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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE THE DETENTION OF JOHN C. SANCHEZ	)	2 CA-MH 2009-0003-SP DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. A-20020026

Honorable Virginia C. Kelly, Judge

AFFIRMED

Barbara LaWall, Pima County Attorney
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B R A M M E R, Judge.

¶1 In August 2003, a jury found appellant John Carlos Sanchez to be a sexually violent person as defined in A.R.S. § 36-3701(7) of Arizona's Sexually Violent Persons

(SVP) Act, A.R.S. §§ 36-3701 through 36-3717.[1] Pursuant to the jury's verdict, the trial court ordered Sanchez committed to the custody of the Arizona Department of Health Services for placement at the Arizona Community Protection and Treatment Center (ACPTC). This court affirmed the jury verdict and commitment order on appeal. *In re Commitment of Sanchez*, No. 2 CA-MH 2003-0014-SP (memorandum decision filed Apr. 6, 2005). Sanchez has remained in custody, receiving "care, supervision [and] treatment" pursuant to § 36-3707(B). In this appeal, he challenges the trial court's order of June 26, 2009, denying his request for an unconditional discharge from custody.

¶2 Because he had "made some gains" in treatment, Sanchez was conditionally released in October 2004 to the Less Restrictive Alternative (LRA) program, located on the grounds of the ACPTC. In December 2007, the state stipulated that, based on the further progress he had made, "Sanchez should be conditionally released to Track B, Level 6 (community based living) of the LRA program." The trial court approved the parties' stipulation and ordered Sanchez's conditional release. By June 2009, however, Sanchez was still living on the campus of the ACPTC program and had not yet moved into the community.

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[1]Sanchez had been convicted in 1985 of three counts of sexual conduct with a minor under the age of fifteen, for which he was sentenced to seven years in prison. Released in 1992, he then reoffended in 1997. He pled guilty in that matter to one count each of attempted sexual abuse of a minor under fifteen and aggravated assault of a minor under fifteen. He was placed on lifetime probation for those offenses in 1998, but soon violated its conditions. The trial court revoked his probation in 1999 and returned him to prison for 3.5 years. Before his scheduled release in 2002, the state successfully petitioned for his detention and evaluation pursuant to the SVP Act.

¶3 In September 2008, Sanchez requested an evaluation pursuant to § 36-3708(B) and a hearing pursuant to § 36-3714(C) to determine if he was "an appropriate candidate for outright release from confinement."[2] The issue to be determined at such a hearing is dictated by statute:

> The attorney for the state has the burden of proving 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. If the state does not meet its burden of proof, the person shall be discharged from treatment.

§ 36-3714(C). The term "likely," as used throughout the SVP Act, has been held "to require a standard somewhat higher than 'probable.'" *In re Leon G.*, 204 Ariz. 15, ¶ 27, 59 P.3d 779, 787 (2002). Thus, our supreme court has held, the state must show that a sexually violent person's "*mental disorder makes it highly probable* that the person will engage in acts of sexual violence." *Id.* ¶ 28. Although without citing the statute specifically, the trial court acknowledged the statutory requirements in its opening comments at the evidentiary hearing on June 17, 2009.

¶4 At the hearing, three clinical psychologists testified: Drs. Hector Barillas and Daniel Montaldi for the state, and Dr. Donald Irwin for Sanchez. Following the hearing, the trial court denied the request for discharge, giving rise to the present appeal. Sanchez contends there was insufficient evidence to prove he remained dangerous or that it was

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[2]Sanchez filed a "request for trial," mistakenly citing § 36-3709; however, that statute governs requests for "conditional release to a less restrictive alternative." § 36-3709(A), (B), (E). Section 36-3714 governs petitions for unconditional discharge from treatment.

highly probable he would reoffend if he were discharged unconditionally. He faults the court for discounting the basis for Irwin's opinion that Sanchez no longer meets the criteria for commitment. And he maintains his continued confinement is a denial of his constitutional right to due process of law.

¶5 Sanchez has failed to comply with Rule 13(a)(6), Ariz. R. Civ. App. P., which requires him, "[w]ith respect to each contention raised on appeal, [to identify] the proper standard of review on appeal . . . , with citations to relevant authority, at the outset of the discussion of that contention." The applicable standards, as supplied by the state, are as follows. "[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 trial court's 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, ¶ 20, 139 P.3d 612, 616 (2006); *In re Maricopa County Mental Health Case No. MH 94-00592*, 182 Ariz. 440, 443, 897 P.2d 742, 745 (App. 1995) (trial court's findings of fact "will not be set aside unless they are clearly erroneous or unsupported by any credible evidence"). And, we view the evidence in the light most favorable to upholding the trial court's ruling. *In re Maricopa County Mental Health No. MH 2008-001188*, 221 Ariz. 177, ¶ 14, 211 P.3d 1161, 1163 (App. 2009).

¶6 In a detailed minute entry ruling, the trial court reviewed the testimony of all three psychologists before finding, beyond a reasonable doubt:

1) [Sanchez]'s mental disorder of pedophilia has not changed;

2) [Sanchez]'s mental disorder predisposes him to commit sexual acts to such a degree that he remains a danger to others, and;

3) It is highly probable that [Sanchez] will engage in acts of sexual violence if discharged because:

   a. he continues to have a high level of social anxiety with adults while remaining attracted to the physical qualities, soft voices and innocence of children;

   b. he continues to masturbate, albeit not regularly but more than last year, to fantasies about female minors, typically those whom he sees in the community;

   c. his anti-social personality traits require additional intervention;

   d. he requires ongoing therapeutic intervention for and monitoring to ensure successful integration into the community.

Reasonable evidence in the record supports the trial court's findings.

¶7 Based on his evaluation of Sanchez, Barillas testified Sanchez "was still presenting a high risk to the community, especially to minor girls." Among the constellation of factors that contributed to Barillas's ultimate opinion was the fact that Sanchez had not yet moved away from the ACPTC campus to live independently in the community. Barillas was particularly concerned about that fact because Sanchez previously had been deceptive about his contacts with children soon after being permitted sufficient independence to begin working in the community.

¶8 The state's other witness, Montaldi,[3] testified that he had not reached a final conclusion about whether Sanchez remained dangerous to others, continued to have serious difficulty controlling his behavior, and was therefore likely to engage in further acts of sexual violence. Nonetheless, Montaldi did not recommend Sanchez be discharged unconditionally from ACPTC. He testified that Sanchez continued to fantasize about and have sexual urges toward children, that he initially had been deceptive about contacts he had with children while in treatment, and that he had not shown the good judgment to remove himself from situations that entailed risk. Thus, Montaldi testified:

> I still have concerns for him and I think it's important that he complete the treatment that he needs, and he's not been out in the community yet so, in part, Level 6 allows us to further assess his controllability and also a willingness to exercise control, and it also helps us treat any problems that still exist because he still has the guidance of therapists and he still has the monitoring.

¶9 The written annual progress report that Montaldi signed on behalf of the ACPTC evaluation team in September 2008 recommended that Sanchez continue in the ACPTC's LRA program because Sanchez "still needs therapeutic intervention and monitoring to ensure success." The report states:

> To his credit, Mr. Sanchez has made progress from where he was in previous years, which is why he was advanced to the final, most crucial phase of the ACPTC treatment and reintegration program. It is at this stage that the most important treatment occurs. This phase is most vital because residents eventually acquire residences in the community (while continuing to receive the benefits of treatment and surveillance).

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[3]Montaldi was the director of the ACPTC. In that capacity, he conducted annual and LRA evaluations and served as head of the treatment team.

> This is the phase where a resident hones his skills for managing deviant arousal, such that these skills can endure past the end of treatment. Mr. Sanchez is still near the beginning of this extremely important phase, where he is learning how to cope with the increased fantasizing that comes from increased interaction with the community. He is retaking the Arousal Management group and doing more cue-exposure therapy with his therapist. Once this is completed and if he does well during a renewed period of individual outings, Mr. Sanchez will begin looking for a suitable residence in the community under the supervision of the ACPTC Treatment and Surveillance Teams This is expected to happen within this next year.

As noted above, by the June 2009 evidentiary hearing on his request for release, Sanchez was still living on the grounds of the ACPTC rather than in the community.

¶10 Irwin, the psychologist called by Sanchez, agreed that it was important for Sanchez to complete the final phase of treatment, even though Irwin did not believe Sanchez continued to "meet the criteria necessary for continued involuntary commitment." Irwin testified that, in his opinion, by 2008 the risk that Sanchez would commit additional sexual offenses was "less than highly probable." But, Irwin stated, he did "agree with Dr. Montaldi's conclusion that it would be prudent and wise for Mr. Sanchez to complete the LRA Level 6 Independent Living Program in the community."

¶11 Distilled to their essence, Sanchez's arguments on appeal—as illustrated by his painstaking review of the testimony of all three psychologists—are that the trial court should have accepted the testimony of Irwin and disregarded that of Barillas in evaluating whether Sanchez remained a danger to the community and likely to reoffend if he were unconditionally discharged. But, "credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the [finder of fact]." *State v. Cox*,

217 Ariz. 353, ¶ 27, 174 P.3d 265, 269 (2007). The court as fact-finder here was "not required to accept expert testimony uncritically and [was] entitled to carefully review the factual or documentary bases of [the] expert[s'] conclusions." *State v. Gomez*, 211 Ariz. 111, ¶ 10, 118 P.3d 626, 628 (App. 2005).

¶12 In his reply brief, Sanchez contends that "the only basis for Dr. Barillas'[s] opinion [that Sanchez remained dangerous and should not be discharged] is that Mr. Sanchez was not being treated for anxiety." The record suggests Sanchez had received some treatment for his anxiety, including a prescription for Prozac, of which Barillas may or may not have been aware. But, what emerges from Barillas's testimony is his opinion that, in any event, Sanchez had not been treated "properly" or adequately for a serious anxiety disorder that, as Barillas explained, could lessen Sanchez's control over his underlying pedophilia:

> [T]he one issue was that he had not received any real treatment for his anxiety. He had been offered medications at the beginning. He felt like he didn't need it, and then . . . it seemed like that issue of his anxiety condition faded into the woodwork, so to speak, and never received attention.
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> I was impressed, when I was talking to him, that I still had that impression that he had an anxiety disorder and probably a social phobia, and when individuals have a paraphilia, and in this case a pedophilia, and they have a co-morbid disorder[] that raises their anxiety or stress level, that makes them more vulnerable to their impulses.

Barillas's assessment was supported by Sanchez's most recent annual progress review, in which his continuing feelings of depression and "high levels of anxiety" were noted.

¶13 In short, despite containing some arguably conflicting information, the record nonetheless substantially corroborates Barillas's opinion that Sanchez's anxiety disorder and

antisocial personality disorder[4] placed him at high risk to reoffend. And, contrary to Sanchez's assertion that Barillas's opinion depended on a mistaken belief that Sanchez had not received treatment for anxiety, Barillas testified that his ultimate opinion hinged not on any single fact but on a composite of "everything" he had reviewed and considered in light of his training and experience. Because "there was substantial, reasonable evidence to support the findings made by the trial court," *O'Hern*, 109 Ariz. at 93, 505 P.2d at 553, we affirm its order denying Sanchez's request for discharge.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge

[4]It was Montaldi's opinion that Sanchez suffers from an "avoidant personality disorder" rather than the "antisocial personality disorder" Barillas diagnosed. The court questioned Barillas about the difference between the two before, as its minute entry reflects, it accepted Barillas's opinion over Montaldi's.