Determining the Likelihood of Future Offenses in SVP Hearings

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Virginia Supreme Court Upholds Decision Weighing Demonstrated Behavior Over Statistical Predictions of Risk in SVP Hearing

In *Commonwealth v. Squire*, 685 S.E.2d 631 (Va. 2009), the Supreme Court of Virginia affirmed the trial court's dismissal of a petition for civil commitment of a sexually violent predator (SVP) with an undisputed mental abnormality whose case lacked clear and convincing evidence, despite expert testimony to the contrary, that he was likely to engage in future sexually violent acts. The court noted that a finding of mental abnormality (which by Virginia statute includes the likelihood of future sexually violent offenses) alone is not sufficient for commitment as an SVP, because the loss of control and likelihood of committing a sexually violent act noted in the statute are also required (Va. Code Ann. § 37.2-900 (2009)).

Facts of the Case

In 1994, Frankie Lee Squire was convicted of rape. He was sentenced to 15 years in prison, with 8 years suspended, but was released on parole in 1999. In 2003, after two convictions for assault and battery, his probation was revoked and a portion of his suspended sentence imposed. He was released in 2004, but was reincarcerated in 2006 when he violated the conditions of his release by incurring breaking-and-entering charges. In 2007, the Commonwealth of Virginia filed a petition and found probable cause to pursue an SVP commitment of Mr. Squire. In 2008, a bench trial was held, and testimony was presented by two experts for the Commonwealth, Doris E. Nevin, MD, and Evan S. Nelson, MD. Both testified that Mr. Squire had a mental abnormality or personality disorder and that, because of that disorder, he was likely to commit offenses of a sexually violent nature in the future.

Dr. Nelson testified regarding static risk factors in Mr. Squire's history (e.g., young age at the time of the sexual offense, history of parole/probation violations, and his history of alcohol use) that suggested he was at higher risk of reoffending. Furthermore, Mr. Squire had failed to complete sex offender or substance use treatment and had exhibited a history of sexual deviance and distorted attitudes. Together, these factors were used in Dr. Nelson's testimony to support Mr. Squire's elevated risk for reoffending sexually.

Dr. Nelson also administered the Sex Offense Risk Assessment Guide (SORAG) and found Mr. Squire at higher than average risk for violent or sexual reoffending when compared with other sex offenders. On the Violence Risk Appraisal Guide (VRAG), Dr. Nevin determined Mr. Squire to be in the moderately high range, with a 55% probability of violent reoffending within seven years. Both experts used the Static-99 and found Mr. Squire to be at high risk of reoffending with a statistical likelihood of reoffending of 33% to 39% within the next five years.

Despite the testimony of the experts, the petition for civil commitment of Mr. Squire as an SVP was dismissed. The Commonwealth appealed the decision, arguing that the evidence provided, including uncontradicted testimony of two experts, left the only "reasonable conclusion" that he was an SVP. Furthermore, the Commonwealth argued that the trial court had erred as a matter of law by stating that he had a mental abnormality or personality disorder, but was not an SVP. The Commonwealth defines the former terms as a "congenital or acquired condition that affects a person's emotional or volitional capacity and renders the person so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others" (Va. Code Ann. § 37.2-900 (2009)). Therefore, the Commonwealth argued, if a person is found to meet this definition, he is a sexually violent predator.

Ruling and Reasoning

The Virginia Supreme Court reviewed the findings in the light most favorable to Mr. Squire. The trial court had noted that there was "no question" that he had a mental abnormality or personality disorder that "makes it difficult for him to control his predatory behavior." However, the Virginia Supreme Court noted that the case hinged on whether this mental abnormality or personality disorder made him more likely to commit sex-

ually violent acts. In his total of six years in the community, he had incurred new charges, but had not been charged with a new sexually violent act, nor had he received institutional infractions for such an offense. In reviewing his behavior in the community, the court determined that it "simply cannot say that it is convinced that he will probably offend sexually."

The court reviewed the evidence presented and found that the trial court's judgment was not "plainly wrong or without evidence to support it." Although two experts testified to their opinion that Mr. Squire was a sexually violent predator who was likely to commit violent sexual acts, the opinion of an expert witness is not dispositive in Virginia (Va. Code Ann. § 37.2-908(C) (2009)). The trial court had considered the opinions of the experts, but had also weighed the events of Mr. Squire's life, specifically noting that, in the 10 years he had spent incarcerated and in the community, he had had no allegations or convictions of sexual offenses. The trial court found that his actions were "not consistent with statistical predictors of re-offending" and, in fact, "stood in contrast" to expert opinion that he was likely to commit future violent sexual acts.

The Commonwealth also argued that the trial court erred as a matter of law, because the definition of a mental abnormality or personality disorder includes a finding that the person is "so likely to commit sexually violent offenses that he constitutes a menace to the health and safety of others" (Va. Code Ann. § 37.2-900 (2009)). The court rejected this argument on two grounds. First, the trial court clearly treated the findings of mental abnormality or personality disorder as separate from a finding that Mr. Squire was likely to commit sexually violent acts. This interpretation is consistent with case law that established the "mere use of the phrase" mental abnormality or personality disorder does not automatically lead to the conclusion that a person is likely to engage in sexually violent acts.

The court noted the decision in *Commonwealth v. Allen*, 609 S.E.2d 4 (Va. 2005), in which the disputed issue was whether the defendant Richard Allen was more likely to engage in sexually violent acts because of his personality disorder. In this case, the uncontested testimony of experts regarding a personality disorder did not automatically result in the linkage that the personality disorder meant an increased likelihood of engaging in sexual acts, thus requiring further inquiry. Similarly, in *Commonwealth v. Miller*, 643 S.E.2d 208 (Va. 2007), the court found that the Commonwealth had the burden to prove both components of the definition and specifically reviewed the aspects of the defendant Calvin Miller's mental health disorder, which indicated that he was more likely to commit sexually violent acts. In addition to support in case law, the court found that an interpretation requiring both components of the definition (i.e., both the diagnosis of mental abnormality or personality disorder and the likelihood of future sexual acts) was consistent with the intent of the General Assembly in clearly listing both requirements in their written definitions.

Discussion

In this case, the Supreme Court of Virginia upheld the importance of both components of the Commonwealth's definition of a Sexually Violent Predator. In Virginia, this includes the finding of a mental abnormality or personality disorder that includes a likelihood of committing future sexual offenses as part of its definition and a finding that, as a result of these, the person has difficulty controlling his behavior and is likely to engage in sexually violent acts. In this decision, the court appeared to emphasize the importance of the second prong of the definition and weighed heavily the fact that Mr. Squire had not, in the almost 10 years since his sexual offense, committed or attempted any sexually violent acts.

The court's decision raises interesting questions about the weight to give statistical predictors of risk, versus actual demonstrated behavior in the community. Both experts had administered the Static-99, a measure of static risk factors that do not change with time, treatment, or other interventions. The court raised questions about the measure, and both experts agreed that Mr. Squire's scores would have been the same at the time of his release in 1999 and at the time of the hearing in 2008. Although the differences between and the uses of static and dynamic risk variables are commonplace in the risk literature, it may be difficult for courts to determine how to use estimates of risk that do not vary in response to intervention.

Further complicating the issue for the courts is the fact that Mr. Squire scored relatively highly on statistical measures of risk, including the Static-99, the VRAG, and the SORAG, all of which use historical variables related to violent offending (though the Static-99 and the SORAG include variables specific to risk of sexual offense). The VRAG and SORAG were also designed to assess violence risk in general, which includes, but is not limited to, sexual violence. Their predictions, therefore, incorporate risks that are separate from the risk of

committing another sexual offense, the latter of which was the matter of interest to the court when determining whether Mr. Squire should be determined an SVP.

Cases such as this require a balancing of the individual's right to liberty and the state's interest in protecting the public from a sexually violent individual. In this case, actual behavior in the community was given more weight than predicted risk of recidivism. Forensic clinicians involved in these cases are presented with the challenge of providing the best available information regarding future risk and of clearly presenting the limits of these estimates. In conducting SVP evaluations, especially in jurisdictions like Virginia, evaluators may use risk assessment instruments, but may also need to explore demonstrable behavior in the community and contextual variables that can place the person at more or less risk for sexually violent reoffending.

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Jury Instructions in a Case With a Defense of Not Guilty by Reason of Insanity

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No Requirement to Instruct a Jury That a Defendant Found Not Criminally Responsible Would Be Likely to Be Placed in a Secure Treatment Facility

In *State v. Okie*, 987 A.2d 495 (Me. 2010), John Okie appealed his conviction for murder, arguing that the court improperly instructed the jury regarding the defense of not criminally responsible by reason of insanity, because the jury was not informed as to the consequences of such a verdict. He also appealed his conviction claiming that, during closing arguments, the prosecutor misstated the law regarding the proof needed to support an insanity defense.

Facts of the Case

On July 10, 2007, John Okie went to the home of his friend, Alexandra Mills, where the two engaged in sexual relations. A short time later, Mr. Okie attacked and killed Ms. Mills. Six days later, after a heated argument, Mr. Okie attacked and killed his father. He was indicted in Superior Court for the intentional and knowing murder of his father and the depraved-indifference murder of Ms. Mills.

During the trial in December 2008, Mr. Okie requested that the jury be informed "that a person found not criminally responsible by reason of insanity would be institutionalized by the Commissioner of the Department of Health and Human Services, and that certain criteria must be met, with court oversight, before that person could be discharged from the institution" (*Okie*, p 496). The court denied the request.

Mr. Okie also argued that the prosecutor's statements during her closing argument misstated the law of insanity and requested a curative statement to the jury. This request was also denied. The prosecutor stated that an "insanity verdict requires a showing (1) of 'public insanity,' (2) that the defendant suffered hallucinations and delusions, and (3) that only the 'worst of the worst' or 'crazy of the crazy' are eligible for an insanity verdict" (*Okie*, p 497).

Ruling and Reasoning

The Supreme Judicial Court of Maine ruled that the trial court did not err in refusing Mr. Okie's request detailing the consequences of a not criminally responsible verdict as part of the jury instructions. The court noted that jury instructions, as a whole, should accurately and fairly inform the jury of the law. The denial of a jury instruction is reviewed and can be vacated, if it is demonstrated (by the appellant) that the denied instruction "1) stated the law correctly, 2) was generated by the evidence in the case, 3) was not misleading or confusing, 4) was not sufficiently covered in the instructions the court gave" (*State v. Barretto*, 953 A.2d 1138 (Me. 2008), p 1140). Further, the court noted that it was not appropriate to inform the jury of the consequences of the verdict, citing, among other things, historical precedent (*State v. Park*, 193 A.2d 1 (Me. 1963)), which is consistent with federal law (*Shannon v. United States*, 512 U.S. 573 (1994)). In its ruling, the Supreme Judicial Court of Maine highlighted the differences between the function of the judge and jury. In Maine, the jury is charged only with finding facts and determining guilt on that basis, making the consequences of the verdict "technically irrelevant." The court noted that in Maine judges are responsible for imposing sentences, not the jury.