

missing children and reuniting families. These contrasting situations of governmental investigation of death and kidnapping illustrate the challenge balancing the public policy interest in identifying wrongdoers and individual privacy interests.

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The Admissibility of Prior Criminal and Psychiatric History in Civil Sexually Violent Predator Commitment Hearings

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The Supreme Court of Kansas Affirms the Judgment of the District Court and the Court of Appeals That Civil Commitment Hearings May Include Victim Testimony, Psychiatric Testimony, and Evidence of Nonsexual Prior Crimes in Determining the Disposition of Defendants Convicted of Sexual Offenses

In the case *In re Care and Treatment of Miller*, 210 P.3d 625 (Kan. 2009), the Kansas Supreme Court agreed with the decision of the district court to allow the state to present multiple types of evidence in commitment proceedings held to determine Miller's designation as a sexually violent predator (SVP) under the Kansas Sexually Violent Predator Act (Kan. Stat. Ann. § 59-29a01 et seq. (2003)—hereafter referred to as the Act). The contested evidence presented at the hearing included a prior sexual conviction, testimony by a former victim, testimony from a treating doctor at the penitentiary regarding behavior in the institution, and prior criminal history, including arrests for nonviolent crimes and those in which the charges were ultimately dropped. Citing relevant case law, the Kansas Supreme Court rejected each claim made by the defense and affirmed the decision of the lower courts, ruling that Mr. Miller had been properly committed.

Facts of the Case

In 1980, Richard A. Miller abducted a 15-year-old. He was charged and ultimately pleaded guilty to charges of aggravated sodomy in addition to two other charges. While on parole in 1992, he was arrested for burglary and attempted rape, and although he was ultimately convicted on the burglary charge, the attempted rape charge was dropped. While incarcerated in the state penal system, he was evaluated and treated for polysubstance dependence, including alcohol, cannabis, amphetamines, and opioids. His diagnosis also included antisocial personality disorder. He was also noted to manifest sexually inappropriate behavior in prison, including stalking female employees, persistent aggressive behavior toward a female therapist, and purposeful masturbation within view of female corrections employees.

The state later brought proceedings against Mr. Miller to commit him under the Act. During the proceedings, the court allowed live in-court testimony from his victim and from a detective who investigated an act of aggravated sodomy that Mr. Miller had committed in 1980, for which he was subsequently convicted. This testimony was allowed despite Mr. Miller's motion to stipulate to the evidence. He also unsuccessfully sought to suppress the presentation of evidence stemming from the 1992 arrest in which he was convicted of burglary and was also charged but not convicted of attempted rape. The court heard testimony from a woman who found that Mr. Miller had broken into the basement of her duplex while she was bathing. She subsequently escaped, presumably avoiding rape. The court heard testimony from state psychologist Dr. Ryan David Donahue, who recited Mr. Miller's numerous prior criminal charges to the court, including some charges that had been dismissed for lack of evidence and misidentification. Dr. Donahue testified to acts of lewd and lascivious conduct and indecent liberties that Mr. Miller allegedly committed in 1976, for which he was never convicted. He testified to the aforementioned inappropriate behavior of Mr. Miller toward women in prison. He also testified that he had administered two screening tests to Mr. Miller that indicated that he was at high risk of committing future sex offenses. During the proceedings, Mr. Miller sought (unsuccessfully) to limit Dr. Donahue's testimony. Both Dr. Donahue and Mr. Miller's psychiatrist, William Logan, testified that

Mr. Miller demonstrated antisocial personality disorder, as well as drug and alcohol abuse and dependence.

Mr. Miller was subsequently committed under the Act. He appealed to the Kansas Court of Appeals, alleging an abuse of discretion by the trial court and undue prejudice as well as cumulative error. The court of appeals affirmed the commitment as properly conducted. Mr. Miller appealed to the Kansas Supreme Court.

Ruling and Reasoning

In rejecting Mr. Miller’s motion to stipulate, the district judge had relied on two Texas cases: *In re Adams*, 122 S.W.3d 451 (Tex. App. 2003), which asserted that a court may admit a sex offender’s prison disciplinary records and copies of previous conviction records despite an offender’s stipulation, and *In re Commitment of Petersimes*, 122 S.W.3d 370 (Tex. App. 2003), which asserted that a court may admit copies of a sex offender’s indictments and judgments of prior offenses, despite the offender’s stipulation. Mr. Miller’s appeal of the district court’s decision was based on the U.S. Supreme Court’s decision in *Old Chief v. United States*, 519 U.S. 172 (1997). In *Old Chief*, the defendant’s proffered stipulation to his prior conviction (criminal possession of a firearm) was rejected by the lower court. The Court reversed the conviction and held it was an abuse of the lower court’s discretion to spurn an offer of stipulation, thus raising “the risk of a verdict tainted by improper considerations” (*Old Chief*, p 174). The Kansas Supreme Court rejected Miller’s *Old Chief* rationale, relying on their own precedents in *State v. Lee*, 977 P.2d 263 (Kan. 1999), and *In re Care and Treatment of Crane*, 7 P.3d 285 (Kan. 2000). In *Lee*, the court held that although the *Old Chief* rationale was valid for most instances, the court’s “views should not be read as limiting the State in presenting a full in-depth story of a prior crime when the prior crime has relevance independent of merely proving prior felony status” (*Lee*, p 271). In *Crane*, the court asserted that *Lee* (and implicitly *Old Chief*) did not apply to sexually violent predator commitment hearings, holding that “. . . evidence of prior conduct was material to the question of likelihood that the respondent would engage in repeat conduct as well as to the element of conviction of prior conduct” (*Crane*, p 293).

Discussion

The Kansas Supreme Court considered multiple allegations made by Miller’s counsel alleging error in the process used to civilly commit him under the Kansas SVP Act. In rejecting each claim, the court confirmed that a wide range of evidence is admissible in such hearings. The trial court admitted live, in-court testimony from former victims and prison personnel, evidence concerning prior nonsexual offenses, and charges dismissed due to lack of evidence. The court relied on *State v. Franklin*, 677 N.W.2d 276, 282, n. 9 (Wis. 2004):

The nature of the [sexually violent] predator inquiry virtually guarantees the wide-ranging admissibility of evidence concerning the defendant’s past crimes and transgressions.

In *Miller*, as in other SVP cases, the court separated those convicted of sexual offenses from typical criminal offenders. Normally, the inquiry in criminal cases looks backward to determine guilt. In sex offender determinations, the inquiry looks backward to determine propensity. The criminal offender is presumed to be rationally autonomous—that is, able to choose to obey the law, or not. The SVP inquiry focuses on whether the subject has, to some extent, lost free will. This loss of autonomy (and by extension, behavioral control) shifts the focus from prior wrong to future menace. Per the Kansas SVP Act, the inquiry “looks to the future, to the probability of a respondent’s continuing ‘menace to the health and safety of others’” (Kan. Stat. Ann. § 59-29a02(c) (2006)).

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Competence for Execution

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The Sixth Circuit Reversed the District Court’s Dismissal of an Inmate’s Petition as to Incompetency to Be Executed and Remanded for Further Proceedings

In *Thompson v. Bell*, 580 F.3d 423 (6th Cir. 2009), Gregory Thompson appealed a Tennessee