. Stoudmire's self-reports. (5/28/13 RP 110-111). These reports included interviews and his responses to a psychological test that he administered to Mr. Stoudmire in 2011, approximately two years before trial, and candid statements he made as part of his treatment. (Id.; 5/28/13 RP 112).

In the most recent interview he conducted with Mr. Stoudmire, Dr. Hoberman reported that he said, "I don't have them. I haven't had them since '06 or '07. Back then, my deviant thinking was my flashbacks with my last victim." (5/28/13 RP 114). He acknowledged that pedophilia may be a lifelong condition, but because of treatment, he was able to

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[1] The diagnostic criteria for pedophilia consist of: over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children. The person has acted on these urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty. The person is at least age 16 years and at least 5 years older than the child or children in criterion A. DSM IV-TR: Diagnostic Criteria for 302.2 Pedophilia.

refocus and deal with the flashbacks. (5/28/13 RP 94). Dr. Hoberman also relied on the MSI II[2]: a computer scored diagnostic inventory that, based on his responses, characterized Mr. Stoudmire as having pedophilia. (5/28/13 RP 117).

After a jury trial, Mr. Stoudmire was committed as a sexually violent predator. (CP 607). Mr. Stoudmire appealed the verdict, challenging whether sufficient evidence exists to establish a link between serious difficulty in controlling behavior and the mental abnormality of pedophilia. (Br. of Appl. at 14). In its unpublished opinion, the Court of Appeals affirmed the commitment. (App. A).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Washington legislature has defined a sexually violent predator as any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder, which makes the person likely to engage in predatory acts of sexual violence, if not confined in a secure facility. RCW 71.09.020(18). Under U.S. and Washington case law, a diagnosis of mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury

[2] Multiphasic Sex Inventory II.

to find a serious lack of control. The diagnosed disorder must impair the individual's ability to control his dangerous behavior. *In re Det. of Thorell,* 149 Wn.2d 724, 761-62, 72 P.3d 708 (2003), *cert. denied,* 541 U.S. 990 (2004); *Kansas v. Crane,* 534 U.S. 407, 122 S.Ct. 867, 151 L.Ed.2d 856 (2002).

For an individual to be considered a sexually violent predator, there must be some historical information of perpetrated sexual violence. But in order to commit an individual, significantly curtailing his rights, due process requires the State to prove beyond a reasonable doubt that the alleged sexually violent predator is mentally ill and *currently* dangerous. *In re Det. of Moore,* 167 Wn.2d 113, 124, 216 P.3d 1015 (2009)(citing *Foucha v. Louisiana,* 504 U.S. 71, 112, S.Ct. 1780, 118 L.Ed.2d 437 (1992). (Emphasis added).

Pedophilia requires at least 6 months of recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children, which are either acted on or cause the individual marked distress or interpersonal difficulty. Any individual who has experienced the fantasies, urges or behaviors for a period of at least six months is diagnostically a pedophile. So, whether it

has been a year, or 7 years or the majority of a lifetime since experiencing symptoms, one can still be classified a pedophile.

The question in this case is whether the State produced sufficient evidence to establish beyond a reasonable doubt that Mr. Stoudmire should be confined under RCW 71.09 because the historical diagnosis of pedophilia makes him *currently* dangerous. Mr. Stoudmire successfully completed sex offender treatment at Twin Rivers. His candid admissions in therapy and the diagnostic interviews indicated that when he had intrusive sexual flashbacks he used the skills he had learned in treatment. Numerous individuals testified that Mr. Stoudmire had made positive changes as he progressed through treatment. (6/4/13 RP 76-79; 6/5/13 RP 7-8).

The legislature has defined sexually violent predators as individuals who have personality disorders and/or mental abnormalities which are unamenable to existing treatment modalities and those conditions render them likely to engage in sexually violent behavior and that the prognosis for curing sexually violent offenders is poor, the treatment needs are very long term and modalities are different from traditional treatment modalities. RCW 71.09.010. The State offers sex offender

treatment to those confined- yet, when individuals participate in the treatment, progress, and manage their behavior for years on end, the State is not required to prove anything more than an historical diagnosis and sometimes decades old convictions.

Here, the State presented no evidence that Mr. Stoudmire had acted on any pedophilic urges in any fashion while confined, and the State's expert agreed there was no evidence that Mr. Stoudmire had serious difficulty controlling his sexual behavior since he had been confined over twenty years ago. (5/29/13 RP 138). Defense expert Dr. Rosell testified that based on Mr. Stoudmire's prior history and the plethora of reviewed records, Mr. Stoudmire's diagnosis of pedophilia did not continue to persist. (6/3/13 RP 46).

An individual's liberty interest is fundamental: "...Incarceration of persons is one of the most feared instruments of state oppression and state indifferences... freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution." *Foucha,* 504 U.S. at 90. Under a factual situation, as here, where the evidence more than strongly suggests that the diagnosis is historical and not current, the

State has not produced sufficient evidence to establish serious difficulty controlling behavior or that Mr. Stoudmire must be confined to a secure facility.

VI. CONCLUSION

Mr. Stoudmire respectfully asks this Court to grant his petition for review.

Dated this 15th day of December 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 15th day of December, 2014, I sent via electronic service pursuant to a prior agreement between the parties, or sent by USPS first-class postage prepaid, a true and correct copy of the Petition for Review with Appendix Attached to the following:

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December 15, 2014 - 3:38 PM

Transmittal Letter

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Detention of: JERROD STOUDMIRE, aka DUANE G. STOUDMIRE, Appellant.	No. 45030-5-II UNPUBLISHED OPINION

WORSWICK, P.J. — Jerrod Stoudmire appeals a trial court order civilly committing him as a sexually violent predator (SVP).[1] Stoudmire contends that the State failed to present sufficient evidence to support the jury's finding that he met the definition of an SVP. We affirm the trial court's civil commitment order.

FACTS

Stoudmire has admitted to the following history of sexual misconduct against minor female victims. When Stoudmire was 12 or 13 years old, he molested two 8-year-old girls and a 10-year-old girl by touching the girls on their breasts and vaginal areas. After the girls' parents found out about Stoudmire's behavior, they scolded him but did not report his behavior to the police.

In November 1980, when Stoudmire was 15 years old, he touched a 9-year-old girl on her vaginal area over her clothing and forced her 6-year-old sister to touch his penis over his clothing. Based on this sexual misconduct, a juvenile court adjudicated Stoudmire guilty of two

[1] Chapter 71.09 RCW.

counts of indecent liberties[2] and committed him to 26 to 32 weeks in a juvenile correctional facility.

After his release from juvenile commitment in September 1981, Stoudmire volunteered at a community center as a dance instructor for children who were 9 to 14 years old. In 1983, when Stoudmire was 18 years old, he began sexually abusing BP,[3] an 11-year-old girl in his dance group. From 1983 to 1987, Stoudmire continued to commit hundreds of sexual acts against BP, which acts included sexual intercourse. During that same time period, Stoudmire also committed sexual acts against 6 other girls in his dance group, CM, BB, C_, V_, EB, and ED; each of the girls was 11 to 13 years old when Stoudmire began sexually abusing them.

In June 1987, the State charged Stoudmire with indecent liberties based on his sexual misconduct against ED. ED had told the police that Stoudmire was also committing sexual acts against other members of the dance group, but Stoudmire convinced BP and BB to deny ED's allegations against him. Stoudmire continued to commit sexual acts against members in his dance group while he was awaiting trial on his indecent liberties charge. In January 1988, a jury found Stoudmire guilty of indecent liberties and the trial court sentenced him to one year and one day of incarceration. While Stoudmire remained out of custody pending an appeal of his indecent liberties conviction, he continued to commit sexual acts against former members of his dance group, including BP and CM.

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[2] Former RCW 9A.88.100 (1975).

[3] This opinion refers to the juvenile victims by their initials to protect their privacy interests. General Order 2011-1 of Division II, *In Re The Use Of Initials Or Pseudonyms For Child Witnesses In Sex Crimes Cases*, available at http:www.courts.wa.gov/appellate_trial_courts/.

Stoudmire served his sentence for indecent liberties from December 1989 to October 1990. After Stoudmire was released from incarceration, he went to live with the family of an 11-year-old girl, HS. A short time after moving in with the family, Stoudmire, who was then 26 years old, began committing sexual acts against HS, which acts included sexual intercourse. Stoudmire continued sexually abusing HS until 1992. In July 1992, the State charged Stoudmire with one count of second degree child rape[4] for his sexual misconduct against HS. Around that same time, the State separately charged Stoudmire for his sexual misconduct against BP and CM. In September 1993, Stoudmire pleaded guilty to second degree child rape for his sexual misconduct against HS, and he pleaded guilty to second degree statutory rape,[5] second degree child rape, third degree child rape,[6] and two counts of indecent liberties for his sexual misconduct against BP and CM.[7] The trial court sentenced Stoudmire to a total of 198 months of incarceration.

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[4] RCW 9A.44.076.

[5] Former RCW 9A.44.080 (1979). The legislature repealed former RCW 9A.44.080 in July 1988. LAWS OF WASHINGTON 1988, ch. 145, § 24. The State's information alleged that Stoudmire committed second degree statutory rape between September 1, 1985 and June 30, 1988, before the legislature had repealed former RCW 9A.44.080.

[6] RCW 9A.44.079.

[7] Our Supreme Court vacated Stoudmire's 1993 convictions of two counts of indecent liberties on statute of limitation grounds after Stoudmire filed a successful personal restraint petition. *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 354-55, 5 P.3d 1240 (2000). The vacation of Stoudmire's indecent liberties convictions did not affect his total incarceration term.

The State filed a petition to civilly commit Stoudmire as a sexually violent predator shortly before Stoudmire's scheduled release date. At the jury trial, Stoudmire admitted to the sexual misconduct described above.

Dr. Harry Hoberman testified as the State's expert witness. Hoberman testified that he had interviewed and had administered psychological testing on Stoudmire in 2007 and 2011.[8] In evaluating Stoudmire's psychological condition, Hoberman also relied on several documents, including Stoudmire's medical records, DOC records, police reports, and court documents.

Hoberman diagnosed Stoudmire with two types of paraphilia—pedophilia and hebephilia.[9] Hoberman opined that Stoudmire's paraphilia diagnoses constituted mental abnormalities[10] under the SVP statute. In this regard, Hoberman testified that paraphilia is a congenital or an acquired condition. And Hoberman testified that the condition affected Stoudmire's emotional or volitional capacity in such a degree that it predisposed Stoudmire to

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[8] Specifically, Hoberman testified that he had conducted three or four structured interviews and had administered the Minnesota Multiphasic Personality Inventory II (MMPI-II), the Millon Clinical Multiaxial Inventory second edition, the Paulhus Deception Scale, and the Personality Disorder Questionaire version 4 in 2007. He further testified that he had administered the MMPI-II, the Millon Clinical Multiaxial Inventory third edition, and the Multiphasic Sex Inventory II during his reevaluation of Stoudmire in 2011.

[9] Hoberman explained that paraphilia is a type of sexual disorder involving "recurrent, intense sexually arousing fantasies, sexual urges or behaviors." Report of Proceedings (May 28, 2013) at 107. Pedophilia is a paraphilia related to a sexual attraction to prepubescent children, whereas hebephilia is a paraphilia related to a sexual attraction to children who have attained puberty.

[10] RCW 71.09.020(8) defines "Mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others."

commit criminal acts endangering the health and safety of others based on Stoudmire's history of repeated sexual offending despite criminal sanctions.

Hoberman also diagnosed Stoudmire with two personality disorders: antisocial personality disorder and narcissistic personality disorder. Hoberman also determined that Stoudmire had a high level of psychopathy, which Hoberman described as "similar to a personality disorder." Report of Proceedings (RP) (May 28, 2013) at 137. Hoberman explained that "persons who have a higher degree of psychopathic traits are more likely to be involved in criminal behavior, violent behavior, [and] sexual offending." RP (May 28, 2013) at 137-38. Hoberman opined that Stoudmire's personality disorders constituted mental abnormalities under the SVP statute.

Hoberman stated his opinion that Stoudmire would more likely than not engage in predatory acts of sexual violence if not confined to a secure facility. Hoberman said that he based this opinion on Stoudmire's individual risk factors and by using actuarial tools to compare the recidivism rate of offenders that scored similarly to Stoudmire in the various psychological tests that Stoudmire completed. Hoberman concluded that, to a reasonable degree of psychological certainty, Stoudmire had one or more mental abnormalities and personality disorders that made him more likely than not to commit predatory acts of sexual violence if not confined to a secure facility.

Dr. Luis Rosell testified as an expert for the respondent. Rosell similarly diagnosed Stoudmire with pedophilia and antisocial personality disorder based on Stoudmire's history. Rosell opined, however, that based on the passage of time since his last offense and based on his participation in treatment, Stoudmire did not currently have serious difficulty controlling his

pedophilic behavior. Rosell also noted that antisocial personality disorder generally remits in the fourth decade of an individual's life. Rosell concluded that Stoudmire did not meet the criteria for commitment as an SVP because Stoudmire did not have a mental abnormality or personality disorder that made him likely to commit sexually violent acts in the future if not confined to a secure facility.

The jury returned a verdict finding that the State had proved beyond a reasonable doubt that Stoudmire was a sexually violent predator, and the trial court entered an order civilly committing Stoudmire to the custody of the Department of Social and Health Services. Stoudmire appeals.

ANALYSIS

Stoudmire asserts that the State failed to present sufficient evidence to support the jury's verdict finding that he met the definition of an SVP. Specifically, he contends that the State failed to present sufficient evidence that his mental abnormalities or personality disorders made him likely to engage in predatory acts of sexual violence if not confined in a secure facility. We disagree.

We apply the same standard of review to sufficiency challenges to SVP civil commitment determinations as we apply to sufficiency challenges to criminal convictions. *In re Det. of Thorell*, 149 Wn.2d 724, 744, 72 P.3d 708 (2003). Under this standard, "We must determine whether the evidence, viewed in a light most favorable to the State, is sufficient to persuade a fair minded rational person that the State has proven beyond a reasonable doubt that [the respondent] is a sexually violent predator." *State v. Hoisington*, 123 Wn. App. 138, 147, 94 P.3d 318 (2004) (citing *Thorell*, 149 Wn.2d at 744). We defer to the trier of fact on conflicting

testimony, witness credibility, and the persuasiveness of the evidence. *In re Det. of Sease*, 149 Wn. App. 66, 80, 201 P.3d 1078 (2009).

To civilly commit Stoudmire as an SVP, the State had to prove beyond a reasonable doubt that he met the definition of an SVP under RCW 71.09.020. *In re Det. of Post*, 170 Wn.2d 302, 310, 241 P.3d 1234 (2010). RCW 71.09.020(18) defines a "Sexually violent predator" as

> any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility.

This definition contains three elements that the State was required to prove beyond a reasonable doubt in order to civilly commit Stoudmire as an SVP:

> (1) that the respondent "has been convicted of or charged with a crime of sexual violence," (2) that the respondent "suffers from a mental abnormality or personality disorder," and (3) that such abnormality or disorder "makes the person likely to engage in predatory acts of sexual violence if not confined in a secure facility."

Post, 170 Wn.2d at 310 (quoting RCW 71.09.020(18)). Stoudmire challenges only the sufficiency of evidence in support of the third element—whether his mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility.

As an initial matter, Stoudmire frames this issue as a challenge to the evidence supporting a finding that he had a serious difficulty controlling his behavior, citing *Thorell*, 149 Wn.2d 724. Br. of Appellant at 13-14. In *Thorell*, our Supreme Court addressed whether the United States Supreme Court's decision in *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) (holding that due process requires a lack-of-control determination before a State could civilly commit a sexually violent offender), required the trial court to instruct the jury in an SVP

proceeding to return a specific finding that the respondent had a serious difficulty controlling his or her behavior. 149 Wn.2d at 735-36. The *Thorell* court answered this question in the negative, reasoning that the standard "to commit" jury instruction listing the three elements of an SVP determination adequately required a finding that the respondent had a serious difficulty controlling his or her behavior and, thus, satisfied the due process concerns addressed in *Crane*. 149 Wn.2d at 742-43. Because *Thorell* explicitly held that *Crane* did not require the State to prove any additional elements beyond the three required elements to an SVP determination, we consider this issue as a challenge to the third element (whether Stoudmire's mental abnormality or personality disorder makes him likely to engage in predatory acts of sexual violence if not confined in a secure facility).

Stoudmire acknowledges the evidence at trial that Hoberman had diagnosed him with a mental abnormality of paraphilia, had opined that the abnormality affected Stoudmire's emotional or volitional control, and had concluded that the abnormality predisposed him to commit predatory acts of sexual violence in the future if not confined. But he asserts that Hoberman's testimony was insufficient to support the jury's SVP determination because "[i]n the 25 years since his conviction, ample evidence demonstrates that Mr. Stoudmire has the capacity to manage his behavior." Br. of Appellant at 15.

This argument ignores the scope of our review in assessing the sufficiency of evidence in support of an SVP determination because it asks us to view the evidence in a light most favorable to the respondent, to resolve issues of conflicting testimony and witness credibility, and to evaluate the persuasiveness of evidence. But in reviewing the evidence in support of an SVP determination, we view the evidence in a light most favorable to the State, and we defer to

the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Hoisington*, 123 Wn. App. at 147; *Sease*, 149 Wn. App. 80.

Here, applying the correct standard to our review of Stoudmire's sufficiency challenge, we hold that the State presented ample evidence through Hoberman's expert testimony that Stoudmire had a mental abnormality or personality disorder making him likely to engage in predatory acts of sexual violence if not confined in a secure facility. Accordingly, we affirm the trial court's order civilly committing Stoudmire as an SVP.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, P.J.

We concur:

Lee, J.

Sutton, J.