IN THE COURT OF APPEALS OF IOWA

No. 9-224 / 08-0830
Filed May 29, 2009

IN RE THE DETENTION OF
VALJEAN LEHMAN,

VALJEAN LEHMAN,
Appellant.

Appeal from the Iowa District Court for Page County, Greg W. Steensland, Judge.

On appeal from his civil commitment as a sexually violent predator, Valjean Lehman appeals from the district court ruling denying his motion to dismiss. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Amy Kepes, Steven Addington, Michael Adams, and Greta Truman, Assistant Public Defenders, for appellant.

Thomas J. Miller, Attorney General, and Linda J. Hines, Becky Goettsch and Denise Timmins, Assistant Attorneys General, for appellee.

Heard by Mahan, P.J., and Eisenhauer and Mansfield, JJ.

MAHAN, P.J.

A jury found Valjean Lehman was a "sexually violent predator" (SVP), as defined in Iowa Code section 229A.2(11) (2007), and the district court consequently committed him to the custody of the Iowa Department of Human Services (DHS). Lehman appeals from the district court's ruling denying his motion to dismiss based on the State's failure to prosecute the civil commitment as a SVP within the ninety-day time period provided in section 229A.7(3). We affirm.

I. Factual Background and Proceedings.

On September 16, 2005, the State filed a petition alleging Lehman is an SVP. *See id*. § 229A.2(11) (defining SVP); *id*. § 229A.4(1) (authorizing the attorney general's filing of a petition alleging "a person presently confined" is an SVP when a prosecutor's review committee has concluded the person meets the definition of an SVP). After a hearing, the district court found probable cause existed to believe Lehman was an SVP, ordered Lehman's transport to a secure facility for evaluation, and set trial for December 13, 2005. *Id*. § 229A.5(2), (5) (requiring a court to determine, after a hearing, "whether probable cause exists to believe the person named in the petition" is an SVP, and in instances where probable cause exists, to direct the person's transfer to a secure facility for evaluation). The State demanded a jury trial. Lehman filed a motion to strike the jury demand, which the district court granted on December 9. The State filed an application for discretionary review on December 12.

On December 23, 2005, our supreme court granted the State's application for discretionary review and request for an immediate stay. *See id.* § 814.5(2)(*d*)

(authorizing discretionary review of "[a] final judgment or order raising a question of law important to the judiciary and the profession").

On February 1, 2008, the supreme court concluded section 229A.7(4) (allowing either party to demand a jury trial) did not violate Lehman's rights to due process and equal protection of the law. The matter was reversed and remanded for further proceedings. Procedendo issued on February 29, 2008.

On March 19, Lehman moved to dismiss, asserting that pursuant to the ninety-day time limit of section 229A.7(3), the State was required to have brought him to trial on or before March 8, 2008. Lehman argued he was "being held against his will contrary to Constitutional liberty interest" and "after the completion of his criminal sentence [] in violation of chapter 229A."

The district court denied the motion, and the matter proceeded to jury trial on April 22, 2008. The jury found Lehman was a SVP, and the district court committed him to the custody of the DHS. Lehman now appeals.

II. Scope and Standard of Review.

Our review of the district court's construction and interpretation of the statute is for correction of errors at law. *In re Detention of Cubbage,* 671 N.W.2d 442, 444 (Iowa 2003). To the extent Lehman asserts a constitutional claim, our review is de novo. *Id.*

III. Analysis.

Iowa Code chapter 229A is civil in nature. *In re Detention of Garren,* 620 N.W.2d 275, 283 (Iowa 2000). While the statute does afford respondents certain

"criminal" rights,[1] a state legislature's decision to "provide some of the safeguards applicable in criminal trials cannot itself turn these [civil commitment] proceedings into criminal prosecutions requiring the full panoply of rights applicable there." *Allen v. Illinois,* 478 U.S. 364, 372, 106 S. Ct. 2988, 2993, 92 L. Ed. 2d 296, 306 (1986).

The civil nature of chapter 229A has been continuously recognized and emphasized by the Iowa courts.

> The Iowa legislature expressly labeled the Sexually Violent Predator Act as civil in nature. *See* Iowa Code § 229A.1 (finding that "a *civil* commitment procedure for the long-term care and treatment of the sexually violent predator is necessary" (emphasis added)). The preamble to the statute also suggests that the purpose of the commitment is public safety and treatment of the committed individual rather than punishment. *See id.* ("existing involuntary commitment procedure[s] . . . [are] inadequate to address the *risk* these sexually violent predators pose to society . . . [and] the *treatment* needs of this population are very long-term and the *treatment* modalities . . . are very different from the traditional treatment modalities available in a prison setting or for persons appropriate for commitment under chapter 229" (emphasis added)). The legislature's intent to enact a civil statute is also implied from the placement of the law among code chapters dealing with the mentally ill; chapter 229 provides for the voluntary and involuntary hospitalization of persons with mental illness and chapter 230 concerns support of persons with mental illness. *See* Iowa Code chs. 229, 230; *see also* [*Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 514-15 (1997)] (holding placement of commitment statute within probate code rather than within criminal code was evidence of intent to enact civil remedy). Additionally, a person determined to be a sexually violent predator under the statute is "committed for control, care, and treatment *by the department of human services,*" as opposed to the department of corrections, another indication of the civil nature of the commitment. Iowa Code § 229A.7 (emphasis added). As the

[1] *See id*. §§ 229A.5 (right to preliminary hearing to determine probable cause); 229A.6(1) (right to counsel); 229A.7(2) (right to speedy trial); 229A.7(3) (right to jury trial); 229A.7(4) (right to unanimous verdict and right to have State prove case beyond reasonable doubt).

> United States Supreme Court stated in *Hendricks,* "Nothing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm." 521 U.S. at 361, 117 S. Ct. at 2082, 138 L. Ed. 2d at 515.

Garren, 620 N.W.2d at 280-81. Because chapter 229A is a civil statute, it does not implicate the state and federal Ex Post Facto Clauses or Double Jeopardy Clauses, which apply only in the criminal/penal contexts.

> Although the civil commitment scheme at issue here does involve an affirmative restraint, "the mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment." The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded. The Court has, in fact, cited the confinement of "mentally unstable individuals who present a danger to the public" as one classic example of nonpunitive detention. If detention for the purpose of protecting the community from harm *necessarily* constituted punishment, then all involuntary civil commitments would have to be considered punishment. But we have never so held.

Hendricks, 521 U.S. at 363, 117 S. Ct. at 2083, 138 L. Ed. 2d at 516 (citations omitted).

In *Cubbage*, relying upon Iowa Code section 812.3[2], the respondent asserted a right to be competent through the course of the trial inquiry into whether he was a SVP. *See Cubbage*, 671 N.W.2d at 444. Our supreme court rejected the statutory right, noting section 812.3 pertained to criminal

---

[2] Section 812.3 provides:

> If at any stage of a *criminal* proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question.

(Emphasis added.)

proceedings. *Id.* The court also rejected Cubbage's claim to a constitutional claim:

> As noted previously, Cubbage supports his due process arguments by citation to cases in the criminal and extradition case contexts and a case of the Wisconsin Court of Appeals. However, the *specialized, civil nature of the proceedings under the SVPA [Sexually Violent Predator Act]* undermines the application of the extradition and criminal case precedents he seeks to apply.

Id. at 446 (emphasis added).

In rejecting an equal protection claim, the Iowa Supreme Court stated:

> Respondents in SVP proceedings *are generally different from defendants in criminal cases* insofar as respondents in SVP proceedings allegedly have (1) in the past been convicted of or charged with committing a sexually violent offense, and (2) a mental abnormality making it likely they will commit sexually violent predatory acts if not confined and treated. The legislative findings articulated in section 229A.1 clearly express the conclusion that SVPs, because of their mental abnormality and concomitant inability to control their predatory acts of sexual violence, pose a greater risk of recidivism than criminal defendants generally. The legislature could reasonably conclude that this heightened risk of recidivism by SVPs and the danger to the public resulting from that risk gives the State a correspondingly greater interest in the outcome of SVP cases than it has in some criminal cases.

State v. Hennings, 744 N.W.2d 333, 339-40 (Iowa 2008) (emphasis added).

Chapter 229A was designed for "a small but extremely dangerous group of sexually violent predators," Iowa Code § 229A.1, who require treatment by the long-term application of nontraditional mental illness treatment modalities with the goal of ensuring public safety and providing "'treatment of the committed individual rather than punishment.'" *In re Detention of Swanson,* 668 N.W.2d 570, 576 (Iowa 2003). With these principles in mind, we turn to Lehman's contention that the district court erred in denying his motion to dismiss for the

State's failure to prosecute this SVP civil commitment within the ninety-day time period provided in Iowa Code section 229A.7(3).

A. Statutory Construction.

Section 229A.7(3) provides:

> Within ninety days after either the entry of the order waiving the probable cause hearing or completion of the probable cause hearing held under section 229A.5, the court shall conduct a trial to determine whether the respondent is a sexually violent predator. The respondent or the attorney for the respondent may waive the ninety-day trial requirement as provided in this section; however, the respondent or the attorney for the respondent may reassert a demand and the trial shall be held within ninety days from the date of filing the demand with the clerk of court. The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and when the respondent will not be substantially prejudiced. In determining what constitutes good cause, the court shall consider the length of the pretrial detention of the respondent.

Lehman contends the statutory language—"[w]ithin ninety days . . . the court *shall* conduct a trial"—creates a mandatory duty and, because the trial was not held within ninety days, he must be released. Lehman argues the term "shall" in this context is mandatory rather than directory. *See State v. Klawonn*, 609 N.W.2d 515, 522 (Iowa 2000) (citing *State v. Luckett,* 387 N.W.2d 298, 301 (Iowa 1986), and noting use of "shall" creates mandatory action unless context clearly indicates otherwise). He contends the outcome should follow that of *Iowa Supreme Court Attorney Disciplinary Board v. Attorney Doe*, 748 N.W.2d 208 (2008) (concluding Board's failure to file appeal within time allowed required dismissal of appeal), rather than *Taylor v. Department of Transportation*, 260 N.W.2d 521, 523 (Iowa 1977) (concluding failure to hold revocation hearing

within time allowed did not require reversal of revocation). Following the relevant analysis, we conclude the time period provided in section 229A.7(3) is directory.

In *Taylor*, a driver appealed the revocation of his driver's license after the Iowa Department of Transportation failed to hold the revocation hearing within twenty days of receipt of Taylor's hearing request, contrary to section 321B.8. *See Taylor*, 260 N.W.2d at 523. In concluding the time provision was directory despite the use of the term "shall," the supreme court stated:

> We have previously recognized that the main objective of chapter 321B is to promote public safety by removing dangerous drivers from the highways. Construing the time of hearing requirement of [section] 321B.8 as mandatory would undermine rather than further this legislative objective because it would provide a technical basis for avoiding license revocation to many persons whose licenses would otherwise be revoked, without any showing of prejudice from delay in hearing.
>
> The speedy-hearing provision is obviously intended to assure that persons who abuse their driving privilege are removed from the highways quickly and that uncertainty is eliminated for those against whom a statutory basis for revocation does not exist. Delay beyond the statutory period is unfortunate and is not to be condoned. Nevertheless, the time provision . . . is clearly designed to provide order and promptness in the administrative process, the characteristic purpose of a directory statute.

Id.

In *Attorney Doe*, the supreme court explained:

> We have drawn a distinction between those statutes and rules that are mandatory and jurisdictional and those that are merely directory. *See Taylor,* 260 N.W.2d at 522. We have stated:
>
> > Mandatory and directory statutes each impose duties. The difference between them lies in the consequence for failure to perform the duty. . . . If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is mandatory and a violation will invalidate subsequent proceedings under it. If the duty is not essential to accomplishing the principal purpose of the statute but is designed to assure order and promptness in the proceeding, the statute

> ordinarily is directory and a violation will not invalidate subsequent proceedings unless prejudice is shown.
>
> *Id.* at 522-23.
>
> "Whether the statute [or rule] is mandatory or directory depends upon legislative intent. When statutes [or rules] do not resolve the issue expressly, statutory construction is necessary." *Id.* at 522. Therefore, we look to the purpose of a rule when determining whether it is mandatory or directory.

Attorney Doe, 748 N.W.2d at 209.

Borrowing language from *In re Sopoci*, 467 N.W.2d 799, 800 (Iowa 1991), "The issue is not whether the court is subjected to an obligatory duty to hold a hearing within the specified period but rather whether its failure to do so should invalidate the [SVP] proceeding." If the prescribed duty (to conduct a trial within ninety days of the conclusion of the probable cause hearing) is essential to the main objective of the statute, the statute ordinarily is mandatory, and a violation will invalidate subsequent proceedings under it.

The purpose of the civil commitment of a sexually violent predator is public safety and treatment of the committed individual rather than punishment. Iowa Code § 229A.1; *Garren*, 620 N.W.2d at 280. The legislature has specifically provided that the "procedures regarding sexually violent predators should reflect . . . . the need to protect the public, to respect the needs of the victims of sexually violent offenses, and to encourage full, meaningful participation of sexually violent predators in treatment programs." *Id.* § 229A.1. The dismissal of a SVP petition due to the a failure to have a trial within ninety days of the completion of the probable cause hearing not only would subject the public to a person who the district court has determined is likely to commit sexually violent offenses if not in

a secure facility, but deny the SVP of treatment. Construing the ninety-day hearing requirement as mandatory would undermine the stated objectives.

We are mindful of the context in which the ninety-day time period for hearing arises. To be subject to commitment under chapter 229A, a person must already be confined. *See id.* § 229A.3 ("When it appears that a person who is confined may meet the definition of a sexually violent predator . . . ."). The statutory framework requires that notice be given to the attorney general "no later than ninety days prior" to a potential SVP's discharge from confinement. *Id.* This ninety-day notice corresponds with the requirement that trial to determine if a respondent is a SVP is to be conducted within ninety days from the completion of the probable cause hearing. Although the ninety-day period prescribed in section 229A.7(3) "doubtless reflects the legislature's view as to the preferred time frame in which the court should act, we cannot read into this statute the intent to deny the court the power to act beyond that time should exigencies require it to do so." *Sopoci*, 467 N.W.2d at 800. In fact, the statutory framework indicates the opposite intent: it liberally authorizes motions for continuance at "the request of either party" or "by the court on its own motion in the due administration of justice." *Id.* § 229A.7(3).

In *In re Detention of Huss*, 688 N.W.2d 58, 63-64 (Iowa 2004), the respondent urged that he was prejudiced by the failure to have a trial within the ninety-day time limit of the SVPA. Our supreme court stated the delay in hearing was justified as it was caused by the respondent's refusal to be examined, which prejudiced the State. *Huss*, 688 N.W.2d at 64. From the *Huss* court's finding that a delay is permissible, we infer that the ninety-day time period is not

mandatory.[3] We conclude the ninety-day hearing rule is clearly designed to provide promptness in the administrative process—"the characteristic purpose of a directory statute." *Taylor*, 260 N.W.2d at 523; *see also Sopoci*, 467 N.W.2d at 800 (rejecting claim that failure to hold a forfeiture hearing within thirty days rendered the proceedings void).

B. Due Process.

Lehman urges that due process requires that "shall" in section 229A.7(3) be interpreted as mandatory and requires dismissal of the State's petition where the State has failed to bring him to trial within ninety days of the order finding probable cause. Prior decisions related to SVP proceedings do not support Lehman's contention.

The Fourteenth Amendment to the United States Constitution prohibits the states from "depriv[ing] any person of life, liberty, or property without due process of law." Article I, section 9 of the Iowa Constitution "similarly provides that 'no person shall be deprived of life, liberty, or property, without due process of law.'" *State v. Hernandez Lopez*, 639 N.W.2d 226, 241 (Iowa 2002). It is true that a "civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323, 330-31 (1979).

---

[3] We find further support for our conclusion in the fact that section 229A.7(7) authorizes the continued detention of a SVP respondent in the event of a mistrial. ("Upon a mistrial, the court shall direct that the respondent be held at an appropriate secure facility until another trial is conducted."). Such continued detention would likely reach beyond the ninety-day period for trial. In *Atwood v. Vilsack*, 725 N.W.2d 641, 646 (Iowa 2006), our supreme court stated: "This provision unmistakably discloses by implication the legislature's intent that detention shall continue after the district court has made a finding of probable cause until the question of whether the detainee is in fact a SVP has been adjudicated."

Iowa courts have repeatedly held, however, that civil commitment of a SVP does not violate substantive due process. *Atwood*, 725 N.W.2d at 648 (rejecting claim that due process required pre-trial SVP detainees be eligible for release on bail during the interim between the district court's finding of probable cause); *In re Detention of Darling,* 712 N.W.2d 98, 101 (Iowa 2006) (holding that civil commitment of a person with an untreatable condition was consistent with substantive due process under the Iowa Constitution); *In re Detention of Betsworth,* 711 N.W.2d 280, 289 (Iowa 2006) (same); *In re Detention of Hodges,* 689 N.W.2d 467, 470 (Iowa 2004) (holding that civil commitment on the basis of an antisocial personality disorder was consistent with substantive due process under the Iowa Constitution); *Cubbage,* 671 N.W.2d at 445-48 (finding no fundamental right to be competent during SVP statute proceedings and, thus, that commitment of incompetent people is consistent with substantive due process under the Iowa Constitution).

> Substantive due process principles preclude the government "from engaging in conduct that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'" To assess the petitioners' substantive due process claim, we first define the nature of the involved right. "[F]reedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action.'" Although the liberty interest of an individual to be free from physical restraint has been described as "a paradigmatic fundamental right," the Supreme Court has noted that the interest is not absolute. States, including Iowa, have "in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." Involuntary civil commitment statutes have withstood due process challenges if they authorize detention pursuant to proper procedures and evidentiary standards.

Atwood, 725 N.W.2d at 648 (citations omitted).

Without determining whether the right at issue was fundamental,[4] the *Atwood* court found the pretrial detention survived a strict scrutiny analysis. *Id*. It explained that the "state's interest in detaining persons during the interim between the district court's finding of probable cause and the trial of the SVP claim is compelling." *Id.*

The State has an equally compelling interest in protecting the public from potential SVPs who have not been brought to trial within ninety days of a probable cause finding. Moreover, interpreting section 229A.7(3)'s provision for a trial within ninety days to impose a directory rather than mandatory duty is narrowly tailored to the specific subcategory of pretrial detainees who will not be prejudiced by a delay of trial where a party has established there is good cause for a continuance, or where the court has concluded a continuance is necessary in the due administration of justice.

In finding the pretrial detention did not violate due process the *Atwood* court noted the "significant procedural protections afforded detainees during the pre-trial stage in SVP cases." *Atwood*, 725 N.W.2d at 648. For example, a multidisciplinary team must have reviewed the person's records and made an assessment that the person meets the definition of a sexually violent predator. Iowa Code § 229A.3(4). If the multidisciplinary team determines the person does meet the definition of an SVP, it notifies the attorney general. *Id.* A prosecutor's review committee then reviews the records and determines whether the person meets the definition of a SVP. *Id*. § 229A.3(5). Upon the filing of a petition

[4] The specific claim being "that once detained, they have a due process right to bail at the pre-trial stage under the Iowa Constitution." *Atwood*, 725 N.W.2d at 747.

alleging a person is a SVP, the court makes a preliminary probable cause determination. *Id*. § 229A.5(1). It is only upon a preliminary finding of probable cause that the court may direct that the person be taken into custody (or the person's custody transferred) and served with the petition, supporting documentation, and notice of procedures. *Id.* A probable cause hearing must occur within seventy-two hours after a person is so taken into custody. *Id*. §§ 229A.5(1) and (2). Lehman has received these procedural safeguards.

Here, Lehman was convicted and serving his sentence for two counts of third-degree sexual abuse, which are sexually violent offenses under section 229A.2(1). A SVP petition was filed, which alleged that the multidisciplinary team established by the department of corrections convened and notified the attorney general of its assessment that Lehman met the criteria for definition of a sexually violent predator. A probable cause hearing was held, and the district court found probable cause exists to believe Lehman is an SVP. Lehman objected to the State's request for jury trial, and that objection was ultimately rejected.

In overruling Lehman's motion to dismiss, the district court wrote in part:

> The probable cause hearing was held on September 22, 2005. On that date, the Court entered an Order setting trial for December 13, 2005. The 90 days would have run out on Monday, December 22, 2005. Respondent filed a Motion to Strike Jury Demand, which the Court granted. The State sought discretionary review on appeal. On December 12, 2005 (literally on the eve of trial), the State received a temporary stay of proceedings. The Supreme Court ultimately granted discretionary review and stayed all proceedings pending the appeal. At this point, due to the issuance of the stay on December 12, 2005, 10 days remained in the 90-day requirement.
>
> The Supreme Court reversed the District Court and remanded the case for jury trial. Procedendo was signed on Friday, February 29, 2008 and filed with the Page County Clerk of Court on Monday, March 3, 2008. Whether you count the time from

> the date of signing the Procedendo[,] or the date of its filing, the remaining 10 days of the 90-day requirement clearly expired.
>
> . . . .
>
> [T]his court finds that the likelihood of scheduling a trial of this nature within 10 days even if every one knew of the Procedendo is remote at best. Scheduling a trial like this one in such a short time would not be good practice, and it certainly would not be consistent with the due administration of justice.
>
> The Court also finds that Respondent has not and will not suffer substantial prejudice. Almost all of the delay is due to an appeal of a Motion made by Respondent in which he did not prevail.

We find no error.

IV. Conclusion.

Iowa Code section 229A.7(3)'s prescribed duty—to conduct a trial within ninety days of the conclusion of the probable cause hearing—is not essential to the main objective of the SVP civil commitment statute, and thus a violation will not invalidate subsequent proceedings under it. The court did not abuse its discretion in concluding the administration of justice required a continuance of Lehman's SVP trial beyond the ninety-day time limit and that he would not be prejudiced thereby. We conclude the district court did not err in denying Lehman's motion to dismiss. We affirm.

AFFIRMED.