

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

SUPERIOR COURT
CIVIL NO. 13-616

COMMONWEALTH OF MASSACHUSETTS

Petitioner

v

JEFFREY [REDACTED]

Respondent

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JUL 17 2014


CLERK OF COURTS

**MEMORANDUM OF DECISION AND ORDER FOR
JUDGMENT ON PETITION UNDER G.L. c. 123A**

This is an action commenced on September 3, 2013, by the District Attorney for Hampden County on behalf of the petitioner seeking a commitment of the respondent, Jeffrey [REDACTED], under the provisions of G.L. c. 123A, §§ 12-15. An order was entered on September 6, 2013, under Section 12(e) for the temporary commitment of the respondent at the Massachusetts Treatment Center pending hearing and determination of probable cause under the provisions of G.L. c. 123A, § 12(c). Counsel was appointed for the respondent and the case was scheduled for a hearing to determine whether probable cause exists to believe that the respondent is a sexually dangerous person. On January 13, 2014, respondent waived a probable cause hearing. As required by G.L. c. 123A, two qualified examiners issued reports in February 2014. Drs. Katrin Rouse-Weir and Michael Murphy opined that the respondent is sexually dangerous. The matter came on for trial on July 14, 2014, before me, sitting without jury. For the reasons that follow, I conclude that the Commonwealth has failed to establish that the respondent is a sexually dangerous person as defined in G.L. c. 123A, §1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Introduction

According to G.L. c. 123A, § 14(d), the Commonwealth has the burden to prove beyond a reasonable doubt that the respondent is a sexually dangerous person, as defined in section one thereof: “a person who has been convicted by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility.” It is not enough for the Commonwealth to prove, without more, that the respondent was or is dangerous, or that there is a likelihood of his re-offending sexually, or that there is a likelihood of his re-offending generally. The statute requires the Commonwealth to prove beyond a reasonable doubt that there presently exists a mental abnormality or personality disorder and, as a result, there is a likelihood that he will offend sexually. Moreover, according to the statutory definition of sexually dangerous person,¹ the assessment of whether a particular respondent qualifies as such must be made as of the present time. There must be evidence presented by the Commonwealth, in support of its burden to prove that the respondent is a sexually dangerous person, that the respondent continues to suffer from a mental abnormality or personality disorder at the present time.

¹ "Sexually dangerous person," any person who has been (i) convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility; (ii) charged with a sexual offense and was determined to be incompetent to stand trial and who suffers from a mental abnormality or personality disorder which makes such person likely to engage in sexual offenses if not confined to a secure facility; or (iii) previously adjudicated as such by a court of the commonwealth and whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of 16 years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.

The Supreme Judicial Court has held that "[w]hether a person suffers from a mental abnormality or personality defect, as well as the predictive behavioral question of the likelihood that a person suffering from such a condition will commit a sexual offense, are matters beyond the range of ordinary experience and require expert testimony."

Commonwealth v. Bruno, 432 Mass. 489, 511 (2000).

Five psychologists testified during the trial. All of the professionals utilized a guided clinical approach to their evaluations, combining traditional clinical analysis and judgment with actuarial factors noted in the relevant literature and accepted by them as scientifically significant. The Commonwealth, through its experts, Dr. Katrin Rouse-Weir, Ed.D., and Dr. Michael Murphy, Ed. D., contends that the respondent suffers from a mental abnormality, pedophilia, and that unless the respondent is confined to a secure facility he would be likely to commit additional sexual offenses. The respondent called experts Laurie Guidry, Psy. D., Ph.D., Leonard A. Bard, Ph.D., and Joseph J. Plaud, Ph.D. Although these experts had different opinions as to whether or not the respondent suffers from a mental abnormality or personality disorder, they all agreed that the respondent is not likely to commit additional sexual offenses if not confined to a secure facility.

2. Sexual Offenses and Convictions

On September 15, 1982, the respondent, now a 68 year-old widower, pled guilty to Rape of a Child by Force in Hampden County Superior Court. He was sentenced to 2 and ½ years in the Hampden County House of Correction on one count with a suspended 2 and ½ year sentence on an additional count to follow the period of incarceration. These convictions arose from allegations that the respondent had repeated sexual contact

with four different boys ages 12-18. The sexual contact ranged from mutual masturbation to oral sex and anal rape.

On July 16, 1996, the respondent pled guilty to five counts of Rape of a Child - No Force, as a subsequent offender, in Hampden County Superior Court. He was sentenced to a 9-12 year state prison sentence on two counts and a suspended life sentence on the remaining counts with supervised probation for 15 years following his state prison sentence. These convictions arose from allegations that over a two-year period the respondent engaged in repeated sexual contact with his son's friend at a time when he was between the ages of 11 and 13. The sexual contact included mutual masturbation, oral sex and anal rape. In 2005, prior to the respondent's scheduled release from custody, the Commonwealth filed a petition seeking to commit the respondent as a sexually dangerous person. Following a jury-waived trial on that petition in 2006, the Court (Sweeney, J.) found that the Commonwealth had not established beyond a reasonable doubt that respondent was sexually dangerous. Respondent was ordered released from custody on December 11, 2006.

On April 29, 2010, the respondent admitted that he had violated the terms and conditions of his probation by having unsupervised social contact with young boys at church and having images of children in his possession. He was sentenced to an additional 4-5 year state prison sentence on one count. The suspended life sentence with probation from and after his incarceration remains in effect on another count.

The parties have stipulated that the respondent has a designated sexual offense under G.L. c. 123A, § 1.²

² "Sexual offense," includes any of the following crimes: indecent assault and battery on a child under fourteen under the provisions of section thirteen B of chapter two hundred and sixty-five; indecent assault and battery on a mentally retarded person under the provisions of section thirteen F of chapter two hundred and sixty-five; indecent assault and battery on a person who has obtained the age of fourteen under the

3. Mental Abnormality or Personality Disorder

All the experts agreed that the respondent does not suffer from a personality disorder. There was disagreement, however, as to whether the respondent suffers from a mental abnormality. Doctors Rouse-Weir, Murphy, Guidry and Plaud opined that the respondent suffers from pedophilia.³ Dr. Bard found that there was insufficient evidence to conclude that respondent was attracted to prepubescent as opposed to pubescent males and therefore could not conclude that he suffered from pedophilia. Dr. Plaud concluded that respondent's pedophilia did not meet the statutory definition of mental abnormality because it did not "affect the emotional or volitional capacity" of the respondent so as to predispose him to the commission of criminal acts.

I am persuaded by the weight of the expert testimony that the respondent suffers from pedophilia. I further conclude beyond a reasonable doubt that his pedophilia is a mental abnormality within the context of this case and the meaning of Chapter 123A.

provisions of section thirteen H of chapter two hundred and sixty-five; rape under the provisions of section twenty-two of chapter two hundred and sixty-five; rape of a child under sixteen with force under the provisions of section twenty-two A of chapter two hundred and sixty-five; rape and abuse of a child under sixteen under the provisions of section twenty-three of chapter two hundred and sixty-five; assault with intent to commit rape under the provisions of section twenty-four of chapter two hundred and sixty-five; assault on a child with intent to commit rape under section 24B of chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under the age of sixteen under the provisions of section thirty-five A of chapter two hundred and seventy-two; and any attempt to commit any of the above listed crimes under the provisions of section six of chapter two hundred and seventy-four.

³ The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) defines Pedophilia as:

- A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
- B. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
- C. The person is at least 16 years of age and at least 5 years older than the child or children in Criterion A.

4. Likely to Engage in Sexual Offenses if not Confined to a Secure Facility

There is disagreement among the experts as to whether or not the respondent is likely to engage in sexual offenses if not confined to a secure facility.⁴ Doctors Rouse-Weir and Murphy opined that he is. Doctors Guidry, Bard and Plaud concluded that he is not.

All of the experts used an empirically developed actuarial tool known as the STATIC-99-R Sex Offender Risk Assessment to provide a basis for assessing the risk of the respondent reoffending. The STATIC- 99 measures static or unchanging factors found to be related to sex offender recidivism. According to the results, the respondent scored 3 which places him in a group that has a low to moderate risk of sexually re-offending, approximately a 6% likelihood of reoffending over a five year period. Doctors Guidry, Bard and Plaud relied on additional dynamic factors that they believe further reduce the risk that the respondent will engage in sex offenses if not confined. First, the respondent has engaged in extensive sex offender treatment while incarcerated and as an outpatient while on probation. Second, treatment will continue as a condition of the respondent's fifteen year probationary period immediately following his release from custody. Should he violate probation again he faces imposition of a mandatory life sentence. Third, he has not committed a sex offense for over twenty years and, although inappropriately placing himself in high risk situations while out on probation from 2006 to 2009, he did not reoffend. Finally, the risk of sexual reoffending declines with

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The Supreme Judicial Court in Commonwealth v. Boucher defined "likely" for purposes of determining whether a respondent is an SDP to mean "it is reasonably to be expected in the context of the particular facts and circumstances at hand." 438 Mass. 274, 276 (2002). The Supreme Judicial Court refused to give the term "likely" a quantifiable statistical probability, declaring that its definition "demands contextual, not statistical, analysis," but it did state that it requires "more than a mere propensity or possibility." *Id.* at 277.

advancing age. The respondent is 68 now and will be 83 when his probation is terminated.

The Commonwealth's experts focus, in part, on the respondent's failure to stay away from children while on probation. According to the Commonwealth, this high-risk behavior demonstrates that, despite his advanced age and ongoing treatment, the respondent is unable to control his urge to engage in sexual contact with young boys. Further, the Commonwealth points out that while incarcerated, the respondent failed to successfully complete sex offender treatment and obtained a disciplinary report for engaging in sex with an adult male. The respondent's experts agree that he should have had no contact with children, but emphasize that the contact was not physical and did not involve sex, an indication that treatment has had some positive effect. Sex with a consenting adult male, while a violation of institutional rules, is not, they claim, an indicator that he will continue to stalk and prey upon children. Each of the respondent's experts opined that, despite some relapse behavior, the respondent had responded well to treatment and is committed to continuing.

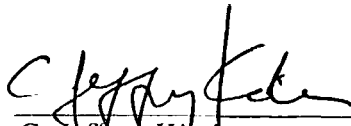
I am persuaded by the quantity and the quality of the expert testimony presented by the respondent. Accordingly, I conclude that the Commonwealth has failed to prove beyond a reasonable doubt that as a result of his mental abnormality the respondent is likely to engage in sexual offenses if not confined to a secure facility. Of course, there is always a possibility that a sex offender with this clinical diagnosis may give in to the impulse to re-offend. But the statute requires more. The Commonwealth must prove *beyond a reasonable doubt* that it is *likely* that the respondent will again engage in sexual offenses if not confined to a secure facility. In my judgment, the Commonwealth has

failed to meet that burden here. I do not come to this decision lightly, but the quantity and the quality of the expert testimony presented by the respondent leaves me with reasonable doubt regarding the likelihood that the respondent will re-offend if not confined. I must therefore conclude that the Commonwealth has failed to establish that the respondent is a sexually dangerous person as defined in G.L. c. 123A §1.

ORDER

It is therefore **ORDERED** that the respondent, having completed his sentence, be released from the treatment center upon completion of any necessary processing and transported to the Hampden County Courthouse where he will immediately report to the Superior Court Probation Department.

7/17/14
Date



C. Jeffrey Kinder
Associate Justice, Superior Court