FILED

OCT 20 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

NO. 28867-6-III

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IN RE THE DETENTION OF
RONALD R. TIMM,

Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. Expert testimony failed to establish, beyond a reasonable doubt, that Ronald R. Timm is a sexually violent predator (SVP).

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Does an expert opinion, which is contrary to a battery of actuarial tests, and which relies upon so-called predictive factors that are purely subjective, and which is in conflict with established recidivism rates for Washington sex offenders, provide sufficient evidence to enable a jury to find a person to be a SVP beyond a reasonable doubt?

STATEMENT OF CASE

Mr. Timm was scheduled to be released from prison on May 13, 2006. He was serving a sentence on a conviction of first degree child rape which occurred in 1997. The State filed a Sexually Violent Predator Petition on May 1, 2006. (CP 1; CP 6; RP 797, ll. 3-4).

Numerous waivers were filed in order to allow counsel to properly prepare for trial. Mr. Timm's trial commenced on February 22, 2010. A portion of his video deposition was played at trial pursuant to notice previously given to his attorney. (CP 57; CP 72; CP 75; CP 84; CP 86; CP 94;

CP 267; CP 789, ll. 11-14; RP 935, l. 25 to 936, l. 11; RP 937, ll. 3-17; RP 1053, ll. 12-16).

Mr. Timm was convicted of attempted statutory rape in 1989. He received a SSOSA sentence. He was supervised by Steven Holmes a Department of Corrections (DOC) Community Corrections Officer (CCO). (RP 696, l. 19 to RP 697, l. 8; RP 698, ll. 13-18; RP 701, ll. 14-20).

Mr. Holmes described Mr. Timm as "all show and no go" in reference to sex offender treatment. Mr. Timm continued to have unsupervised contact with minors and was violated on two occasions. Eventually his SSOSA was revoked. (RP 721, ll. 14-17; RP 723, ll. 13-16; RP 726, ll. 3-8; RP 727, ll. 6-8; RP 729, ll. 13-14; RP 730, l. 21 to RP 732, l. 10; RP 741, ll. 3-8).

Lori Zickler, a former DOC employee, interviewed Mr. Timm in July 1990. During the interview Mr. Timm admitted to fantasies of touching minor children and removing their clothes. He masturbated to these fantasies. (RP 779, ll. 18-20; RP 780, ll. 1-4; RP 781, ll. 22- 25; RP 782, ll. 1-3).

After he was incarcerated in 1997, Eric Currier, a CCO and psychologist with DOC assessed him for amenability to sex offender treatment. Mr. Currier found Mr. Timm amenable to treatment. He was high risk due to his continued obsession with minors and his masturbation to fantasies on a regular basis. (RP 820, ll. 1-4; ll. 7-11; RP 821, l. 18 to RP 823, l. 5; RP 837, ll. 14-16; RP 837, l. 25 to RP 838, l. 7).

Stuart Frothingham, a DOC community treatment provider for sex offenders at Twin Rivers, conducted a penile plethysmograph (PPG) examination of Mr. Timm in July 2003. The PPG, by itself, is not a diagnostic instrument. However, it does act as a strong predictor of sexual preference. (RP 839, ll. 19-23; RP 840, l. 10 to RP 841, l. 9; RP 934, ll. 1-8).

Mr. Frothingham described Mr. Timm's PPG response. It increased with respect to females ages four (4) through thirteen (13). Mr. Timm was categorized as having compliant female sexual preferences for both minors and adults. (RP 847, l. 10 to RP 848, l. 11; RP 855, ll. 7-11; RP 917, ll. 14-18).

While he was incarcerated Mr. Timm engaged in the Sexual Offender Treatment Program (SOTP). Sally Neiland, now the director of the Washington State Sex Offender Treatment Program, worked with Mr. Timm at that time. Mr. Timm admitted to having twenty-four victims (23 female and 1 male) between the ages of three and a half (3 ½) and seven (7). He prepared a sexual history timeline in connection with his treatment program. (RP 942, ll. 22-23; RP 951, ll. 6-7; RP 955, ll. 15-20; CP 348).

Ms. Neiland described SOTP as having the goal of reducing deviant sexual arousal. She further described sexual preoccupation as a person's sexual thoughts, fantasies, masturbation or behaviors adversely impacting normal life relationships. (RP 952, ll. 9-13; RP 964, ll. 1-4).

Mr. Timm was required to present his sexual history timeline in a group setting. Ms. Neiland described him as reading it without emotion. During another discussion Mr. Timm told her: "If I don't have this, I won't have anything," (referring to being able to achieve sexual pleasure). (RP 976, ll. 2-21; RP 981, ll. 15-21).

Mr. Timm was eventually terminated from the SOTP program. (RP 997, ll. 7-11).

The State retained Dr. Goldberg, a forensic psychologist to evaluate Mr. Timm. The initial evaluation was conducted in 2005. An update was performed in 2009. (RP 1054, ll. 21-22; RP 1065, ll. 3-9).

Dr. Goldberg determined that Mr. Timm suffers from pedophilia. He is sexually attracted to females, non-exclusive type. Dr. Goldberg described pedophilia for the jury. (RP 1096, ll. 21-24; RP 1097, ll. 3-10).

Mr. Timm admitted his attraction to young girls during an interview with Dr. Goldberg. However, Mr. Timm is attracted to both adult and minor females. (RP 1103, l. 16 to RP 1104, ll. 20-23; RP 1183, ll. 16-17).

Pedophilia is a chronic condition. Nevertheless, Dr. Goldberg admitted that Mr. Timm's age (60 on September 1, 2010) does impact sexual recidivism. (RP 1109, ll. 1-4; l. 20; RP 1140, ll. 4-13).

Dr. Goldberg administered a number of actuarial tests to determine whether or not Mr. Timm was a (SVP). The tests included the **Static 99R, Static 2002R, MnSOST-R, SORAG and the HARE Psychopathy In-**

dex. Mr. Timm scored from moderately low to high risk. (RP 1115, l. 17; l. 22; RP 1116, l. 2; ll. 12-13; RP 1117, ll. 22-23; RP 1120, ll. 20-23; RP 1121, ll. 22-23; RP 1123, l. 4).

Dr. Goldberg also applied dynamic risk factors in his assessment of Mr. Timm. He did this because of the vast disagreement among the actuarial tests, the categories within the tests, and the results of the tests. (RP 1116, l. 23; RP 1128, ll. 13-15).

Even though Dr. Goldberg's initial screening of Mr. Timm placed him in a high risk category, the actuarial tests did not fully confirm that fact. The results of the tests were:

Static 99R	-	15.8% @ 5 years and 24.3% @ 3 years
Static 2002R	-	29.3% @ 5 years and 39.7% @ 10 years
MnSOST	-	30 to 57%
SORAG	-	39 to 59%.

(RP 1120, ll. 13-19; RP 1121, l. 1; RP 1122, ll. 1-4; RP 1123, ll. 9-11; ll. 18-22; RP 1124, l. 8).

Dr. Goldberg described dynamic risk factors which come from a publication known as the **Stable 2007**. The factors, along with Dr. Goldberg's assessment of those factors in relation to Mr. Timm, are:

Significant social influences – mixed

Relationship stability – negative due to disfunctionality.

Emotional identification with children – aggravating based upon the fact that Mr. Timm knows a lot about children and what they like.

Hostility toward women – mixed.

General social rejection – favorable due to the fact that Mr. Timm is a social person.

Lack of concern for others – aggravating due to lack of remorse.

Sexual preoccupation – mixed.

Sex as coping – aggravating.

Deviant sexual interest – aggravating.

Lack of cooperation with supervision – mixed.

Impulsivity - favorable because Mr. Timm is not an impulsive person.

Poor problem solving skills – aggravating.

Negative emotionality – aggravating.

(RP 1130, ll. 1-4; ll. 10-22; RP 1131, ll. 3-13; RP 1131, l. 15 to RP 1132, l. 10; RP 1132, ll. 12-19; RP 1132, l. 22 to RP 1133, l. 2; RP 1133, ll. 4-12; ll. 16-24; RP 1133, l. 25 to RP 1134, ll. 8-15; RP 1134, l. 16 to RP 1135, l. 1; RP 1135, ll. 2-24).

Dr. Goldberg admitted that controversy exists on how to use dynamic risk factors within the profession. He decided to move Mr. Timm up one risk category based upon the presence of certain factors. He did this because he believed there is a moderate correlation between sexual deviance and recidivism. (RP 1136, ll. 3-10; RP 1137, ll. 16-18; RP 1145; ll. 6-13).

The test results on the Hare-PCL-R were low and indicated that Mr. Timm was not psychopathic. However, because Mr. Timm scored high on an interpersonal facet of the test Dr. Goldberg used it as an aggravating factor in his analysis. He also described treatment failure as an aggravating factor. (RP 1138, ll. 4-19; RP 1139, ll. 1-13).

It is Dr. Goldberg's opinion that Mr. Timm is a SVP due to the predatory nature of his sexual acts and that he needs to be confined. (RP 1142, ll. 14-15; RP 1144, ll. 15-25).

Dr. Goldberg admitted that pedophilia can become dormant or be controlled. He also admitted that Mr. Timm does not have a personality disorder. (RP 1156, ll. 4-14; RP 1172, ll. 17-19).

Dr. Goldberg conceded that few sixty (60) year old sex offenders actually reoffend. Nevertheless, he believes that Mr. Timm is a very different type of sex offender; not like a normal fifty-eight (58), fifty-nine (59) or sixty (60) year old sex offender. (RP 1184, ll. 18-22; RP 1183, ll. 12-15).

Recidivism rates are declining nationwide. The current recidivism rate in Washington State is 2.7%. The recidivism rate in the United States for sex offenders is under 5%. (RP 1177, ll. 1-6; RP 1180, ll. 2-5; RP 1196, l. 15).

Dr. Goldberg testified that even though recidivism rates are declining, there is a 23% recidivism rate in Washington as to sex offenders similar to Mr. Timm. (RP 1232, ll. 10-16).

Mr. Timm's expert was Dr. Donaldson, a clinical psychologist specializing in forensic psychology. (RP 1249, ll. 11-12; ll. 23-24).

Dr. Donaldson opined that uncertainty exists about Mr. Timm's ability to control his behavior. The uncertainty revolves around "choice" versus "inability to control." (RP 1265, ll. 18-21).

Dr. Donaldson also discussed a study on recidivism conducted by Dr. Malloy in Washington. The study indicated that no person over fifty years of age had reoffended. (RP 1342, ll. 18-23).

A jury determined that Mr. Timm qualified as a SVP. An order of commitment was entered on March 3, 2010. Mr. Timm filed his Notice of Appeal the same date. (CP 963; CP 964; CP 965).

SUMMARY OF ARGUMENT

The evidence does not support a determination that Mr. Timm is a SVP. Dr. Goldberg's opinion is unsound and runs counter to the actuarial test results.

A careful analysis of the trial testimony of Dr. Goldberg leads to the conclusion he had to find some way of declaring Mr. Timm a SVP, even if it contradicted the test results.

ARGUMENT

Mr. Timm's challenge to the sufficiency of the evidence based upon inadequate expert opinion must be

> ... viewed in...[a] light most favorable to the State, [and] there must be sufficient evidence in the finding of mental illness to allow a rational trier of fact to conclude the person facing commitment has serious difficulty controlling behavior.

Detention of Thorell, 149 Wn. 2d 724, 744-45, 72 P. 3d 708 (2003).

Experts use actuarial tests in order to validate their opinions concerning future dangerousness. In Mr. Timm's case, the actuarial tests did not meet the criteria of "more likely than not" and thus do not satisfy the "likely to engage in predatory acts of sexual violence" portion of the SVP statute. *See:* RCW 71.09.020 (7),(16).

Dr. Goldberg testified to the following:

Mr. Timm's condition affects his emotional capacity

and impairs him. (RP 1110, l. 22 to RP 1111, l. 3).

Mr. Timm's abnormality causes him "some difficulty

in controlling his sexually violent behavior." (RP 1112,

ll. 1-6)

A preponderance of the evidence indicates that Mr.

Timm has "problems controlling sexual behavior."

(RP 1113, ll. 3-4).

Mr. Timm contends that Dr. Goldberg's opinion is so flawed that no rational jury could have determined, beyond a reasonable doubt, that he qualifies as a SVP.

> To determine whether the jury's verdict in a SVP case was based on sufficient evidence, 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 proved beyond a reasonable doubt that [the defendant] is a sexually violent predator." *State v. Hoisington,* 123 Wn. App. 138, 147, 94 P. 3d 318 (2004). " The substantial evidence test is satisfied if this court is convinced that 'a rational trier of fact *could* have found each means of [fulfilling the SVP requirements] proved beyond a reasonable doubt.'" [Citation omitted.]

Detention of Sease, 149 Wn. App. 66, 79, 201 P. 3d 1078 (2009).

Dr. Goldberg and Dr. Donaldson both concluded that Mr. Timm suffers from a mental abnormality; *i.e.,* pedophilia. (Appendix "A")

"Because of the egosyntonic nature of pedophilia, many individuals with pedophilic fantasies, urges, or behaviors do not experience significant distress." DSM IV-TR, § 302.2

The only evidence that Mr. Timm's pedophilia causes him any type of distress is his statement concerning loss of interest in children. He would then have nothing else upon which to rely for sexual satisfaction.

At first blush it would appear that a diagnosis of pedophilia, in and of itself, would be sufficient to satisfy the SVP statute. However, "...a diagnosis of a mental abnormality or personality disorder is not, in itself, sufficient evidence for a jury to find a serious lack of control." *Detention of Thorell, supra,* 761-62.

It is for the forgoing reason that experts in SVP proceedings rely upon actuarial instruments. The actuarial instruments used in Mr. Timm's evaluation do not establish, beyond a reasonable doubt, that he is more likely than not to engage in predatory acts of sexual violence.

The Static 99R and the Static 2002R, as well as the Hare PCL-R all indicate that Mr. Timm's likelihood of reoffending his less than 30%.

The MnSOST-R and the SORAG give a range of possible re-offense. Dr. Goldberg's testimony did not assign any specific percentage to Mr. Timm. Rather, Dr. Goldberg used the dynamic risk factors to try and satisfy the required burden of proof placed upon the State.

The *Thorell* case addresses the acceptability of actuarial instruments in Washington courts.

> ...[T]here are two broad approaches to conducting risk assessments: clinical judgment or actuarial assessment. [Citation omitted.] The clinical approach requires evaluators to consider a wide range of risk factors and then form an overall opinion concerning future dangerousness. The actuarial approach evaluates a limited set of predictors and then combines these variables using a predetermined, numerical weighting system to determine future risk of re-offense which may be adjusted (or not) by expert evaluators considering potentially important factors **not included in the actuarial measure.**

Detention of Thorell, supra, 753. (Emphasis supplied.)

Query: Why use actuarial testing if it is not an accurate indicator of reoffense?

Query: Aren't the dynamic risk factors repetitive and already included in the actuarial tests and/or the diagnosis of pedophilia?

Mr. Timm argues that the dynamic risk factors utilized by Dr. Goldberg to place him in a high risk category are already included in the actuarial tests.

Actuarial tests are based upon static factors. These are factors that are unchanging. Dynamic risk factors are utilized for clinical assessment. However, they are subjective in nature and, as discussed by Dr. Goldberg, appear to be significantly stable and substantially similar to the actuarial test factors.

Dr. Goldberg testified that you "have to look at each case differently." (RP 1200, ll. 14-15).

Dr. Goldberg treated the factor of emotional identification with children as an aggravating factor. However, this factor is of necessity included in the diagnosis of pedophilia. It should not be considered separately from the mental abnormality itself. The same can be said of sexual preoccupation and deviant sexual interest.

Dr. Goldberg did not find that Mr. Timm suffers from a personality disorder. Yet, the dynamic risk factors of negative emotionality, lack of cooperation with supervision, and hostility toward women seem to pertain to personality traits.

In the absence of an actual personality disorder, these so-called dynamic risk factors relating to a personality trait should not be utilized to assess risk in relation to a diagnosis of pedophilia.

The dynamic risk factors of poor problem solving skills, sex as coping, and relationship stability can probably be found in the majority of the general population in the United States.

Mr. Timm contends that lack of concern for others would constitute an aggravating factor in most situations; not just in SVP proceedings.

Also, Dr. Goldberg's description of the Hare PCL-R factors indicates that they align with the dynamic risk factors. If so, then the low score on the Hare implies that the dynamic risk factors have little or no validity. (RP 1208, ll. 22-25; RP 1210, ll. 2-11).

The State, in *Thorell,* argued that the actuarial models are more reliable then clinical judgment. The Court concluded at 757: "We are persuaded by the State's arguments."

When Dr. Goldberg's opinion is examined in the light of all trial testimony, it is readily apparent that the opinion is a hodgepodge of psychobabble implicating a multitude of subjective factors running contrary to established recidivism rates and actuarial tests results.

In order to protect a person's due process rights, the Legislature has seen fit to place a heavy burden of proof upon the State in order to commit a person as a SVP. The burden of proof was not met in Mr. Timm's case.

CONCLUSION

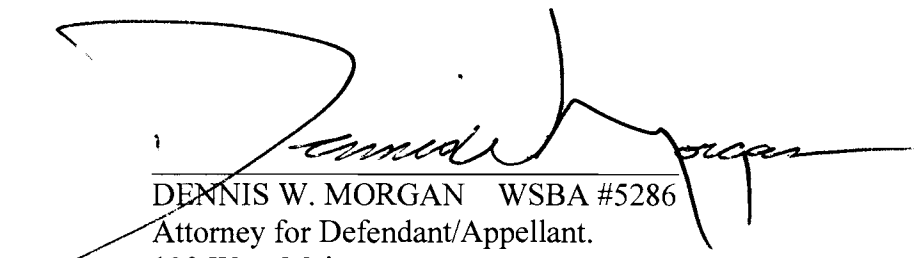
> There is no question that due process guaranties must accompany involuntary commitment for mental disorders. *In re Levias,* 83 Wn. 2d 253, 517 P. 2d 588 (1973); *In re Quesnell,* 83 Wn. 2d 224, 517 P. 2d 568 (1973); *Addington v. Texas,* 441 U.S. 418, 60 L.Ed. 2d 323, 99 S. Ct. 1804 (1979). The United States Supreme Court has described involuntary commitment as "a massive curtailment of liberty." *Humphrey v. Cady,* 405 U.S. 504, 509, 31 L. Ed. 2d 394, 92 S. Ct. 1048 (1972).

In re Harris, 98 Wn. 2d 276, 279, 654 P. 2d 109 (1982).

Mr. Timm's liberty interest has been violated as a result of Dr. Goldberg's suspect conclusions. The jury's verdict should be overturned and the SVP determination vacated.

DATED this 19th day of October, 2010.

Respectfully submitted,



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APPENDIX "A"

302.2 Pedophilia

The paraphilic focus of Pedophilia involves sexual activity with a prepubescent child (generally age 13 years or younger). The individual with Pedophilia must be age 16 years or older and at least 5 years older than the child. For individuals in late adolescence with Pedophilia, no precise age difference is specified, and clinical judgment must be used; both the sexual maturity of the child and the age difference must be taken into account. Individuals with Pedophilia generally report an attraction to children of a particular age range. Some individuals prefer males, others females, and some are aroused by both males and females. Those attracted to females usually prefer 8- to 10-year-olds, whereas those attracted to males usually prefer slightly older children. Pedophilia involving female victims is reported more often than Pedophilia involving male victims. Some individuals with Pedophilia are sexually attracted only to children (Exclusive Type), whereas others are sometimes attracted to adults (Nonexclusive Type). Individuals with Pedophilia who act on their urges with children may limit their activity to undressing the child and looking, exposing themselves, masturbating in the presence of the child, or gentle touching and fondling of the child. Others, however, perform fellatio or cunnilingus on the child or penetrate the child's vagina, mouth, or anus with their fingers, foreign objects, or penis and use varying degrees of force to do so. These activities are commonly explained with excuses or rationalizations that they have "educational value" for the child, that the child derives "sexual pleasure" from them, or that the child was "sexually provocative"—themes that are also common in pedophilic pornography. Because of the egosyntonic nature of Pedophilia, many individuals with pedophilic fantasies, urges, or behaviors do not experience significant distress. It is important to understand that experiencing distress about having the fantasies, urges, or behaviors is not necessary for a diagnosis of Pedophilia. Individuals who have a pedophilic arousal pattern and act on these fantasies or urges with a child qualify for the diagnosis of Pedophilia.

Individuals may limit their activities to their own children, stepchildren, or relatives or may victimize children outside their families. Some individuals with Pedophilia threaten the child to prevent disclosure. Others, particularly those who frequently victimize children, develop complicated techniques for obtaining access to children, which may include winning the trust of a child's mother, marrying a woman with an attractive child, trading children with other individuals with Pedophilia, or, in rare instances, taking in foster children from nonindustrialized countries or abducting children from strangers. Except in cases in which the disorder is associated with Sexual Sadism, the person may be attentive to the child's needs in order to gain the child's affection, interest, and loyalty and to prevent the child from reporting the sexual activity. The disorder usually begins in adolescence, although some individuals with Pedophilia report that they did not become aroused by children until middle age. The frequency of pedophilic behavior often fluctuates with psychosocial stress. The course is usually chronic, especially in those attracted to males. The recidivism rate for individuals with Pedophilia involving a preference for males is roughly twice that for those who prefer females.

Diagnostic criteria for 302.2 Pedophilia

A. 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 (generally age 13 years or younger).

B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.

C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.

Note: Do not include an individual in late adolescence involved in an ongoing sexual relationship with a 12- or 13-year-old.

Specify if:

Sexually Attracted to Males
Sexually Attracted to Females
Sexually Attracted to Both

Specify if:

Limited to Incest

Specify type:

Exclusive Type (attracted only to children)
Nonexclusive Type

302.83 Sexual Masochism

The paraphilic focus of Sexual Masochism involves the act (real, not simulated) of being humiliated, beaten, bound, or otherwise made to suffer. Some individuals are bothered by their masochistic fantasies, which may be invoked during sexual intercourse or masturbation but not otherwise acted on. In such cases, the masochistic fantasies usually involve being raped while being held or bound by others so that there is no possibility of escape. Others act on the masochistic sexual urges by themselves (e.g., binding themselves, sticking themselves with pins, shocking themselves electrically, or self-mutilation) or with a partner. Masochistic acts that may be sought with a partner include restraint (physical bondage), blindfolding (sensory bondage), paddling, spanking, whipping, beating, electrical shocks, cutting, "pinning and piercing" (infibulation), and humiliation (e.g., being urinated or defecated on, being forced to crawl and bark like a dog, or being subjected to verbal abuse). Forced cross-dressing may be sought for its humiliating associations. The individual may have a desire to be treated as a helpless infant and clothed in diapers ("infantilism"). One particularly dangerous form of Sexual Masochism, called "hypoxyphilia," involves sexual arousal by oxygen deprivation obtained by means of chest compression, noose, ligature, plastic bag, mask, or chemical (often a volatile nitrite that produces a temporary decrease