In The

Supreme Court of Virginia

RECORD NO. 082440

COMMONWEALTH OF VIRGINIA,

***Appellant*,**

v.

FRANKIE LEE SQUIRE,

Appellee.

BRIEF OF APPELLEE

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Frankie Lee Squire (hereinafter “Squire”) respectfully requests that the Supreme Court of Virginia uphold the decision of the Circuit Court of Greensville County dismissing the Commonwealth’s Petition to commit Squire as a Sexually Violent Predator (hereinafter “SVP”). In support thereof, he files the following as his brief.

STATEMENT OF THE CASE

The Commonwealth accurately summarized the Statement of the Case in its opening brief.

STATEMENT OF FACTS

At trial on September 15, 2008, the Honorable W. Allan Sharrett considered evidence of whether or not Squire met the criteria for commitment as an SVP. The Commonwealth called two witnesses, Dr. Doris Nevin and Dr. Evan Nelson.

The SVP Act applied to Squire because of a 1994 conviction of rape (Appendix, hereinafter “App.”, 106:13-15). Squire’s only other charges or incidents of a sexual nature, after the rape conviction, were four charges of indecent exposure, and one charge of making advances towards an employee, all of which occurred during his incarceration between 1995 and 1999 (App., 113:25, 114:1-4, 193:2-7). Squire received no charges,

incidents, or convictions of a sexual nature since 1999 when the Department of Corrections initially released Squire (App., 193:5-7). In 2001, Squire's probation officer removed Squire from supervised probation because of Squire's compliance with probation (App., 193:21-24).

Dr. Nevin testified that in her expert professional opinion, Squire met the criteria as an SVP as defined by Virginia law (App.,141:1-6). She based her opinion on her diagnoses of Squire having the mental abnormalities or personality disorders paraphilia, not otherwise specified; exhibitionism; and anti-social personality disorder (App.,124:20-25, 125:1-3). All of these conditions, in Dr. Nevin's opinion, would make it difficult for Squire to control his sexual behavior (App., 126:9-11, 127:23-25, 129:22-25).

In addition to her diagnoses that Squire had mental abnormalities or personality disorders, Dr. Nevin conducted actuarial tests for risk assessment including the Static-99 (App., 132:18-25). According to Dr. Nevin, the Static-99 measures the risk of sexually re-offending by having a new sex offense conviction (App.,132:24-25, 133:1-2). Squire scored a six, which when compared to similar individuals would give Squire a 39 percent risk of re-conviction within five years, 45 percent risk within ten years, and

52 percent within fifteen years (App., 134:1-13). Both Dr. Nevin and Dr. Nelson testified they could not say that Squire would be one of the individuals who would re-offend, based on the Static-99 percentages, just that he had similar traits to individuals who had re-offended (App., 146:20-25, 147:1-9, 198:13-25). Dr. Nevin further stated that "none of the actuarials can look at a specific individual and say they will [re-offend]" (App., 147:8-10).

Dr. Nevin also evaluated Squire using the Violence Risk Appraisal Guide (VRAG) which assesses an individual's risk of re-offending violently, but not necessarily re-offending sexually (App., 136:15-19, 138:5-8, 147:11-15). Based on Squire's score on the VRAG, Squire had a 55 percent probability of re-offending violently within seven years, and 64 percent probability within ten years (App., 137:21-24). Dr. Nevin also looked at the dynamic factors of Squire failing to complete sex-offender treatment, alcoholism, and other self-regulation problems (App., 139:1-5).

Dr. Nelson also concluded that Squire met the criteria of commitment as a sexually violent predator (App., 192:14-18). Dr. Nelson based his opinion on diagnoses of mental abnormalities exhibitionism and anti-social personality disorder, which in his opinion would make it difficult for Squire

to control his sexual behavior (App., 180:6-23, 183:11-25, 184:1-5). In addition to the Static-99, Dr. Nelson scored Squire using the Sex Offense Risk Assessment Guide (hereinafter "SORAG"). The SORAG studied how many people convicted of sex crimes were re-arrested for any violent offense, not necessarily re-arrested for a new sexual offense or convicted of any offense (App., 190:4-7, 199:8-10).

In response to questions from the Court, both Dr. Nevin and Dr. Nelson stated that if a person scored Squire on the Static-99 upon his release from prison in 1999, Squire would have received the exact same score he scored in 2007 (App., 161:6-16, 162:8-12, 204:16-19). Dr. Nevin further testified in response to the Court that the score in 1999 would put Squire at a 39 percent chance of sexually re-offending in five years, yet Squire's record since 1999 shows no sexual offenses (App., 161:17-24).

At the conclusion of the evidence, the trial court considered both doctors' reports, their opinions and the chronology of Squire's life from 1990 to 2008 (App., 234:11-14). The Commonwealth's case turned on whether the trial court believed Squire was likely to engage in sexually violent acts (App., 235:1-3). The trial court researched the definition of "likely", and found it to be synonymous to "probable" (App., 235:17-20).

The fact that for nine years Squire had no new convictions or incidents of a sexual nature caused the trial court to question whether Squire "probably" would re-offend sexually (App., 236:9-13). As the trial court questioned whether Squire would probably re-offend sexually, the trial court decided it was not convinced he would and dismissed the petition (App., 237:5-11).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR AS A MATTER OF LAW IN FINDING SQUIRE WAS NOT LIKELY TO ENGAGE IN SEXUALLY VIOLENT ACTS.

The Commonwealth asserts that because the trial court contradicted itself as a matter of law, then its decision is subject to *de novo* review. No authority cited by the Commonwealth asserts that a contradiction is an error of law and subject to *de novo* review. Regardless, the decision of the trial court is not subject to *de novo* review because a full reading of the trial court's decision, together with application of the holdings of both the United States Supreme Court and Virginia Supreme Court, shows the trial court did not contradict itself.

In order to be committed as an SVP, § 37.2-908 requires the court determine by clear and convincing evidence that the respondent is an SVP.

The elements for finding the respondent an SVP are found in § 37.2-900 and require that a person

> (i) has been convicted of a sexually violent offense or has been charged with a sexually violent offense . . . and (ii) because of a mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts.

"Mental abnormality or personality disorder" is further defined in § 37.2-900 as "a congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others." While the SVP Act is civil, the rule of lenity from criminal cases applies, and therefore the Act must be strictly construed in favor of the respondent's liberty. Townes v. Commonwealth, 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005); Miles v. Commonwealth, 272 Va. 302, 307, 634 S.E.2d 330, 333 (2006). In its petition, the Commonwealth is required to prove both a "mental abnormality or personality disorder" and also "because of the mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." Va Code § 37.2-900; Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867 (2002); Shivaee v. Commonwealth, 270 Va. 112, 613 S.E.2d 570 (2005).

In urging reversal of the trial court's decision, the Commonwealth focuses on one sentence of the trial court's ruling which states "there is no question in the Court's mind that Squire has a mental abnormality or personality disorder." The Commonwealth argues that since the trial court stated Squire had a mental abnormality or personality disorder, then the trial court believes Squire is "so likely to commit sexually violent offenses" that he constitutes a menace to the health and safety of others (App., 234:19-23). In reaching this result, the Commonwealth asks the Supreme Court to ignore the remainder of the judge's comments throughout the case and his ruling.

In contrast to the Commonwealth's assertions, it is clear from the next two pages of the transcript in its ruling, the trial court did not believe Squire was likely to engage in sexually violent acts and therefore the trial court did not believe Squire to meet the higher standard of "so likely to commit sexually violent offenses." The judge states: "the fact that the Court simply cannot get away from . . . is that the defendant for the last nine years has engaged in no behavior which can be characterized of a sexually abnormal nature" (App., 236:9-13). The trial court further states that "it simply cannot say that it is convinced that he will probably offend

sexually" (App., 237:5-6). Obviously, if the trial court cannot find that Squire will probably offend sexually, then the trial court did not find that he is likely to engage in sexually violent acts, or the even higher "so likely to commit sexually violent offenses." Further, in questions from the trial court, it is clear that the trial court has problems with whether or not Squire will sexually re-offend (App., 158:7-18, 162:13-20, 200:15-23).

In reading the entirety of the trial court's ruling, it is clear that if there is any contradiction, it is in the trial court's use of the phrase mental abnormality or personality disorder. In stating that Squire had a mental abnormality or personality disorder, the trial court seems to mean that Squire had the diagnoses of paraphilia and exhibitionism, not that these diagnoses would "render the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others." If the trial court believed that Squire was so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others, it would not have ruled later "that it cannot say that it is convinced that he will probably offend sexually" (App., 237:5-6).

The Commonwealth implies that in SVP commitment hearings it need only prove a "mental abnormality" or "personality disorder", and not that a

respondent "finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." Justice Scalia makes this same argument in his dissent in Kansas v. Crane, where in his opinion "it could not be clearer that . . . the very existence of a mental abnormality or personality disorder that causes a likelihood or repeat sexual violence in itself establishes the requisite 'difficulty if not impossibility' of control." Kansas v. Crane, 534 U.S. at 419-420, 122 S. Ct. at 874. However, in its seven to two decision, the majority rejects Justice Scalia's argument, and requires not only a finding of a "mental abnormality" or "personality disorder," but also that a respondent "finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."

In support of its position the Commonwealth asserts that the Supreme Court of Virginia ruled in Shivaee v. Commonwealth, that the Commonwealth only needs to prove that a person has a mental abnormality or personality disorder, and does not need to prove that he "finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts." The Commonwealth's interpretation of Shivaee is incorrect. The portions of Shivaee which the Commonwealth

references address whether the definition of “mental abnormality” or “personality disorder” is “void for vagueness.” Shivaee, 270 Va. at 124-125, 613 S.E.2d at 578. The discussion which the Commonwealth cites merely explains the Supreme Court of Virginia’s rationale as to why the definition of “mental abnormality” or “personality disorder” is not “void for vagueness.”

In contrast, in its discussion of the constitutionality of the Virginia SVP Act, in Shivaee the Supreme Court of Virginia sets out the requirements for the Commonwealth to prove under the SVP Act. The Act requires first, “proper procedures and evidentiary safeguards, second,“a finding that the person has a mental abnormality or personality disorder” and “finally . . . because of a mental abnormality or personality disorder, finds it difficult control his predatory behavior which makes him likely to engage in sexually violent acts.” *Id.* at 123, 613 S.E.2d at 576. At no point in its holding does the Supreme Court of Virginia state the Commonwealth does not have to prove that a respondent “finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent offenses.”

In its enactment of § 37.2-900, the General Assembly follows the majority opinion of Kansas v. Crane and Shivaee v. Commonwealth and does not define a sexually violent predator as someone with only a "mental abnormality" or "personality disorder." Instead, the General Assembly specifically coupled the finding of a "mental abnormality" or "personality disorder" with the requirement that the trier of fact also find that "because of the mental abnormality or personality disorder, finds it difficult to control his predatory behavior, which makes him likely to engage in sexually violent acts."

Further, applying the rule of lenity in favor of the respondent's liberty requires that the Commonwealth prove more than just a "mental abnormality" or "personality disorder." The trial court correctly applied the General Assembly's intent of § 37.2-900 by addressing both the requirements that it consider whether Squire had a "mental abnormality" or "personality disorder" and whether Squire "finds it difficult to control his predatory behavior which makes him likely to engage in sexually violent acts." The trial court made no error as it considered as "the nub of this case . . . is whether all of that makes him likely to engage in sexually

violent acts" and found "it simply cannot say that it is convinced that he will probably offend sexually" (App., 235:1-3, 237:5-6).

Finally, the Commonwealth asserts that the trial court reached its decision by the imposition of an additional requirement that the Commonwealth prove that the respondent has committed a recent overt act of criminal sexual behavior. In looking at the trial court's questions and ruling, it did not impose any additional requirements of a recent overt act of criminal sexual behavior, however, the lack of behavior of a sexually abnormal nature did cause the trial court to question the expert opinions.

The trial court emphasized its problems with the expert opinions, by pointing out that Squire would have scored the exact same on the Static-99 in 1999 when he was released, as he did in 2008, yet he had no new charges, convictions, or any incidents of a sexual nature, not just no new sexual convictions (App., 161:6-16,162:8-11, 204:16-19). As the trial court stated "we have an unusual opportunity to have observed someone's behavior over a significant period of time and to have compared his specific behavior to what the statistics say" (App.,162:16-20). Despite the statistics saying "that of 100 individuals, then 39 of them are going to sexually re-offend, reconvict," Squire had now "gone nine years with no sexual deviant

behavior either charge, uncharged, alleged or infraction" (App., 154:4-5, 157:13-16). These statements show the trial court did not require the Commonwealth to prove a new criminal act, however, the fact that there was no incident of a sexual nature caused the court to question the psychologists' expert opinion.

II. THE TRIAL COURT DID NOT ERRONEOUSLY RULE THAT THE COMMONWEALTH'S EVIDENCE FAILED TO ESTABLISH THAT SQUIRE IS A SEXUALLY VIOLENT PREDATOR.

When reviewing the sufficiency of the evidence, the Supreme Court views the evidence in the light most favorable to the party prevailing below and affirms the judgment unless plainly wrong or without evidence to support it. Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). In reviewing the record, great deference is given to the trier of fact who "had the opportunity to see and hear that evidence as it is presented." Sandoval v. Commonwealth, 20 Va. App. 133, 138, 455 S.E.2d 730, 732 (1995).

As the only witnesses in Squire's case were experts, § 37.2-908 of the Code of Virginia gives direction as to their use in the present case. If the expert witness meets the qualifications of § 37.2-904 or § 37.2-907, any expert witness may be permitted to testify at the trial, but the General

Assembly specifically directed in § 37.2-908(c) that such opinions shall not be dispositive of whether the respondent is a sexually violent predator. Where a statute is plain in its language, the appellate courts cannot give a meaning that the General Assembly did not intend. Commonwealth v. Miller, 273 Va. 540, 550, 643 S.E.2d 208, 214 (2007).

Expert testimony assists the trier of fact to understand the evidence. Payne v. Commonwealth, 277 Va. 531, 546, 674 S.E.2d 835, 841 (2009). However, the United States Supreme Court has cautioned that psychiatry "informs but does not control ultimate legal determinations." Kansas v. Crane, 534 U.S. at 413, 122 S. Ct. at 871.

In SVP commitment hearings, the Commonwealth must show clear and convincing evidence that the respondent is an SVP. § 37.2-908. Clear and convincing evidence establishes a "firm belief or conviction concerning the allegations a party seeks to establish" and is an intermediate standard between preponderance of the evidence and beyond a reasonable doubt. Miller, 273 Va. at 551, 643 S.E.2d at 215.

The evidence should be viewed in the light most favorable to Squire, as the party prevailing below. The Commonwealth states in its brief that the only evidence at trial of this matter was the uncontradicted testimony of

the two expert witnesses, but pursuant to § 37.2-908(c) the expert witness opinions are not dispositive of whether or not Squire is a sexually violent predator.

While both experts testified that in their opinion, Squire met the definition of an SVP, other evidence introduced in the Commonwealth's case causes questions regarding these opinions. Both experts testified that besides the 1994 rape conviction, Squire had no convictions of sexual nature and no charges or incidents of a sexual nature since 1999 (App., 193:5-7). The complete absence of any new sexual offenses since 1999 was evidence which went to the issue of whether or not Squire was likely to sexually re-offend, and affected the trial court's view of the expert opinions.

Both doctors performed actuarial tests that helped form the basis of their opinions. Squire's score on the Static-99 would put him in the category of individuals that would give him a 39 percent risk of re-conviction within five years, 45 percent risk within ten years, and 52 percent within fifteen years (App., 134:1-13). Squire's score on the Static-99 would have been the same upon release in 1999, yet he has had no sexual incidents since 1999 (App., 161:6-16, 162:8-12, 204:16-19). The trial court focused in its questioning of the experts that "we have an

unusual opportunity to have observed someone's behavior over a significant period of time and to have compared his specific behavior to what the statistics say" (App.,162:16-20). In this comparison, the statistics of the Static-99 show that Squire had a 39 percent chance to re-offend within five years, while Squire's actual life shows that he did not re-offend at all, a factor the court placed emphasis on in making its decision (App., 236:7-15).

Additionally, both Dr. Nevin and Dr. Nelson testified that they could not say that Squire would be one of the individuals who would re-offend under the Static-99, just that he had similar traits to individuals who had re-offended (App., 146:20-25, 147:1-9, 198:13-25). Again, Squire's actual behavior during that time period showed that he was not one of the individuals, and therefore called into question part of the expert opinions. Dr. Nevin and Dr. Nelson further relied on the VRAG and SORAG, respectively to ascertain whether Squire was likely to re-offend. Again despite the VRAG and SORAG results placing Squire into a certain category that would make him likely to re-offend, Squire has not sexually re-offended within the past nine years.

While both experts opined that Squire met the statutory definition of an SVP and was likely to sexually re-offend, the Court also looked at the evidence of Squire not having any new charges, convictions, or incidents of a sexual nature since 1999 (App., 234:11-16). The trial court did not arbitrarily disregard the opinions of the experts, but instead looked at their reports and opinions in the context of Squire's behavior and found in looking at all of the evidence, "it simply cannot say that it is convinced that he will probably offend sexually" (App., 237:5-6). As the trial court did not arbitrarily disregard the evidence of the expert witnesses, and focused on the evidence that Squire had not sexually re-offended in almost ten years, the verdict is not plainly wrong or without evidence to support it and therefore should not be overturned on appeal.

In its brief, the Commonwealth argues that Dr. Nevin and Dr. Nelson testified why these lack of new charges or incidents of a sexual nature did not change their opinions. The court did not arbitrarily disregard the expert witness evidence:

> [i]t has listened carefully to the reports of Drs. Nevin and Nelson, both of whom it respects tremendously . . . It has looked at those two facts in issue, those two reports, those two opinions, and the other fact in issues [sic] is the chronology of the defendant's life essentially from 1990 to the present time. . . (App., 234:7-14)

By this statement, the trial court shows that it considered the expert opinions and the expert reports, but also looked at the other evidence of the case in reaching its ruling. It did not arbitrarily disregard the opinions of the experts, but reached its decision by also examining Squire's life since 1990. The decision of the court was not plainly wrong or without evidence to support it, as the court had some concerns with the opinions of the experts compared with the fact that Squire had no new incidents or convictions of a sexual nature in nine years, whereas the expert opinions would say that he would re-offend within that time period.

After considering all the evidence, the trial court found that it was not convinced by clear and convincing evidence that Squire met the definition of SVP. In § 37.2-908, the General Assembly specifically gives the trial court the discretion to decide a respondent is not an SVP despite the expert opinions as "such opinions shall not be dispositive of whether the respondent is a sexually violent predator." In urging the overturn of the trial court's judgment, the Commonwealth asks the Supreme Court of Virginia to take away the trial court's authority as trier of fact and to give § 37.2-908 "a meaning the General Assembly did not intend." Miller, 273 Va. at 550, 643 S.E.2d at 214. As the trier of fact, it is the trial court's decision to

determine whether or not Squire is an SVP, not the psychologist experts, as psychology "informs but does not control ultimate legal determinations." Kansas v. Crane, 534 U.S. at 413, 122 S. Ct. at 871. Any other interpretation of the SVP Act would dispense with the necessity of trial once the Commonwealth's expert and the respondent's court-appointed expert opined that the respondent is an SVP.

CONCLUSION

The trial court did not err as a matter of law in finding that Squire was not likely to engage in sexually violent acts, as a complete reading of the questions and ruling of the trial court shows the trial court did not believe Squire would probably sexually re-offend, and therefore would not believe Squire would be so likely to re-offend.

The General Assembly has specifically stated that the expert witness opinions are not dispositive of the issue of whether or not a respondent is an SVP, therefore there is no error in the trial court dismissing the Commonwealth's petition even though both experts testified Squire is an SVP. In looking at the evidence of the respondent's life since 1990, it is clear the trial court did not arbitrarily disregard the evidence of the experts in dismissing the Commonwealth's Commitment Petition.

For the foregoing reasons, Frankie Lee Squire, respectfully requests the Supreme Court of Virginia deny the Commonwealth's Appeal and uphold the decision of the Circuit Court of Greensville County dismissing the Commonwealth's Petition to Commit Squire as a Sexually Violent Predator.

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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, I hereby certify that on this 10th day of June, 2009, I caused fifteen paper copies and one electronic copy on CD of the foregoing Brief of Appellee to be hand-filed with the Clerk of the Supreme Court of Virginia, and caused three paper copies of the same to be served by first-class mail, postage prepaid, upon John H. McLees, Esquire, Senior Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219.

Alvin A. Lockerman, Jr.