



People v. Bergey

2003 | Cited 0 times | California Court of Appeal | May 13, 2003

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A jury found that defendant David William Bergey is a sexually violent predator within the meaning of Welfare and Institutions Code section 6600. Thereafter, the court recommitted him to Atascadero State Hospital (ASH) for a term of two years.

Defendant appeals. Relying on the United State Supreme Court's holding in *Kansas v. Crane* (2002) 534 U.S. 407 [151 L.Ed.2d 856] (*Crane*), defendant contends the Sexually Violent Predator Act (SVP Act or the Act) is unconstitutional because it fails to require that as a result of a mental disorder, defendant had serious difficulty in controlling his behavior. He also asserts error in the trial court's failure to so instruct the jury. We conclude that the Act complies with the constitutional requirements of *Crane* and that the instructions the court gave satisfied those requirements.

Facts

In 1993, defendant was convicted of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a)) and orally copulating a person under the age of 18 years (Pen. Code, § 288a, subd. (b)(1)). In the first offense, the 13-year-old victim met the 30-year-old defendant and they began to "date." Eventually, the victim ran away from home and lived with defendant. Defendant thereafter became abusive and forced the victim to have sexual intercourse three or four times a week. Two months after running away, the victim moved back home with her parents but defendant moved into a trailer on her parent's property. The victim claimed defendant continued to force her to have sexual intercourse with him three or four times a week over the next three months.

In the second offense, the 16-year-old victim had known defendant for about a month when she accepted a ride with him in his car. After dropping off his son, defendant proceeded to a dirt road where he parked, threatened the victim, and then orally copulated her with force. Defendant was sentenced to state prison for a determinate term for each of the offenses.

Dr. William Knowlton, a licensed clinical psychologist at ASH, evaluated defendant. Dr. Knowlton reviewed defendant's clinical chart, conferred with defendant's treatment and ward staff, and



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conducted a clinical interview with defendant. Dr. Knowlton diagnosed defendant as having various Axis I mental disorders, including paraphilia, not otherwise specified, which is characterized by "abnormal deviant thoughts, impulses, urges, behaviors, usually against inappropriate sexual partners or nonconsensual sexual partners." Dr. Knowlton explained that the basis of defendant's diagnosis of paraphilia was his past history of multiple offenses with underage female sexual partners. Dr. Knowlton also diagnosed defendant as having Bipolar I disorder. Dr. Knowlton explained that "[b]ipolar means that there's a swinging from a normal to more of an elevated manic type." Defendant's other disorders included a "reading disorder, disorder of written expression, and mixed receptive expressive language disorder." Dr. Knowlton diagnosed defendant with an Axis II antisocial personality disorder, not otherwise specified. Defendant had "major factors" of this disorder, including a "pattern of impulsivity." Dr. Knowlton gave defendant a score of four on the Static-99, an evaluation tool used in predicting the likelihood of reoffending. Defendant's score suggests a 36 percent chance of reoffending within 15 years, a 31 percent chance within 10 years and a 26 percent chance within five years. Although the Static-99 was endorsed by the mental health community, Dr. Knowlton did not accord it much weight because it presented "an illusion of objectivity [and] precision."

Dr. Knowlton opined that defendant was unable to function in the community in a "safe, pro-social manner" and was likely to reoffend. He also opined that "whenever the mood disorder would become instable, that would place [defendant] at a greater risk as far as acting out on his deviant paraphiled impulses." Defendant's antisocial personality disorder contributed to defendant's instability.

In reaching his diagnosis, Dr. Knowlton considered not only the offenses for which defendant was convicted but also an incident in Pennsylvania in 1989 when defendant had sex with an underage female. He also considered defendant's threatening behavior toward his common-law wife. According to Dr. Knowlton, factors relevant to his diagnosis included "underage females, using force, violence, coercion" and "claims by [defendant] in each case that there was no force, violence, coercion," and blaming the victim.

Dr. Jill Nelson, a staff psychologist at ASH, reviewed defendant's history and progress in treatment, and interviewed defendant. She diagnosed defendant with several mental disorders, including "paraphilia, not otherwise specified, non-consenting partners, with a preference for adolescent girls, and schizoaffective disorder, bipolar type, and . . . antisocial personality disorder."

Dr. Nelson gave defendant a score of six on the Static-99, which suggests a 39 percent chance of reoffending in five years, a 45 percent chance in 10 years and a 52 percent chance within 15 years. Dr. Nelson noted that the Static-99 "does not include everything that we know is important in [evaluating] sexual offense recidivism. Therefore, it's only one of the things we use."

Based on her review and the defendant's history, Dr. Nelson opined that defendant presented a danger to the health and safety of the public due to his likelihood of committing sexual predatory



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acts in the future.

In reaching her diagnosis, Dr. Nelson considered defendant's history, his social adjustment, intimacy deficits, "attitudes that are tolerant of sexual entitlement, and intolerant of . . . rape," low remorse, blaming the victim, and ongoing lack of anger control. Dr. Nelson concluded that other than the incident in Pennsylvania that involved a stranger, the other sex crimes and predicate behavior involved relationships that were developed primarily for the purpose of victimization. Dr. Nelson also determined that defendant had an impulse control problem or an anger control problem that added to the risk of reoffense.

Defense expert, Dr. Christopher Heard, disagreed with the diagnosis of both Drs. Knowlton and Nelson and thought defendant did not suffer from paraphilia, or antisocial personality disorder. Dr. Heard held the opinion that defendant had no mental disorder that predisposed him to the commission of future criminal sexual acts, although defendant did suffer from either "schizoaffective-type disorder with perhaps some manic and some transient psychotic states, or he suffers from a relatively severe personality disorder that would lie in the schizoid spectrum." Dr. Heard concluded that the Static-99 is "not really appropriate for someone who has been in treatment."

Discussion

The trial court used a modified version of CALJIC No. 4.19, to instruct the jury. In pertinent part, the trial judge told the jury:

"A petition for commitment has been filed with the court alleging that the respondent, David Bergey, is a sexually violent predator. The term 'sexually violent predator' means a person who, (1) has been convicted of a sexually violent offense against two or more victims for which he has received a determinate sentence, and (2) currently has a diagnosed mental disorder that makes him a danger to the health and safety of others in that it is likely that he will engage in sexually violent criminal behavior. [¶] . . . [¶]

"'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in any degree constituting the person a menace to the health and safety of others."

Defendant contends CALJIC No. 4.19, which predates the decision in *Crane*, supra, 534 U.S. 407 [151 L.Ed.2d 856], does not require the jury to find that defendant, "as a result of a mental disorder, had 'serious difficulty in controlling his behavior' such that he was likely to commit sexually violent offenses in the future." Without such element, defendant argues that the "SVP Act does not pass constitutional muster by adequately differentiating the 'dangerous sexual offender subject to civil commitment' from the general prison population which is prone to recidivism." Defendant argues



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that "a reasonable juror may have concluded that, due to a mental disorder, the [defendant] may have had impaired judgment, so that he simply chose to commit sexually violent crimes[, which] is different than having difficulty controlling his criminal behavior, which suggests something in the nature of an (almost) irresistible urge, something which compels the person to reoffend even though he knows it is wrong." He argues this interpretation is supported by the definition of "diagnosed mental disorder" given to the jury that used the alternatives of emotional capacity and volitional capacity. He claims that although a disorder that affects volitional capacity would meet Crane's requirement, a disorder that affects emotional capacity would not because it affects the person's desire, not his ability. Because an element was completely omitted by the jury instructions, defendant claims the test of prejudice is reversal per se.

The State of Kansas, in Crane, under the Kansas Sexually Violent Predator Act, sought a civil commitment of Michael Crane, a convicted sex offender who suffered from a mental disorder. (Crane, *supra*, 534 U.S. at p. ____ [151 L.Ed.2d at p. 861].) The district court ordered Crane's commitment after a jury trial. Citing *Kansas v. Hendricks* (1997) 521 U.S. 346 [138 L.Ed.2d 501], the Kansas Supreme Court reversed, concluding that the federal Constitution requires a "' finding that the defendant cannot control his dangerous behavior'" and the trial court had not so found. (Crane, *supra*, 534 U.S. at p. ____ [151 L.Ed.2d at p. 861].) The State of Kansas filed a petition for a writ of certiorari, challenging the Kansas Supreme Court's decision as a misinterpretation of *Kansas v. Hendricks*. (Id. at p. ____ [151 L.Ed.2d at p. 866] (dis. opn. of Scalia, J.).)

Crane agreed that *Kansas v. Hendricks* did not require a total lack of control but that the constitution required "proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case." (Crane, *supra*, 534 U.S. at p. ____ [151 L.Ed.2d at pp. 862-863].) Crane vacated the Kansas Supreme Court's judgment and "remanded for further proceedings not inconsistent" with their opinion. (Id. at p. ____ [151 L.Ed.2d at p. 864].) The dissent in Crane complained that the trial court would not know how to charge a jury on the new constitutional test. (Id. at p. ____ [151 L.Ed.2d at p. 869] (dis. opn. of Scalia, J.).)

"[T]he Kansas and California schemes use nearly identical wording to define an SVP as someone who suffers from a diagnosed mental disorder which 'predisposes' the person to committing sexually violent acts, and which makes the person a 'menace' to the health and safety of others and 'likely' to reoffend. The only difference is that the California statute contains additional language not present in the Kansas law stating that an SVP is 'a danger' to the public. (§ 6600, subd. (a), *italics added*.)" (*Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1158, fn. 24.) "[T]he [California scheme] tracks the Kansas scheme verbatim in describing the requisite mental disorder as a 'congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and



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safety of others.' (§ 6600, subd. (c).) Through this language, the Act targets sexual offenders who suffer from a diagnosed 'volitional impairment' making them 'dangerous beyond their control.'" (Id. at p. 1157.)

In *People v. Buffington* (1999) 74 Cal.App.4th 1149, this court concluded that the key consideration for purposes of equal protection analysis of the SVP Act is "that the person whose commitment is sought must be currently suffering from a mental condition that renders him dangerous beyond his control." (Id. p. 1157.) *People v. Buffington* found that the definition of a diagnosed mental disorder in the SVP Act "encompass[es] a current mental condition that renders a person dangerous beyond his or her control." (Ibid.)

CALJIC 4.19 is written in the language of the SVP Act. It required the jury to find that defendant suffered from a diagnosed mental disorder that made him a danger to others in that he was likely to commit sexually violent acts and that his disorder was one "affecting the emotional or volitional capacity that predisposes [him] to the commission of criminal sexual acts," rendering him a menace to others. By finding that defendant is a sexually violent predator under these instructions, the jury necessarily found that defendant had serious difficulty in controlling his behavior. We find no error.

Disposition

The judgment is affirmed.

We concur:

SCOTLAND, P.J.

CALLAHAN, J.

