In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-15-00420-CV

IN RE COMMITMENT OF GARY DON MOSLEY

On Appeal from the 435th District Court
Montgomery County, Texas
Trial Cause No. 14-09-10393-CV

MEMORANDUM OPINION

Gary Don Mosley appeals from a jury verdict that resulted in his civil commitment as a sexually-violent predator. *See* Tex. Health & Safety Code Ann. § 841.001–.151 (West 2010 & Supp. 2016) (the SVP statute). In four issues, Mosley challenges the facial constitutionality of the SVP statute, complains the trial judge should have been recused from handling his case, and contends the evidence is legally and factually insufficient to support the jury's verdict. We conclude that Mosley's issues are without merit, and we affirm the trial court's judgment.

Facial Constitutional Challenge

In his first issue, Mosley argues that the 2015 amendments to the SVP statute rendered all of Chapter 841 of the Texas Health and Safety Code facially unconstitutional. According to Mosley, because the amendments "tipped Chapter 841 into the punitive realm[,]" the SVP statute fails the "intent-effects test," which is the test the Texas Supreme Court used in 2005 in rejecting various arguments that challenged the constitutionality of the statute. *See In re Commitment of Fisher*, 164 S.W.3d 637, 645-53 (Tex. 2005).

The amendments at issue in Mosley's appeal are found in Senate Bill 746, which amended several of the provisions in Chapter 841 of the Texas Health and Safety Code. *See* Act of May 21, 2015, 84th Leg., R.S., ch. 845, 2015 Tex. Sess. Law Serv. 2700, 2700-12. The amendments at issue in Mosley's appeal went into effect on June 17, 2015. *Id*. Mosley's trial began on July 13, 2015. However, the appellate record shows that Mosley did not present a facial challenge to the constitutionality of the SVP statute, as amended, before or during his trial. Mosley also did not complain about the facial constitutionality of the SVP statute, as amended, in his motion for new trial.

Generally, to preserve a complaint for appellate review, the complaining party is required to present the complaint to the trial court in a timely request, objection,

or motion. Tex. R. App. P. 33.1(a)(1). Mosley presents a facial challenge to the constitutionality of the amended SVP statute in his appeal. Facial challenges to a statute must first be presented to the trial court before they may be raised in an appeal. *In re Commitment of Welsh*, No. 09-15-00498-CV, 2016 WL 4483165, at *2 (Tex. App.—Beaumont Aug. 25, 2016, pet. denied) (mem. op.).

Mosley argues that we should excuse his failure to raise his challenge because he challenged the constitutionality of the amended SVP statute in his appeal shortly after learning that another person involved in sexually-violent-predator commitment proceeding obtained a ruling from a lower court finding that the amended SVP statute is facially unconstitutional based on the amendments that are at issue in this appeal. *See generally In re Commitment of May*, 500 S.W.3d 515, 520-527 (Tex. App.—Beaumont 2016, pet. denied). However, we reversed *May* on appeal, and we agreed with the State's arguments that the amendments to Chapter 841 did not change the SVP statute in ways that made the statute unconstitutional. *Id.* at 527.

We hold that Mosley failed to properly preserve his challenge because he failed to first present his facial challenge to the constitutionality of the SVP statute when his case was pending in the trial court. *See In re Commitment of Clemons*, No. 09-15-00488-CV, 2016 WL 7323298, at *8 (Tex. App.—Beaumont Dec. 15, 2016, pet. denied) (mem. op.). We overrule issue one.

Motion to Recuse

In his second issue, Mosley argues that the judge presiding over the hearing conducted on his motion to recuse should have recused Judge Michael T. Seiler from presiding over his trial. We review the denial of a motion to recuse under an abuse of discretion standard. *See* Tex. R. Civ. P. 18a(j); *In re Commitment of Winkle*, 434 S.W.3d 300, 310 (Tex. App.–Beaumont 2014, pet. denied). A judge must be recused when his "impartiality might reasonably be questioned[ ]" or he has a "personal bias or prejudice concerning the subject matter or a party[.]" Tex. R. Civ. P. 18b(b)(1), (2). The complaining party "must show that a reasonable person, with knowledge of the circumstances, would harbor doubts as to the impartiality of the trial judge, and that the bias is of such a nature and extent that allowing the judge to serve would deny the movant's right to receive due process of law." *Winkle*, 434 S.W.3d at 311.

In his pre-trial motion to recuse, Mosley argued that Judge Seiler's conduct demonstrated a lack of impartiality and a bias or prejudice concerning persons who have committed more than one sexually-violent offense.[1] To support his arguments, Mosley relied upon speeches Judge Seiler made to the Texas Patriots PAC and the Montgomery County Republican Women, Judge Seiler's campaign slogans, and his

[1] Mosley produced no evidence that Judge Seiler harbored a specific bias or prejudice against him individually and personally, as opposed to all other similarly situated persons that were the subject of a civil commitment proceeding.

recusals in other civil commitment cases. In the hearing on the motion to recuse, Mosley also argued that Judge Seiler's impartiality could reasonably be questioned because the Texas Judicial Conduct Commission publicly reprimanded Judge Seiler in 2015, the Legislature amended the SVP statute in the 2015 legislative session for the express purpose of eliminating Judge Seiler's sole control over civil commitment trials, local lawyers were reported to have made comments critical of the manner Judge Seiler handled various SVP cases in articles published in local newspapers, and a psychiatrist who frequently testified on behalf of individuals in SVP proceedings indicated that Judge Seiler had, on occasion, censored and belittled him when he testified. According Mosley's brief, the evidence admitted during the hearing on the motion to recuse established that "a reasonable person, with knowledge of the circumstances, would harbor doubts as to the impartiality of the trial judge[.]" *Winkle*, 434 S.W.3d at 311; *see also* Tex. R. Civ. P. 18b(b)(1). Mosley argues that Judge Seiler's public comments, courtroom treatment of attorneys representing the individuals subjected to civil commitment proceedings and their clients, and comments that Judge Seiler made about the expert witness who testified on behalf of individuals in SVP cases demonstrated that Judge Seiler could not be fair and impartial due to the alleged bias and alleged prejudice he harbors against

individuals who allegedly are sexually-violent predators. *See generally* Tex. R. Civ. P. 18b(b)(1), (2).

The determination of whether a recusal is necessary is decided on a "case-by-case fact-intensive basis." *McCullough v. Kitzman*, 50 S.W.3d 87, 89 (Tex. App.—Waco 2001, pet. denied). The recusal hearing in Mosley's case was consolidated with six other cases that involved motions seeking to recuse Judge Seiler. The judge assigned to rule on all seven motions had his ruling from the consolidated hearing appealed on four prior occasions. *See Welsh*, 2016 WL 4483165, at **2-5; *In re Commitment of Lewis*, 495 S.W.3d 341, 343-45 (Tex. App.—Beaumont 2016, pet. denied); *In re Commitment of Massingill*, No. 09-15-00365-CV, 2016 WL 2594720, at **1-3 (Tex. App.—Beaumont May 5, 2016, pet. denied) (mem. op.); *In re Commitment of Dupree*, No. 09-15-00269-CV, 2016 WL 1600763, at **1-3 (Tex. App.—Beaumont Apr. 21, 2016, pet. denied) (mem. op.). All four of the appeals addressed the same evidence and arguments that Mosley relies on in his appeal; and, in all four prior appeals, we concluded that the judge assigned to hear the motions to recuse acted within his discretion by denying the motions. *Welsh*, 2016 WL 4483165, at *5; *Lewis*, 495 S.W.3d at 345; *Massingill*, 2016 WL 2594720, at *3; *Dupree*, 2016 WL 1600763, at *3.

In Mosley's case, some of the conduct Mosley complains about in his appeal occurred before the Judicial Conduct Commission reprimanded Judge Seiler[2] but before the hearing on the motion to recuse that is relevant in Mosley's appeal. In deciding how to rule on the motions to recuse, the judge presiding over the hearing on the motions was entitled to presume that after being reprimanded, Judge Seiler "divest[ed] himself of any previous conceptions, and . . . base[d] his judgment, not on what he originally supposed but rather upon the facts as they are developed at the trial." *Lombardino v. Firemen's & Policemen's Civil Serv. Comm'n*, 310 S.W.2d 651, 654 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.); *see Dupree*, 2016 WL 1600763, at *3. The judge who presided over the hearing on the motions could reasonably conclude that the evidence failed to show that Judge Seiler harbored such a degree of bias or prejudice toward the individuals who filed the motions that he would be unable to provide them with a fair trial. *See Winkle*, 434 S.W.3d at 311. Because the judge presiding over the recusal hearing did not abuse his discretion by denying Mosley's motion to recuse, we overrule issue two.

[2] Public Reprimand and Order of Additional Education of Michael Thomas Seiler, 435th District Court Judge, Nos. CJC 12-0737-DI; 12-1143-DI; 13-0027-DI; 13-0235-DI; 13-0373-DI; 15-0129-DI; 15-0374 (Comm'n Jud. Conduct Apr. 24, 2015).

Sufficiency of the Evidence

In his third and fourth issues, Mosley argues that the evidence is legally and factually insufficient to support the jury's finding that he has a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Under the SVP statute, the State bears the burden of proving that a person is a sexually-violent predator beyond a reasonable doubt. *See* Tex. Health & Safety Code Ann. § 841.062(a) (West 2010). In reviewing legal sufficiency challenges, we assess the evidence in the light that most favors the jury's verdict to determine whether the jury could rationally find that the individual who is the subject of the commitment proceeding is a sexually-violent predator. *In re Commitment of Mullens*, 92 S.W.3d 881, 885 (Tex. App.—Beaumont 2002, pet. denied). In reviewing the jury's verdict, we must keep in mind that it was the jury's responsibility to fairly resolve any conflicts in the testimony and to weigh the evidence for and against the finding being challenged in the appeal. *Id*. at 887. In reviewing factual sufficiency challenges in SVP commitment cases, we must determine whether the jury's verdict rests on such weak evidence that although constituting legally sufficient evidence that the individual is a sexually-violent predator, the individual should nonetheless receive another trial. *In re Commitment of Day*, 342 S.W.3d 193, 213 (Tex. App.—Beaumont 2011, pet. denied).

The evidence from Mosley's trial established that Mosley had been convicted of two sexually-violent offenses before the State filed a petition seeking to have him committed as a sexually-violent predator. When the civil commitment case was tried, Mosley did not object when the State moved for a directed verdict on the issue of whether Mosley is a repeat sexually-violent offender. In arguing issues three and four, Mosley focuses largely on whether the jury could have reasonably relied upon the opinion of the State's expert psychiatrist in finding that Mosley is a sexually-violent predator. According to Mosley, the opinion offered by the psychiatrist who testified for the State is based in part on information that Mosley contends was inherently unreliable.

Dr. Sheri Gaines, a psychiatrist, was called during the State's presentation of its case and addressed whether she thought that Mosley is a sexually-violent predator. The record shows that Dr. Gaines based her testimony on her education, training, experience, and the methodology used in this type of case that others use in her field. During the trial, Dr. Gaines testified that Mosley suffers from a behavioral abnormality that makes him likely to engage in a predatory act of sexual violence. Dr. Gaines explained that she thought Mosley had several major risk factors that increased the risk that he would commit another sexually-violent offense, these factors included Mosley's history of sexual deviance and his history of sexual

thoughts or fantasies on which he had acted. According to Dr. Gaines, Mosley's sexual deviance was demonstrated because he committed sadistic rapes of the two victims. Dr. Gaines also indicated Mosley has other psychopathic traits, sexual sadism disorder and antisocial personality disorder, which she thought increased the risk that Mosely would reoffend. Dr. Gaines' testimony indicates she was familiar with the diagnostic criteria for sexual sadism disorder, as she described the criteria in her testimony. Dr. Gaines' testimony also indicates that she became familiar with various details about the background facts that led to Mosley's two prior convictions, as she indicated that his offenses were committed six months apart, and that the acts Mosley committed in the offenses included choking, suffocating, and forcing himself on the women without their consent.

The record also shows that Dr. Gaines reviewed various records in forming the opinions she expressed in the trial about Mosley's case. Dr. Gaines explained that Mosley's records indicated that Mosley stalked and fantasized about one of his victims, a stranger to him, before he attacked her. The record also shows that Dr. Gaines interviewed Mosley in forming her opinions, and shows that she relied on some of the information that he provided in that interview. For instance, Dr. Gaines indicated that when she interviewed Mosely, he claimed that he did know the victim (even though she indicated the records she reviewed of that incident showed

otherwise), and that he claimed his sexual encounter with the victim was a consensual relationship that involved rough sex.

Dr. Gaines also described several instances of conduct that support the opinions she expressed that Mosley did not have sufficient control over his impulses that resulted in his violation of rules that applied to his conduct. For example, Dr. Gaines described that Mosley committed a sexual assault while he was on probation for another offense. She described that Mosley had failed to register as a sex offender, that his records revealed that he quit sex-offender treatment, even though sex-offender treatment was a requirement of his probation, and that Mosley's records revealed that he had choked his landlord and then pushed her down the stairs.

Dr. Gaines' testimony indicates that she reviewed Mosley's probation records before testifying in Mosley's trial, and that she explained how these records support the opinions she expressed during Mosely's trial. Dr. Gaines considered Mosley's age, thirty-eight, as an additional risk factor that she explained increased the risk that Mosley would reoffend. The evidence that Dr. Gaines considered included records showing Mosley's lengthy history, which she explained indicated that he lacked control over his behavior. For example, Dr. Gaines pointed to records showing that Mosley continued to violate various rules while he was in a structured prison environment. In summarizing her testimony, Dr. Gaines stated that Mosley had a

lifelong pattern of illegal behavior that began before he was fifteen, and that his history supported her diagnosis of antisocial personality disorder.

The record also shows that Dr. Gaines considered Mosley's history of substance abuse in forming her opinions. According to Dr. Gaines, Mosley related that he had abused methamphetamines and alcohol and used them before committing one of the rapes. Dr. Gaines indicated that Mosley's history of substance abuse was a risk factor she considered in evaluating whether Mosley had control over his behaviors.

In his brief, Mosley argues that Dr. Gaines' testimony constitutes no evidence to support the jury's verdict because her opinions were "based in large part on what Mr. Mosley supposedly told some unknown person who repeated this to another unknown person who then wrote this down in some 'probation records' and which finds no support in any of the other voluminous records in this case." Contrary to Mosley's argument, the information in Mosley's probation record was only one item out of a much larger body of information that Dr. Gaines considered in forming her opinions. In our opinion, the record does not show that Dr. Gaines' testimony was baseless or that it was conclusory. Viewing the evidence in the light most favorable to the verdict, we hold that a rational jury could have found beyond reasonable doubt that Mosley is a sexually-violent predator. *See* Tex. Health & Safety Code Ann. §

841.062(a); *see also Kansas v. Crane*, 534 U.S. 407, 413 (2002); *Mullens*, 92 S.W.3d at 885. We overrule issue three.

In issue four, Mosley contends the evidence is factually insufficient to support the jury's finding that Mosley is a sexually-violent predator. Mosley identifies the same evidence that he relied on to argue his legal insufficiency issue in arguing his factual insufficiency issue. Mosley sums up his factual insufficiency issue by arguing that "[i]t would be clearly wrong and manifestly unjust to uphold a verdict that is based on inherently unreliable information which was key evidence that [Dr. Gaines] used to support her opinion that Mr. Mosley has a 'behavioral abnormality.'"

However, our review of the record shows that the opinions Dr. Gaines expressed in the trial represent "a reasoned judgment based upon established research and techniques for [her] profession and not the mere *ipse dixit* of a credentialed witness." *Day*, 342 S.W.3d at 204. Dr. Gaines' testimony, in our opinion, offers significant factual support for the verdict the jury reached following Mosley's trial.

As an aside, we note that the methodology Dr. Gaines followed is consistent with the methodology that was followed by Mosley's expert, Dr. Marisa Mauro, a psychologist who testified in the trial. Dr. Mauro stated that she used the usual

methodology used by psychologists in behavioral abnormality cases, which she explained involved reviewing the records she was provided in the file referring the case to her, and supplemental materials, such as Mosley's probation records. According to Dr. Mauro, the records she reviewed document that Mosley stated he had rape fantasies from the age of thirteen. Dr. Mauro stated that she considered the records in forming her opinions in Mosley's case, but she explained that she did not place much weight on the record about rape fantasies because the questions that precipitated Mosley's response were not noted in his records. Dr. Mauro also explained that information about Mosley's rape fantasies did not appear more than once in Mosley's records, based on her review.

Dr. Mauro's testimony also indicates that Mosley had several substance use disorders; unlike Dr. Gaines, Dr. Mauro indicated that she thought that Mosely's substance use disorders were in remission. Dr. Mauro also testified that Mosley had exhibited antisocial traits, but she found that these traits in his case were better explained by Mosley's life experiences, which had required him to adapt behaviors to survive a difficult childhood and to cope with being incarcerated shortly after he became an adult. Dr. Mauro stated that she disagreed with Dr. Gaines' diagnosis that Mosley was a sexual sadist; she explained that his records, in her opinion, did not

indicate that sadistic behavior was the method Mosley preferred to obtain sexual arousal.

Essentially, the record shows that the trial largely consisted of a battle between the experts. The jury resolved the dispute by crediting the opinions expressed by Dr. Gaines over the opinions expressed by Dr. Mauro. As the exclusive judge of the credibility of the witnesses and the weight assigned to the testimony of the witnesses, the jury was entitled to resolve the conflicts and contradictions between the evidence that was admitted in the trial, and to accept the opinions of one expert over another. *See generally In re Commitment of Kalati*, 370 S.W.3d 435, 438-39 (Tex. App.—Beaumont 2012, pet. denied).

Weighing all of the evidence, we conclude the verdict does not reflect a risk of injustice that would compel ordering a new trial. *Day*, 342 S.W.3d at 213. We overrule issue four, and we affirm the trial court's judgment and order of civil commitment.

AFFIRMED.

HOLLIS HORTON
Justice

Submitted on May 30, 2016
Opinion Delivered March 9, 2017

Before McKeithen, C.J., Horton and Johnson, JJ.