

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3357-22

IN THE MATTER OF THE
CIVIL COMMITMENT
OF F.S., SVP-393-05.

Submitted May 14, 2024 – Decided May 22, 2024

Before Judges Puglisi and Haas.

On appeal from the Superior Court of New Jersey, Law Division, Cape May County, Docket No. SVP-393-05.

Jennifer Nicole Sellitti, Public Defender, attorney for appellant (Phuong V. Dao, Designated Counsel, on the brief).

Matthew J. Platkin, Attorney General, attorney for respondent State of New Jersey (Melissa H. Raksa, Assistant Attorney General, of counsel; Stephen Slocum, Deputy Attorney General, on the brief).

PER CURIAM

Appellant F.S. appeals from a June 12, 2023 Law Division order, which found him to be a sexually violent predator and continued his involuntary

commitment in the Special Treatment Unit (STU) pursuant to the Sexually Violent Predator Act (SVPA), N.J.S.A. 30:4-27.24 to -27.38. We affirm.

A judge committed F.S. to the STU in 2005 pursuant to the SVPA. In re Civ. Commitment of F.S., No. A-3092-21 (App. Div. Mar. 20, 2023) (slip op. at 1). Judges have continued F.S.'s commitment since that time following annual review hearings. Ibid. The events that culminated in his commitment, including the sexual assaults he committed against two female children, are fully recounted in our 2019 decision that affirmed his continued commitment and need not be repeated here. In re Civ. Commitment of F.Z.S., No. A-0336-18 (App. Div. Oct. 31, 2019) (slip op. at 2-4).

Judge Christine Smith conducted F.S.'s most recent review hearing on June 1, 2023. The State relied upon the testimony of a psychiatrist and a psychologist. F.S. testified on his own behalf and he also presented the testimony of a psychologist.¹

Dr. Michael Kunz, M.D. was the State's expert psychiatrist. He examined F.S. and reviewed the available records. Kunz diagnosed F.S. with Pedophilic Disorder, sexually attracted to females, non-exclusive; Other Specified

¹ The judge accepted the three medical professionals who testified as experts in their respective fields.

Personality Disorder, with Paranoid and Antisocial Features; Alcohol Use Disorder, severe, in a controlled environment, and Borderline Intellectual Functioning.

Kunz noted that these conditions do not spontaneously remit and that F.S. required treatment to learn to control his sexually violent tendencies. However, F.S. refused all sex offender and substance use treatment since his commitment began in 2005. Kunz opined that even though F.S. was now seventy-four years old, he remained "highly likely to engage in acts of sexual violence" because of his refusal to engage in treatment. Therefore, Kunz concluded that F.S.'s age did not diminish the risk he posed "enough to no longer be at . . . a high level."

Laura Polhamus, Psy.D., testified as the State's expert psychologist. Polhamus was a member of the Treatment Progress Review Committee that evaluated F.S.'s lack of progress in treatment at the STU. Like Kunz, Polhamus diagnosed F.S. with Pedophilic Disorder, attracted to females, non-exclusive type, not limited to incest; Other Specified Personality Disorder, with Antisocial and Paranoid Features; and Alcohol Use Disorder, severe, in a controlled environment. Polhamus opined that F.S. remained "at high risk to sexually recidivate if not confined to a secure facility like the STU" and that F.S. needed to "engage in the treatment program in an open and constructive manner."

Christopher P. Lorah, Ph.D. testified as F.S.'s expert psychologist. Lorah diagnosed F.S. with Pedophilic Disorder, sexually attracted to females, non-exclusive type. However, Lorah believed that because of F.S.'s age, "his risk is now considered low enough to initiate discharge planning and explore housing options" in the community. In reaching his opinion, Lorah relied upon general studies examining the impact of a sex offender's age on the risk that he will recidivate. However, Lorah acknowledged that some of these studies had been criticized because they were based on a relatively small sample size. Lorah also did not think that F.S. "ha[d] appropriate relapse . . . prevention strategies . . . congruent with what the . . . STU expectations are."

F.S. testified on his own behalf. He repeatedly denied the allegations that he has ever committed any wrongdoing, and blamed the victims instead. He stated he would comply with the court's orders regarding treatment if he were released and that he had not committed any institutional offenses while committed at the STU.

Following the hearing, Judge Smith rendered a thorough nineteen-page written decision and concluded that F.S. should remain committed at the STU. In so ruling, the judge found by clear and convincing evidence that F.S. had been convicted of a sexually violent offense and suffered from mental abnormalities

and personality disorders that predisposed him to engage in acts of sexual violence. Judge Smith found that all of the experts presented credible testimony, but that the opinions provided by the State's witnesses were most persuasive.

In explaining her decision to continue F.S.'s commitment, Judge Smith stated:

[F.S.'s] current diagnosis, coupled with Antisocial Personality Disorder, cause[s] this court to have serious concerns. Additionally, much of [F.S.'s] deviant sexual behavior was cultivated during a time when he was abusing alcohol. His alcoholism remains formally untreated. It is clear [F.S.] is able to contain his deviant behavior in a controlled setting; however, the court is less convinced he has fully acquired the necessary skills to control his behavior when not met with a controlled setting. Even Dr. Lorah appears to recommend significant controls over [F.S.'s] treatment and independence, despite opining that he is ready for discharge, relying primarily on the controls afforded through [F.S.'s] status on [community supervision for life]. Given his longstanding [refusal of treatment] status while at the STU, there is no reason for this court to believe [F.S.] will suddenly meaningfully engage in any treatment once discharged. There is nothing to suggest he will be compliant as his entire period of commitment at the STU has been fraught with noncompliance.

On appeal, F.S. argues that due to "a significant change in [his] age, the evidence does not show by a clear and convincing standard that [he] requires ongoing civil commitment." F.S. also contends for the first time that "the trial

court failed to carry out its role as a gatekeeper because it accepted the net opinions of the State's experts, and it failed to consider F.S.'s age as a mitigating factor." These contentions lack merit.

The governing law is clear. An involuntary civil commitment under the SVPA can follow an offender's service of a custodial sentence, or other criminal disposition, when he or she "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for control, care and treatment." N.J.S.A. 30:4-27.26.

As defined by the statute, a "mental abnormality" consists of "a mental condition that affects a person's emotional, cognitive or volitional capacity in a manner that predisposes that person to commit acts of sexual violence." Ibid. The mental abnormality or personality disorder "must affect an individual's ability to control his or her sexually harmful conduct." In re Commitment of W.Z., 173 N.J. 109, 127 (2002). A showing of an impaired ability to control sexually dangerous behavior will suffice to prove a mental abnormality. Id. at 129; In re Civ. Commitment of R.F., 217 N.J. 152, 173-74 (2014).

At a commitment hearing, the State has the burden of proving under the SVPA that the offender poses a threat:

to the health and safety of others because of the likelihood of his or her engaging in sexually violent acts [T]he State must prove that threat by demonstrating that the individual has serious difficulty in controlling sexually harmful behavior such that it is highly likely that he or she will not control his or her sexually violent behavior and will reoffend.

[W.Z., 173 N.J. at 132.]

The court must address the offender's "present serious difficulty with control over dangerous sexual behavior." Id. at 132-33 (emphasis omitted). To commit the individual to the STU, the State must establish, by clear and convincing evidence, that it is highly likely that the individual will reoffend. Id. at 133-34; see also R.F., 217 N.J. at 173.

In this appeal, our review of Judge Smith's decision is "extremely narrow." R.F., 217 N.J. at 174 (quoting In re D.C., 146 N.J. 31, 58 (1996)). "The judges who hear SVPA cases generally are 'specialists' and 'their expertise in the subject' is entitled to 'special deference.'" Ibid. (quoting In re Civ. Commitment of T.J.N., 390 N.J. Super. 218, 226 (App. Div. 2007)). On appeal, we will not disturb the judge's decision unless there was a clear abuse of discretion, and "it is our responsibility to canvass the record, inclusive of the expert testimony, to determine whether the findings made by the . . . judge were clearly erroneous."

In re Civ. Commitment of W.X.C., 407 N.J. Super. 619, 630 (App. Div. 2009), aff'd, 204 N.J. 179 (2010).

Applying these well-established standards, we affirm the order for F.S.'s continued commitment substantially for the reasons detailed in Judge Smith's comprehensive opinion. The judge was entitled to accept Kunz's and Polhamus's persuasive expert testimony as to F.S.'s high risk of re-offending if he were released, and to reject Lorah's contrary opinion. See Angel v. Rand Express Lines, Inc., 66 N.J. Super. 77, 85-86 (App. Div. 1961) (recognizing the fact-finder's prerogative to accept the opinions of certain testifying experts and to reject competing opinions of an opposing expert). F.S. has not cooperated with the treatment required to address the disorders that led him to commit the sexually violent offenses that required his commitment under the SVPA.

We also reject F.S.'s contention that because he is now seventy-four years old and has not committed any offenses since his commitment to the STU in 2005, he is no longer in need of commitment. F.S.'s argument ignores the fact that he has been committed to the STU during this entire period. He has had no access to his victim pool, minor girls. He remains an untreated sex offender, who still does not acknowledge any need to change his behaviors, and who has made no progress toward developing relapse prevention strategies.

Finally, F.S. did not object at the hearing to the admission of Kunz's and Polhamus's testimony or their written reports.² Ordinarily, we "decline to consider issues not presented to the trial court unless they 'go to the jurisdiction of the trial court or concern matters of great public interest[,]" neither of which applies here. Kvaerner Process, Inc. v. Barham-McBride Joint Venture, 368 N.J. Super. 190, 196 (App. Div. 2004) (quoting Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

In any event, we discern no basis for F.S.'s complaint that Kunz and Polhamus rendered net opinions. Judge Smith specifically found that "each expert [Kunz, Polhamus, and Lorah] produced a viable, cognizable opinion. Each relied on appropriate factors in weighing the evidence and reaching a conclusion. There were no net opinions."

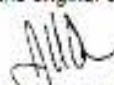
Judge Smith's conclusion on this point was well supported by the record. Kunz and Polhamus fully explained the grounds for their conclusions and were subject to cross-examination concerning them. Both experts were well qualified, their testimony and written reports addressed all of the relevant issues, and their conclusions were firmly supported by the facts in the record. See

² Indeed, the parties stipulated to the qualifications of each of the experts and to the admission of their reports.

Townsend v. Pierre, 221 N.J. 36, 55 (2015) (The net opinion rule directs that experts "be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable.") (quoting Landrigan v. Celotex Corp., 127 N.J. 404, 417 (1992)). Therefore, we reject F.S.'s newly-minted contention on this point.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



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