

competent in the criminal courts to get convicted and sentenced before appearing in an SVP hearing. He also highlighted the fact that SVPs who are found to be incompetent would be transferred to a civil hospital for restoration of competency and not simply “unleashed” on the public.

Discussion

This case once again highlights the ambiguous nature of sexually violent predator laws. At the root of the matter lies the question of where to delineate the defendant’s civil and criminal rights. In *Allen v. Illinois*, 478 U.S. 364 (1986), the U.S. Supreme Court argued that providing some procedural “safeguards applicable in criminal trials cannot itself turn [SVP proceedings] into criminal prosecutions” (*Allen*, p 372). By law, sexually violent predator proceedings are civil proceedings; however, the substantial restrictions of liberty give rise to questions such as the one addressed by the California Supreme Court in *People v. Moore*. In their majority opinion, the justices emphasized the rights already granted to these defendants—rights that include the right to counsel, the right to have expert assistance, and the heightened standard of proof (beyond a reasonable doubt). In *People v. Moore*, the court contended that these rights, coupled with annual recommitment hearings, could “mitigate the effects of any ‘error’ in the commitment proceeding attributable to the reduced participation of a mentally incompetent SVP” (*Moore*, p 544).

The decision also elaborates on the nature of a defendant’s role in an SVP hearing. As stated in *People v. Otto*, 26 P.3d 1061 (Cal. 2001), SVP hearings allow details of predicate offenses to be proven by documentary evidence and allow “the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted” (*Otto*, p 1066) without violating a defendant’s right to due process. Combined with expert testimony and perhaps the defendant’s own testimony, the decision in *Moore* concludes “findings in an SVP proceeding prevent *any* defendant from playing much more than a supporting role” (*Moore*, p 543; emphasis in the original). This conclusion, in the majority’s opinion, attenuates any chance that the defendant’s incompetence in an SVP proceeding would significantly impair his defense.

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Can a Witness Be Required to Produce Mental Health Records or to Submit to a Psychiatric Examination?

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Refusal to Require a Witness to Produce Mental Health Records, to Submit to Questioning Regarding Her Refusal, and to Undergo a Psychiatric Evaluation Did Not Violate the Sixth Amendment Confrontation Clause

In *United States v. Hargrove*, 382 Fed. Appx. 765 (10th Cir. 2010), the United States Court of Appeals for the Tenth Circuit considered Demetrius Hargrove’s appeal of a guilty verdict from the United States District Court for the District of Kansas. In his appeal, Mr. Hargrove argued that his Sixth Amendment Confrontation Clause rights were violated because the district court refused to require a trial witness to produce mental health records or submit to questioning before the jury regarding her refusal.

Facts of the Case

Demetrius Hargrove and Christopher Trotter were friends who together sold drugs in Kansas City, Kansas. In February 1998, Mr. Hargrove and Mr. Trotter drove to meet one of Mr. Hargrove’s customers, Mr. Berg, who had not paid his \$1,500 bill. While Mr. Trotter remained in the car, Mr. Hargrove killed Mr. Berg and Mr. Berg’s sister, Ms. Castor. A few months later, Tyrone Richards, after telling people that Mr. Hargrove committed the murders, was kidnapped by Mr. Hargrove and Mr. Trotter in an effort to keep him quiet. Shortly after the kidnapping, they were pulled over by police, and Mr. Hargrove escaped while Mr. Trotter was arrested; Mr. Richards was unharmed. Mr. Richards agreed to testify against Mr. Trotter regarding the kidnapping, but was later found murdered, presumably by Mr. Hargrove. Mr. Hargrove also attempted to have a witness to the kidnapping murdered.

Mr. Hargrove was eventually arrested and charged with three counts of murder and one count of conspiracy and attempt to murder a federal witness. Mr. Hargrove's girlfriend, Ms. Graham, initially testified that she was with Mr. Hargrove on the evening Mr. Berg and Ms. Castor were killed. She later changed her story and stated that Mr. Hargrove told her he killed Mr. Berg and Ms. Castor. Ms. Graham testified that she had decided to tell the truth after she was visited by the spirits of Mr. Berg and Ms. Castor. She attributed the visit to having a spiritual connection with Mr. Berg. On cross-examination, Ms. Graham acknowledged that she was seeing a psychiatrist for an anxiety disorder and was taking Klonopin.

Mr. Hargrove requested that Ms. Graham produce her mental health records or submit to a psychiatric examination. She refused, and the court did not require her to do either. Mr. Hargrove then asked for permission to recall Ms. Graham to question her in front of the jury regarding her refusal or that her testimony be stricken by the court. The court refused these requests as well, but allowed Mr. Hargrove to seek additional funds to retain his own mental health expert to testify in regard to Ms. Graham's testimony. Mr. Hargrove did not pursue this option. He was convicted and spared the death penalty but was sentenced to life imprisonment without the possibility of release.

Mr. Hargrove claimed that the district court erred by not permitting sufficient inquiry into the mental status of Ms. Graham. He argued that his Sixth Amendment Confrontation Clause rights were violated, because the district court refused to require Ms. Graham to produce mental health records, to submit to questioning before the jury regarding her refusal, and to submit to a psychiatric examination.

Ruling and Reasoning

The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the district court. The appellate court noted that under the Federal Rules of Evidence, cross-examination should be limited to the subject matter of the direct examination and questions of the credibility of the witness. The fact of insanity or mental abnormality of a witness, either at the time of observing the facts that are reported in testimony or at the time of testifying, may be provable, on cross-examination or by extrinsic evidence, as bearing on credibility.

Although psychological history may be admissible when credibility is in question, the appellate court found that there was no indication that Ms. Graham had a mental illness or had been treated for one that would have affected her credibility. Federal courts have found mental instability relevant to credibility only when the witness exhibited a pronounced disposition to lie or hallucinate or had a severe illness such as schizophrenia that dramatically impaired the witness's ability to tell the truth. There have been no cases in which a witness's credibility was called into question on the basis of an anxiety disorder.

Although the district court did not require Ms. Graham to disclose her mental health records or submit to questioning before the jury regarding her refusal, no other meaningful limitations were placed on cross-examination. Mr. Hargrove could have questioned Ms. Graham in greater detail about her testimony regarding the spiritual "visitings," which would have provided the jury a better chance to assess whether these visitings were a sign of mental illness. He also could have further questioned Ms. Graham about her psychiatric treatment and the basis for her diagnosis, had he believed that her diagnosis was something other than an anxiety disorder. Mr. Hargrove could have tested whether Ms. Graham could comprehend, recall, and correctly relate the truth without having access to her mental health records.

Trial judges have wide latitude to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant. Before permitting a psychiatric examination, the court must consider the infringement on a witness's privacy, the opportunity for harassment, and the possibility that an examination will hamper law enforcement by deterring witnesses from coming forward. Ordering Ms. Graham to undergo a psychiatric examination would obviously infringe on her privacy and would provide an opportunity for harassment.

Discussion

The right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination. Normally, the right to confront one's accusers is satisfied if defense counsel receives great leeway at trial to question witnesses. The Sixth Amendment Confrontation Clause guarantees only

an opportunity for effective cross-examination, not for cross-examination that is effective in whatever way and to whatever extent the defense would like. The decision of whether to permit cross-examination of a witness regarding his or her mental condition falls within the broad discretion of the trial court in attempting to balance possible prejudice versus evidence that is sufficiently useful to prove something important in a trial.

Evidence regarding a witness's mental illness is relevant only when it may reasonably cast doubt on the ability or willingness of a witness to tell the truth. In *United States v. Robinson*, 583 F.3d 1265 (10th Cir. 2009), the Tenth Circuit Court of Appeals held that the trial court erred when it did not allow the defendant access to a witness's mental health records and restricted cross-examination about his mental illness and substance abuse. In this case, the witness, who was the sole witness in the trial, was involuntarily committed to a mental health facility six days before trial. Records from this hospitalization showed that the witness was a heavy drug user and had a long history of mental illness with psychotic symptoms. On the stand, the witness presented himself in a much different light. The appellate court felt that if the jury had been aware of the restricted information, it may well have rejected the witness's testimony, without which Mr. Robinson could not have been convicted.

Before permitting a psychiatric examination of a witness to challenge the individual's credibility, a court must consider the infringement on the witness's privacy and the opportunity for harassment. In Mr. Hargrove's case, the appellate court was concerned that if the admission of an anxiety disorder by a witness resulted in a court ordered psychiatric examination, it could lead to other witnesses with anxiety disorders or similar psychiatric conditions being loath to testify in the future. Such hesitancy could have far-reaching ramifications that could impede law enforcement by deterring witnesses from coming forward. This concern is raised especially when a witness's credibility can be challenged with an effective cross-examination, negating the need for a psychiatric evaluation. The appellate court noted, "Graham's competency and credibility were not beyond the ken of the jury in the absence of expert testimony. . . . Graham's testimony about 'visitings, not dreams' is so unusual that the jury would be cautious in evaluating it" (*Hargrove*, p 774).

In *United States v. Provenzano*, 688 F.2d 194 (3rd Cir. 1982), the appellate court held that there was no abuse of discretion in the trial judge's refusal to order a psychiatric examination of a witness where the cross-examination of the witness placed the witness's credibility in doubt and thus "provided ample information [to the jury] for its task of evaluating the truthfulness of the . . . witness" (*Provenzano*, p 203). In general, courts are more likely to order the release of psychiatric records or to permit a psychiatric examination if there are reasonable grounds to believe that a witness has a mental illness that will affect his or her testimonial capacity and reliability. In practice, however, there is still a reluctance to do so, given that knowing a witness's specific psychiatric diagnosis and treatment is irrelevant. It is the functional impact of symptoms on the witness's ability to testify that is important to assess, and as previously described, the impact can usually be demonstrated during cross-examination. This case raises a concern about the rehabilitation of a witness's testimony when his or her credibility has been called into question. It is possible that a psychiatric examination can be requested to demonstrate that there is no mental illness or functional impairment that would affect credibility. Again, perhaps the most effective way to manage this problem is to address the potential flaws on redirect examination.

It is interesting that the appellate court made a distinction between different types of mental illnesses, believing that some are more likely to lead to questionable credibility than others. The appellate court did not believe having an anxiety disorder was sufficient grounds to order a psychiatric evaluation, but noted that it may be necessary for those with a "severe mental illness, such as schizophrenia." While many may agree with this argument, there are persons with mental illness characterized as less severe or less serious who nonetheless have significant symptoms that may affect their observation of facts and their ability to recall and recount facts. Likewise, there are individuals with schizophrenia and other severe mental illnesses whose symptoms are well controlled and have no impact on their credibility. This case and others raise the concern that individuals with specific types of mental illnesses may be more susceptible to an infringement of their privacy.

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