

Violent Sexual Predator (SVP) Civil Hearings and the Application of Collateral Estoppel: SVP Civil Hearings and Double Jeopardy

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Collateral Estoppel Does Not Bar the Alleged Victim From a Prior Criminal Trial of Again Testifying Against the Defendant in His Subsequent SVP Hearing

At the end of a defendant's term of imprisonment for a sexual crime to which he had pled guilty, the State petitioned to have the defendant found to be a sexually violent predator (SVP) and a proceeding pursuant to the state's SVP statute was conducted. The state sought to introduce into evidence at that proceeding the testimony of a "victim" of alleged sexual offenses where that victim had previously testified against the defendant in a trial in which he was found not guilty of all alleged offenses. The defendant objected to the admissibility of that victim's testimony, citing the doctrine of Collateral Estoppel as a bar to her testimony. The doctrine of Collateral Estoppel prohibits the relitigation, by the same parties, of issues that have been fully litigated and resolved between them. Thus, the defendant argued that his not guilty verdict in the previous criminal trial, in which the "victim" had testified, barred the reintroduction of her testimony at his subsequent SVP hearing. Over his objection, the SVP hearing trial judge allowed the alleged victim to testify again concerning the defendant's same alleged sexual offenses against her. The defendant also raised the United States and Virginia Constitutional prohibitions against double jeopardy (the retrying of a defendant for the same crime for which he had previously been tried and acquitted). The SVP trial court overruled the double

jeopardy objection. At the conclusion of the SVP hearing, the defendant was found to be an SVP and was committed for a possible indefinite term of inpatient confinement and treatment. The defendant appealed this finding, and his case was heard by the Virginia Supreme Court and decided in *Ellison v. Commonwealth*, 639 S.E.2d 209 (Va. 2007).

Facts of the Case

In August 1998, defendant-appellant Mr. Ellison, pled guilty to abduction and rape of a female victim. He was then sentenced to a 50-year prison term, with 42 years and 7 months of that sentence suspended. In 2002, in an unrelated case, he was tried for crimes he was alleged to have committed on December 18, 1997. The charges in the 2002 trial included: statutory burglary, rape, forcible sodomy, and inanimate object penetration against a different "female victim" than in the 1998 trial. At the conclusion of the 2002 jury trial, he was found not guilty of all charges related to the alleged offenses of December 18, 1997. On May 9, 2005, as Mr. Ellison approached the end of his prison sentence, the Attorney General filed a petition for his civil commitment as an SVP, pursuant to the state's Sexually Violent Predators Act, VA. Code Ann. § 37.1-70 et seq. (2003).

After an initial hearing on the petition, probable cause to establish Mr. Ellison as an SVP was found, and he was detained for trial and final disposition on the SVP matter. A bench trial was held on September 21 and 22, 2005, and expert testimony as well as other testimony was placed into evidence. Most notably in the instant case, the prosecutor called as a witness the "victim" of the alleged rape of December 18, 1997. Mr. Ellison objected to her testimony on grounds that it was barred by collateral estoppel and double jeopardy, given that he was found not guilty of all charges in the 1997 case. Over his objections, the trial judge allowed the alleged victim to testify that Mr. Ellison had raped her on December 18, 1997. At the conclusion of the hearing, Mr. Ellison was found to be an SVP and was then committed to inpatient hospitalization for a year, with another hearing on his SVP status to be held at that time. Following his SVP trial, Mr. Ellison filed an appeal based on his claim that the testimony of the alleged 1997 victim was improperly admitted by the SVP trial court.

Ruling and Reasoning

The Virginia Supreme Court considered Mr. Ellison's two claims; that the collateral estoppel and double jeopardy were each grounds that should have barred the alleged victim's testimony at the SVP trial. The court unanimously held that neither of these claims applied to the admission of the victim's testimony at the SVP trial and affirmed the judgment of the trial court.

The court's reasoning on the collateral estoppel doctrine claim was brisk. It reviewed the elements required for the application of the doctrine as a bar to testimony. In the court's words:

The doctrine of collateral estoppel precludes the same parties to a prior proceeding from litigating in a later proceeding any issue of fact that actually was litigated and was essential to the final judgment in the first proceeding. Before the doctrine may be applied, four elements must be met: (1) the parties to the two proceedings must be the same; (2) the factual issue sought to be litigated in the second proceeding must have actually been litigated in the first; (3) that factual issue must have been actually decided and essential to the judgment in the prior proceeding; and (4) the prior proceeding must have resulted in a valid, final judgment against the party to whom the doctrine is sought to be applied (*Ellison*, p 212).

The supreme court then concluded that elements (2) and (3) were not met by Mr. Ellison's collateral estoppel argument. It explained that a not guilty verdict in a criminal trial does not establish that the defendant is factually innocent. It noted that under the established evidentiary rules of criminal trials, the jury in the criminal trial only determined that Mr. Ellison was not guilty beyond a reasonable doubt. This, the court noted, left undecided the issue of whether he might be guilty by the lesser, clear and convincing, standard of evidence, which is the standard applied in SVP trial hearings. Hence, the court concluded that condition (2) of the four necessary conditions was not met by the fact of Mr. Ellison's verdict of not guilty beyond a reasonable doubt in his 1997 trial. It follows from this, the court reasoned, that the issue of Mr. Ellison's actual innocence of the sexual offense was not litigated in the 2002 trial. And so, the court ruled that the requirement of element (3) was also not met by Mr. Ellison.

The Virginia Supreme Court went on to dispatch Mr. Ellison's double jeopardy claim quickly. It did this by citing the precedents of *Dowling v. United States*, 493 U.S. 342 (1990), which held that the double jeopardy clause did not preclude the government from relitigating an issue when a lower stan-

dard of proof was to be applied; *Kansas v. Hendricks*, 521 U.S. 346 (1997), which held that the double jeopardy clause did not apply to SVP statutes since they are civil, not criminal, proceedings; and *Shivae v. Commonwealth*, 613 S.E.2d 570 (Va. 2005), which held that Virginia's SVP act did not violate state or federal double jeopardy provisions.

Discussion

The *Ellison* case follows a trend in appellate cases, with a few exceptions (see *Commonwealth v. Gillis*, 861 N.E.2d 422 (Mass. 2007), this issue, below), in which psychiatric nosology, statutory interpretation, and evidentiary rules are construed in the service of lowering the bars to the involuntary indeterminate civil commitment of persons found to be SVPs. While the Virginia Supreme Court's decision in *Ellison* followed a strict construction of the double jeopardy clause and the application of the doctrine of collateral estoppel, the import of the court's holding is to give the nod to prosecutors to take a second bite of the apple by retrying those sexual offense cases that they have previously lost in criminal trials. The court's signaling that not guilty never means not guilty at all, but merely means not guilty beyond a reasonable doubt, encourages the use of past complainants in subsequent SVP hearings (that have a lower evidentiary standard, typically clear and convincing). Since a criminal trial never finds someone factually innocent, even the most egregious prosecutions of sex offense cases (for example, the notorious day-care cases of the 1980s) that produce not guilty verdicts do not preclude the rerun of those same cases as SVP trials, but with a lower standard of proof this time around. This trend portends the casting of a wider net as the defenses against being found an SVP grow narrower.

Consistent with these comments, we note the more recent decision of the Virginia Supreme Court in *Commonwealth v. Miller*, 643 S.E.2d 208 (Va. 2007). In that case, the court reversed the ruling of the SVP trial court, which held that the government did not meet its evidentiary standard in seeking to have Mr. Miller declared an SVP. The court accomplished this reversal by finding that the testimony of a defense witness, a licensed psychiatrist, should not have been admitted at trial, since while she was skilled in the diagnosis of the mental disorders related to sex offenders, she did not have sex offenders as part of her treatment practice and so could be said

not to have the “. . .required skill. . .” to qualify as an “expert concerning sexual offenders” (Va. Code Ann. § 37.2-904 (2007)). With this finding, the court excluded all of the defense expert’s testimony as well as the findings of the objective psychological tests that she had administered to the defendant.

Having stricken Mr. Miller’s expert defense and with only the state’s evidence admitted, the Virginia Supreme Court concluded: “We hold that the above evidence, as a matter of law, provided clear and convincing proof that Miller is a sexually violent predator as defined by the Act” (*Miller*, p 216).

Civil Commitment of Sexually Dangerous Persons: Statutory Interpretation of State’s SDP Law

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Strict Judicial Interpretation of State’s Sexually Dangerous Person (SDP) Statute Bars SDP Proceedings Initiated After a Defendant’s Completion of Criminal Sentence

In the companion cases *Commonwealth v. Gillis*, and *Commonwealth v. Andrews*, 861 N.E.2d 422 (Mass. 2007), the defendant sex offenders served their criminal terms at a state hospital and were then civilly committed to the hospital after their sentences expired. While they were being civilly committed to the state hospital, the Commonwealth petitioned to have them committed as sexually dangerous persons (SDPs). The trial courts denied the petition and the Commonwealth appealed. The Massachusetts Supreme Judicial Court on its own initiative transferred the cases from the appeals court and affirmed the dismissal of the Commonwealth’s petition by the trial courts.

Facts of the Case

Richard Gillis, Jr., was convicted of sexual and nonsexual offenses and was sentenced to a term in prison. During that incarceration he was transferred to Bridgewater State Hospital (BSH). He remained there until his prison sentence ended in December 2001. He continued to be held at BSH under an involuntary civil commitment. Nearly three years after his prison sentence ended, but while he continued in his civil commitment at BSH, the Commonwealth petitioned to commit him as a sexually dangerous person instead of an involuntary civil commitment.

Mark Andrews was convicted of sexual and nonsexual offenses and sentenced to prison. During that incarceration he was transferred to Bridgewater State Hospital. Like Mr. Gillis, he served out his prison sentence in the state hospital and was held there under involuntary civil commitment after his prison sentence ended. A few weeks after his criminal sentence ended, the Commonwealth petitioned to commit him as a sexually dangerous person instead of an involuntary civil commitment.

The Essex and Worcester Superior Courts of Massachusetts dismissed both petitions to commit the defendants as SDPs. The respective superior courts based their decisions on the findings that the defendants were no longer prisoners serving a penal confinement at the time the SDP petitions were filed, and thus, pursuant to state law, were not subject to commitment as SDPs. The Commonwealth appealed. The Supreme Judicial Court of Massachusetts, on its own initiative, transferred the cases from the appeals court. The court found the cases of these two individuals factually identical in all respects material to their decision and affirmed the trial courts’ dismissal of the Commonwealth’s SDP petitions.

Ruling and Reasoning

The Supreme Judicial Court of Massachusetts reviewed the statute governing commitment of an SDP. That statute, Mass. Gen. Laws ch. 123A, § 12(b) (2004), authorizes the indefinite commitment to a treatment facility of persons who have been convicted of sexual offenses or charged with sexual offenses and determined to be incompetent to stand trial and who have a mental abnormality or personality disorder that makes the person likely to engage in sexual offenses if not confined to a secure facility. The procedure for seeking commitment of an SDP