

Dodson was found to be able to comprehend fully and appreciate the danger of injury.

Discussion

This case affirms a standard to be used in suicide cases when considering the contributory negligence and assumption of risk doctrines. In considering contributory negligence, one argument made by the defense in suicide cases has been that, independent of the errors the clinician makes in the course of treatment, it is the patient's self-imposed conduct that caused the harm. The issue before the court becomes whether mentally ill patients, who are receiving psychiatric treatment for life-threatening behavior that is an expected risk of their illness should be considered contributorily negligent when they die from the very behavior for which they sought treatment and against which defendants had a duty to protect.

Courts nationwide have often addressed this question by looking at the capacity of the individual who commits a high-risk act such as suicide at the time the action is undertaken. The general conclusion has been, as it was in the opinion of the South Dakota Supreme Court, that a plaintiff with mental illness should be expected to be responsible for his self-destructive actions only to the extent that his diminished capacity permits. The rationale behind this position seems to be that as the capacity of a mentally ill individual who attempts or commits suicide decreases, the clinician's responsibility may increase. The diminished capacity of patients impairs their ability to appreciate the risks and dangers involved in their self-destructive acts, arguing against the use of an assumption of risk defense. In sum, the defenses of contributory negligence and assumption of risk have been viewed by many, including the courts, as an often unjustifiable excuse for mental health professionals who failed in their duty to provide reasonable care to individuals with foreseeable life-threatening behavior.

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Competence Requirements for Sexually Violent Predator Hearings

Texas Sex Offender Law Hearings Held to Be Civil; Competence to Stand Trial Not Required for Adjudication as a Sexually Violent Predator

In Re Fisher, 164 S.W.3d 637 (Tex. 2005), is a case concerning the necessity of competence in a civil proceeding adjudicating a person as a sexually violent predator. Questions were raised about whether the proceeding was indeed a civil proceeding, as criminal charges could be filed if the petitioner violated the terms of his outpatient commitment.

Facts of the Case

In January 1987, Michael James Fisher pled guilty to second-degree sexual assault and received a two-year sentence to a facility in the Texas Department of Corrections. Over the course of the next 12 years, Mr. Fisher was found to have violated the terms of his parole on three occasions for such things as a conviction for first-degree aggravated assault (August 1987), an indictment for assault (June 1996), and an indictment for unspecified violations of the terms of his release (May 1999). Mr. Fisher was reportedly hospitalized on numerous occasions between 1991 and 1996 for psychiatric problems. The state of Texas petitioned on October 25, 2000, to have Mr. Fisher adjudicated a sexually violent predator according to the Texas Sexually Violent Predator Act (TSVPA). Mr. Fisher filed a "general denial" and requested a trial by jury for this proceeding.

A trial was convened to determine whether Mr. Fisher was a sexually dangerous predator according to Texas statutes. An evidentiary hearing was conducted, without the presence of a jury, regarding Mr. Fisher's competence to stand trial. Two experts testified that Mr. Fisher was incompetent, as he lacked factual or rational knowledge of the proceedings and could not assist in his defense. Even in the absence of evidence to contradict these experts' testimony, the trial court denied Mr. Fisher's motion for a jury trial regarding competency.

At the trial that was held to determine Mr. Fisher's status as a sexually dangerous person three psychologists and a psychiatrist testified as to his diagnosis and risk for future dangerousness. The experts generally agreed that Mr. Fisher merited diagnoses of Schizo-

phrenia, Antisocial Personality Disorder, and Mild to Borderline Mental Retardation. Regarding his capacity for impulse control, it was opined that Mr. Fisher functioned like a “semi careening down a hill without breaks” (*In Re Fisher*, 164 S.W.3d, p 643). One expert testified that, based on actuarial measures, Mr. Fisher was in the high-risk category for future sexual re-offending with a 70 percent recidivism level. Furthermore, a psychiatrist testified that he had a high likelihood of success in complying with the TSVPA commitment terms if he stayed on his medication. The trial court directed a verdict that Mr. Fisher was a repeat sexually violent offender, and the jury found that he suffered from a behavioral abnormality that made him likely to engage in a predatory act of sexual violence.

Based on these findings, Mr. Fisher was committed for treatment and supervision on an outpatient basis, with the following provisions: he must live at a residence approved by his case manager and adhere to the more than 90 conditions set forth by his treatment providers; he could not participate in programs involving children or go near premises where children commonly gathered; he was to be monitored with satellite monitoring equipment; he must submit blood and hair samples to the state; he could not contact the victims of his crimes; he could not leave the state without authorization; he could not consume alcohol or controlled substances. Noncompliance with these terms could result in third-degree felony charges. Mr. Fisher moved for a new trial, asserting that by denying him the opportunity for a jury determination of competence to stand trial, he was deprived of substantive and procedural due process. The trial court denied the motion.

Mr. Fisher appealed the trial court’s decision to the 13th District Texas Court of Appeals on several grounds. He asserted that the TSVPA was punitive because he did not have the capacity to understand or comply with the commitment order. In addition, he argued that his due process rights were violated because he was adjudicated in a proceeding where he was incompetent. The court of appeals ruled in Mr. Fisher’s favor, concluding that the TSVPA was punitive, not civil, and that both substantive and procedural due process rights were violated. Specifically, it held that he was entitled to rights afforded those in criminal proceedings, including the right to be competent to stand trial and the right to effective assistance of counsel. The appellate court furthermore

concluded “substantive due process requires [that Fisher] be mentally competent to comply with the order of commitment” (*In Re Fisher*, 164 S.W.3d, p 644). The state appealed the appellate decision to the Supreme Court of Texas, which agreed to review the TSVPA’s constitutionality.

Ruling and Reasoning

The Supreme Court of Texas ruled that the TSVPA was a civil procedure that did not require competence to stand trial for adjudication. In arriving at its ruling, the court adopted much of the reasoning of the U.S. Supreme Court in *Kansas v. Hendricks* (521 U.S. 346, 363 (1997)). In determining Mr. Fisher’s competence-related rights, the court first determined whether the act was civil or criminal, as adjudication of an incompetent defendant is unconstitutional, whereas civil cases can proceed, even if a party is incompetent. To address this question, the court examined legislative intent, seen as the first criterion for how to categorize an act. Based on language in the TSVPA that identified it as a civil procedure, the court determined that the legislative intent was for the TSVPA to be a civil commitment.

Second, the court looked to determine whether, independent of legislative intent, the purpose or effect of the statute was so punitive as to negate its designation as civil. In doing so, the court referenced criteria set forth by the U.S. Supreme Court (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). These criteria, which were neither exhaustive nor dispositive included: (1) whether the sanction involves affirmative disability or restraint; (2) whether it has historically been seen as punishment; (3) whether its comes into play on a finding of *scienter* (i.e., defendant’s knowledge that the act was illegal); (4) whether its implementation will promote retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether a purpose apart from punishment can rationally be connected to the commitment; and (7) whether it appears excessive in relation to the alternative purpose as signed.

The sanctions were seen as imposing affirmative disability, as Mr. Fisher was constrained in his ability to travel and faced numerous restrictions on permissible activities. However, that by itself was not seen as proof of the TSVPA as punishment, as other purely civil commitments have not been seen as punishment, including Kansas’ inpatient commitment of

sexual predators, which was upheld as constitutional by the U.S. Supreme Court in *Kansas v. Hendricks*. Furthermore, because the TSVPA was to be applied to individuals based on future dangerousness and to individuals not seen as culpable for their crimes (e.g., NGRI acquittees), the court determined that the TSVPA was not intended to function as a deterrent or as retribution and did not require a culpable mental state. In addition, the TSVPA was determined to be serving legitimate state functions other than punishment, such as the use of police power to protect the public and *parens patriae* power to provide care for its citizens. Although the Texas statute provides for criminal sanctions for violation of the conditions of commitment, this was not adequate, in the court's view, to make the statute punitive or excessive, as it was outweighed by the allowance for outpatient commitment rather than commitment to a secure facility (making it less restrictive than statutes in other states).

Having determined that commitment under the TSVPA is a civil rather than a criminal matter, the court noted that lack of competence has not historically been a bar to civil commitment. The court recognized established precedent that civil commitment, by nature, involved individuals who had mental illness and due to that mental illness were a danger to themselves or others. As such, it stood to reason that a subset of individuals who were to be civilly committed might not have the requisite abilities to demonstrate a factual or rational understanding of proceedings or work with an attorney. Therefore, the court ruled that Mr. Fisher was not entitled to a competency hearing. However, because the court noted that violation of the commitment could result in criminal sanctions, a defendant charged with violation of the conditions imposed under the TSVPA was to receive all the rights afforded to criminal defendants, including the right to be competent to stand trial. The court noted that if indeed Mr. Fisher's mental state, as he claimed, would prevent him from being able to understand or comply with the order, he could raise this as a defense, were he to be subsequently criminally charged with violation of the conditions of commitment.

Discussion

The petitioner in this case challenged his commitment as a sexually violent predator, stating that the procedure was criminal and that he had a constitu-

tional right to be competent to stand trial for a criminal proceeding. Relying on the reasoning in *Kansas v. Hendricks*, the court established firmly that the sexually violent predator commitment was a civil, not a criminal, proceeding. As such, the court clearly stated competence to understand the proceedings was not a prerequisite for the commitment hearing. However, because violation of the commitment terms could result in criminal charges, the court held that the full range of rights afforded to criminal defendants should be available to individuals charged with violating the terms of their sexually violent predator commitments. This case provides persuasive precedent to other jurisdictions in its holding that sexually violent predator commitments are civil. It furthermore extends the findings of *Kansas v. Hendricks* to outpatient commitment of sexually violent predators.

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Residency Restrictions for Convicted Sex Offenders

State Law Imposing Residency Restrictions for Convicted Sex Offenders Is Not Unconstitutional, Given Their Presumed Dangerousness

In *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), the Eighth Circuit Court of Appeals considered the claim of the Iowa Attorney General, who challenged the judgment of the United States District Court for the Southern District of Iowa in its holding Iowa Code § 692A.2A, which imposes residency restrictions on certain sex offenders, unconstitutional.

Facts of the Case

In 2002, the Iowa state government created a law (Iowa Code § 692A.2A) that prohibits a person convicted of certain sex offenses involving minors from