IN THE COURT OF APPEALS OF IOWA

No. 0-617 / 09-1443
Filed December 8, 2010

ELWOOD THOMPSON,
Plaintiff,

vs.

IOWA DISTRICT COURT FOR WAPELLO COUNTY,
Defendant.

Certiorari to the Iowa District Court for Wapello County, Michael R. Mullins, Judge.

Plaintiff in a certiorari action challenges the district court's decision denying his request for a final hearing on the issue of whether he is still a sexually violent predator. **WRIT ANNULLED.**

Mark Smith, First Assistant State Public Defender, and Amy Kepes and Greta Truman, Assistant Public Defenders, for plaintiff.

Thomas J. Miller, Attorney General, Linda Hines and Susan Krisko, Assistant Attorneys General, and Allen Cook, County Attorney, for defendant.

Heard by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

I. Background Facts & Proceedings

In 2000 Elwood Thompson was committed as a sexually violent predator (SVP) under Iowa Code chapter 229A (1999). *See In re Detention of Thompson*, No. 00-0887 (Iowa Ct. App. June 29, 2001). Thompson, who was born in 1955, had a history of over twenty-five years of sex offenses, beginning when he was fourteen years old. *Id.* Prior to his commitment, Thompson was evaluated by Dr. Dennis Doren, who diagnosed Thompson with pedophilia, alcohol dependence, and a personality disorder.

Once a person is committed under chapter 229A, there is a rebuttable presumption the commitment will continue. Iowa Code § 229A.8(1) (2009). A person committed as an SVP must have a current examination made each year, and an annual report is provided to the court. *Id.* § 229A.8(2), (3). The court then holds a hearing to determine whether a final hearing should be held on the status of the committed person. *Id*. § 229A.8(3).

Thompson had an annual report every year, and he continued to be committed. Thompson was evaluated for his ninth annual review in 2009 by Dr. Michael Ryan, a psychologist, and Jason Smith, a licensed clinical psychologist. The report stated Thompson showed little change in his sexual recidivism risk factors "and therefore, remains at the same high risk to re-offend as identified in the actuarial assessment tools at the time of his commitment . . . ." The report concluded Thompson remained more likely than

not to commit a sexually violent offense if released. For the same reasons, he was not considered appropriate for placement in a transitional release facility.

Thompson presented an evaluation by Dr. Richard Wollert, a psychologist from Portland, Oregon. Dr. Wollert reviewed material relating to Thompson and personally interviewed him. Dr. Wollert gave the opinion that Thompson had been misdiagnosed with pedophilia because he was not attracted exclusively to children. Dr. Wollert administered the Static-99, an actuarial test, and concluded Thompson's risk of reoffending had dropped due to his age.

The district court considered the evidence presented by the State and Thompson and found Thompson "has failed to prove by a preponderance of the evidence that there is relevant and reliable evidence to rebut the presumption of continued commitment." The court concluded Thompson was not entitled to a final hearing on his status. Thompson filed a petition for writ of certiorari, claiming the district court exceeded its authority and jurisdiction, and acted illegally in denying his request for a final hearing.

II. Standard of Review

In a certiorari case, we review the district court's action for corrections of errors at law. *Weissenburger v. Iowa Dist. Ct.*, 740 N.W.2d 431, 434 (Iowa 2007). We may examine "only the jurisdiction of the district court and the legality of its actions." *Christensen v. Iowa Dist. Ct.*, 578 N.W.2d 675, 678 (Iowa 1998). An "illegality exists when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law." *Id.* We accept as true the

district court's factual findings, if well supported. *State Pub. Defender v. Iowa Dist. Ct.*, 644 N.W.2d 354, 356 (Iowa 2002).

III. Merits

The procedures for obtaining a final hearing on whether a committed person should remain committed have changed over time. When chapter 229A was enacted in 1998, a person could petition the court for discharge at a probable cause hearing. Iowa Code § 229A.8(3) (1999). The section then provided:

> If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality has so changed that the person is safe to be at large and will not engage in predatory acts or sexually violent offenses if discharged, then the court shall set a final hearing on the issue.

Id. § 229A.8(4). At the final hearing the State had the burden to show beyond a reasonable doubt "the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and if discharged is likely to engage in acts of sexual violence." *Id.* § 229A.8(5).

The Iowa Supreme Court has noted that many states use the probable cause standard at an annual review hearing. *Johnson v. Iowa Dist. Ct.*, 756 N.W.2d 845, 848-49 (Iowa 2008). Cases from these states "make it clear the probable cause standard does not permit the court to weigh evidence, and the burden on the committed person is quite low to be granted a final hearing on the issue of release." *Id.* at 849.

The statute was substantially amended in 2002 and no longer provided for a probable cause hearing. *See* 2002 Iowa Acts, ch. 1139, §§ 10, 27. Under the

new provision, the court conducted an annual review, and if warranted, would set the matter for a final hearing. Iowa Code § 229A.8(3) (2003). The statute provided there was a presumption a committed person would remain committed, but this presumption could be rebutted. *Id.* § 229A.8(1). The statute additionally provided:

> The burden is on the committed person to show by a preponderance of the evidence that there is competent evidence which would lead a reasonable person to believe a final hearing should be held to determine either of the following:
>
> (1) The mental abnormality of the committed person has so changed that the person is not likely to engage in predatory acts constituting sexually violent offenses if discharged.
>
> (2) The committed person is suitable for placement in a transitional release program pursuant to section 229A.8A.
>
> If the committed person shows by a preponderance of the evidence that a final hearing should be held on either determination under subparagraph (1) or (2), or both, the court shall set a final hearing within sixty days of the determination that a final hearing be held.

Id. § 229A.8(5)(e). At the final hearing, the State still has the burden to show beyond a reasonable doubt that the committed person should remain committed. *Id.* § 229A.8(6)(d).

The Iowa Supreme Court determined that under the 2002 statute a committed person was not required to show by a preponderance of the evidence the person would be successful at a final hearing, but was required to show by a preponderance of the evidence only that there was competent evidence that would lead a reasonable person to believe a final hearing should be held. *Johnson*, 756 N.W.2d at 850. The court stated that section 229A.8(5)(e) should not be interpreted "to require the committed person to disprove the state's final-hearing case in order to obtain a final hearing." *Id.*

The court asserted that looking at the language of section 229A.8(5)(e), "we believe a reasonable person would give the committed person a hearing when there is competent evidence that would allow a fact finder to find reasonable doubt on the issue of whether his mental abnormality has changed." *Id.* (footnote omitted). The court noted competent evidence meant admissible evidence, not credible evidence. *Id.* n.4. The district court may evaluate the evidence, but should not engage in a mini-hearing to determine whether a committed person was entitled to a final hearing. *Id.* at 851. The court concluded:

> [I]f the committed person presents admissible evidence that could lead a fact finder to find reasonable doubt on the issue of whether his mental abnormality has changed such that he is unlikely to engage in sexually violent offenses, then the committed person should be granted a final hearing.

Id. On this basis, the court determined it was sufficient to obtain a final hearing for the committed person to submit a report by an expert concluding he no longer suffered from a mental abnormality, or was not likely to commit sexually violent offenses if released. *Id.*

After the *Johnson* decision, section 229A.8(5)(e) was amended again in 2009. *See* 2009 Iowa Acts ch. 116, § 1. The statute now provides:

> (1) The court shall consider all evidence presented by both parties at the annual review. The burden is on the committed person to prove by a preponderance of the evidence that there is relevant and reliable evidence to rebut the presumption of continued commitment, which would lead a reasonable person to believe a final hearing should be held to determine either of the following:
>
> (a) The mental abnormality of the committed person has so changed that the person is not likely to engage in predatory acts constituting sexually violent offenses if discharged.

> (b) The committed person is suitable for placement in a transitional release program pursuant to section 229A.8A.
>
> (2) If the committed person shows by a preponderance of the evidence that a final hearing should be held on either determination under subparagraph (1), subparagraph division (a) or (b), or both, the court shall set a final hearing within sixty days of the determination that a final hearing be held.

Iowa Code § 229A.8(5)(e) (Supp. 2009). The State still has the burden at the final hearing to show beyond a reasonable doubt that the person should remain committed. *Id.* § 229A.8(6)(d).

The district court applied the 2009 version of section 229A.8(5)(e), stating it had "considered all evidence presented by both parties." The court considered both the annual report by the Civil Commitment Unit for Sexual Offenders of Iowa, written by Dr. Ryan and Smith, and the report submitted by Dr. Wollert. The court found Thompson had "failed to prove by a preponderance of the evidence that there [was] relevant and reliable evidence to rebut the presumption of continued commitment." The court concluded that:

> a reasonable person would not, therefore, believe that a final hearing should be held to determine whether the committed person should be discharged or placed in a transitional release program pursuant to the standards set forth in Iowa Code section 229A.8.

Thompson contends he should be entitled to a final hearing because he proved by a preponderance of the evidence that there was relevant and reliable evidence which would lead a reasonable person to believe a final hearing should be held. He claims a committed person needs to prove by a preponderance of the evidence only that there is relevant and reliable evidence to support his position. Thompson states Dr. Wollert's report should be considered relevant and reliable, and he should be granted a final hearing.

The State argues that by amending the statute after the *Johnson* decision, the legislature intended to change the meaning of the statute. The State asserts that a committed person has a higher burden to show relevant and reliable evidence rather than merely competent evidence, which had been interpreted to mean admissible evidence. The State also asserts that by specifically stating that the court should consider "all evidence presented by both parties," the legislature intended for the court to weigh the evidence to determine whether a committed person had proved by a preponderance of the evidence that there was relevant and reliable evidence the person should no longer be committed.

In *Johnson*, 756 N.W.2d at 849, the Iowa Supreme Court noted that Missouri is the only other state that requires a committed person to make a showing by a preponderance of the evidence at a preliminary hearing prior to having a final hearing.[1] The Missouri statute provides:

> If the court at the hearing determines by a preponderance of the evidence that the person no longer suffers from a mental abnormality that makes the person likely to engage in acts of sexual violence if released, then the court shall set a trial on the issue.

Mo. Rev. Stat. § 632.498(4) (2006). The Missouri Supreme Court has held, "[t]he preponderance of the evidence standard is a weighing standard, where the fact

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[1] California law regarding the conditional release and discharge of sexually violent predators provides, "In any hearing authorized by this section, the petitioner shall have the burden of proof by a preponderance of the evidence." Cal. Welf. & Inst. Code § 6608(i) (2007); *People v. McKee*, 223 P.3d 566, 574 (Cal. 2010). California, however, does not have a similar two-hearing system regarding release of committed persons. *See* Cal. Welf. & Inst. Code § 6608. Rather, after an initial hearing a committed person may be required to remain in commitment, or may be "placed with an appropriate forensic conditional release program operated by the state for one year." *Id.* § 6608(d). If the person is placed in the conditional release program, another hearing is held after the one year period, and the person may then be unconditionally released. *Id.*

finder must consider whether the greater weight of the evidence supports release." *In re Care & Treatment of Coffman*, 225 S.W.3d 439, 444 (Mo. 2007). The court determined, "it is not unduly burdensome to provide a 'gatekeeper' to ensure that only those who make a legitimate claim can obtain a jury trial." *Id.* If the committed person meets the preponderance of the evidence burden, then the case proceeds to a jury trial where the state has the burden to prove, by clear and convincing evidence, the person is not entitled to release. *Id.* at 446.

The Iowa Supreme Court considered the Missouri statute and *Coffman*, and found "[a]lthough both the Iowa and Missouri statutes use the preponderance-of-the-evidence standard, the Missouri statute is different from the Iowa statute in *what* must be proven by a preponderance of the evidence." *Johnson*, 756 N.W.2d at 849. The court noted that the Missouri statute required the committed person to show by a preponderance of the evidence the person no longer suffered from a mental abnormality. *Id.* (citing Mo. Rev. Stat. § 632.498(4)). On the other hand, the 2002 Iowa statute required a committed person to show by a preponderance of the evidence there was competent evidence which would lead a reasonable person to believe a final hearing should be held. *Id.* (citing Iowa Code § 229A.8(5)(e) (2003)). The court rejected the State's argument that the preponderance of the evidence standard should be interpreted as in Missouri to allow the district court to weigh competing evidence to determine whether a committed person is entitled to a final hearing. *Id.* at 849-50. Thus, the Iowa Supreme Court has already determined that the "preponderance of the evidence" language in section 229A.8(5)(e) does not

mean a district court should weigh the evidence in determining whether a committed person is entitled to a final hearing. *See id.* at 851.

We turn then to the question of whether the changes in the language of section 229A.8(5)(e) (Supp. 2009), signal a change in the meaning of the statute. One rule of statutory construction is that an amendment to a statute is intended to make some change to existing law. *Anderson v. W. Hodgeman & Sons, Inc.*, 524 N.W.2d 418, 420 (Iowa 1994). "This presumption of intent to change existing law is particularly strong when the amendment follows a contrary executive or judicial interpretation of an unambiguous statute." *Midwest Auto. III, LLC v. Iowa Dep't of Transp*, 646 N.W.2d 417, 425 (Iowa 2002).

While the 2002 statute required a committed person to show by a preponderance of the evidence there was *competent* evidence that would allow a fact finder to find reasonable doubt on the issue of whether his mental abnormality had changed, the amended statute requires a committed person to show by a preponderance of the evidence that there is *relevant and reliable* evidence. Iowa Code § 229A.8(5)(e) (Supp. 2009), (2003). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401. The relevance of evidence depends upon whether it relates to the subject matter at hand; it is not necessarily a determination of credibility. *See Raim v. Stancel*, 339 N.W.2d 621, 624 (Iowa Ct. App. 1983) (finding competent and credible witnesses may produce material and relevant evidence).

The term "reliable" means "that can be relied on; dependable; trustworthy." Webster's New World Dictionary 1199 (2d ed. 1976). The term "reliable" often goes hand in hand with the term "credible." *See State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003) (finding a defendant's confession was supported by credible "other proof" and was therefore sufficiently reliable to support the verdict); *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998) (noting information from a confidential informant may be considered credible if the informant has given reliable information in the past); *Key v. State*, 577 N.W.2d 637, 641 (Iowa 1998) (finding there must be sufficient information to show confidential information relied upon by a prison disciplinary committee was credible and reliable); *Mercy Hosp. v. Hansen, Lind & Meyer, P.C.*, 456 N.W.2d 666, 672 (Iowa 1990) (noting it was for the jury to decide which experts were more credible, and which used more reliable data). We determine evidence is reliable when it is credible.

The 2009 statute also provides, "The court shall consider all evidence presented by both parties at the annual review." Under *Johnson*, 756 N.W.2d at 851, the district court did not need to consider the evidence presented by the State because it was sufficient for a committed person to obtain a final hearing to present "admissible evidence that could lead a fact finder to find reasonable doubt on the issue of whether his mental abnormality has changed such that he is unlikely to engage in sexually violent offenses." By specifically providing that the district court should consider the evidence presented by both parties, we believe the legislature was indicating a departure from the previous rule. We determine this language also supports a finding that the legislature intended the

district court to weigh the evidence at the preponderance of the evidence hearing.

We conclude the district court did not act illegally or exceed its jurisdiction by finding Thompson had failed to prove by a preponderance of the evidence that there was relevant and reliable evidence to rebut the presumption of continued commitment. As the fact finder, the district court properly applied the law by looking at the evidence presented by both parties, and concluded the evidence presented by Thompson was not sufficiently relevant and reliable to lead a reasonable person to believe a final hearing was warranted. There was substantial evidence in the record to support the court's conclusion because Dr. Wollert's report was based primarily upon general research that sexual recidivism decreases with age. *See Christensen*, 578 N.W.2d at 678 (noting an "illegality exists when the court's findings lack substantial evidentiary support, or when the court has not properly applied the law").

We annul the writ of certiorari.

WRIT ANNULLED.