IN THE COURT OF APPEALS OF IOWA

No. 2-118 / 10-1462
Filed May 23, 2012

IN RE THE DETENTION OF TODD ERIC JOHNSON,

TODD ERIC JOHNSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Paul D. Miller, Judge.

Todd Eric Johnson challenges the constitutionality of his civil commitment under Iowa Code chapter 229A (2009). **AFFIRMED.**

Greta Truman, Assistant State Public Defender, until withdrawal, and then Michael H. Adams, Chief Public Defender, Special Defense Unit, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson and Susan Krisko, Assistant Attorneys General, Janet M. Lyness, County Attorney, and John McCormally, Assistant County General, for appellee.

Heard by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

Todd Eric Johnson challenges the constitutionality of his civil commitment under Iowa Code chapter 229A (2009). He alleges present confinement for a sexually violent offense should not automatically satisfy the recent-overt-act requirement. He contends that because the State presented no evidence that he engaged in sexual misconduct during his more than twenty years in prison, the district court violated his right to substantive due process by finding he posed a current danger to reoffend.

We conclude that due process is satisfied by proof that the last time Johnson was released into the community he committed a violent rape, coupled with evidence that his current mental abnormality makes him likely to commit sexually violent offenses if not confined in a secure facility. Accordingly, we affirm his civil commitment.

I. Background Facts and Proceedings

In 1984, at the age of nineteen, Johnson sexually assaulted a woman after escorting her from a Fort Madison tavern. When the victim rebuffed Johnson's sexual advances, he slapped her and dragged her out of the car. On a grassy spot near the parking lot, he beat her, repeatedly bit her, and raped her. He pushed the victim's dentures down her throat and laughed as she gagged on them. Johnson only stopped the assault when a motorist shined his headlights on the crime scene. Johnson was convicted of sexual abuse in the third degree and spent four years in prison before being released to a halfway house in Iowa City.

After five weeks at the Hope House, Johnson left the facility and committed a second rape. He selected the victim's residence at random because her front door was unlocked. Johnson found the victim on her couch, grabbed her by the throat and threatened to kill her if she made any noise. He struck her repeatedly in the face, head, and stomach. At the trial, Johnson described what happened next:

> I proceeded to rape her. I made her do various sex acts. I penetrated her digitally in the vagina, also with my penis, penetrated her digitally anally while striking her and punching her and biting her . . . [o]n the face and on the breast.

Johnson estimated the brutal assault lasted as long as fifty minutes. Before fleeing, he struck a second woman who was upstairs in the residence. Johnson was convicted of burglary in the first degree, sexual abuse in the second degree, and assault while participating in a felony. In a December 1988 sentencing order, he received consecutive terms totaling forty years.

Johnson was serving that sentence when the State filed its petition on September 14, 2009, alleging Johnson to be a sexually violent predator. A jury considered evidence in the civil commitment trial beginning on August 2, 2010. Testifying for the State, psychologist Harry Hoberman described his testing of Johnson's personality in January 2010. Dr. Hoberman found no change in Johnson's responses to the MMPI[1] when compared with similar testing conducted on the offender in 1984 and 2003. Dr. Hoberman testified the recent results revealed that Johnson was "immature, impulsive and hedonistic—that

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[1] The Minnesota Multiphasic Personality Inventory II involves administering a set of 567 true/false questions, which are scored by a computer.

would be pleasure seeking—and he frequently rebels against authority." The testing also revealed Johnson to be "hostile, quite aggressive, often frustrated" and exhibiting "an extreme pattern of disinhibition"—leading to "high risk taking and impulsive behavior." The psychologist noted that Johnson "tends to make a good impression at first, but is superficial, selfish, hedonistic, untrustworthy, [and] only interested in people for how they can be useful to him."

Dr. Hoberman testified that Johnson fit the definition of a psychopath with "significant elements of a sexual disorder that's referred to as sexual sadism." The psychologist also diagnosed Johnson with antisocial personality disorder.

After the State's case, Johnson moved for a directed verdict, alleging insufficient evidence that he was a sexually violent predator under Iowa Code section 229A. Specifically, his attorney argued:

> Mr. Johnson's last sex offense was approximately 22 years ago. There's been no evidence of any sexual misconduct since that time. No evidence of any recent overt act or acts that would remotely be interpreted as recent overt acts, committing Mr. Johnson and depriving him of his liberty based on offenses that occurred approximately two decades ago.
>
> Finally, Mr. Johnson's . . . right to due process and equal protection is guaranteed by the Constitution of the United States and the Constitution of the State of Iowa. To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past, and that danger was manifested by an overt act or attempt or threat to do substantial harm to himself or another.

The court denied Johnson's motion, rejecting the constitutional claim.

Johnson called several witnesses at the commitment hearing, including Jo Beth Hardin, who supervised him in a prison clerical job. She described Johnson

as a hard worker and "very kind and gentle, soft-spoken." She was aware of the sexual assault crimes he committed, but "never felt fear" being around him.

On August 5, 2010, the jury returned its verdict, finding Johnson was a sexually violent predator. Johnson now appeals.

II. Error Preservation

The State argues Johnson's motion for directed verdict did not preserve error because the district court did not rule on his constitutional claim. Although the court did not offer an extensive analysis, it did say: "I also adopt the State's reasoning on the Constitutional argument and overrule the Respondent's motion in total." Johnson did not need to take further action to preserve his due process claim. *See In re Det. of Hodges*, 689 N.W.2d 467, 470 (Iowa 2004) (finding respondent preserved error where the record indicates the trial court and counsel for both parties had no doubt about the grounds for the directed verdict motion).

III. Scope and Standard of Review

We review due process challenges de novo. *In re Det. of Garren*, 620 N.W.2d 275, 278 (Iowa 2000). To the extent that Johnson is challenging the constitutionality of provisions in chapter 229A, we abide by the notion that statutes are cloaked with a strong presumption of constitutionality. *Id*. The challenger bears a heavy burden to rebut that presumption and negate "every reasonable basis upon which the statute could be upheld as constitutional." *Id*.

To the extent that Johnson is raising a sufficiency claim, we review the evidence in the light most favorable to the State—as the party resisting the motion for directed verdict. *See In re Det. of Hennings*, 744 N.W.2d 333, 340

(Iowa 2008). If the State presented substantial evidence in support of each element of the claim, we affirm. *Id*. Substantial means the kind of evidence from which a juror could reasonably infer a fact in question. *Id*.

IV. Constitutional Framework

Johnson argues that his rights were violated under both the federal and state constitutions. He does not provide a separate analysis under the Iowa Constitution. The federal due process clause prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Iowa Constitution describes the protection in similar language: "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. I, § 9. Our courts have traditionally considered these provisions to be equal in import, scope, and purpose. *Garren*, 620 N.W.2d at 284. We opt here to apply the same analysis to both constitutional claims.

V. Analysis

To classify Johnson as a sexually violent predator, the State must prove beyond a reasonable doubt three elements: (1) he had been convicted of a sexually violent offense; (2) he suffered from a mental abnormality; and (3) that mental abnormality made him more likely to engage in predatory acts constituting sexually violent offenses if he was not confined in a secure facility. *See* Iowa Code § 229A.2(11) (defining sexually violent predator). Johnson does not contest the first two elements on appeal. His substantive due process claim focuses on the third question: did his mental abnormality make him more likely to be a sexually violent predator if he was not confined in a secure facility?

Essentially, Johnson challenges whether the State established he would be dangerous in the future if not civilly committed without showing he committed a recent overt act.

Iowa Code section 229A.4 "plots two separate courses for the civil commitment of a sexually violent predator." *In re Det. of Shaffer*, 769 N.W.2d 169, 173 (Iowa 2009) (interpreting statute as providing "certain criteria to commence proceedings to commit 'a person presently confined' and separate criteria to commence proceedings to commit 'a person who has committed a recent overt act'"). In the first situation, if a person is confined for a sexually violent offense when the State files its petition, the statute does not require proof of a recent overt act. *See In re Det. of Gonzales*, 658 N.W.2d 102, 105 (Iowa 2003) (observing that the recent overt act "would simply be deemed to be the act for which the person is presently confined"). In the second situation, if the offender is not confined for a sexually violent offense when the State files its petition, the State must point to a "recent overt act" to demonstrate the offender is more likely than not to engage in acts of a sexually violent nature. *See* Iowa Code § 229A.2(4). A "recent overt act" is defined as "any act that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm." *Id.* § 229A.2(7).

The question in *Gonzales* was whether the trial court could find that a sex offender—who was presently confined for an offense not involving predatory acts—posed a future danger to the public without receiving evidence that he had committed a recent overt act. *Gonzales*, 658 N.W.2d at 104–05. Our supreme

court reversed Gonzales's commitment order "[b]ecause Gonzales was not confined for a sexually violent offense at the time the petition was filed, and the State failed to prove, or even allege, a recent overt act that meets the definition of the statute." *Id*. at 106. The *Gonzales* court did not address the respondent's due process challenge to the statute because the court interpreted chapter 229A as requiring proof of a recent overt act for offenders presently confined for non-sex offenses. *Id*. at 103.

In this appeal, Johnson argues that the language in *Gonzales* indicating confinement for a sexually violent offense always satisfies the recent-overt-act requirement does not comport with due process principles. He asks us to decide that even when an offender is confined for a sexually violent offense, if he has not demonstrated predatory tendencies during his time in prison—despite the opportunity to do so—substantive due process requires the State to prove a recent overt act in support of its allegation of future dangerousness.

To the extent that Johnson is asking us to backpedal from precedent set by our supreme court, we are not at liberty to do so. *See Figley v. W.S. Indus*., 801 N.W.2d 602, 608 (Iowa Ct. App. 2011). But even if we surmise Johnson is not contesting the holding of *Gonzales*, we are not inclined to find that its dicta opened the door to the due process violation alleged.

Substantive due process prevents the State from engaging in conduct that "shocks the conscience" or interferes with rights "implicit in the concept of ordered liberty." *Hennings*, 744 N.W.2d at 337. A citizen's right to be free from bodily restraint is "at the core of the liberty protected by the Due Process Clause

from arbitrary governmental actions." *Garren,* 620 N.W.2d at 284 (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). But a citizen's liberty interest is not absolute; it must be balanced against the State's interest in detaining "mentally unstable individuals who present a danger to the public." *Id*.

In *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997), the Supreme Court rejected a substantive due process challenge to the sexually violent predator commitment statute enacted by the Kansas legislature. Our sexually violent predator chapter closely tracks the Kansas act. *In re Det. of Mead*, 790 N.W.2d 104, 109 (Iowa 2010). The *Hendricks* court reasoned that a finding of future dangerousness—linked to proof of a "mental abnormality" impairing the individual's volition—justified indefinite involuntary commitment. *Hendricks*, 521 U.S. at 358. Our supreme court followed *Hendricks* and determined that chapter 229A was "plainly of a kind" with those civil commitment statutes upheld by courts against substantive due process challenges. *Garren*, 620 N.W.2d at 284–85; *see also In re Det. of Cubbage*, 671 N.W.2d 442, 448 (Iowa 2003) (rejecting substantive due process challenge related to right to be competent to stand trial as a sexually violent predator).

Our court addressed the substantive due process requirement for proof of future dangerousness in *In re Detention of Selby*, 710 N.W.2d 249 (Iowa Ct. App. 2005). The precise question there was whether chapter 229A violated substantive due process because it failed to place a time limit on calculating a predator's risk to reoffend. *Selby*, 710 N.W.2d at 250. We applied a strict scrutiny test to chapter 229A, seeking to determine whether the civil commitment

provisions were narrowly tailored to achieve the compelling state interest in protecting the public from sexual predators. *Id*. at 253. We ultimately held that due process was satisfied because "under the statute, a person must be found both dangerous and mentally ill at the time of commitment." *Id*.

Applying the same strict scrutiny test here, the inquiry is whether the *Gonzales* interpretation of chapter 229A—allowing present confinement for a sexually violent offense to serve as a proxy for a recent overt act—deprives Johnson of his fundamental right to fair trial in which the State satisfies its burden to prove he is disposed to commit future predatory acts if not confined in a secure facility.

Johnson objects to treating confinement for a sexually violent offense as a per se substitute for the commission of a recent overt act. Johnson asserts:

> the record is devoid of any evidence [he] engaged in any illegal or inappropriate sexual conduct for 21 years following his last conviction, even though he had ample opportunity to sexually assault a female staff member during the time he worked alone with her for six hours per day for at least a year.

The State argues that while substantive due process mandates a close fit between the law and the compelling state interest, it does not "demand perfection." The State relies on cases from other jurisdictions finding that proof of a recent overt act was not required when the respondent was in custody when the petition was filed. For example, a California appellate court determined that the lack of a recent overt act was "immaterial" to the determination of the offender's future dangerousness because the offender had recently been in

custody. *See People v. Felix*, 87 Cal. Rptr. 3d 482, 490 (Cal. Ct. App. 2008). The *Felix* court opined:

> Due process does not require that the absurd be done before a compelling state interest can be vindicated. As in the present case, [a mentally disturbed sexual offender] may have a predisposition to commit a specific type of sexual offense—one that cannot, as a practical matter, be committed during confinement.

Id.

Similarly, the Washington Supreme Court held that proof of a recent overt act is necessary only where a sexually violent offender has been released from total confinement and spent time in the community. *In re Det. of Lewis*, 177 P.3d 708, 713–14 (Wash. 2008). The *Lewis* court reasoned:

> Most offenders are incarcerated and have not been in the community since their predicate offense conviction when the State files the petition. Under such circumstances, where the State lacks an opportunity to prove present dangerousness with evidence of a recent overt act, the statute and our case law relieve the State of pleading and proving a recent overt act.

Id. at 711 (citations omitted) (noting "due process does not require the State to prove the 'impossible'").

Johnson contends it would not be impossible for the State to prove he remained a threat to reoffend by showing a recent overt act committed in prison. He cites *State v. Huss*, 666 N.W.2d 152, 162 (Iowa 2003), where our supreme court rejected the State's argument that recent acts were less relevant to the question of dangerousness where the offender had been in a controlled setting for years. The *Huss* court opined that even a structured environment will not prevent a person from engaging in violent behavior. 666 N.W.2d at 162 (citing

State v. Polly, 657 N.W.2d 462, 465 (Iowa 2003) where an inmate assaulted a prison nurse with the intent to commit sexual abuse).

We do not dispute that it would have been *possible* for Johnson to commit or attempt to commit sexual assault against the women with whom he had contact while incarcerated. But his limited exposure to women and the obvious vigilance against and ready means to detect such crimes inside the walls of a prison do not afford a fair test of whether he is likely to reoffend if not held in a secure facility. Johnson's most recent act while at liberty in the community—albeit while still assigned to a halfway house—was to invade a stranger's apartment and viciously beat and repeatedly rape her for almost an hour. Because of the violent nature of that attack, Johnson received a lengthy prison sentence.

Johnson testified at his sexually violent predator trial that he benefitted from his second round of sexual offender treatment during his most recent incarceration. But Dr. Hoberman, the State's expert, found that Johnson's mental abnormality, including traits of psychopathy and sexual sadism, remained the same in 2010 as when he was tested in 1984 and 2003. This expert testimony sets this case apart from *Huss*, where the court noted that the defendant's mental disorder "ha[d] been in remission for years." 666 N.W.2d at 162.

While our supreme court was addressing a different question in *Gonzales*, we find no hint in its discussion of chapter 229A that it believed allowing confinement for a sexually violent offense to stand in the place of a recent overt

act threatened to violate an offender's substantive due process rights. *See Gonzales*, 658 N.W.2d at 103–105 (noting the word "recent" was not defined in the statute). The court reasoned in *Gonzales* that a just and reasonable construction of chapter 229A would not "allow the State to rely on trivial offenses to start the civil commitment process." *See Schaffer*, 769 N.W.2d at 173. That concern is not manifested in the instant case, where the State relied on Johnson's serious and predatory crimes to launch the commitment process. The purpose of the recent-overt-act requirement, namely that the State prove the respondent's present dangerousness, is satisfied when the respondent exhibited his predatory tendencies during his most recent opportunity to do so while not confined.

We find a useful analogy in criminal cases addressing the impact of incarceration on the relevance of remote prior crimes evidence. "[R]emoteness may render evidence irrelevant where the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered to prove that fact." *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992) (citations omitted). But the *Casady* court concluded that even the significant lapse of fifteen and twelve years between the defendant's prior crimes and the present incident did not render the prior crimes irrelevant when the defendant was incarcerated during most of the time in question. *Id*. at 785–86. "Casady's 'period of opportunity' to commit crimes [was] considerably less." *Id*. at 786 (quoting *State v. Walsh*, 318 N.W.2d 184, 187 (Iowa 1982), for the proposition that "any issue as to remoteness of the prior incident is almost

completely defused by the fact that during the time gap between the prior incident and the [present offense], defendant was in confinement in a correctional institution").

Similarly, Johnson's incarceration drastically reduced his realistic opportunity to commit acts causing harm of a sexually violent nature or creating a reasonable apprehension of such harm. The State's interest in relying on the sexually violent offense for which the respondent is presently confined, rather than trolling for recent overt acts that an offender might dare to commit while in prison, is narrowly tailored to its compelling interest in protecting the public from "a small but extremely dangerous group" of persons who are highly likely to engage in "repeat acts of predatory sexual violence" if not detained. *See* Iowa Code § 229A.1; *Atwood v. Vilsack*, 725 N.W.2d 641, 648 (Iowa 2006).

We believe due process is satisfied by the State's proof of Johnson's future dangerousness through evidence he currently suffered from a mental abnormality, and that abnormality made him likely to engage in predatory acts of sexual violence if he was not confined in a secure facility—based on the fact that during his most recent release into the community he committed a sexually violent offense. The district court did not violate Johnson's constitutional rights by denying his motion for a directed verdict based on the State's failure to offer evidence showing he committed a recent overt act while serving his prison sentence.

AFFIRMED.