

COURT OF APPEALS
DIVISION II

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NO. 37140-5-II

STATE OF WASHINGTON
BY *[Signature]*

DEPUTY

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

In re the Detention of:

DOUGLAS ALSTEEN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

RESPONDENT'S OPENING BRIEF

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I. ISSUES PRESENTED

- A. Was The State Required To Prove That Alsteen Would Commit A Sexually Violent Offense Within The Foreseeable Future?
- B. Did The Trial Court Err By Defining What Constitutes A “Sexually Violent Offense”?

II. STATEMENT OF THE CASE

A. Procedural History

This Sexually Violent Predator (SVP) civil commitment action was initiated on June 3, 2005. CP at 1. At the time of filing Alsteen was serving a 120-month sentence for Attempted Rape in the First Degree, having been convicted in 1990 of that crime in addition to two counts of Assault in the Second Degree with Sexual Motivation. Petitioner’s Exhibit 25. Shortly before Alsteen was scheduled to be released, the State filed the SVP Petition. His commitment trial began on November 5, 2007. 11/5/07 RP at 3.

At trial, the State presented the testimony of two of Alsteen’s adjudicated victims, two police officers who investigated Alsteen’s crimes, and two Department of Corrections (DOC) employees whom Alsteen had exposed himself to while in prison. 11/7/07 RP at 6-90. The State also introduced the videotaped deposition of Alsteen. *Id.* at 91. Finally, the State presented the testimony of Dr. Brian Judd, a licensed psychologist who evaluated Alsteen to determine if he suffered from a

current mental illness that made him likely to engage in future crimes of sexual violence. 11/6/07 RP at 12. In his defense, Alsteen testified and presented the testimony of Dr. Theodore Donaldson. 11/7/07 RP at 95, 11/8/07 RP at 21, 11/13/07 RP at 31. On November 14, 2007, the jury unanimously agreed that the State had proven Alsteen was an SVP beyond a reasonable doubt. CP at 250. Alsteen was committed to the Special Commitment Center (SCC) where he remains today. CP at 251. This appeal follows. CP at 259.

B. Substantive History

1. Alsteen's Criminal Sexual History

On May 15, 1986, 20-year-old Alsteen raped 10-year-old L.C. 11/7/07 RP at 6, 13. Alsteen took L.C. at knifepoint to a shed in a field where he forced her to perform oral sex on him. L.C. escaped when a neighbor happened upon the shed. Alsteen was subsequently arrested and pleaded guilty to Rape in the Second Degree by Forcible Compulsion. Petitioner's Exhibit 20. Alsteen was sentenced to 41 months. Petitioner's Exhibit 21.

Approximately 10 months after his release from prison, on December 4, 1989, Alsteen attacked 39-year-old D.S. Petitioner's Exhibit 23, 24. D.S. worked at a local Exxon service station and was closing the station when Alsteen grabbed her, put a knife to her throat, and

started struggling with her. *Id.* D.S. fell to the ground and Alsteen began strangling her; he then cut her neck with the knife until the blade broke. 11/06/07 RP at 32. Alsteen then fled the scene. Alsteen was not immediately arrested for this incident; however, he ultimately pleaded guilty to Assault in the Second Degree and later admitted that he committed the act with sexual motivation. Petitioner's Exhibit 24, CP 235. Alsteen was sentenced to 70 months. Petitioner's Exhibit 25.

On or about January 17, 1990, Alsteen attacked 19-year-old L.R. as she was jogging in a park. 11/7/07 RP at 21, 23. Alsteen grabbed L.R. from behind, put a knife to her throat, and told her she was coming with him. He then began directing her to the parking lot. The two struggled until L.R. was able to break free and run for help. *Id.* at 26. Alsteen was not immediately arrested for this offense, but ultimately pleaded guilty to Assault in the Second Degree and admitted he committed the act with sexual motivation. Petitioner's Exhibit 24, CP 235. Alsteen was sentenced to 70 months to run current with his sentence for his offense against D.S. Petitioner's Exhibit 25.

Approximately two months later, on March 13, 1990, Alsteen attempted to rape 31-year-old S.H. Petitioner's Exhibit 27. S.H. was hitchhiking and Alsteen offered her a ride. Alsteen then drove S.H. to a secluded area, stopped the car and told S.H. he was going to "fuck her."

Alsteen attempted to remove S.H.'s clothes, however the two struggled and S.H. was able to escape the car and run for help. During the struggle S.H. sustained injuries to her face and ear that required stitches. Petitioner's Exhibit 8, 9. Alsteen was arrested that day, and later pleaded guilty to Attempted Rape in the First Degree. Petitioner's Exhibit 27. Alsteen was sentenced to 128 months. Petitioner's Exhibit 28.

In addition to the above adjudicated offenses, Alsteen received numerous infractions in prison for sexual acts which included exposing himself and masturbating in front of female staff. 11/7/07 RP at 51-90.

2. Expert Opinion Evidence: Dr. Brian Judd

At trial, the State offered the expert opinion testimony of clinical and forensic psychologist Brian Judd, Ph.D. Dr. Judd has considerable experience in the evaluation, diagnosis, treatment, and risk assessment of sex offenders. 11/6/07 RP at 12-24. Dr. Judd has been licensed in Washington as a psychologist since 1991. *Id.* at 13. He has conducted approximately 85 evaluations to determine whether an individual meets or continues to meet the statutory criteria for civil commitment pursuant to RCW 71.09. *Id.* at 18. Dr. Judd's evaluations are done at the request of the defense approximately one third of the time with the remaining individuals evaluated at the request of the State. *Id.*

As part of his evaluation, Dr. Judd reviewed court documents, police reports, presentence investigation reports, criminal history information, and DOC records. *Id.* at 26. Dr. Judd testified that the records he reviewed were of the type that he and other mental health professionals commonly rely upon when evaluating sex offenders. *Id.*

Dr. Judd testified that, in his professional opinion, Alsteen currently suffers from a mental abnormality, specifically Paraphilia, Not Otherwise Specified (NOS). *Id.* at 39. Dr. Judd also diagnosed Alsteen with Exhibitionism, Antisocial Personality Disorder and Substance Abuse. *Id.* at 54-79. In diagnosing those conditions, Dr. Judd relied upon a classification system that is used universally by mental health workers, and is found in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR). *Id.* at 40, 42.

Dr. Judd also conducted a risk assessment to determine whether Alsteen was more likely than not, as a result of his mental abnormality, to commit a predatory sex offense if he were released to the community. *Id.* at 124. The risk assessment involved actuarial instruments, which are a list of factors associated with sexual reoffense. *Id.* at 89. When administered, an offender receives a score which is statistically associated with a likelihood of committing a future sex offense. *Id.*

Dr. Judd employed the use of two actuarial instruments in his risk assessment of Alsteen: the Static-99 and the Sex Offender Screening Tool Revised (SORAG). *Id.* at 91, 107. Dr. Judd cautioned that these instruments underestimate an individual's overall risk because they assess the risk of committing an offense that is detected and results in reconviction or rearrest within a certain time period, rather than estimating the risk of an individual committing any offense throughout the remainder of their lifetime, as the statute requires. *Id.* at 97, 104. Dr. Judd testified that the actuarial instruments employed in Alsteen's case indicate that Alsteen is likely to engage in predatory acts of sexual violence if not confined to a secure facility. *Id.* at 124.

Dr. Judd also scored Alsteen on the Hare Psychopathy Checklist – Revised (PCL-R). *Id.* at 111. The PCL-R measures an individual's psychopathy, or level of criminal orientation, and a score in Alsteen's range is statistically associated with a high probability of violent recidivism, including sexual recidivism. *Id.* at 111-12.

Based upon his education and experience and his review of the records, Dr. Judd testified that it was his professional opinion that Alsteen currently has a mental abnormality that causes him serious difficulty controlling his behavior and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility.

Id. at 124.

III. ARGUMENT

Alsteen makes two arguments on appeal, both which are without merit. First, Alsteen argues that the SVP law violates due process because it does not limit an individual's risk of reoffense to the foreseeable future. Second, Alsteen asserts that the trial court committed error when it defined "sexually violent offense" and all of the associated terms contained therein. Alsteen's arguments are not based in law and therefore this Court should affirm his civil commitment as an SVP.

A. Alsteen's Commitment As A Sexually Violent Predator Is Constitutional

Due process is satisfied upon a showing of current mental illness and current dangerousness. Since Alsteen currently suffers from a mental abnormality that makes him likely to commit future acts of sexual violence if released to the community, his commitment is constitutional.

1. The Washington Supreme Court Has Previously Found That The SVPA Is Narrowly Tailored To Serve A Compelling State Interest

Mr. Alsteen essentially argues that the Sexually Violent Predator Act (SVPA) violates due process because it does not limit an individual's risk assessment to the foreseeable future.

A challenged statute is presumed to be constitutional and the burden is on the challenging party to prove it is unconstitutional beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998). The challenging party must “convince the court that there is no reasonable doubt that the statute violates the constitution.” *Id.* Alsteen has failed to meet this burden. RCW 71.09 survived a due process challenge in *Young*, where the Washington Supreme Court found it met the narrow-tailoring requirements of the Fourteenth Amendment in respect to indefinite commitment. *In re the Detention of Young*, 122 Wn.2d 1, 36-39, 857 P.2d 989 (1993). Civil commitment under the SVPA is justified when a person’s level of danger indicates he is more likely than not to commit a predatory act of sexual violence over his lifetime. The Court of Appeals has recently adopted this exact analysis in *In re the Detention of Wright*, 138 Wn. App. 582, 155 P.3d 945 (2007), *review-denied*, 162 Wn.2d 1017 (2008).

In *Wright*, the appellant argued that the State had to prove that his risk of sexual reoffense was likely within the reasonably foreseeable future. *Id.* at 583. The court noted that our Supreme Court had previously considered and rejected this argument, and therefore rejected Wright’s argument. *Id.* at 583, 586. In doing so, the court cited *Young* which held that “[t]o satisfy due process, a proceeding to commit an individual indefinitely as a sexually violent predator must include proof that the individual is dangerous to the community.” *Young*, 122 Wn.2d at 31. This included a showing that *Young* was both mentally ill and dangerous.

Id. at 27. Young argued that the risk of reoffense should be limited to a set time frame, and the court squarely rejected this argument by concluding that “there are no substantive constitutional impediments to the sexually violent predator scheme.” *Id.* at 26.

The *Young* litigation consolidated personal restraint petitions (PRPs) and direct appeals of the SVP civil commitment orders by Andre Brigham Young and Vance Russell Cunningham. 122 Wn.2d at 18. Cunningham raised this issue in his PRP,¹ alleging that RCW 71.09 violated due process because:

The statute imposes no outside limits on how long the individual may be considered dangerous and be held. The statute is fatally deficient when it fails to specify any time frame within which an expert is to predict the respondent is “likely” to commit another offense.

PRP at 24 (emphasis in original).

The same argument was presented to the *Young* court by the American Civil Liberties Union (ACLU) in their amicus brief:

In addition, the Statute imposes no outside limits on how long the individual may be considered dangerous. Simply put, if the evaluator thinks the defendant has a propensity to commit another sex crime *at any time* after his release—within a day or a decade—he may consider the defendant to be *presently* dangerous. Thus, the Statute is woefully deficient in not specifying a time frame within the defendant is considered likely to commit another crime.

¹ The decision reported at *Young*, 122 Wn.2d 1 is an opinion addressing the consolidated direct appeal from commitment and Young’s PRP. See *Young*, 122 Wn.2d at 18.

ACLU Amicus Brief at 39 (emphasis in original). Additionally, in their direct appeal, appellants Young and Cunningham incorporated the ACLU's argument into their joint opening brief:

The ACLU has filed an amicus brief arguing that the Statute violates procedural due process by not requiring evidence of dangerousness. Appellants adopt the arguments of amicus and incorporate them herein.

Appellants' Opening Brief at 59.

The *Young* court did not find this argument to be of sufficient merit to require discussion, summarily rejecting it with the following holding at the end of the opinion:

Finally, we have given ample consideration to all of the remaining arguments raised in the personal restraint petition and on appeal, as well as those advanced by amici, and conclude that they lack merit.

122 Wn.2d at 59.

The court later confirmed the precedential value of its rejection of arguments raised by Young and Cunningham. *In re Detention of Turay*, 139 Wn.2d 379, 408, 986 P.2d 790 (1999). The *Turay* court noted that an issue raised by the respondent had also been raised in the *Young* case, but not explicitly addressed in the written opinion. Citing both the existence of the argument in the *Young* briefing, and the above-quoted language from 122 Wn.2d at 59, the *Turay* court concluded: "We squarely rejected that claim[.]" 139 Wn.2d at 408 n.30.

In *In re the Detention of Thorell*, the Washington Supreme Court again upheld the constitutionality of RCW 71.09 in the face of a due process challenge. 149 Wn.2d 724, 72 P.3d 708 (2003). “The civil commitment of an SVP satisfies due process if the SVP statute couples proof of dangerousness with proof of an additional element, such as “mental illness.” *Id.* at 731. The court found that civil commitment was limited to a narrow class of offenders because “[t]he connection between past sexually violent behavior and a mental abnormality results in a ‘likelihood of future sexually dangerous behavior,’ and thus a lack of control. *Id.* at 739. In doing so, the court cited *Kansas v. Crane*, 534 U.S. 407, 151 L.Ed.2d 856, 122 S.Ct. 867 (2002), which required “linking an SVP’s serious difficulty in controlling behavior to a mental abnormality, which together with a history of sexually predatory behavior, gives rise to a finding of future dangerousness, justifies civil commitment, and sufficiently distinguishes the SVP from the dangerous but typical criminal recidivist. *Thorell*, 149 Wn.2d at 736.

Alsteen’s argument that a finding of future dangerousness is not related to ones current dangerousness is misplaced. Alsteen will be reexamined every year by a professionally qualified person to determine whether he continues to suffer from a mental abnormality or personality disorder. If he does, the mental abnormality or personality disorder must continue to cause Alsteen serious difficulty controlling his behavior, and as a result make him likely to commit future acts of sexual violence if released. RCW 71.09.070. Although not defined in terms of years, the

SVPA is constitutional because it requires the necessary link between mental illness and dangerousness, and further requires that the State come forward with evidence that meets this burden every single year of Alsteen's commitment.

Mr. Alsteen's argument would gravely undermine the State's "compelling interest both in treating sex predators and protecting society from their actions." *Young*, 122 Wn.2d at 26. Given that it is not possible to pinpoint the exact date, time, and place where Mr. Alsteen will reoffend, the constitution allows civil commitment to serve the State's compelling interest against sexual reoffense so long as Mr. Alsteen is "likely" to reoffend at some time in the future. *See Id.* Petitioner sought commitment of Mr. Alsteen because his risk of reoffense is "more likely than not" currently and over his life expectancy. The State has a continuing burden to show the existence of a mental illness and continuing danger every year of Alsteen's commitment. RCW 71.09.070. There is no merit to imposing a "reasonably foreseeable" test on chapter 71.09 RCW or to otherwise limit the State's "compelling interest" to prevent sexual violence to a narrow period of time.

2. Alsteen's Mental Illness And Risk Of Reoffense Are Current

In this case, the evidence proved beyond a reasonable doubt that Alsteen currently suffers from a mental illness that makes him likely to commit future acts of sexual violence if not confined. CP at 250. Therefore, due process was not violated.

Dr. Judd testified that Alsteen currently suffers from Paraphilia, NOS and Exhibitionism. 11/6/07 RP at 49, 54, 80. Dr. Judd opined that it was Alsteen's paraphilia that causes him serious difficulty controlling his behavior because Alsteen is aroused by non-consenting sexual contact which, by definition, impedes his capacity to control his behavior. *Id.* at 50. As a result of the paraphilia, Alsteen is predisposed to commit crimes of sexual violence, making him more likely than not to reoffend in the future. *Id.* at 51, 124. Since Alsteen's current mental illness and current dangerousness were sufficiently linked at trial, there is no violation of due process and Alsteen's commitment must be affirmed.

B. The Court Did Not Err By Defining What Constitutes A "Sexually Violent Offense"

Alsteen argues that the court erred by including jury instructions defining "sexually violent offense" and the corresponding term definitions. Alsteen's argument must be rejected.

An SVP is an individual "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(16). "The number and specific language of the instructions are matters left to the trial court's discretion." *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991).

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Id.*

In the present case, the instructions given by the court allowed both parties to argue their theory of the case, were not misleading and accurately informed the jury of the applicable law of the case. In order for the jury to determine if Alsteen was “likely to engage in predatory acts of sexual violence”, the jury had to be instructed on what constitutes a sexually violent offense. “Sexually violent offense” was properly defined in jury instruction 4 and was consistent with WPI 365.16, which reads in relevant part “[s]exual violence” means: (identify the applicable crimes)’. The note on use for WPI 365.16 states in relevant part:

“Based on the evidence in the case, fill in the blank with the following crimes of sexual violence: (1) those with which the respondent has allegedly been charged or convicted; (2) *those that the respondent is likely to commit in the future*”...

6A Wn. Practice, *Washington Pattern Jury Instructions: Civil* 365.16 (5th ed. 2005) (emphasis added).

Given that Alsteen had committed sexual offenses against both children and adults, and that his various offenses involved facts that would support a kidnapping, assault and/or unlawful imprisonment charge, each of those sexually violent offenses were properly included in the court’s

instructions. Furthermore, it would have been error had the court failed to define certain terms used in the definitions of the various crimes. For example, instruction 27 defined the crime of unlawful imprisonment, which involves, *inter alia*, the restraint of another. Instruction 28 then defined “restrain or restraint” to enable the jury to determine if Alsteen was likely in the future to commit the crime of unlawful imprisonment with sexual motivation.

Alsteen incorrectly argues that the State is only required to prove those crimes for which Alsteen has previously been charged or convicted, and since Alsteen stipulated to his prior convictions the jury instructions defining “sexual violence” were prejudicial. This argument is simply a misstatement of the elements required for commitment as the State must also prove beyond a reasonable doubt that Alsteen is likely to commit *future acts of sexual violence*. Without instruction as to what constitutes a crime of “sexual violence” the jury would be left to speculate about what each crime of sexual violence entailed. The court clearly was required to define the relevant terms so the jury could make an educated and informed decision about the crimes Alsteen was likely to commit in the future. The court complied with RCW 71.09.020(15), WPI 365.16 and its corresponding note on use and therefore Alsteen’s argument must be rejected.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court deny Alsteen's appeal, and affirm his civil commitment as a sexually violent predator.

RESPECTFULLY SUBMITTED this 30th day of January, 2009.

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

In re the Detention of:

DOUGLAS ALSTEEN,

Appellant.

**DECLARATION OF
SERVICE**

I, Jennifer Dugar, declare as follows:

On this 30th day of January, 2009, I deposited in the United States mail true and correct cop(ies) of Respondent's Opening Brief, postage affixed, addressed as follows:

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

DATED this 30th day of January, 2009, at Seattle, Washington.



JENNIFER DUGAR
Legal Assistant