Sexually Violent Predator Commitment: Reviewing the Evidence on the Likelihood of Reoffending

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Kansas Supreme Court Reverses Appeals Court Decision That Overturned SVP Commitment, Finding That Undue Weight Was Given to Actuarial Test Results in Determining the Likelihood of Reoffending

In the Matter of the Care and Treatment of Darwin C. Williams, 253 P.3d 327 (Kan. 2011), the Kansas Supreme Court reviewed the decision of the Kansas Court of Appeals in overturning a district court finding that Mr. Williams was a sexually violent predator. The Kansas Supreme Court reviewed the elements that must be proved in sexually violent predator cases and whether the district court had sufficient evidence to support a finding beyond a reasonable doubt.

Facts of the Case

Darwin C. Williams was convicted in 1987 of two counts of indecent liberties with a child and sentenced to prison. He received parole in 1999, but it was revoked after six months due to drug use. He was paroled again in 2002. This parole was revoked in January 2003, based on his having sexual contact with a minor, his having consumed alcohol, his unsuccessful discharge from a Sex Offender Treatment Program, and his admission to viewing pornographic and sexually explicit materials. The state filed for civil commitment of Mr. Williams as a sexually violent predator (SVP), and he waived his right to a jury trial. In his district court trial, two expert psychologists gave conflicting opinions regarding the risk of sexual reoffending due to mental abnormality or personality disorder.

The state's expert, Dr. John Reid, opined that Mr. Williams met the criteria as a sexually violent predator, as per Kansas law. He testified that Mr. Williams' mental health diagnoses included alcohol dependence, substance abuse, antisocial personality disorder (ASPD), exhibitionism, and paraphilia not otherwise specified (paraphilia NOS). Dr. Reid's evaluation used two actuarial tests: the MnSOST-R and the Static-99. On the MnSOST-R, Mr. Williams scored in the Level 2 (moderate) category for sexual recidivism, with a 29 percent risk of reoffending. Based on Mr. Williams' history, offenses, substance use, and the presence of mental and personality disorders including paraphilia NOS and ASPD, Dr. Reid opined that Mr. Williams was at risk of committing sex offenses. Dr. Reid based his opinion on the results of the actuarial tests, his interview with Mr. Williams, and Mr. Williams' past behavior and treatment, as reported by the Department of Corrections. He also testified that actuarial tests like the ones used in this case may underestimate the probability that an offender will reoffend.

The defense expert, Dr. Robert Barnett, opined that Mr. Williams did not meet criteria for SVP. Dr. Barnett did not agree with the diagnosis of ASPD, but found that Mr. Williams "suffers from alcohol and substance abuse." He disagreed with the diagnosis of exhibitionism and indicated that the diagnosis of paraphilia NOS was too general. Dr. Barnett was critical of the use of the MnSOST-R and Static-99, because they do not take into account the length of incarceration or mental health and sexual treatment received and because they do not include a psychopathy assessment or penile plethysmograph.

Testifying on his own behalf, Mr. Williams admitted to sexual misconduct with children on three separate occasions. He was asked about the events that led to his parole revocation in 1999 for a positive drug test. His drug use followed an encounter in a bar with a man who later charged him with rape. Mr. Williams denied any sexual misconduct with the man. The rape charge was amended to sodomy and later dismissed without prejudice. Regarding his 2002 parole revocation, Mr. Williams admitted to having sexual contact with a male he had met through a personal advertisement. During his testimony, Mr. Williams admitted the possibility that this male may have been under the age of 18. He also admitted to watching pornography and being sexually active during parole. He returned to drinking alcohol when paroled, a factor known to have been a sexual trigger for him.

The district court was persuaded by Dr. Reid's report and found beyond a reasonable doubt that

Mr. Williams was a sexually violent predator. On appeal, Mr. Williams raised a single issue: whether there was sufficient evidence to support the requirement under Kansas legislation that he is "likely to engage in repeat acts of sexual violence." In short, the court of appeals was not convinced that the facts of the case were sufficient to indicate that he was likely to reoffend beyond a reasonable doubt, and the trial court's decision was reversed. The court of appeals decided that the results of the MnSOST-R and Static-99 suggested "only a possibility" (29%–40%, according to the outcome of the actuarial tests performed by Dr. Reid) rather than proving beyond a reasonable doubt that Mr. Williams would reoffend. The decision did not focus solely on the actuarial tests in determining that the burden of proof was not met. The appeals court also discounted the significance of the allegations that he had reoffended after being paroled twice. The court cited that his charges were dismissed following his first parole revocation and that he was not charged in the matter that led to his second parole violation.

The Supreme Court of Kansas (SCK) granted the state's petition for review of the case. The state argued that the court of appeals improperly reweighed the evidence and failed to consider evidence that supported the district court's findings.

Ruling and Reasoning

The SCK reversed the decision of the appeals court and affirmed the judgment of the district court that Mr. Williams was a sexually violent predator. The SCK reviewed the Sexually Violent Predator Act (SVPA) (Kan. Stat. Ann. § 59-29a01 et seq. (1994)), the Kansas statute that defines SVP. The Supreme Court of the United States considered the constitutionality of the statute in three cases: *Kansas v. Hendricks*, 521 U.S. 346 (1997); *In re Care and Treatment of Crane* (*Crane I*), 7 P.3d 285, 290 (Kan. 2000); and *Kansas v. Crane* (*Crane II)*, 534 U.S. 407 (2002). The blending of the Kansas statute with the holding in *Crane II* resulted in the elements that must be proved beyond a reasonable doubt, to establish that an individual is an SVP: the individual has been convicted of or charged with a sexually violent offense, has a mental abnormality or personality disorder, is likely to commit repeat acts of sexual violence because of a mental abnormality or personality disorder, and has difficulty in controlling his dangerous behavior.

The sole issue raised by Mr. Williams on his appeal was whether there was sufficient evidence to support the requirement under the SVPA that he was likely to engage in sexual acts that would pose a risk to the safety of others. He waived his right to argue the three other elements (first, second, and fourth) by raising the issue on appeal only. The court found sufficient evidence to establish the other three elements. The SCK examined the testimony of Dr. Reid to determine if the third element was established. Dr. Reid testified that his opinion was based on Mr. William's history before and during incarceration and the nature of his disorders.

The appeals court gave considerable weight to the fact that Mr. Williams' scores on actuarial testing did not exceed a 50 percent risk of sexual reoffending. It also noted that the scores were low, relative to those of other individuals who had been committed as SVPs. Justice Luckert of the SCK pointed out that there is no authority supporting a particular method of proof, test, or percentage or category of risk. The SCK ultimately decided that evidence beyond the test scores could convince a rational fact finder that the state had met its burden beyond a reasonable doubt. The SCK determined that there was evidence that Mr. Williams reoffended and engaged in practices that Dr. Reid found were significant indicators of a failure to control behavior and that this evidence did not require that Mr. Williams be charged with a new offense.

Dissent

Justice Rosen dissented based on his opinion that the SCK did not implement proper evidentiary safeguards and that Mr. Williams' "uncharged and unproven conduct" should not be considered absent a specific analysis under Kansas law, K.S.A. 60-455. Without the analysis, Justice Rosen found that the testing results could not support a likelihood of reoffending beyond a reasonable doubt. In this light, Justice Rosen further opined that without proof of further offenses, substance abuse, in and of itself, was not sufficient to prove that Mr. Williams had serious difficulty controlling his dangerous behavior.

Discussion

The primary issue before the SCK was the proper weighing of evidence used to determine if a person is an SVP according to Kansas statute. The SCK majority determined that the court of appeals improperly reweighed the actuarial data and excluded infor-

mation from expert testimony. The interpretation of the actuarial data by the different courts is of interest to forensic clinicians. Ultimately, the question of how much risk is enough to meet the criteria for commitment as an SVP is a legal one. In this case, the appeals court rejected actuarial data that were consistent with moderate to high levels of reoffending as insufficient to support dangerousness beyond a reasonable doubt. The supreme court had a similar though less strict interpretation. The state's expert used testing data, in part, to support his opinion of dangerousness. Experts would do well to prepare for challenges to actuarial findings based on the calculated risk, recognizing the limitations of the particular test.

The court's view of the alleged sexual behavior that resulted in the 2003 parole revocation raised another important evidentiary question. The dissenting justice argued that the data on this behavior were not subject to proper evidentiary analysis, but the SCK relied heavily on Dr. Reid's testimony regarding Mr. Williams' "uncharged and unproven conduct." Thus, another important matter for forensic clinicians to be aware of is that the court may or may not consider the data underlying a forensic opinion to be admissible or relevant in legal proceedings.

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Use of State Facilities for Postconviction Mental Retardation Evaluations Did Not Violate a Defendant's Constitutional Rights; Potential Violation of Those Rights Are Redressable by Appeal

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Supreme Court of Kentucky Denies Writ of Prohibition to Prevent Judge From Forcing Death Row Inmate to Submit to a Mental Retardation Evaluation Conducted by the Kentucky Correctional Psychiatric Center

Karu Gene White was convicted of three counts of capital murder and three counts of first-degree robbery and sentenced to death. In *White v. Payne*, 332 S.W.3d 45 (Ky. 2010), Mr. White sought a writ of prohibition seeking relief from Judge Payne's order requiring him to submit to a mental retardation evaluation by the Kentucky Correctional Psychiatric Center (KCPC) examiner, rather than by an expert of his choosing. Mr. White contended that the judge acted erroneously and that he would suffer irreparable injury by losing state and federal constitutional rights that could not be readdressed on appeal.

Facts of the Case

In 1980, the Powell County Circuit Court convicted Mr. White of three counts of capital murder and three counts of first-degree robbery and sentenced him to death for each of the murders. The Supreme Court of Kentucky affirmed his convictions and sentences. Mr. White's subsequent motion to vacate his death sentence was denied, and that denial was affirmed on appeal. He petitioned for a writ of *habeas corpus* in the United States District Court for the Western District of Kentucky, which was held pending the outcome of his claim that his execution was precluded by his mental retardation, per *Atkins v. Virginia*, 536 U.S. 304 (2002).

Despite no determination of his intelligence quotient (IQ) by testing, Mr. White's petition described deficits in adaptive behavior that convinced Special Judge Paisley that there was sufficient doubt to warrant an evidentiary hearing. The judge subsequently ordered the Finance and Administration Cabinet to pay up to $5,000 for mental health testing by an expert of Mr. White's choosing. The commonwealth sought a writ of prohibition, and the Supreme Court of Kentucky found that Judge Paisley had abused his discretion by ordering the Finance and Administration Cabinet to pay for a private psychologist without first showing that the use of state facilities was impractical, as set forth in *Commonwealth v. Paisley*, 201 S.W.3d 34 (Ky. 2006).

On remand, Special Judge Payne opined that KCPC was capable of providing a competent examiner for the mental retardation evaluation of Mr.