Filed 10/20/16 P. v. Perez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSEPH PEREZ, Defendant and Appellant.	B269409 (Los Angeles County Super. Ct. No. ZM011972)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie LaForteza, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Joseph Perez appeals from the court's judgment finding him to be a sexually violent predator (SVP) and committing him to the State Department of State Hospitals (DSH) for treatment and confinement. He raises a sufficiency of the evidence claim. We affirm.

PROCEDURE

In July 2007, the People filed a petition for commitment of appellant as an SVP under the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.; *People v. Shazier* (2014) 60 Cal.4th 109, 114).[1] The petition alleged appellant was convicted in California in 1987 of 13 counts of lewd and lascivious acts (Pen. Code, § 288), two counts of rape (Pen. Code, § 261), and one count of sodomy (Pen. Code, § 286), and in 1977 of one count of lewd and lascivious acts in Florida. All of appellant's victims were under 16 years old, and several were under 14 years old. The petition further alleged appellant had a diagnosed mental disorder and posed a danger to the health and safety of others in that he was predisposed to commit predatory sexual acts.

In March 2009, the court found probable cause to believe appellant was likely to engage in sexually violent predatory criminal behavior if released and ordered appellant to remain in custody pending trial on the petition. (§ 6602, subd. (a).) Appellant waived a jury trial and the matter proceeded to a bench trial in December 2015.

After trial, the court found appellant had been convicted of sexually violent offenses, had a current diagnosed mental

---

[1] Further undesignated statutory references are to the Welfare and Institutions Code.

disorder, and as a result of that disorder, it was likely he would engage in sexually violent predatory behavior. The court found it necessary to hold him in a secure facility to ensure the health and safety of others. The court rendered a verdict that appellant is an SVP within the meaning of the SVPA and committed him to the DSH for an indeterminate term of treatment and confinement. Appellant filed a timely notice of appeal.

FACTS

1. The People's First Expert: Dr. Michael Musacco

Dr. Michael Musacco is a licensed forensic psychologist who has been conducting evaluations of SVP's for nearly 20 years. He interviewed appellant in 2008 for approximately two hours. The doctor wrote updated evaluations in 2011, 2014, and 2015, but on those occasions, appellant refused to speak with the doctor. Those later evaluations relied on the doctor's review of records and contact with the staff at the hospital housing appellant. At the time of trial, the doctor had reviewed arrest reports, probation officers' reports, prior psychological reports of other evaluators, abstracts of judgment, and the mental health records from the hospital.

Dr. Musacco opined that appellant suffered from a mental disorder that predisposed him to commit sexually violent offenses—specifically, pedophilic disorder, sexually attracted to males. The doctor based his opinion on the following evidence.

Appellant was born in Mexico and moved to the United States when he was 12 years old. Before moving here, older cousins sexually abused him. Appellant insisted he did not feel anything negative about the abuse and he was not certain it affected him. Appellant began having thoughts and urges relating to prepubescent children when he was a teenager. He

dropped out of school in 10th grade to work and help support the family, and then he was drafted into the military in the 1960's. He served two years and discharged honorably, and shortly after he began committing sexually violent offenses against boys.

Appellant's multiple convictions and charges for sexual offenses involving young boys date back to 1967. He was convicted in 1967 in California for sexual acts with a child. In 1969, he was charged again and not convicted, but appellant told the doctor during his interview that he was guilty of that crime. In 1971, in Utah, he was charged with multiple counts of sexual acts on children under age 14. He went to a state hospital for a treatment program or evaluation and was released. Within several years, in Idaho, he was charged again with sexual acts against a child. He fled to Florida. In 1976, he was convicted in Florida of a sexually violent offense involving fondling a nine-year-old boy. He was sentenced to a treatment program for sex offenders and failed out of that program after a year. He then completed a prison term. After his release from prison, he went to California, and within a year, he had committed sexually violent offenses against six boys involving fondling, oral copulation, sodomy, or attempted sodomy. After committing those crimes, appellant fled California for Utah, was apprehended and released, and fled again to either Washington or Oregon. He was finally apprehended in one of those states and held to answer the charges against him. His California charges resulted in convictions for 15 offenses occurring in 1981 to 1983.

His offenses often involved him participating in activities that gave him access to children. For instance, he became a boy scout leader and molested one of his victims during a scouting trip. He had also committed offenses while working as a camp

counselor and little league coach. He would try to develop relationships with his victims—"groom" them—by taking them to drive-in movies, video arcades, or motorcycle riding. In addition to molesting them himself, he would have them act out sexually with each other, take pictures of or film them, and show them pornography.

While appellant had not molested a child in over 20 years, Dr. Musacco attributed that to his custodial situation. Since appellant's convictions in the California case, he had not had access to any children in either prison or the hospital. But in 2008, hospital staff found a DVD containing child pornography in his possession. Appellant told Dr. Musacco that the DVD was a setup—another patient gave it to him as collateral for a debt, and he maintained that he did not have it for purposes of sexual arousal. He said he did not realize that the DVD contained child pornography. The issue was not referred to the district attorney's office for prosecution due to "lack of sufficient chain of custody." Appellant had also been caught selling child pornography to other patients in 2008, according to a police report the doctor reviewed.

Since appellant had been at the state hospital in the SVP program, he had not participated in sex offender treatment at all. When he first arrived at the hospital, he was hopeful that the court would grant his petition for release. When that did not happen, appellant became disinterested in participating in treatment. He saw many people that had participated and still not been released, so he felt that participating would "not bear any fruit for him."

Appellant also lacked insight about his condition in that he did not recognize the harm he had caused his victims and he

partially blamed them, insisting that they sought him out and enjoyed his attentions, and he would never "force it." He insisted that he acted in a loving fashion and that he loved his victims or felt an emotional connection to them. He did not feel comfortable with adults and felt more fulfilled in his relationships with children.

After being in custody for 20 years, appellant had begun to acknowledge that his behavior was wrong. He said he was not going to offend again and did not "have those urges anymore." He was interested in having relationships with adults and said he was no longer attracted to children. Dr. Musacco, however, did not believe appellant no longer held an interest in children, in light of the child pornography found in his possession. The doctor believed appellant's pedophilia would be a lifelong "component of his sexuality."

Dr. Musacco felt his diagnosis of appellant was "fairly clearcut" and there was not much debate about his condition, especially given the number of times appellant had offended, been punished, released, and offended again. His history of reoffending demonstrated "the strength of the disorder." Appellant was something of an outlier in Dr. Musacco's experience in that he had not seen many individuals with a history of reoffending so frequently. Every time he had been released from custody, he had reoffended within a quick time frame.

Pedophilic disorder is generally considered to be chronic and lifelong. One did not hit a "magic age" at which the sexual thoughts and urges went away. Individuals could learn, however, to control their behaviors over the course of time.

Dr. Musacco employed the Static-99—an actuarial test that measures an individual's risk for sexual recidivism—and a revised version of it (the Static-99R) in evaluating appellant. On the Static-99, appellant scored a six, placing him in the high risk category. The Static-99R changed the way evaluators look at age so that, after age 60, there is a clear decline in recidivism risk. When Dr. Musacco scored appellant on the Static-99R, appellant's score went down to three because of his age (73 years old), putting him in the low-moderate risk category.

In appellant's case, Dr. Musacco opined that he continued to pose a substantial, well-founded risk of reoffending, given his history of reoffending many times and his refusal to participate in treatment for almost 20 years. The doctor thought he posed this serious and well-founded risk even though his Static-99R score fell in the low-moderate category. The Static-99R was just one tool in the risk assessment process. While appellant represented less of a risk than he did at 43 or 53, the risk was still high.

Appellant had high blood pressure, diabetes, and kidney disease, but he was still perfectly capable of developing relationships with children, fondling them, orally copulating them, and masturbating them. He had no physical condition that would prevent him from doing these things, as he had done frequently in the past. Dr. Musacco did not see anything in his review of records indicating that appellant had senile dementia or Alzheimer's disease.

Dr. Musacco did not believe appellant would be amenable to outpatient treatment in the community if released because he was not participating in treatment in the hospital, and he had

expressed an opinion that treatment would not be helpful or useful.

2. The People's Second Expert: Dr. Robert Owen

Dr. Owen had been conducting SVP evaluations for 29 years. He had conducted around 1,200 evaluations.

Dr. Owen interviewed appellant in 2007 for an hour and half and in 2008 for a little over an hour. He wrote further evaluations of appellant in 2011, 2013, and 2015, but appellant declined to interview with Dr. Owen on those occasions. The doctor reviewed abstracts of judgment, probation reports, felony complaints, and medical and psychiatric files at the hospital housing appellant. The doctor diagnosed with him pedophilic disorder, a mental disorder predisposing appellant to the commission of sexually violent offenses.

Dr. Owen noted that appellant had fixated on boys since the age of 15 and had reportedly molested over 30 victims in his life, suggesting "a long-standing, lifelong pedophilic disorder of a rather severe nature." Like Dr. Musacco, Dr. Owen found appellant's repeated reoffending to be significant. Appellant's failure to be deterred by harsh consequences indicated poor self-control of his impulses, or volitional impairment. He also demonstrated emotional impairment in that he did not recognize how his actions might negatively impact his victims.

Dr. Owen opined that appellant posed a significant, serious, and well-founded risk of reoffense in the future. Pedophilia was not something that "magically disappear[ed]," and appellant had not participated in any treatment to learn how to manage it. Dr. Owen gave appellant a score of two on the Static-99, which put him in the low-moderate risk category. But the Static-99 was just the "beginning" of a comprehensive risk

analysis. While a score of two was "average," there was "nothing average" about appellant. Appellant had other indicators of a high risk of recidivism, such as his lack of stable romantic relationships with adults, his possession of contraband child pornography, his lifelong sexual deviance, and his refusal to participate in treatment.

Appellant exhibited the symptoms of pedophilia that would normally be addressed in treatment. For instance, he demonstrated cognitive distortion or minimization of his culpability in that he believed his victims often initiated the sexual activities with him. Denial or minimization of involvement is "an essential part of the disease" of pedophilia. Dr. Owen did not believe appellant had a viable release plan because, in discussing his plans, he never mentioned the need for treatment, and appellant "desperately need[ed]" it.

Dr. Owen, like Dr. Musacco, reviewed all of appellant's medical records, and he saw no indication in the records that appellant was developing senile dementia or Alzheimer's disease, or that he had posttraumatic stress disorder (PTSD). Even if he had one of these conditions, it would not necessarily cause him to become less sexual or less dangerous. Appellant had no physical condition that would prevent him from reoffending in his customary way. Assuming he suffered from erectile dysfunction, such a condition would not prevent him from orally copulating boys, as he had done many times in the past.

3. Appellant's Expert: Dr. Vianne Castellano

Dr. Vianne Castellano had evaluated over 100 SVP cases. She interviewed appellant for more than 60 hours over the course of 2014 and 2015. She diagnosed him with childhood PTSD and Alzheimer's disease. Her diagnosis of PTSD was based on his

male cousins having sexually abused him when he was between five and 11 years old.

As to Alzheimer's disease, defense counsel asked Dr. Castellano to evaluate appellant because appellant was having difficulties recalling facts relating to his offenses, and over the 19 months that Dr. Castellano had been working with appellant, she also noted cognitive decline and deterioration. There were also indications in the notes she reviewed from the state hospital that appellant's memory was impaired for recent and remote events. Appellant's father and paternal aunt had died of Alzheimer's disease.

Dr. Castellano opined that appellant's pedophilia was in remission, meaning it was not currently acute or active. He had been in custody for the last 29 years, and his functioning was "essentially asexual." He did not have any fantasies, urges, or "instances of aberrant behavior in terms of watching child pornography." He was fairly apathetic in his interactions with hospital staff and other patients. Dr. Castellano did not use the Static-99 or Static-99R in evaluating appellant. Her training as a clinical forensic psychologist did not involve the use of actuarial tools like the Static-99.

Dr. Castellano knew appellant was not participating in sex offender treatment while in custody. She attributed this to his experience with treatment when he was in custody in Utah in the 1970's. The Utah treatment involved electric shocks and was very painful, and as a result, appellant did not want to participate in any treatment. He had participated in a form of cognitive behavioral therapy through correspondence courses on his own, and she believed it was effective in that he came to terms with his homosexuality, and he understood that being

intimate with an adult male was much more preferable than his previous behavior with children.

Dr. Castellano opined that appellant did not pose a risk of "sexual dangerousness" if released. His plan for release was to move to Mexico and live on his Social Security benefits.

DISCUSSION

Appellant contends there was insufficient evidence to support the finding that he is an SVP. We disagree.

"Under the SVPA, persons serving prison sentences may be referred for possible civil commitment at the conclusion of their terms on grounds that they are SVPs." (*People v. Shazier, supra*, 60 Cal.4th at pp. 125-126.) An SVP is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1).) " 'Danger to the health and safety of others' does *not* require proof of a recent overt act while the offender is in custody." (§ 6600, subd. (d), italics added.) A " '[d]iagnosed 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 a degree constituting the person a menace to the health and safety of others." (§ 6600, subd. (c).)

The People may file a commitment petition only after (1) the Department of Corrections and Rehabilitation screens the prisoner and (2) two state-appointed independent evaluators agree the prisoner is an SVP. (*People v. Shazier, supra*, 60 Cal.4th at p. 126.) If the court finds probable cause to believe the individual is likely to engage in sexually violent predatory

criminal behavior if released, the court orders a trial on the SVP issue. (*Ibid.*)

At trial, "the People must prove beyond reasonable doubt, among other things, that because of a diagnosed mental disorder affecting the person's volitional or emotional control, ' "it is likely he or she will engage in sexually violent behavior" if released.' " (*People v. Shazier, supra*, 60 Cal.4th at p. 126.) "Likely" means " ' "the person presents a *substantial danger*, that is, a *serious and well-founded risk*, that he or she will commit such crimes if free in the community." ' " (*Ibid.*) Conviction of one or more sexually violent offenses shall constitute evidence to support an SVP determination, but it "shall not be the sole basis for the determination." (§ 6600, subd. (a)(3).)

When an appellant challenges the sufficiency of the evidence supporting an SVP finding, we review the record in the light most favorable to the judgment to determine whether substantial evidence supports it. (*People v. Sumahit* (2005) 128 Cal.App.4th 347, 352 (*Sumahit*).) We " 'may not redetermine the credibility of witnesses, nor reweigh any of the evidence, and must draw all reasonable inferences, and resolve all conflicts, in favor of the judgment.' " (*Ibid.*)

Appellant argues the SVPA requires proof that his current mental condition and behavior render him dangerous at the time of commitment, and there was insubstantial evidence of this, given that the experts and court relied on facts surrounding his sexually violent offenses of 30 years ago. We are not persuaded. There was substantial evidence to support his commitment as an SVP.

It is true that both prosecution experts relied in part on facts surrounding appellant's numerous offenses from the 1970's

and 1980's in forming their opinions. There was nothing improper about this. (§ 6600, subd. (a)(3) [conviction of past sex offenses is evidence supporting an SVP determination, though may not be the sole evidence]; *Sumahit, supra*, 128 Cal.App.4th at p. 353 [SVP "assessment must include consideration of [the defendant's] past behavior, his attitude toward treatment and other risk factors applicable to the facts of his case"].) Appellant's past behavior was relevant to the experts' *current* diagnosis of pedophilia because it was evidence of the lifelong disorder impairing his volitional capacity (he could not control his impulses) and emotional capacity (he did not understand the negative impact he had on his victims, and he believed they participated voluntarily in the abuse).

But the experts' diagnosis and opinions were not based solely on the past convictions. The doctors interviewed him, reviewed reports of other psychologists who had evaluated appellant, reviewed probation reports and other court records, and reviewed notes or records of the hospital where appellant was in custody. Moreover, the experts cited other factors supporting their conclusions—appellant's recent and longstanding refusal to participate in sex offender treatment and his recent possession of contraband child pornography. (*Sumahit, supra*, 128 Cal.App.4th at p. 353 [rejecting the argument that the People's experts relied solely on the appellant's prior sex crimes, when they reviewed commitment evaluations, hospital records, psychologists notes, probation reports and other court records; applied the Static-99 test; and relied on his refusal to undergo treatment and untreated alcohol abuse problem].) According to the experts, pedophilia is a lifelong disease that did not simply disappear, although an individual

could manage it through treatment. "The availability of treatment is at the heart of the SVPA. [Citation.] 'Through passage of the SVPA, California is one of several states to hospitalize or otherwise attempt to treat troubled sexual predators.' [Citation.] Accordingly, one of the key factors which must be weighed by the evaluators in determining whether a sexual offender should be kept in medical confinement is 'the person's progress, if any, in any mandatory SVPA treatment program he or she has already undergone; [and] *the person's expressed intent, if any, to seek out and submit to any necessary treatment* . . . .' [Citation.] A patient's refusal to cooperate in any phase of treatment may therefore support a finding that he 'is not prepared to control his untreated dangerousness by voluntary means if released unconditionally to the community.' " (*Id.* at pp. 354-355.) Thus, appellant's "refusal to undergo treatment constitute[d] potent evidence that he [was] not prepared to control his untreated dangerousness by voluntary means." (*Id.* at p. 354.)

Moreover, as appellant recognizes, a finding that he poses a danger to the health and safety of others does not require proof of a recent overt act while in custody. (§ 6600, subd. (d); *Sumahit, supra*, 128 Cal.App.4th at p. 353.) While in custody, appellant had no access to children and thus has had no opportunity to reoffend. (*Sumahi*, at p. 353 ["The fact that defendant has not misbehaved in a strictly controlled hospital environment does not prove he no longer suffers from a mental disorder that poses a danger to others. Defendant has an abnormal attraction to female children. Because he currently lacks access to children, his lack of outward signs of sexual deviance is not dispositive of whether he is likely to reoffend if released into society at large."].)

Even if a recent act were required, there was evidence of that in the child pornography found in appellant's possession in 2008. Appellant contends the experts and the court improperly relied on this evidence because the incident did not result in any charges or convictions, due to a problem with establishing a chain of custody for the DVD. But appellant cites no rule of evidence or case law demonstrating that such evidence was inadmissible. At best, his arguments went to the weight of the evidence—a matter that was solely within the province of the trial court, as the trier of fact. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207.)

Appellant also asserts that the opinions of the People's experts were improper because they ignored other factors, such as his age, infirmity, and his purportedly current asexual functioning. He contends his expert, Dr. Castellano, was more credible because she "properly focused on appellant's current condition." The People's experts did not ignore his age and infirmity. They recognized that the risk of recidivism generally decreased with age. In appellant's case, they simply did not believe that his age meant he no longer presented a serious and well-founded risk to children, given the severe nature of his pedophilia and his refusal to seek treatment. They also did not believe his various ailments would prevent him from sexually abusing children in ways that had nothing to do with erectile functioning.

To the extent appellant is arguing Dr. Castellano's opinions were more reliable because they were based on current statements from appellant, while Drs. Musacco's and Owen's were not, we reject this argument. Like appellant, the defendant in *Sumahit* argued there was insufficient evidence of a current mental disorder because the People's experts relied on sexual

offenses that were 12 and 17 years old or even older. (*Sumahit, supra*, 128 Cal.App.4th at p. 352.) The court rejected this argument for several reasons, including the appellant's refusal to be interviewed by the People's experts. It explained: "[W]e cannot overlook the significance of defendant's refusal to be interviewed by either of the state's experts. The law has a strong interest in seeing to it that litigants do not manipulate the system, especially where to hold otherwise would permit them to ' "trifle with the courts." ' [Citation.] Here, defendant fully cooperated with his own psychologist, while denying the People's doctors the opportunity to interview him [citation]. A sex offender cannot deny the state access to the workings of his mind and then claim a lack of proof that he has a 'current' psychological disorder. Because he refused to be interviewed by the state's experts, who could have formed an opinion as to his present dangerousness, defendant has forfeited the claim that the state did not prove that he was currently dangerous." (*Id.* at pp. 353-354.)

In our case, appellant consented to one 2-hour interview in 2008 with Dr. Musacco, and two interviews with Dr. Owen in 2007 and 2008, one for an hour and the other for an hour and a half. He refused to meet with them otherwise. But he consented to over 60 hours of interviews with his own expert in 2014 and 2015. While appellant did not refuse to meet with the People's experts at all, he unquestionably gave his own expert far more "access to the workings of his mind" (*Sumahit, supra*, 128 Cal.App.4th at p. 353), and he did so much more recently than 2007 or 2008. We therefore reject any claim that Dr. Castellano's opinions were more reliable because she based them on more current information. That was a situation of appellant's making.

In short, the experts' differing opinions and conclusions merely created a conflict in the evidence, which the trial court resolved by crediting the testimony of the People's experts. Their testimony constituted substantial evidence supporting the judgment. "It is not the role of this court to redetermine the credibility of experts or to reweigh the relative strength of their conclusions." (*People v. Poe* (1999) 74 Cal.App.4th 826, 831.)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.