

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUN 11 2009

NO. 37934-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2009 JUN 11 AM 10:40

In re the Detention of:

James LaBaum,

Appellant.

BRIEF OF RESPONDENT

ROBERT M. MCKENNA
Attorney General

JOSHUA CHOATE
Assistant Attorney General
WSBA # 30867
800 Fifth Avenue, Suite 2000
206-464-6430

FILED
COURT OF APPEALS
DIVISION II
09 JUN 15 AM 9:04
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

 ORIGINAL

TABLE OF CONTENTS

I. ISSUES PRESENTED.....1

 1. Where the trial court concluded that the State had proved a recent overt act at trial, should Mr. LaBaum’s claim that the State was improperly relieved of its burden to prove a recent overt act be considered on appeal?.....1

II. STATEMENT OF THE CASE.....1

 A. Mr. LaBaum’s Custodial Status At The Time The SVP Case Was Filed2

 B. Evidence That Mr. LaBaum Committed A Recent Overt Act.....5

III. ARGUMENT6

 A. Proof Of A Recent Overt Act Was Not Required In This Case.....6

 B. The Record Contains Sufficient Evidence To Establish Beyond A Reasonable Doubt That Mr. LaBaum Committed A Recent Overt Act.....10

IV. CONCLUSION13

TABLE OF AUTHORITIES

Cases

| | |
|---|-------|
| <i>In re Detention of Hovinga</i> , 132 Wn. App. 16, 130 P.3d 830 (2006)..... | 8, 13 |
| <i>In re the Detention of Albrecht</i> , 147 Wn.2d 1, 51 P.3d 73 (2002)..... | 11 |
| <i>In re the Detention of Broten</i> , 130 Wn. App. 326, 122 P.3d 942 (2005)..... | 7, 10 |
| <i>In re the Detention of Henrickson</i> , 140 Wn.2d 686, 2 P.3d 473 (2000)..... | 7 |
| <i>In re the Detention of Kelley</i> , 133 Wn. App. 289, 135 P.3d 554(2006)..... | 8 |
| <i>In re the Detention of Paschke</i> , 136 Wn. App. 517, 150 P.3d 586 (2007)..... | 7, 8 |
| <i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002)..... | 9 |
| <i>State v. Eaker</i> , 113 Wn. App. 111, 53 P.3d 37 (2002)..... | 9 |
| <i>State v. Jennings</i> , 111 Wn. App. 54, 44 P.3d 1 (2002)..... | 10 |

Statutes

| | |
|------------------------|---|
| RCW 9.94A.030(44)..... | 7 |
| RCW 13.40.300 | 3 |
| RCW 71.09 | 6 |

| | |
|------------------------|--------------|
| RCW 71.09.020(10)..... | 4, 5, 11, 12 |
| RCW 71.09.020(15)..... | 1, 9 |
| RCW 71.09.020(16)..... | 2 |
| RCW 71.09.030(1)..... | 7 |
| RCW 72.64.050 | 7 |
| RCW 72.64.060 | 7 |

I. ISSUES PRESENTED

1. Where the trial court concluded that the State had proved a recent overt act at trial, should Mr. LaBaum's claim that the State was improperly relieved of its burden to prove a recent overt act be considered on appeal?
2. Is evidence that Mr. LaBaum was masturbating to deviant themes including sexual activity with children and nonconsenting persons five to seven times daily, coupled with Mr. LaBaum's admission that he was going to reoffend against a minor male if released into the community, sufficient proof of a "recent overt act?"

II. STATEMENT OF THE CASE

James LaBaum is a seriously mentally ill man whose mental disorder includes a sexual attraction to children and forced sex that he is incapable of controlling. He has been convicted of two sexually violent offenses as that term is defined by RCW 71.09.020(15). Specifically, Mr. LaBaum has a 1999 conviction for Indecent Liberties with Forcible Compulsion, and a 2001 conviction for Attempted Rape of a Child in the First Degree. CP at 80. As a result of those convictions, he was placed in the custody of the Juvenile Rehabilitation Administration (JRA). During that time, Mr. LaBaum continued to be sexually aroused to forced sex with adults and young children. RP at 200. Even while in confinement, he was unable to control his sexual behavior. RP at 200-205.

In December 2006, when Mr. LaBaum was nearing his release date, he was masturbating five to six times per day to thoughts of sex with children or to forced sex with persons of all ages. RP at 203-204. At that

time, Mr. LaBaum was also rated on an actuarial tool that uses a variety of researched factors to measure the likelihood that a sex offender will re-offend. Mr. LaBaum's score on that tool was similar to a group of offenders with a recidivism rate of 100%. RP at 255.

On January 9, 2007, shortly before he was about to be released from his sentence for the Attempted Rape of a Child, the State filed a Petition alleging Mr. LaBaum was a sexually violent predator (SVP) as defined by RCW 71.09.020(16). CP at 1-2. In May 2008, after a four day bench trial, Judge James Warne of the Cowlitz County Superior Court found that Mr. LaBaum met SVP criteria. The trial court also ruled that the state did not have to prove a recent overt act because LaBaum was in total confinement on a "sexually violent offense" at the time the state filed the SVP Petition, but nonetheless, it also found that the state did prove a recent overt act. CP at 68-69.

A. Mr. LaBaum's Custodial Status At The Time The SVP Case Was Filed

In 2005, Mr. LaBaum was granted parole from his Attempted Rape of a Child sentence. He was placed under strict supervision conditions, and released to the Citizen Access Residential Resources (CARR) program in Olympia, WA. CP at 80. CARR provides housing and resources for developmentally disabled young adults. RP at 53-54. Mr. LaBaum lived in a fully staffed home operated by CARR from

approximately March 2005 through April 2006. RP at 146. While at this home, Mr. LaBaum was under the constant supervision of at least two adults at all times. Also, he was the only person living in that particular home due to CARR's concern that Mr. LaBaum would be unable to control himself around other residents. RP at 55.

Mr. LaBaum was eventually removed from the CARR program because he physically assaulted a staff member. As a result, he was convicted of Assault in the Fourth Degree, and spent a period of months in the Thurston County jail. RP at 63. The assault also rendered Mr. LaBaum ineligible to return to the CARR house. *Id.* While at the Thurston County Jail, Mr. LaBaum's behavioral problems continued. RP at 65. Consequently, his JRA parole was revoked, and he was returned to a JRA detention facility where he remained confined until shortly after this case was filed. *Id.*

JRA loses the jurisdictional authority to supervise or detain persons over the age of twenty-one. RCW 13.40.300. In December 2006, as Mr. LaBaum's twenty-first birthday approached, Dr. Brian Judd, Ph.D. was retained by the Joint Forensic Unit to conduct a SVP psychological evaluation of Mr. LaBaum. RP at 144-145. The evaluation consisted of a review of approximately 3,900 pages of records pertaining to Mr. LaBaum, and a personal interview of Mr. LaBaum at Maple Lane. RP

at 145-147. After considering all of this information, Dr. Judd concluded that Mr. LaBaum did meet the SVP definition. RP at 235-236; RP at 258-260. The SVP Petition was filed shortly thereafter.

Because he was serving a sentence for a sexually violent offense at the time State filed, the petition initiating SVP proceedings against Mr. LaBaum did not allege that he committed a recent overt act. CP at 1-2. Rather, it noted that Mr. LaBaum was currently incarcerated as a result of having his parole revoked. *Id.* As noted above, Mr. LaBaum resided with CARR for approximately one year before his ultimate return to Maple Lane. Although, Mr. LaBaum was under constant supervision during his time with CARR, the State subsequently moved to amend the Petition to allege a recent overt act. CP at 49. That motion was ultimately granted. RP at 14. The Amended Petition included the following allegation:

Furthermore, Respondent has committed a recent overt act, as that term is defined in RCW 71.09.020(10). On or about December 20, 2006, during a forensic interview with Dr. Brian Judd, Respondent reported masturbating five to seven times per day to paraphilic themes involving coerced oral and anal intercourse with both minor and adult males and females. Respondent was engaging in these paraphilic behaviors just prior to the State filing its initial petition in this case on January 9, 2007. – Amended Pet. CP 63

CP at 63.

B. Evidence That Mr. LaBaum Committed A Recent Overt Act

A recent overt act is “any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act.” RCW 71.09.020(10). At trial, Dr. Judd testified at length about the mental disorders from which Mr. LaBaum suffers, the risk assessment, and the content of his December 20, 2006 interview. When asked about whether Mr. LaBaum had committed a recent overt act, Dr. Judd testified:

There’s so many different events, but I suppose specifically the time that I conducted the interview with him on 12/20/06 in which he self-reported compelling arousal particularly to minors and to fantasies of coercion, and of those I regarded the arousal to minors as being the most significant.

...

He reported that he was masturbating to children ... five to seven times daily.

...

[I]t’s basically -- the term or the phrase that we typically use is it’s reinforcing a paraphilic outlet. In more standard English, he’s just reinforcing his arousal to deviant themes, to themes involving children or themes involving coercion. And he has demonstrated a history of acting upon that masturbation in the past. ... [I]n particular the one that comes to mind immediately is documented in Bate stamp 902, in which he describes masturbating to the fantasy or the thoughts of [the victim of Mr. LaBaum’s 2001 Attempted Rape] on the day that he offended against her prior to actually commission of the offense. And apparently attempted to offend against her not once, but twice during that day on the day in question. So the masturbation to her that he engaged in, reported that he engaged in prior to the

actual commission of the offense links those kinds of masturbatory behaviors with the actual actions themselves.

And based upon that, I felt that the self-report of masturbating to, continued masturbation to, number one, all paraphilic things, okay, nothing that's nonparaphilic, non-coercive, non-children, but that constituted a recent overt act and gave me a real concern that he would engage in an act of sexual violence against somebody if given the opportunity.

RP at 261-263.

During his interview, Dr. Judd also asked Mr. LaBaum if he was concerned that he might commit another sex offense if released into the community. Regarding that discussion, Dr. Judd testified:

During the course of the interview I posed the question, quote, "Do you think if you were released into the community and you were around a little boy, you might do something like this," close quote. And in the context of that conversation I was referring to sexually re-offend, and he responded, quote, "Yeah, I can't control my thoughts, I've seen it happen."

RP at 257

III. ARGUMENT

A. Proof Of A Recent Overt Act Was Not Required In This Case

Mr. LaBaum argues that the State was improperly relieved of its burden to prove that he committed a recent overt act prior to the filing of the SVP Petition. This argument is misplaced. Civil commitment pursuant to Chapter 71.09 RCW "is premised on a finding of current dangerousness." *In re the Detention of Broten*, 130 Wn. App. 326, 335,

122 P.3d 942 (2005) (citing *In re the Detention of Hendrickson*, 140 Wn.2d 686, 692, 2 P.3d 473 (2000)). The State may file a sexually violent predator petition against a person who may be a sexually violent predator and who previously has been convicted of a sexually violent offense if the person “is about to be released from total confinement” without proof of a recent overt act. RCW 71.09.030(1). “‘Total confinement’ means confinement inside the physical boundaries of a facility or institution operated or utilized under contract by the state or any other unit of government for twenty-four hours a day, or pursuant to RCW 72.64.050 and 72.64.060.” RCW 9.94A.030(44).

It “is generally not required to prove the individual committed a recent overt act where the individual is incarcerated on the day the petition is filed for a sexually violent act or for an act that qualifies as a recent overt act.” *In re the Detention of Paschke*, 136 Wn. App. 517, 521, 150 P.3d 586 (2007) (citing *In re the Detention of Marshall*, 156 Wn.2d 150, 156-57, 125 P.3d 111 (2005)). Moreover, “[p]eriods of temporary release after arrest and prior to extensive confinement do not modify the statute’s unambiguous directive that the State need not prove a recent overt act when the subject of a sexually violent predator petition is incarcerated on the day the petition is filed.” *In re the Detention of Henrickson*, 140 Wn.2d 686, 693, 2 P.3d 473 (2000); *In re the Detention of Kelley*, 133

Wn. App. 289, 294, 135 P.3d 554(2006). Here, at trial, the court found that proof of a recent overt act was not required because Mr. LaBaum was in custody for a sexually violent offense and about to be released when the Petition was filed. RP at 321-322.

In *Paschke*, the alleged SVP was convicted of a second degree rape in 1979, and released on parole in 1987. *Paschke* at 519. In 1989, while still on parole, he made numerous telephone calls over a 10-day period to E.C., partly telling her he knew where she lived and repeatedly threatening to rape her. Based on that incident, Paschke's parole was revoked, and he was returned to prison to serve the remaining five years of his 1979 sentence. *Id.* at 519-520. Shortly before Paschke's 1979 sentence was set to expire, the State petitioned to have him civilly committed as a SVP. *Id.* at 520. The Court of Appeals held that proof of a recent overt act was not required in this circumstance. *Id.* at 523 (*see also In re Detention of Hovinga*, 132 Wn. App. 16, 23, 130 P.3d 830 (2006) (SVP who's parole was revoked prior to filing of SVP case deemed to be was incarcerated for a sexually violent offense when the petition was filed); *Kelley* at 294 (Proof of recent overt act not required where SVP was serving the last months of a 20-year sentence for first degree statutory rape after parole was revoked).

Like Paschke, Mr. LaBaum was in total confinement serving the sentence imposed on a “sexually violent offense,” his Attempted First Degree Rape conviction, when this SVP case was filed. RCW 71.09.020(15). Just like Paschke, Mr. LaBaum was returned to confinement after time spent in the community due to a parole revocation, and his sentence was about to expire when the SVP Petition was filed. Even assuming his placement in the CARR house under 24-hour supervision amounted to release from total confinement, Mr. LaBaum was back in confinement for several months prior to the initiation of this case. Therefore, proof of a recent overt act was not required in this case and Mr. LaBaum’s argument is without merit.

In addition, Mr. LaBaum’s argument also ignores the fact that the State did prove a recent overt act at trial, as the trial court noted in its ruling. CP at 84. Thus, at trial, the State met every requirement of proof that he believes should have been imposed with uncontroverted evidence. RP at 363 (defense expert acknowledges that Mr. LaBaum masturbates frequently to thoughts of children). As such, even if this Court believes that the trial court improperly relieved the State of a portion of its burden of proof by finding a recent overt act was not required, the error was harmless. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002); *State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002); *State v. Jennings*,

111 Wn. App. 54, 62-63, 44 P.3d 1 (2002). Consequently, Mr. LaBaum's appeal should be denied.

B. The Record Contains Sufficient Evidence To Establish Beyond A Reasonable Doubt That Mr. LaBaum Committed A Recent Overt Act

Finally, Mr. LaBaum argues that masturbating to sexual fantasies about children and forced sex just prior to his release date did not amount to a recent overt act. Specifically, he argues that the trial court did not have sufficient evidence to support its conclusion that a recent overt act had occurred. When sufficiency of the evidence is challenged, the evidence is viewed in the light most favorable to the State to determine if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt. *In re the Detention of Broten*, 130 Wn. App. 326, 334, 122 P.3d 942, 946 (2005) (citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003)). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be drawn therefrom. *Id.* at 334-335 (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial evidence is as reliable as direct evidence. *Id.* (citing *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). The appellate court defers to the trier of fact regarding witness credibility, conflicting testimony, and the persuasiveness of the evidence. *Id.* (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

A person who “has since been released from total confinement,” however, may not be the object of a petition for commitment unless the person has also committed “a recent overt act.” RCW 71.09.020(10). A recent overt act is “any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm.” *Id.* The existence of a recent overt act in cases where the alleged SVP has been released into the community “necessarily satisfies the dangerousness element required by due process. This is because the recent overt act requirement directly and specifically speaks to a person’s dangerousness and thus satisfies the dangerousness element required by due process.” *In re the Detention of Albrecht*, 147 Wn.2d 1, 11, 51 P.3d 73 (2002).

Given the level of scrutiny Mr. LaBaum was under while on parole at the CARR house, the trial court was conflicted about whether or not he was ever actually released from confinement prior to the filing of the SVP Petition. RP at 316-317. Regardless, it ruled that proof of a recent overt act was not required because Mr. LaBaum was in custody and about to be released when the Petition was filed. However, in an abundance of caution, the trial court found that one had occurred. RP at 395 (“Clearly, there’ve been acts. His own orientation, his own discussion of his acts, they’re acts.”). The trial court also made the following written findings and conclusions:

I. FINDINGS OF FACT

...

16. On December 20, 2006, during a forensic interview, Dr. Judd asked Respondent if he would offend against a minor male if released into the community. Mr. LaBaum answered, "Yeah. I can't control my thoughts. I've seen it happen." During the same interview, Mr. LaBaum admitted that he was masturbating five to seven times a day to deviant themes of violent rape and sexual contact with children ages 8 to 11 years old. Respondent also admitted that all of his fantasies were deviant.

17. Dr. Brett Trowbridge testified on behalf of Respondent. Dr. Trowbridge testified that Respondent needed supervision until he was elderly because he was at high risk to criminally reoffend, to include sexual offenses. Dr. Trowbridge also testified that Mr. LaBaum is sexually attracted to a wide range of people as well as objects.

...

II. CONCLUSIONS OF LAW

...

11. Nonetheless, this Court concludes that the Petitioner proved Respondent committed a recent overt act, as defined in RCW 71.09.020(10), with evidence that Respondent was masturbating to deviant themes including sexual activity with children and nonconsenting persons five to seven times daily, and also with evidence of Respondent's admission that he was going to reoffend against a minor male if released into the community.

CP at 79-84.

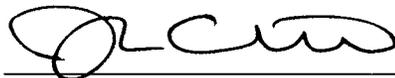
Here, LaBaum argues the recent overt act evidence was insufficient because his deviant behavior was "natural" and not indicative of a lack of self control. However, not only is frequent daily masturbation to deviant fantasies unnatural, it is also indicative of a person who is compelled to engage in deviant behaviors. This is further evidenced when

Mr. LaBaum acknowledges that child molestation and rape are wrong, yet is unable to control himself. RP at 195. At trial, Dr. Judd testified that the research in his field showed that sexual compulsivity, like Mr. LaBaum's, is a factor that was identified as "important and related to imminent risk for recidivism or re-offense." RP at 264. In addition, the masturbatory behavior displayed by Mr. LaBaum is similar to behavior found sufficient to satisfy the recent overt act definition in other SVP cases. *See e.g. Hovinga* at 24, 130 P.3d 830, 834 (masturbating while following young girls around a department store was a recent overt act). Thus, sufficient evidence exists to support the trial courts findings in this case, and Mr. LaBaum's appeal should be denied.

IV. CONCLUSION

For the foregoing reasons, Mr. LaBaum's appeal is without merit and his civil commitment should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of June, 2009.



JOSHUA CHOATE, WSBA # 30867
Assistant Attorney General
Attorney for State of Washington
800 Fifth Avenue, Suite 2000
Seattle, Washington 98104
(206) 389-3075

RECEIVED
COURT OF APPEALS
DIVISION ONE

JUN 11 2009

NO. 37934-1-II

WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

James LaBaum,

Appellant.

DECLARATION OF
SERVICE

FILED
COURT OF APPEALS DIV. II
STATE OF WASHINGTON
2009 JUN 11 AM 10:40

I, Allison Martin, declare as follows:

On this 11th day of June, 2009, I deposited in the United States
mail true and correct cop(ies) of Brief of Respondent, postage affixed,
addressed as follows:

Lisa Tabbut
P.O. Box 1396
Longview, WA 98632-7822

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 11th day of June, 2009, at Seattle, Washington.

Allison Martin
ALLISON MARTIN

FILED
COURT OF APPEALS
DIVISION II
09 JUN 15 AM 9:04
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

 ORIGINAL