DIVISION ONE
FILED: 06/17/10
PHILIP G. URRY, CLERK
BY: JT

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

IN RE RICHARD K.	)	1 CA-MH 09-0073 SP
	)	DEPARTMENT B
	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Coconino County

Cause No. CV 2003-0387

The Honorable Danna D. Hendrix, Judge

AFFIRMED

David W. Rozema, Coconino County Attorney — Flagstaff
by Timothy G. McNeel, Deputy County Attorney
Attorneys for Appellee

H. Allen Gerhardt, Coconino County Public Defender — Flagstaff
Attorney for Appellant

P O R T L E Y, Judge

¶1 Petitioner Richard K. appeals the trial court's denial of his petition for discharge from civil commitment at the Arizona Community Protection and Treatment Center ("ACPTC")

pursuant to Arizona's Sexually Violent Person Act, Arizona Revised Statutes ("A.R.S.") sections 36-3701 to 3717 (2009).

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Petitioner was sentenced to fourteen years in the Arizona Department of Corrections on April 18, 1990, after being convicted of sexual assault. Before he completed his sentence, the State sought to have him civilly committed as a sexually violent person ("SVP"). The trial court found that there was probable cause to believe Petitioner was an SVP, and a jury subsequently found that he was an SVP beyond a reasonable doubt. Petitioner, as a result, was civilly committed to ACPTC in June 2004.[1] Petitioner dismissed his appeal when the State agreed to ACPTC's recommendation for conditional release to a less restrictive alternative ("LRA") program.

¶3 Petitioner absconded while on an LRS program outing in 2005 and a warrant was issued for his arrest. Four years later, Petitioner was stopped for a traffic violation in Arkansas, arrested on the warrant and extradited to Arizona. Petitioner then filed a petition for discharge from civil commitment. He was examined by two physicians; both had also evaluated him in

[1] During 2003 and 2004, Petitioner was evaluated by four physicians and was diagnosed with: paraphilia, NOS-forced sex with non-consenting person; personality disorder, NOS with antisocial features; polysubstance dependence; and alcohol abuse. Both substance abuses were found by at least one physician to be in remission in a controlled environment.

the SVP proceeding. After taking evidence, the court denied Petitioner's request for discharge. He appeals that denial, and we have jurisdiction pursuant to A.R.S. § 12-2101 (2003).

DISCUSSION

¶4 The SVP Act was designed to protect the public from sexually violent felons by allowing the State to seek civil commitment of those persons. *Martin v. Reinstein*, 195 Ariz. 293, 299, ¶ 2, 987 P.2d 779, 785 (App. 1999). The State, as a result, must prove beyond a reasonable doubt that the person suffers from a mental disorder that "predisposes the person to commit sexual acts to such a degree that he or she is dangerous to others," and that the "mental disorder makes it highly probable that the person will engage in acts of sexual violence." *In re Leon G.*, 204 Ariz. 15, 23, ¶ 28, 59 P.3d 779, 787 (2002) (emphasis omitted). "[O]nly those persons who lack control because a mental disorder, not a voluntary choice, makes them likely to commit sexually violent acts" can be committed. *Id.* at ¶ 29.

¶5 Once committed, A.R.S. § 36-3714(B) allows the individual to annually challenge his confinement. To defeat the challenge, the State must prove to the court "beyond a reasonable doubt that the person's mental disorder has not changed and that the person remains a danger to others and is

likely to engage in acts of sexual violence if discharged." § 36-3714(C).

¶6 Petitioner argues that substantial evidence was not presented to establish beyond a reasonable doubt that he meets the statutory requirements for continued commitment. He contends that "there was a definite change in [the State expert's] analysis of [Petitioner's] mental disorder because he eliminated [his previous] Axis I diagnosis."

¶7 "[T]he findings of the trial court as to the weight and effect of the evidence will not be disturbed unless they are clearly erroneous." *O'Hern v. Bowling*, 109 Ariz. 90, 92, 505 P.2d 550, 552 (1973). If the findings "are supported by reasonable evidence or based on a reasonable conflict of evidence, they will not be disturbed on appeal." *Id.* at 93, 505 P.2d at 553; *accord Moreno v. Jones*, 213 Ariz. 94, 98, ¶ 20, 139 P.3d 612, 616 (2006).

¶8 The State's expert, Dr. DiBacco, diagnosed Petitioner in 2004 with an Axis I: paraphilia NOS (not otherwise specified), non-consent; polysubstance dependence in remission because of detention; and Axis II: antisocial personality disorder. In Dr. DiBacco's 2009 evaluation, he again diagnosed Petitioner with an Axis II antisocial personality disorder, but left out the Axis I paraphilia NOS diagnosis. Dr. DiBacco testified that he left out the Axis I diagnosis because some

controversy had arisen about the use of the term and "because of the dispute about the diagnosis, [he] chose not to use it."

¶9 When Dr. DiBacco was asked if the exclusion of the Axis I diagnosis indicated a change in Petitioner's mental disorder, he testified that "there is no change in my diagnosis and there is no disparity." He clarified that even though he made the decision not to give the Axis I diagnosis, Petitioner's antisocial personality disorder remained, and this disorder is in conjunction with Petitioner sexually acting out and his inability to control his behavior.[2] Accordingly, there was substantial evidence to support the court's finding that Petitioner's mental disorder had not changed.

¶10 Petitioner also argues there was insufficient evidence to prove that he is likely to reoffend because "likely" requires a finding of "high probability." Dr. DiBacco, however, testified that he tested Petitioner's risk to reoffend, and Petitioner scored in the high range on both tests.[3] Moreover, Dr. DiBacco found that Petitioner's failure to complete treatment was an aggravating factor in the risk assessment. Although Dr. DiBacco considered Petitioner's age as a mitigating

[2] In Dr. DiBacco's 2004 evaluation, he found that both the Axis I paraphilia and Axis II personality disorder were conditions that predisposed Petitioner to sexually act out.

[3] The tests included an actuarial prediction instrument referred to as the MnSOST-R, and a risk assessment tool known as the Static-99.

factor,[4] he still concluded Petitioner had a high risk to reoffend. Consequently, the trial court did not err when it found Petitioner was likely to engage in acts of sexual violence.

¶11 Petitioner contends that Dr. DiBacco did not "completely discredit the testimony of [Petitioner's] witness[,] . . . did not refute the findings of the other doctors whose reports were referenced[,] and nothing refuted the undeniable fact that [Petitioner] lived as a free man without offending for four and one-half years."

¶12 Here, the trial court had to resolve conflicts in testimony. The "credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the [fact-finder]." *State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007). The trial court, after considering the diagnosis of both experts, found that "[a]fter weighing all of the evidence . . . [Petitioner's] mental disorder has not changed." Similarly, after the court noted that the expert witnesses had opposite opinions on whether Petitioner was likely to reoffend, it found that "the [S]tate has proven beyond a reasonable doubt that . . . [Petitioner] remains a danger to others and is likely to engage in acts of sexual violence if

[4] Research has shown that when an individual reaches the age of fifty there may be a reduction in the likelihood of sexually acting out.

discharged." Finally, the court acknowledged that Petitioner did not reoffend during his hiatus, but found that Petitioner would have been "better served" if he had completed the civil commitment treatment. Consequently, because "there was substantial, reasonable evidence to support the findings made by the trial court," we find no error. *O'Hern*, 109 Ariz. at 93, 505 P.2d at 553.

CONCLUSION

¶13 Based on the foregoing reasons, we affirm the trial court's denial of Petitioner's petition for discharge.

/s/
_____
MAURICE PORTLEY, Judge

CONCURRING:

/s/
_____
JOHN C. GEMMILL, Presiding Judge

/s/
_____
PATRICIA K. NORRIS, Judge