

FILED
COURT OF APPEALS
DIVISION II

Court of Appeals No. 37515-0-II

08 JUL 30 PM 1:06

STATE OF WASHINGTON

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**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

**STATE OF WASHINGTON
Respondent,**

v.

**IN RE THE DETENTION OF DANIEL ANDREWS,
Appellant.**

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 07-2-05099-5
The Honorable Vicki Hogan, Presiding Judge**

**Sheri Arnold, WSBA No. 18760
Attorney for Appellant
P.O. Box 7718
Tacoma, Washington 98417
(253) 759-5940**

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to establish that Mr. Andrews more likely than not would engage in predatory acts of sexual violence if not confined in a secure facility.

II. ISSUE PRESENTED

Does the State present sufficient evidence to establish that a defendant would more likely than not engage in predatory acts of sexual violence where the only evidence presented to establish the defendant's probability of reoffense is the opinion of one expert whose opinion is based on tests which give the defendant a less than 50% likelihood of reoffending and the experts personal opinion arrived at without interviewing the defendant?

III. STATEMENT OF THE CASE

Factual and Procedural Background

On July 26, 1994, Mr. Andrews pled guilty to one count of first degree child molestation. CP 4-71. On April 18, 1995, Mr. Andrews was sentenced to 51 months plus community placement. CP 4-71. On December 9, 1997, Mr. Andrews was granted work release. CP 4-71. On December 9, 1997, Mr. Andrews escaped from work release. RP 4-71.

Mr. Andrews was incarcerated in Arizona on an unrelated preexisting conviction for aggravated DUI. CP 4-71. Upon his release in Arizona on the DUI charge, Mr. Andrews was arrested and pled guilty to failure to register as a sex offender in Arizona. CP 4-71. On May 19, 2003, Mr. Andrews was sentenced to four and one-half years imprisonment, followed by seven months of community supervision. CP 4-71. Mr. Andrews was returned to

Washington State in 2006. CP 4-71.

On February 7, 2007, pursuant to RCW 71.09.030, the State of Washington filed a Certification for Determination of Probable Cause that Mr. Daniel Andrews was a sexually violent predator pursuant to RCW 71.09 *et. seq.* CP 4-71. On February 7, 2007, the trial court issued an order finding probable cause to believe that Mr. Andrews was a sexually violent predator and scheduled a probable cause hearing. CP 72-73.

On February 12, 2007, Mr. Andrews stipulated that the Petition and the Certification for Determination of Probable Cause filed on February 7, 2007, established probable cause to believe that Mr. Andrews was a Sexually Violent Predator. CP 87-89.

On February 12, July 9, and August 23, 2007, Mr. Andrews waived his right to trial within 45 days following the probable cause hearing. CP 90, 92, 96.

On February 26, 2008, a jury trial was held to determine whether Mr. Andrews was a sexually violent predator. RP 102.

The jury unanimously found that Mr. Andrews was a sexually violent predator. CP 247, RP 536-537.

IV. ARGUMENT

THE EVIDENCE RELIED UPON BY DOCTOR NORTH WAS INSUFFICIENT TO SUPPORT THE CONCLUSION THAT MR. ANDREWS WAS MORE LIKELY THAN NOT TO REOFFEND.

In order to commit an individual as a sexually violent predator (SVP) under chapter 71.09 RCW, the State must show beyond a reasonable doubt that the individual is a sexually violent predator. *In re Detention of Stout*, 159 Wn.2d 357, 365, 150 P.3d 86 (2007), citing *In re Pers. Restraint of Young*, 122 Wn.2d 1, 13, 857 P.2d 989 (1993). A 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.” *Stout*, 159 Wn.2d at 365, 150 P.3d 86; RCW 71.09.020(16).

“Likely to engage in predatory acts of sexual violence if not confined in a secure facility” means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition. RCW 71.09.020(7).

In reviewing a sufficiency of evidence challenge from a finding of commitment under the Sexually Violent Predators Act, the appellate court views the evidence in the light most favorable to the State and determines if it could permit a rational trier of fact to find the essential elements beyond a reasonable doubt. *In re Detention of Broten*, 130 Wn. App. 326, 334-335, 122 P.3d 942 (2005), review denied 158 Wn.2d 1010, 143 P.3d 830 (2006).

Here, Mr. Andrews did not dispute that he had pled guilty to one

count of first degree child molestation in July of 1994. The State's evidence that Mr. Andrews more probably than not would engage in predatory acts of sexual violence if released from detention consisted entirely of the opinion of Doctor Christopher North.

Dr. North conducted a risk assessment of Mr. Andrews regarding the likelihood that Mr. Andrews would commit more predatory acts of sexual violence. RP 187. Dr. North concluded that Mr. Andrews was more likely than not to reoffend. RP 212. Dr. North based his opinion on several actuarial tools, a psychological test known as the "hair psychopathy check list," and Mr. Andrews' "dynamic risk factors." RP 187. The actuarial tests predict how likely Mr. Andrews was to commit future sex crimes. RP 187. The "hair" test indicates how criminally oriented an individual is, but is a measure of general criminality and not directly related to sexual recidivism. RP 187, 216.

A. *The results of the actuarial tests do not support the conclusion that Mr. Andrews is more likely than not to reoffend.*

Dr. North completed two actuarial tests regarding Mr. Andrews: the STATIC-99 test and the Minnesota Sex Offender Screening Tool, revised (MnSOSTR). RP 188, 203-204.

The STATIC-99 test indicated that, at worst, Mr. Andrews had a 40% chance of committing a new sex crime within 15 years of his release into the

community. RP 199-200. Dr. North testified that Mr. Andrews' score on the STATIC-99 test did not mean that Mr. Andrews was more likely than not to commit a new sex offense. RP 200. Further, Dr. North testified that the STATIC-99 test is only 70% accurate (RP 245-246) and, due to changes in recidivism rates since the test was developed, it is possible that the STATIC-99 test overestimated Mr. Andrews' recidivism. RP 249.

Mr. Andrews' score on the MnSOSTR indicated that there was a 25% probability that Mr. Andrews would be arrested for a sex offense within six years after being released. RP 212.

Neither actuarial test indicated that Mr. Andrews was more likely than not to reoffend.

B. *The result of the "hair psychopathy test" does not support the conclusion that Mr. Andrews is more likely than not to reoffend.*

The "hair psychopathy test" is a psychological test which measures how "criminally oriented" the subject of the test is. RP 214. Mr. Andrews' score on the "hair test" indicated that he was a psychopath (RP 215), however, Dr. North testified that the "hair" test is not directly related to the sexual recidivism of the subject of the test. RP 216. The "hair" test only measures how likely an individual is to engage in general criminal behavior. RP 216.

The State's burden in a SVP proceeding is not to establish that a

defendant will more likely than not commit crime, rather, the State's burden is to show that more likely than not the defendant will engage in predatory acts of sexual violence. The "hair" test does not measure an individual's likelihood of committing further acts of sexual violence, therefore the "hair test" does not support a conclusion that an individual will commit acts of sexual violence.

C. *The "dynamic risk factors" analyzed by Dr. North are too remote in time to be relevant to any analysis of whether or not Mr. Andrews was likely to engage in further acts of sexual violence.*

Dr. North looked at five risk factors when analyzing Mr. Andrews. RP 217-218. However, after Dr. North analyzed Mr. Andrews, one of the risk factors Dr. North examined ceased to be used in evaluation of sex offenders. RP 218. Dr. North examined Mr. Andrews' "intimacy deficit" (ability to form a close emotional relationship), Mr. Andrews' "sexual self regulation" (a person's ability to control their sex drive), Mr. Andrews' "cooperation with supervision" (the likelihood that Mr. Andrews would comply with his probation when released), and Mr. Andrews' "general self regulation" (how much general self control an individual has). RP 217-221.

Dr. North acknowledged that the dynamic risk factors are supposed to be measurements of what was currently going on in the test subject's life (RP 218) and that, due to Mr. Andrews' long period of incarceration, it was

very difficult to measure his sexual self regulation. RP 219.

Given that Mr. Andrews has been incarcerated since 1999 (CP 4-71), these dynamic risk factors are not reliable indicators of how Mr. Andrews would behave now. Mr. Andrews has been in a highly controlled environment and Dr. North formed his opinion of Mr. Andrews based solely on Mr. Andrews records and without conducting an in person interview to assess the current status of Mr. Andrews' dynamic risk factors. RP 149. In effect, Dr. North was reviewing Mr. Andrews' "dynamic risk factors" from times before Mr. Andrews was in custody and taking medication for his mental illnesses. RP 148, 465. As a result, Dr. North was not actually reviewing Mr. Andrews' current dynamic risk factors and his opinion is therefore invalid.

Viewing the evidence in the light most favorable to the State reveals that Dr. North's opinion that Mr. Andrews was more likely than not to commit a new crime of sexual violence was based on two actuarial tests which indicated that Mr. Andrews was *not* more likely than not to reoffend, a test which did not measure Mr. Andrews' chances of committing a new sex crime, and the consideration of Mr. Andrews' "dynamic risk factors" as represented by documents up to fifteen years old. Dr. North testified that this evidence was sufficient to convince him that Mr. Andrews was more likely than not to commit another sex crime, but a review of the evidence shows

that the evidence does not support Dr. North's conclusion. At worst, the State's evidence is contrary to Dr. North's conclusion, and at best the evidence is outdated or irrelevant to the determination of whether or not Mr. Andrews will commit another act of sexual violence.

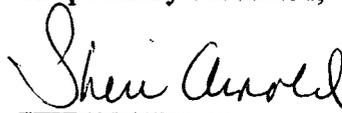
The State presented insufficient evidence to permit a rational trier of fact to find that Mr. Andrews more probably than not would engage in predatory acts of sexual violence if not confined in a secure facility.

V. CONCLUSION

This court should reverse the trial court's order of commitment and remand for a new trial.

DATED this 30th day of July, 2008.

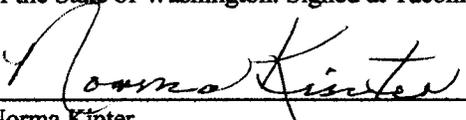
Respectfully submitted,



Sheri Arnold, WSBA No. 18760
Attorney for Appellant

Certificate of Service

The undersigned certifies that on July 30, 2008, I delivered by U. S. Mail to: Jana R. Ranae Franklin, Attorney General's Office, 800 5th Avenue, Suite 2000 Seattle, Washington 98104-3188, and Daniel Andrews, Special Commitment Center, McNeil Island Corrections Center , Post Office Box 88600, Steilacoom, Washington 98388, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on July 30, 2008.



Norma Kinter

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