

Commonwealth v. Allen, 269 Va. 262, 609 S.E.2d 4 (2005)

IN THE SUPREME COURT OF VIRGINIA

COMMONWEALTH OF VIRGINIA*

v.

RICHARD BRYAN ALLEN

Record No. 041454

Decided: March 3, 2005

Present: All the Justices

The trial judge did not err in ruling that the Commonwealth failed to meet its burden of proof in a petition pursuant to Code § 37.1-70.6(A) to civilly commit a prisoner nearing the end of his prison term to the custody of a secure mental institution as a sexually violent predator. The trial court did not err under then-applicable law in admitting testimony of the defense expert witness, a psychologist not licensed to practice in Virginia, or in applying the correct standards under the statutes. The judgment dismissing the Commonwealth's petition is affirmed.

Criminal Law and Procedure — Mental Health Statutes — Civil Commitment of Sexually Violent Predators — Evidence — Admissibility of Expert Testimony — Psychologists Not Licensed in Virginia — Trial Court Discretion — Testimony Regarding

Statutory Criteria — Likelihood of Committing Violent Sexual Acts in the Future — Clear and Convincing Evidence Standard — Statutory Construction (Code § 37.1-70.1 through § 37.1-70.19)

Pursuant to Code § 37.1-70.4, the Director of the Virginia Department of Corrections notified the Commitment Review Committee that a prisoner nearing the end of 20 years' imprisonment for aggravated sexual battery upon an eight-year-old girl and a nine-year-old girl was subject to review for civil commitment to a secure mental institution because he was incarcerated for a sexually violent offense and had been identified through a preliminary screening test as being likely to re-offend. Following receipt of a psychological evaluation, the CRC forwarded to the Attorney General a recommendation that the Commonwealth seek to have the prisoner committed to a secure mental health facility as a sexually violent predator. The Commonwealth filed in the trial court a petition for the civil commitment. Counsel was appointed for the prisoner, and funds were provided for a mental health expert to aid in his defense. After a hearing as required by Code § 37.1-70.7, the trial court determined that there was probable cause to believe that the prisoner is a sexually violent predator and ordered that he be held in custody until a full hearing on the Commonwealth's petition [Page 263] could be conducted. In a bench trial on the merits, the trial court heard evidence from numerous witnesses, including a psychologist licensed in Pennsylvania and New Jersey who served as the defense expert witness. The trial court ruled that the Commonwealth had not proven by clear and convincing evidence that the prisoner is likely to engage in sexually violent acts in the future. Accordingly, the trial court dismissed the Commonwealth's petition to have him civilly committed as a sexually violent predator. This appeal followed.

1. This case involves the procedures required to be followed in order for the Commonwealth to have a prisoner who has been convicted of a sexually violent offense declared to be a sexually violent predator and to have that prisoner involuntarily committed to a secure mental health facility upon his release from prison. Those procedures are set out in Chapter 2, Article 1.1 of Title 37.1, commonly referred to as the Sexually Violent Predators Act. Code § 37.1-70.1 through Code § 37.1-

70.19 (SVPA).

2. At the time the trial court granted the prisoner's motion for funds to employ an expert, Code § 37.1-70.8(A) provided that any person who is the subject of a petition under this article shall have, prior to trial, the right to employ experts at his own expense to perform examinations and testify on his behalf. However, if a person has not employed an expert and requests expert assistance, the judge shall appoint such experts as he deems necessary to perform examinations and participate in the trial on the person's behalf.

3. Where a statute designates express qualifications for an expert witness, the witness must satisfy the statutory criteria in order to testify as an expert.

4. Nothing in Code § 37.1-70.8(A) as applicable at the time of this prisoner's trial or elsewhere in the SVPA expressly requires or by implication suggests that a mental health expert employed or appointed to assist a prisoner must be licensed to practice in Virginia. In the absence of express statutory requirements for the qualification of an expert witness in this particular type of proceeding, the general rules applicable to expert testimony in other civil cases are applied.

5. The sole purpose of permitting expert testimony is to assist the trier of fact to understand the evidence presented or to determine a fact in issue.

6. Generally, a witness is qualified to testify as an expert when the witness possesses sufficient knowledge, skill, or experience to make the witness competent to testify as an expert on the subject matter at issue. In essence, all that is necessary for a witness (to qualify as an expert is that the witness have sufficient knowledge of the subject to give value

to the witness's opinion.

7. Without question, the expert designated by the prisoner had education, employment experience, and professional knowledge and skill with respect to the identification and treatment of sexually violent offenders which qualified him to render an opinion that would assist the trial court.

8. The admission of expert testimony is committed to the sound discretion of the trial judge, and a trial court's decision will be rejected only where that court has abused its discretion. Similarly, when the admission of expert witness testimony is challenged in a post-trial proceeding, the determination whether that testimony was properly received is a matter committed to the trial court's discretion. [Page 264] When the admissibility of the expert's testimony is subsequently challenged on appeal, that testimony must be viewed as a whole.

9. While the Commonwealth can point to isolated statements in the defense expert's testimony and in his written evaluation that do not track the precise language of the definition of a sexually violent predator in the SVPA, it also is clear that the witness was aware of that standard. Indeed, in his written evaluation the expert quotes language from Code § 37.1-70.1 defining the standard almost verbatim. Moreover, even if it were agreed that the expert's opinion that the prisoner does not meet the SVPA's definition of a sexually violent predator was based on a standard higher than that required by the SVPA, the trial court could nonetheless consider the other evidence presented by this expert regarding the prisoner's performance on the various tests administered to make its own determination of the ultimate issue of fact. Accordingly, the trial court did not abuse its discretion in receiving the defense expert's testimony and did not err in denying the Commonwealth's motion to reconsider.

10. The Commonwealth concedes that the clear and convincing

standard of proof places a heavy burden upon it. Indeed, the Commonwealth's burden of proving the necessity of involuntary civil confinement by clear and convincing evidence arises from due process concerns and, thus, is of constitutional dimension and not merely a statutory elective.

11. Clear and convincing evidence has been defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear and unequivocal.

12. The appropriate standard of proof requires the Commonwealth to prove only that the prisoner would likely re-offend. The trial court did not fail to apply that standard in assessing the evidence in this case. Nothing in the trial court's conduct of the trial suggests that it was requiring the Commonwealth to prove that the prisoner would be unable to control his sexual impulses. To the contrary, in its summation the trial court expressly stated that the standard here is whether or not the prisoner would be *likely* to commit a sexually violent offense. This is in accord with the standard prescribed by Code §§ 37.1-70.1 and 37.1-70.9.

13. As in all civil cases, under Code § 8.01-680 the judgment of a trial court, sitting without a jury, is entitled to the same weight as a jury verdict and will not be set aside unless it appears that the judgment is plainly wrong or without evidence to support it.

14. When, as here, the evidence presented a “battle of experts,” deference will be given to the trial court's judgment of the weight and credibility to be given their testimony. Thus, while there may be a “generalized fear” about releasing this prisoner, it cannot be said that the trial court's conclusion that the evidence did not rise to a level of

clear and convincing evidence that he would be likely to commit future acts of sexual violence is plainly wrong or without evidence to support it. Accordingly, the trial court did not err in determining that the Commonwealth [Page 265] had not met its burden of proof to establish that Allen is a sexually violent predator as defined by Code § 37.1-70.1.

Appeal from a judgment of the Circuit Court of the City of Alexandria. Hon. Alfred D. Swersky, judge designate presiding.

Affirmed.

Pamela A. Sargent, Senior Assistant Attorney General (Jerry W. Kilgore, Attorney General; Francis S. Ferguson, Deputy Attorney General, on brief), for appellant.

Andrea L. Moseley (Leibig, Moseley and Bennett, on brief), for appellee.

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