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19-P-208

Appeals Court

COMMONWEALTH vs. DAVID VENETUCCI.¹

No. 19-P-208.

Hampden. May 6, 2020. - August 11, 2020.

Present: Vuono, Milkey, & Desmond, JJ.

Sex Offender. Due Process of Law, Sex offender. Practice,
Civil, Civil commitment, Sex offender. Jurisdiction, Sex
Offender.

Civil action commenced in the Superior Court Department on
August 24, 2016.

The case was heard by Mary-Lou Rup, J.

John S. Day for the defendant.
Travis H. Lynch, Assistant District Attorney, for the
Commonwealth.

MILKEY, J. In October of 2011, the respondent, David Venetucci, pleaded guilty to assault with intent to rape, and two counts of assault and battery by means of a dangerous weapon. He received a prison sentence of from five to seven

¹ Also known as David Mullins.

years, to be followed by four years of probation. On August 24, 2016, when that sentence was about to end, the Commonwealth filed a petition pursuant to G. L. c. 123A, § 12, requesting that Venetucci be committed as a sexually dangerous person (SDP). Venetucci sought to dismiss the SDP petition as untimely, because even though he was about to be released from incarceration on his Massachusetts sentence, he had yet to serve a separate seventy-one month Federal sentence. A Superior Court judge denied the motion and, after a jury-waived trial, found that Venetucci met the criteria of an SDP. A judgment granting the Commonwealth's petition and committing Venetucci to indefinite civil confinement entered on October 3, 2017, and this appeal ensued.

We face the question whether the Commonwealth can proceed with an SDP petition against a convicted sex offender who is about to complete his incarceration on a Massachusetts sentence but who cannot be released back into the community until he has served a sentence imposed by a different jurisdiction. For the reasons that follow, although the Commonwealth acted consistently with the terms of the governing statute, we agree with Venetucci that the filing of the SDP petition years before he will be released into the community violates principles of due process. We therefore are constrained to vacate the judgment.

Background. Venetucci has a long history of committing sexual offenses. In 1979, when he was thirteen, he was found guilty in New York of various such offenses, including sodomy of a five year old boy. In 1981, he was found guilty in Indiana of the sexual molestation -- at knifepoint -- of an eight year old boy. By the time he turned eighteen in 1984, Venetucci was convicted of additional charges stemming from the rape of a ten year old girl at knifepoint and was sentenced to concurrent terms of twenty-five years in prison. After he completed those sentences, Venetucci moved to Massachusetts where he was charged with assault with intent to rape. The victim was a forty-four year old woman. He again was armed with a knife, which he used to attack the woman's son who came to her rescue. Venetucci pleaded guilty and received the sentence referenced above, a prison term of from five to seven years, to be followed by four years of probation.

In 2014, while Venetucci was serving his Massachusetts sentence, he pleaded guilty to Federal charges that he failed to register as a sex offender for which he was sentenced to a seventy-one month term of incarceration to be followed by 240 months of supervised release. By its express terms, the Federal sentence was to be served "consecutive to any state sentence."

Having been notified of the impending end of Venetucci's Massachusetts sentence, the Commonwealth filed its SDP petition

on August 24, 2016, which was approximately two weeks before his scheduled release.² An order of temporary commitment was issued on August 30, 2016, and following a hearing, a Superior Court judge found probable cause that Venetucci met the criteria of an SDP and continued his temporary commitment pending trial. On August 2, 2017, while Venetucci remained at the Massachusetts Treatment Center (treatment center), the United States Marshal filed a detainer seeking to secure custody of him prior to his release.

Through both a pretrial motion to dismiss and motions for directed verdict filed at the close of the Commonwealth's case and renewed at the close of all the evidence, Venetucci argued that the SDP petition was untimely in light of the fact that he could not be released into the community until after he served his Federal sentence, which would not occur for at least another five years.³ The judge rejected this argument, explaining her reasoning in a memorandum of decision and order that she issued

² See G. L. c. 123A, § 12 (a) (requiring that those with custody of sexual offenders provide notice six months prior to release, or "as soon as practicable" if incarceration is for less than six months). The purpose of this notice provision is to allow the Commonwealth the opportunity to file an SDP petition, if appropriate, before the sex offender is released.

³ According to Venetucci, even if he were to receive the maximum credits for "satisfactory behavior" pursuant to 18 U.S.C. § 3624, he would be required to serve over five years on his Federal sentence before he could be released back into the community. The Commonwealth has not challenged that contention.

following the trial. She adjudicated Venetucci an SDP and entered judgment committing him to the treatment center for an indefinite period of time. At the time of oral argument, he remained there still, and had yet to begin serving his Federal sentence.

Discussion. We begin by noting that Venetucci effectively is making two distinct arguments. First, he claims that an SDP petition filed more than five years before a sex offender could be released into the community is untimely. Second, he argues that by allowing the SDP process to delay indefinitely his ability to serve his Federal sentence is fundamentally unfair and could result in his serving many additional years of confinement.⁴ See Commonwealth v. Bonnett, 472 Mass. 827, 845 (2015), quoting Commonwealth v. Liebman, 379 Mass. 671, 674 (1980) (noting that Supreme Judicial Court has "recognized for many years that the interface between State and Federal

⁴ For example, consider Venetucci's situation if he were released from SDP confinement after five years because he no longer met the criteria of an SDP (e.g., based on his being five years older or on his having made sufficient progress in sex offender treatment). If he began serving his Federal sentence at that point, he would have served five additional years of confinement than if he had begun serving his Federal sentence upon the conclusion of his State sentence. It bears noting that sex offender treatment would have been required during his Federal incarceration. See 18 U.S.C. § 3621(f) (2018) (requiring Federal Bureau of Prisons to provide "appropriate treatment to sex offenders who are in need of and suitable for treatment" in accordance with specified provisions).

sovereigns in criminal investigations and prosecutions 'creates a potentiality for unfairness which would need correction if realized in practice'").

The latter argument presents a conundrum. Venetucci has not identified, nor are we independently aware of, any legal impediment preventing the United States from pursuing a writ of detainer to seize him from his current State civil commitment. Thus, Venetucci's commitment to the treatment center would not appear to stand as a legal bar to his commencing his Federal sentence. At the same time, the fact that the United States has not taken such steps indicates that Venetucci's commitment as an SDP may have serious practical consequences regarding his ability to begin serving his Federal sentence. As the Commonwealth acknowledged at oral argument, it may very well be that the United States has no objection to Venetucci completing his current indefinite period of civil commitment before he begins his Federal sentence. In the end, we need not resolve this conundrum, because we conclude that the SDP petition here was untimely in any event.

SDP commitments are extraordinary by nature, because they involve the detaining of a sex offender not in punishment for past crimes but in anticipation of future ones. Such schemes pass constitutional muster on the theory that the individual so confined suffers from distinct mental conditions that will

prevent him from controlling his dangerous behavior in the future. See Kansas v. Hendricks, 521 U.S. 346, 358-360 (1997). Whether the sex offender has such a condition and continues to present a sufficient danger to society to warrant his preemptive confinement can change over time. This is especially so as the offender reaches an advanced age. See, e.g., Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 621-622 & n.5 (2010) (noting well-recognized phenomenon that risk that sex offenders will reoffend generally tends to decline with age). For these reasons, it is critical that a determination that a sex offender is an SDP be based on current information.

We addressed the timing of SDP petitions in Commonwealth v. Shedlock, 58 Mass. App. Ct. 445, 452 (2003). There, we concluded that the Commonwealth could file a SDP petition against a person who had completed the sentences imposed on his sex offenses but remained incarcerated on a two-year sentence for a nonsexual crimes. Id. at 457-458. Central to our reasoning was our conclusion that the filing of an SDP petition at the earlier point in time (when he completed his sentence on the sex offense but remained incarcerated) would have been untimely. Id. at 454-456. As we explained, "particularly in light of the pellucid intent of the statutory scheme to authorize commitment petitions against sexually dangerous

persons who pose an actual danger to society because they 'are about to be released into the community,' Commonwealth v. McLeod, 437 Mass. [286, 291 (2002)] -- the [respondent's] position [that a petition had to have been filed before his sentence on the rape had concluded] makes little sense." Shedlock, supra at 454. For one thing, "the public requires no protection from potentially dangerous sexual predators so long as they remain incarcerated, for whatever reason, after their sexual offense sentence has come to an end." Id. at 452. For another, had the respondent been evaluated for whether he qualified as an SDP at the earlier point in time, the Commonwealth would have had to start the process over at the point that his prison term was about to end years later. Id. at 454-455. Indeed, we stated that the respondent was entitled to SDP review close in time to his release back into the community based on "basic due process grounds." Id. at 455.

In Doe, Sex Offender Registry Bd. No. 7083 v. Sex Offender Registry Bd., 472 Mass. 475 (2015) (Doe No. 7083), the Supreme Judicial Court addressed a similar issue in the analogous area of sex offender registration. See generally Doe, Sex Offender Registry Bd. No. 11204 v. Sex Offender Registry Bd., 97 Mass. App. Ct. 564, 568-571 (2020) (reviewing similarities and differences between statutory schemes involving SDPs and sex offender registration). At the time the Sex Offender Registry

Board finally classified the plaintiff in Doe No. 7083 as a level three sex offender, he was being held at the treatment center and was not eligible for release back into the community for at least another eighteen months.⁵ 472 Mass. at 476. Arguing that this rendered his classification untimely, the plaintiff sought to stay the SORB proceedings until his release into the community was imminent. Id. Specifically, the plaintiff argued "that his risk of reoffense was zero while he was confined at the treatment center, and that the denial of his request to continue or to leave open the classification hearing violated his right to due process." Id. The Supreme Judicial Court agreed that the classification process was untimely. The court held "that the hearing examiner's 2009 recommendation that Doe be classified as a level three sex offender, based on evidence presented at a time when a trial on his petition . . . was at least eighteen months away, risked classifying Doe based on factors that would be stale at the time of his discharge, in violation of due process protections." Id. at 478. Although the plaintiff had an available means to seek reclassification at

⁵ The plaintiff in Doe No. 7083 was confined at the treatment center where he was both committed as an SDP and serving a criminal sentence. 472 Mass. at 476. The sentence was for a conviction that postdated his civil commitment. Id. at 480.

a later date, the court held that this did not alleviate the due process concerns. Id. at 488-489.

What occurred here is inconsistent with the principles recognized in Shedlock and Doe No. 7083. Even though it is undisputed that Venetucci could not be released back into the community for at least another five years, the Commonwealth is indefinitely depriving him of his liberty based solely on the degree of danger he would present to the public were he so released. Adjudicating that Venetucci currently meets the criteria of an SDP does nothing to protect the public in the years prior to his release into the community. Moreover, even if the United States had seized Venetucci in lieu of his being sent to the treatment center, the evidentiary record on which he was adjudicated an SDP would be significantly stale at the point that he was due to be released into the community. The due process concerns raised by this timing are significantly more acute than those present in Shedlock, 58 Mass. App. Ct. at 455 (two-year delay between SDP petition and scheduled release into community would be unacceptable based on "basic due process grounds"), and Doe No. 7083, 472 Mass. at 478 (eighteen-month delay between final classification as level three sex offender and release into community violated due process).⁶

⁶ To be sure, once confined to the treatment center, an SDP has the right "to file a petition for examination and discharge

In concluding that the SDP petition was timely, the judge relied in great part on our decision in Commonwealth v. Trappaga, 76 Mass. App. Ct. 538 (2010). That case is distinguishable. There, the respondent argued that an SDP petition could not be filed against him "because a Federal immigration detainer had been lodged against him that would preclude his release into the community [after his State sentence had ended]." Id. at 539. We rejected that argument, but we did so based on the highly discretionary nature of immigration detainers. See id. at 547 ("The decision to execute a deportation order rests entirely with the Federal authorities, who have the discretion to abandon the endeavor at any time,

once in every twelve months." G. L. c. 123A, § 9. In some respects, this available remedy offers more protection than the regulatory reclassification procedure that the court found inadequate in Doe No. 7083. See 472 Mass. at 488-489 (focusing on fact that, under SORB regulations, sex offender could not petition for reclassification until three years after his return to community and then would bear burden of proof). However, the total deprivation of liberty that is the result of a SDP confinement is, needless to say, far greater than that which results from a level three classification. Regardless of whether the United States takes steps to seize someone in Venetucci's position once he has been confined as an SDP, the risk that such a person will be confined for an extended period of time based on stale information is very real. That an SDP has an opportunity to remedy an erroneous finding of dangerousness after one year does not relieve the Commonwealth of its burden to present evidence at the time of the hearing that Venetucci is a sexually dangerous person based on his mental condition at the time he will be released into the community.

whether for humanitarian reasons or simply for . . . convenience" [quotations and citation omitted]). In the case before us, the Commonwealth has not pointed to anything discretionary about Venetucci's obligation to serve at least five years of his Federal sentence.⁷

In holding that the current SDP petition was untimely, we recognize that the Commonwealth followed the procedures that c. 123A made available. More significantly, we recognize that the Commonwealth will likely be unable to file an SDP petition at the point that Venetucci is about to complete his Federal sentence. See Commonwealth v. Gardner, 480 Mass. 551, 555-561 (2018), and cases cited (Commonwealth had no statutory authority

⁷ The judge also cited to, and found persuasive, a Washington State case that addressed a similar issue under a violent sex offender civil commitment statute analogous to c. 123A. See Detention of Smith, 130 Wash. App. 104 (2005). The court there held that a sex offender could be civilly committed under the Washington State statute even though he faced a parole violation detainer from the State of Alaska. Id. at 108-112. As Venetucci before us points out, the sex offender in Smith had not yet been adjudicated as having violated his Alaska parole and, in any event, he faced a maximum sentence of only 215 days were such a violation to be found. See Smith v. Richards, 569 F.3d 991, 994 (9th Cir. 2009) (providing further factual detail about sex offender's circumstances). In the case before us, by contrast, Venetucci faced certain incarceration of over five years. With regard to the potential prematurity of a civil commitment petition where only one State was involved, compare Commitment of Gilbert, 342 Wis. 2d 82, 89-90, 112-113 (2012) (commitment petition filed over two years before end of prison sentence not invalid) with id. at 116-119 (Bradley, J., dissenting) (time lag created due process violation).

to file SDP petition against defendant who had completed Massachusetts sentences but was incarcerated in Massachusetts prison on sentence imposed by different jurisdiction).⁸ In fact, the Commonwealth posits, savvy sex offenders might even choose to commit minor nonsex crimes in other States in an effort to game their sentences so as to deprive Massachusetts of SDP jurisdiction.⁹

We are not unsympathetic to the Commonwealth's concerns. In addition, we note that although there is a parallel Federal statute pursuant to which the United States itself could pursue civil commitment of Venetucci as his Federal sentence was expiring, see 18 U.S.C. § 4248 (2018), the Commonwealth has no control over whether that procedure will be invoked. However, the problem that the Commonwealth identifies would appear to

⁸ Thus, even though the United States might have the ability to let Venetucci serve some or all of his Federal sentence in a Massachusetts State prison, see 18 U.S.C. § 3621(b) (2018), such an arrangement would not restore the Commonwealth's SDP jurisdiction based on how c. 123A is currently drafted.

⁹ To be clear, we note that we do not reach the question whether there might be situations where the additional, extra-jurisdictional sentence at issue were sufficiently brief that the Commonwealth could in good faith file an SDP petition claiming that the offender would be an SDP at the point that the second sentence was due to expire, with the petition then stayed pending the offender's serving the other sentence. See Doe No. 7083, 472 Mass. at 489-490 (untimely SORB process held open during period plaintiff could not be released, but preliminary classification decision not vacated).

lend itself to a straightforward legislative remedy: amending c. 123A to allow the Commonwealth to pursue an SDP petition against a convicted sex offender at the point he is about to be released back into the community following the conclusion of a sentence imposed by another jurisdiction even if he already has completed his Massachusetts sentences.¹⁰

Conclusion. For the reasons set forth above, we vacate the judgment and remand the case for entry of a judgment dismissing the Commonwealth's petition as untimely.

So ordered.

¹⁰ Although we do not pass on the constitutionality of a statute that has not been enacted, we do note that a statute that allowed SDP petitions to be filed close in time to an offender's release back into the community would not raise the particular due process problem at issue in the case before us. We additionally note that the Legislature enacted a similar amendment in the wake of the Supreme Judicial Court's opinion in McLeod. The SDP petition in McLeod had been filed after the sex offender had finished serving his sentence on a sex offense conviction, been released, and then reincarcerated on a new, nonsex offense. 437 Mass. at 287. The court ruled that under the version of c. 123A then in effect, the petition had to be filed prior to the offender's release from his incarceration on the sex offense. Id. at 292. In 2004, in response to McLeod, the Legislature amended c. 123A so that an SDP petition could be filed against a convicted sex offender who had been released from incarceration on the sex offense but who subsequently was reincarcerated on a nonsex offense. See St. 2004, c. 66, §§ 7-9. See also Commonwealth v. Gillis, 448 Mass. 354, 361-362 & n.8 (2007).