IN THE COURT OF APPEALS OF IOWA

No. 8-237 / 07-1021
Filed April 30, 2008

IN RE THE DETENTION OF
FRANK H. ALLOWAY III

FRANK H. ALLOWAY III,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Glenn E. Pille, Judge.

Frank Alloway III appeals from his civil commitment as a sexually violent predator. **AFFIRMED.**

Mark C. Smith, State Public Defender, and Amy Kepes, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, and Cristen Douglass, Assistant Attorney General, for the appellee, State.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

VOGEL, J.

On November 2, 2006, the State filed a petition under Iowa Code section 229A.4 (2005) seeking the commitment of Frank Alloway as a sexually violent predator. The district court found probable cause to believe Alloway was a sexually violent predator on November 9, 2006, and a trial followed on May 14, 2007. The jury found Alloway to be a sexually violent predator and the district court committed him to the custody of the Director of the Department of Human Services. Alloway appeals from his commitment.

I. Alloway first claims Iowa Code section 229A.7(4), which gives the attorney general the right to demand that commitment proceedings be before a jury, violates both his due process and equal protection rights[1]. Our supreme court squarely rejected these claims in *In re Detention of Hennings*, 744 N.W.2d 333 (Iowa 2007).

II. Alloway next claims the court erred in admitting evidence concerning actuarial risk assessment reoffense rates of sex offenders for periods of "six, ten and fifteen years after release and evidence of 'lifetime' risk." *See* Iowa R. Evid. 5.401 (defining relevant evidence) & 5.402 (rendering irrelevant evidence inadmissible). He argues that none of this evidence is relevant to the issue of his dangerousness *at the time of commitment*. *See In re Detention of Selby*, 710 N.W.2d 249, 253 (Iowa Ct. App. 2005) (recognizing that an individual must be both dangerous and possess a mental abnormality that makes the individual likely to engage in sexually violent predatory acts at the time of commitment).

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[1] Iowa Code section 229A.7(4) states "The respondent, the attorney general, or the judge shall have the right to demand that the trial be before a jury."

We reject this contention. First, the actuarial risk assessments used here by the State's expert were just one factor in her clinical evaluation of Alloway that led to her ultimate opinion that he suffers from two mental abnormalities that predispose him to commit sexually violent acts. *See In re Detention of Holtz*, 653 N.W.2d 613, 619 (Iowa Ct. App. 2002) ("The instruments were used in conjunction with a full clinical evaluation and their limitations were clearly made known to the jury."). Moreover, we conclude the risk assessments in question were relevant to the essential question of whether Alloway is more likely than not to commit a sexually violent offense if he is not confined in a secured facility. The actuarial instruments, while measuring *future* reoffending rates, assisted in understanding this essential question.

III. Finally, relying on *Selby*, 710 N.W.2d at 253, Alloway claims the court improperly failed to give a proposed instruction to require the State to prove that he is *presently* likely to commit acts of a sexually violent nature. Specifically, the court instructed the jury that the State had to prove Alloway suffers from a "mental abnormality [that] makes the Respondent likely to engage in predatory acts constituting sexually violent offenses . . . ." Alloway had requested that the court insert the term "presently" prior to "likely to engage." Upon our review for the correction of errors at law, *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006), we reject this claim.

We agree with the State that Alloway misinterprets the *Selby* decision in that sense that *Selby* does not require a showing that the individual will commit a sexually violent offense *at the present time* if not confined to a secured facility. Rather, *Selby* stands for the proposition that the individual must have a *present*

abnormality that makes him more likely than not to commit sexually violent offenses if not confined. *Selby*, 710 N.W.2d at 253 ("A person must currently be suffering from a mental abnormality that makes the person likely to engage in sexually violent predatory acts"). When read in that light, Alloway's proposed addition of the word "presently" to the instruction did not accurately state the law. The court therefore did not err in refusing to amend the instruction.

We affirm the commitment order.

AFFIRMED.