

Four Years' Delay in Sexually Violent Person Commitment Hearing Ruled Unconstitutional

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The U.S. Constitution Guarantees a Due Process Right to a Speedy Trial in Civil Commitment Hearings of Sexually Violent Persons

In *In re Ellison*, 385 P.3d 15 (Kan. 2016), the Kansas Supreme Court considered what constitutes the proper framework to ascertain when a delay violates an individual's due process right to a speedy trial in the setting of civil commitment for sexually violent offenses. Siding with Mr. Ellison, the court held that four factors should be weighed: length of delay, reasons for delay, defendant's assertion of the right to a speedy trial, and prejudice to the defendant. The court determined that in civil commitment proceedings depriving a person of liberty, the right to a speedy trial emerges from the Fourteenth Amendment's Due Process Clause and concluded that an analytic framework developed in criminal cases applies.

Facts of the Case

The Kansas Sexually Violent Predator Act (KSVPA) allows for civil commitment of sexually violent persons (SVPs) who are deemed too dangerous to be released into the community after their criminal sentences. It provides for an initial probable cause hearing to determine whether a person convicted of or charged with a sexually violent offense "suffers from a mental abnormality or personality disorder which makes the person likely to engage in repeat acts of sexual violence" (Kan. Stat. Ann. § 59-29a02 (2016)). That is, is there probable cause that the individual is an SVP? If so, the defendant is transferred to a secure facility to undergo evaluation to determine whether the person is an SVP. Within

60 days of the probable cause hearing, the state must prove at a civil commitment trial that the defendant is an SVP beyond a reasonable doubt.

In June 2009, Kansas filed a KSVPA petition against Todd Ellison, who was, at the time, finishing his sentence for a sexual offense. Probable cause was found, and Mr. Ellison was transported to a county jail to await trial. However, due to a series of motions, continuances, and administrative hindrances, he remained in jail without trial until March 2014, when the district court ordered his release, agreeing with his June 2012 motion that the KSVPA violated his constitutional due process rights, which included the right to a speedy trial. The state appealed, contending that Mr. Ellison did not have a right to a speedy trial, which was reserved for criminal cases, and even if he did, the district court erred in its assessment of the relevant speedy trial factors. The Kansas Court of Appeals accepted the state's second argument and held that although the district court applied the correct analytic framework, it failed to consider all the required factors. The court of appeals reversed and remanded the case for further development of those factors. Mr. Ellison appealed this reversal to the state supreme court.

Ruling and Reasoning

The Kansas Supreme Court affirmed the district court's ruling that the delay in Mr. Ellison's trial was excessive and violated his Fourteenth Amendment due process rights. Responding to the state's argument that the Sixth Amendment right to a speedy trial in criminal cases does not apply to civil proceedings, the court stated that due process nevertheless requires "the opportunity to be heard at a meaningful time and in a meaningful manner" when a state seeks to deprive someone of life, liberty, or property" (*Ellison*, p 21). The court recognized that civil commitment constitutes a deprivation of liberty, and a speedy trial enables individuals facing civil commitment to be heard at a meaningful time. Conversely, excessive delay in obtaining a trial violates due process.

The court determined that *Barker v. Wingo*, 407 U.S. 514 (1972), provides the appropriate framework to establish whether a trial delay is excessive. In *Barker*, the U.S. Supreme Court held that in assessing violations of the Sixth Amendment right to a speedy trial in criminal cases, courts should weigh four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and preju-

dice to the defendant” (*Barker*, p 530). This balancing of the defendant’s and state’s conduct is needed because defendants and states may have differing, and sometimes opposing, interests in moving toward trial.

Citing *U.S. v. \$8,850*, 461 U.S. 555 (1983), the court analogized from the Sixth Amendment right to a speedy trial in criminal cases to the right to a speedy trial flowing from the Fourteenth Amendment in civil matters involving deprivation of life, liberty, or property. In *\$8,850*, customs officials seized property and waited 18 months before filing for civil forfeiture. The U.S. Supreme Court used the *Barker* framework to determine that this delay was excessive and violated the owner’s due process rights. In *\$8,850*, the Supreme Court did not find a meaningful difference between the Sixth Amendment right to a speedy trial and the due process restriction against undue delay in the deprivation of property. The Kansas Supreme Court further opined that numerous other jurisdictions have incorporated a *Barker* or *Barker*-like analysis in assessing pretrial delay in SVP commitments.

The court applied the *Barker* test to Mr. Ellison’s case and affirmed the district court’s analysis. All parties agreed that the length of delay (over four years) was noteworthy. Whereas the state and Mr. Ellison differed in their assignments of reasons for delay, the court observed that even the most favorable accounting of responsibility allotted 326 days to the state, more than five times the statutory limit of 60 days. Furthermore, although the district court assigned Mr. Ellison responsibility for 461 days, nearly 1,000 days remained unaccounted for. The court held that the state had the responsibility not only to bring Mr. Ellison to trial (he had no responsibility to bring himself to trial) but also to provide evidence to justify any unaccounted for delays. Failure to do so weighed against the state, although the weight was not heavy, because the court did not necessarily assume malicious intent.

The third factor the court considered was the assertion of the right, which the court construed as having been made by Mr. Ellison in his June 2012 motion. However, the court found that this factor was neutral or weighed minimally in Mr. Ellison’s favor because although the motion claimed that the KSVPA violated due process, it did not clearly assert the right to a speedy trial.

Finally, the court ruled that the delay was highly prejudicial. Focusing on Mr. Ellison’s pretrial detention, the court noted that pretrial detention is even more prejudicial in civil commitment than it is in criminal law. Unlike in criminal cases, a civil commitment pretrial detainee gains no credit for time served and instead loses opportunities to secure treatment, rehabilitation, and release. Pretrial detention also has negative social and occupational consequences. Had Mr. Ellison been committed immediately, he would have had four years of treatment, four annual examinations, and four opportunities to petition for release. The Kansas Supreme Court therefore agreed with the district court and concluded that the *Barker* factors weighed in Mr. Ellison’s favor.

Discussion

SVP commitment occupies a space between traditional civil proceedings and traditional criminal proceedings. Every one of the 21 jurisdictions with SVP statutes guarantees a right to counsel. All except five states and the federal government provide the right to a jury trial. Nine states, including Kansas, require that an SVP be proven as such beyond a reasonable doubt (Lave TR: Throwing away the key: has the Adam Walsh Act lowered the threshold for sexually violent predator commitments too far? *U Pa J Const L* 14:391–430, 2011). The present Kansas Supreme Court decision found a right to a speedy trial. These protections are akin to those found in criminal courts. Yet, with few exceptions, there is no right to be competent to stand trial and no right against self-incrimination. There are likewise no double jeopardy or *ex post facto* protections. As the Kansas Supreme Court remarked in this case, pretrial detainees gain no credit for time served. Notwithstanding the purportedly nonpunitive nature of civil commitment and the requirement of a “mental abnormality,” there is no constitutional right to treatment (Izzi AR: Constitutional law: the cage a fetish can build. Proposed legislation reform for civil commitment procedures in sexually violent predator laws. *W New Eng L Rev* 39:141–76, 2017).

Despite no constitutional right to treatment, most SVP statutes nevertheless provide for some form of treatment and procedures for release. The Kansas Supreme Court emphasized the existence of such treatment and procedures as one reason that pretrial detention was particularly prejudicial. However, the difficulty for mental health clinicians is the lack of

professional consensus concerning standards for assessment and treatment. States vary widely with respect to their diagnostic approaches, treatment protocols, and methods for identifying progression in the program (Deming A: Sex offender civil commitment programs: current practices, characteristics, and resident demographics. *J Psychiatry & L* 36: 439–61, 2008). Presumably, this variation results in a corresponding variation in the level of prejudice attributed to a defendant’s pretrial detention. Nonetheless, pretrial detention is considered prejudicial, even without the opportunity for treatment or release, as is the case in criminal trials. With critics in many fields, SVP laws will continue to be a hotbed of legal, ethics-related, and pragmatic challenges for the foreseeable future.

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Constitutionality of Involuntary Commitment of Sex Offenders to State Offender Programs

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The Eighth Circuit Court of Appeals Rules that the State’s Conduct Must Be “Conscience Shocking” for the Minnesota Civil Commitment and Treatment Act for Sexually Dangerous Persons and Sexual Psychopathic Personalities to Be Unconstitutional

In *Karsjens v. Piper*, 845 F.3d 394 (8th Cir. 2017), the Eight Circuit Court of Appeals agreed with a lower court decision that individuals committed to the Minnesota Sex Offender Program (MSOP) had standing to challenge the constitutionality of the Minnesota Civil Commitment and Treatment Act (MCTA) for Sexually Dangerous Persons and Sexual Psychopathic Personalities Act (then Minn. Stat. § 246B and 253B (2011)). It also concluded the lower court erred in determining that these offenders had a fundamental right to liberty and therefore

could rely on the strict scrutiny test (the highest standard of review, used to test the validity of government action in the context of individual constitutional rights) as the standard for judicial review; rather, the court found that this class failed to demonstrate that the MSOP deficits were “egregious, malicious, or sadistic as is necessary to meet the conscience-shocking standard” (*Karsjens*, p 411). The Eighth Circuit also held that the services and protections provided to those committed under the MCTA were rationally related to the state’s interest of protecting its citizens.

Facts of the Case

Kevin Scott Karsjens was the lead plaintiff in a class of individuals who were involuntarily enrolled in the MSOP. Mr. Karsjens had a long criminal history dating back to his teens that included convictions for first degree criminal sexual conduct, terroristic threats, kidnapping, felony theft, and fleeing a police officer, among others. Just before his commitment to the MSOP, Mr. Karsjens was sentenced to 41 months’ imprisonment after pleading guilty to domestic assault and terroristic threats. His incarceration was extended by 540 days because of his refusal to participate in sex offender treatment. After his incarceration, he was committed to the MSOP in 2008 as a sexually dangerous person because of his likelihood to reoffend, extensive legal history, and prior refusals to participate in treatment. He declined to participate in treatment during his initial 6-month evaluation period at the MSOP and was subsequently ordered for indeterminate commitment to the MSOP.

The class of plaintiffs who joined with Mr. Karsjens had also been convicted of sex crimes, served the entirety of their prison sentences, and, upon release from the Department of Corrections, were committed to the MSOP under the MCTA. They filed suit against the Commissioner of the Minnesota Department of Human Services and other MSOP managers alleging that their right to due process (42 U.S.C. §1983 (2008)) was violated by the managers of the MSOP. Among the concerns raised was that the treatment provided was not consistent with the reason for their commitment; indeed the MSOP did not even employ a full-time psychiatrist to treat its 726 clients. In addition, there were no less restrictive alternatives for treatment or periodic independent risk assessments to determine whether offenders continued to meet criteria for commitment,