IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI
PROBATE DIVISION

IN THE MATTER OF THE CARE AND TREATMENT OF PL, Respondent.	)	Cause No. Div. 36

JUDGMENT AND ORDER

COMES NOW THE COURT and makes the following findings of fact and conclusions of law regarding Respondent's Motion to Dismiss that was taken up with the probable cause hearing in the above-styled case.

PROCEDURAL HISTORY

On July 11, 2017, the Attorney General for the State of Missouri filed a petition to have respondent PL civilly committed pursuant to the provisions of Missouri's "Sexually Violent Predator Act." V.A.M.S. Section 632.480 et seq.

The following day on July 12, 2017, the probate judge entered her Findings and Order for Detention and Service, which compelled the sheriff of St. Louis County take the respondent into custody. The Court set a probable cause hearing on July 28, 2017 at 10:00 AM for the respondent to have an opportunity to appear and contest probable cause whether he is a sexually violent predator.

On July 20, 2017, attorney for the respondent entered his appearance and filed a motion to continue the probable cause hearing. The hearing was continued to August 11, 2017 at 1:30 PM. and assigned to Division 8.

On August 7, 2017, after consultation with counsel, the Court on its own motion recused itself from further proceedings. The acting presiding judge and the probate judge reassigned the case to the undersigned judge to serve as deputy probate judge for the purposes of hearing the above-styled case.

On August 8, 2017, Respondent's counsel filed his motion to dismiss. On August 10, 2017, State of Missouri filed its response. On August 11, 2017, Respondent filed memorandum in support of his motion to dismiss.

On August 11, 2017, Respondent's motion to dismiss was argued and heard with the probable cause hearing.

FACTUAL BACKGROUND

The State of Missouri via its petition alleges that Respondent, PL, is currently confined in the custody of the Department of Corrections for sexual misconduct involving a child, failure to register as a sex offender and possession of child pornography, charges originating in St. Louis County, Missouri.

The State of Missouri alleges that by notice received from the Missouri Department of Corrections, Respondent PL "may meet the criteria of a sexually violent predator as defined by statute ... ".

The State of Missouri does not allege that the crimes for which respondent is currently confined meet the criteria for "sexually violent offenses" but instead alleges the respondent's conviction from a plea of guilty to a felony in the District Court of El Paso County, Colorado meets the definition of a "sexually violent offense" as defined by Section 632.480 (4), RSMo.

In January 2003, Respondent pled guilty to Attempted Sexual Assault on a Child, a Class 5 Felony, in that he attempted to commit the crime of sexual assault on a child by taking a substantial step to subject the child, not his spouse, to sexual contact and said child was less than 15 years of age and that the respondent was at least four years older than the child in violation of Colorado's revised

statutes 18–2–101, and C.R.S. 18–3–405 (1) (a), Criminal Attempt to Commit Sexual Assault on a Child.

Recognizing that Respondent's Colorado conviction is not contained in the list of sexually violent offenses as defined by Section 632.480 (4) RSMo, the State of Missouri argues that the Colorado offense falls within the "catch all" phrase that the Colorado felony offense is "substantially similar" to the offenses of attempted statutory sodomy in the first degree and/or child molestation in the fourth degree.

In his Motion to Dismiss, Respondent argues there is no "substantial similarity" between Missouri's offense of attempted statutory sodomy in the first degree and Colorado's offense attempted sexual assault of a child. The respondent also points out that even though child molestation in the fourth degree is identified under Section 632.480 (4) RSMo as "sexually violent offense," the **attempt** of child molestation in the fourth degree or any degree does not qualify as a sexually violent offense.

Both parties agree that the issue of "substantially similar sex offenses" has yet to be litigated on appeal in the State of Missouri.

MISSOURI STATE STATUTES

Section 632.486 states that the Attorney General may file a petition for commitment against the person who is "presently confined" who "meets the definition of sexually violent predator."

Section 632. 480 (5) defines "sexually violent predator" as "any person who suffers from a mental abnormality which makes the person more likely than not to engage in predatory acts of sexual violence if not confined in a secured facility and who: (a) has pled guilty or been found guilty in the state or any other jurisdiction, … of a sexually violent offense; …."

Section 632.480 (4) sets forth the prerequisite offenses for the civil commitment of a person as a sexually violent predator:

"The felonies of rape in the first degree, forcible rape, rape, statutory rape in the first degree, sodomy in the first degree, forcible sodomy, sodomy, statutory sodomy in the first degree, or **an attempt to commit any of the preceding crimes**, or child molestation in the first, second, third, or fourth degree, sexual abuse, sexual abuse in the first degree, rape in the second degree, sexual assault, sexual assault in the first degree, sodomy in the second degree, deviant sexual assault, deviant sexual assault in the first degree, or the active abuse of a child involving either sexual contact, a prohibited sexual act, sexual abuse, or sexual exploitation of a minor, or any felony offense that contains elements substantially similar to the offenses listed above" (emphasis added).

Section 566.062 (1) "a person commits the offense of statutory sodomy in the first degree if he or she has deviant sexual intercourse with another person who is less than 14 years of age."

Section 566.062 (2)" the offense of statutory sodomy in the first degree or an attempt to commit statutory sodomy in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or of term of years not less than five years…".

Section 566.010 (3) defines "deviant sexual intercourse" referenced in the offense of statutory sodomy in the first degree, as "any act involving the genitals of one person and the hand, mouth, tongue, or anus of another person or a sexual act involving the penetration, however slight, of the penis, female genitalia, or the penis by a finger, instrument or object done for the purpose of arousing or gratifying the sexual desire of any person or for the purpose of terrorizing the victim."

Section 566. 010 (6) "sexual contact," "any touching of another person with the genitals or any touching of the genitals or anus of another person, or the breast of a female person, or such touching through the clothing, for the purpose of arousing a gratifying the sexual desire of any person or for the purpose of terrorizing the victim."

Section 566.071. Child molestation, fourth degree, penalty. 1. A person commits the offense of child molestation in the fourth degree if, being more than four years older than a child who is less than 17 years of age, subjects the child to sexual contact.

COLORADO STATE STATUTES

C R.S.A. Section 18-3-405

Section 18-3-405. Sexual Assault on a Child. (1) any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than 15 years of age and the actor is at least four years older than the victim.

Section 18-3-401. Definitions (4) "sexual contact" means the knowing touching of the victims intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim or actor's intimate parts if that sexual contact is for the purpose of sexual arousal gratification or abuse.

F: 186 Intimate Parts. "Intimate parts" means the external genitalia, perineum, penis, buttocks, pubis, or breast of any person.

LEGISLATIVE ANALYSIS

Whenever possible, the Court must determine the legislature's intent from the plain and ordinary meaning of the statutory language. The Court discerns the clarity or ambiguity of the statutory language by references to language itself, and the specific content in which the languages is used in the broader context of the statute as a whole. The Court must read and consider the statute as a whole to give consistent harmonious and sensible effect to all its parts. The Court will not find a statutory interpretation that leads to an illogical or absurd result.

In the absence of statutory definitions, the Court may rely on dictionary definitions to determine the meaning of the language used. Gash v. Lafayette County, 245 S.W.3d 229, 232 (Mo. banc 2008). Statutes on the same subject are read in pari materia and should be construed

harmoniously. Investors Alliance, LLC. V. Bordeaux, 428 S.W.3d 693, 696 (Mo. App. E.D. 2014) citing South Metro. Fire Protection District v. City of Lee Summit, 278 S.W.3d 659, 666 (Mo. banc 2009). Further, the Court should avoid any interpretation that renders meaningless any portion of the statutory language. Id citing White v. White, 293 S.W.3d 1, 9 (Mo. App. W.D. 2009)

The legislature is presumed to be "aware of the state of law at the time it enacts a statute." Martinez v. State, 204 S.W.3d 10, 17 (Mo. App. E.D. 2000). The Court therefore assumes at the time of the drafting of Section 632.480 (4), the legislature was aware of the distinction in the statutory terms "deviant sexual intercourse" and "sexual contact," the differences in punishments, the differences in individuals protected, and the differences in which attempted offenses rose to the level of "sexually violent offenses."

"It may be true that sweeping more offenders into coverage of the SVP Act would promote the act's remedial goal of protecting the public from dangerous recidivists. We cannot further the legislature's general objectives by rewriting the language of the statute it passed." In the matter of Eric Robertson v. State, 392 S.W.3d 1, 5 (Mo. App. W.D. 2012) (overturned by legislative action) "[t]o the point courts could achieve 'more' of the legislative objectives by adding to [a statute's coverage], it is enough to respond that statutes have not only ends but also limits... A court's job is to find and enforce stopping points no less than to implement other legislative choices." Id. citing Edward Hines Lumber Co. v. Vulcan Materials Co., 861.F.2d 155, 157 (7th Circuit 1988) (Citations omitted).

"The legislature's use of different terms in different subsections of the same statute is presumed to be intentional and for a particular purpose" MC Dev. Co. LLC v. Cent. R-3 School District of St. Francis County, 299 S.W.3d 600, 605 (Mo. banc 2009). "When different statutory terms are used in different subsections of a statute, appellate courts presume that the legislature intended the terms to have different meaning and effect" (Citation omitted).

If the legislature had intended to include all degrees of all sexual offenses, it would have simply referred to a generic identifier for such offenses. Drawing distinctions between different degrees of statutory rape, sodomy, or other sex offenses would be unnecessary and ineffective. The use of broad terms or generic identifiers would make much the list of offenses in Section 632.480 (4) redundant and unnecessary. In fact, the legislature intentionally carved out very specific limited sexually violent offenses whose "attempts" also qualify as sexually violent offenses.

The State urges this Court to rely upon the analysis of the Texas court in Prudholm v. State, 333 S.W.3d 590, (Tex. Crim. App. 2011) for the definition of "substantially similar" used in Section 632.480 (4).

In the Prudholm case, the Texas court found that for the elements of a prior out-of-state offense to be "substantially similar" to a sexual offense enumerated in their statutes, the elements being compared must display a "high degree of likeness" Id at 594. ("We are still left, however, with the critical question of the respect in which the elements must display a high degree of likeness.")

In fact, the Texas court found by applying the standard of "high degree of likeness" that the California offense of sexual battery did not contain elements that are substantially similar to the elements of Texas sexual assault. Id. at 598. The "touching" of an "intimate part" involved in elements two and three of the California offense encompassed a markedly different range of conduct than the "penetration or contact" of a person's "anus" or "sexual organ" involved in the elements two and three of Texas is offense. Id. The Court found that "while the elements of California and Texas offense may be similar in a general sense, they do not display the high degree of likeness required to be substantially similar." Id.

In addition, the individual interests protected by sexual elements of the California offense were more like those protected by the Texas offense of an assault under a completely different statute, rather than those of the Texas sexual assault statute at issue. The Texas court found that the difference in the

sexual elements result in a much less serious California offense relying in part, in the difference of how the offenses were punished. Id. The trial court noted that sexual battery is a misdemeanor punishable only six months imprisonment, while sexual assault in the second degree felony was punishable by 20 years imprisonment. Id.

PROBABLE CAUSE PURSUANT TO SECTION 632.489.3

At the probable cause stage of SVP commitments, the probate division is tasked with acting as a "gatekeeper merely to determine if the state's evidence raises a triable issue of fact" Tyson v. State, 249 S.W.3D 849, 852-53 (Mo. 2008); citing Martineau v. State, 242 S.W.3d 456, 460 (Mo. App. S.D. 2007).

"This gatekeeping role does not allow the Court to weigh evidence or make credibility determinations" Tyson at 853. "SVP act proceedings are civil in nature." Id.

"At a probable cause hearing, the trial judge is the sole judge of the sufficiency of the evidence to determine whether probable cause exists to believe that the appellant is a sexually violent predator" Amonette v. State, 98 S.W.3d 593, 599 (Mo. App. E.D. 2003) citing State v. Hester, 331 S.W.2d 535, 537 (Mo. 1960). By statutory definition, a sexually violent predator must have a conviction for a sexually violent offense.

The question of whether Respondent's conviction constitutes a sexually violent offense within the ambit of section 632.480 (4) is a question of law for the Court to decide. In the Matter of the Care and Treatment of John Gorman, 371 S.W.3d 100, 106 (Mo. App. E.D. 2012) citing Murrell v. State, 215 S.W.3d 96, 102 (Mo. Banc 2007)

At a minimum, due process requires a meaningful review of the issues at any hearing.

LEGAL ANALYSIS

Under Colorado law, Respondent's conviction from 2003 for attempted sexual assault of a child has a range of punishment of one to three years. The range of punishment for the Missouri offense of sodomy in the first is a minimum of five years to life imprisonment.

Further distinctions are that Missouri's legislature by definition has distinguished the act of "deviant sexual intercourse" from "sexual contact," and has distinguished which attempted offenses rise to the level of sexually violent offenses and which ones do not. It is it is presumed that the legislature intended the terms to have different meanings and effects. The Court must avoid any interpretation that renders meaningless any portion of the statutory language.

Colorado's definition of "sexual contact" is very similar to Missouri's. Both Missouri and Colorado defined "sexual contact" as a knowing "touching" of a victim's intimate parts or the knowing touching of the clothing covering the immediate area of the victim's intimate parts. Thus, an offender's hand to the chest area of a woman's shirt could constitute an offense. However, that same act would not meet Missouri's definition of "deviant sexual intercourse" as the definition requires an act involving the genitals of one person in the hand, mouth and tongue, or anus of another person or a sexual act involving penetration. Missouri statutory sodomy law prohibits acts far more egregious than the scope of the Colorado statute on sexual assault of a child.

If two statues are to be substantially similar, their respective elements must be substantially similar with respect to the individual or public interest protected and the impact of the elements on the seriousness of the offenses. Not only did the two statutes differ with respect to the seriousness of the offenses, they also differ with respect to the individuals protected.

Statutory sodomy in the first degree describes victims "less than 14 years of age" while Colorado's statute for sexual assault of a child describes victims "less than 15 years of age".

Missouri's legislature finds it significant to distinguish the age of the victim. In Missouri if the victim is 15 years of age, the appropriate charge is statutory sodomy in the second degree, not the first. Section 566.064 RSMo. A person charged with statutory sodomy in the second degree faces a term of imprisonment of one to seven years. Attempted statutory sodomy in the second degree is not a sexually violent offense. See Section 632.480 (4).

The state alleges in the alternative that sexual abuse of a child under Colorado law is substantially similar to child molestation in the fourth degree. However, the State fails to take into account Respondent's conviction is one for attempting an offense. Attempted child molestation in the fourth degree is not a sexually violent offense. Section 632.480 (4). Missouri limits civil commitments on attempt liability to convictions of "rape in the first degree," forcible rape, rape, statutory rape in the first three, sodomy in the first degree, forcible sodomy, sodomy, and statutory sodomy in the first degree." It is also important to note that attempted child molestation in the fourth degree in Missouri would be a Class A misdemeanor and not a felony. In fact, attempted child molestation in any degree in the state of Missouri does not qualify as a sexually violent offense.

The State urges the Court to follow the "logic and guidance" of Prudholm. In Prudholm, the Texas court looked to other statutes within the criminal code to determine what was substantially similar to the California offense of sexual battery. The Texas court, looking for a "high degree of likeness," found that the individual interest protected by the sexual elements of the California offense were more like those interests protected by the Texas offense of assault under a different statute. The Court found the difference in the sexual elements result in a much less serious California offense. The Texas court recognized "without the restraint involved in Element IV, which is absent in sexual assault, sexual battery is a misdemeanor punishable only by six months imprisonment while sexual assault is a second-degree felony punishable by 20 years of imprisonment."

Whether the Court applies Prudholm's "high degree of likeness" test or Missouri's Appellate Court guidance in regards to legislative construction analysis, this trial court reaches the same conclusion.

Respondent's conviction does not qualify as a sexually violent offense within the meaning of section 632.480 (5) under any theory.

CONCLUSION

Whether the respondent's Colorado conviction falls within the meaning of Section 632.480(5) is a question of law that this trial court, as a gatekeeper, must determine. It is not a triable issue of fact for a jury to determine. Jury instructions do not exist that guide jurors how to interpret legislative intent of terms not defined by statute, or to assess whether the elements of an out-of-state offense are substantially similar to the elements of numerous offenses contained in Missouri's criminal code. Whether an offense meets the legal definition of "sexually violent offense" is a question of law.

The Court's examination of Missouri statutes, Colorado statutes, Missouri case law, and the court record of Respondent's Colorado conviction leads to the conclusion that the Colorado offense of attempted sexual assault of a child, to which Respondent pled guilty, is not substantially similar to Missouri's offense of attempted statutory sodomy in the first degree and does not fall within the definition under current statutes for any of the felonies that are listed as offensives that would qualify Respondent to be civilly committed under the provisions of Section 632.480.

In addition, an attempt to commit sexual abuse of a child is not substantially similar to the completed offense of child molestation in the fourth degree. The Colorado offense is more analogous to attempted child molestation in the fourth degree or attempted statutory sodomy in the second degree, which are not sexually violent offenses as defined by the statute.

Therefore, even construing the statute broadly, Respondent's conviction should not be considered as a qualifying felony for purposes of the statute. The Court finds as a matter of law that

Respondent's conviction for attempted sexual abuse of a child is not a qualifying offense pursuant to the statute and, therefore, the Court finds that there is not probable cause to hold Respondent or to allow this petition to proceed.

WHERFORE, for the above stated reasons, this Court DISMISSES the petition against Respondent, and ORDERS that Respondent be released from custody and from further proceedings for his civil commitment as a "sexually violent predator."

SO ORDERED:

[redacted] Date: 8-17-17

Hon. Joseph L. Green
Deputy Probate Judge
21st Judicial Circuit

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