STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
No. 21-CV-1206

JOHN LOCKWOOD,
Petitioner,

v.

JAMES BAKER, Interim Commission of the Vermont Department of Corrections,
Respondent.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

After pleading guilty to one count of lewd and lascivious conduct with a child and three counts of lewd and lascivious conduct in 2020, Petitioner John Lockwood received an agreed upon sentence of 2 to 30 years to serve. Once incarcerated, the Department of Corrections designated him a "high-risk sex offender." High-risk sex offenders, while so designated, are ineligible for early release until serving 70% of their sentence maximum.[1] 28 V.S.A. § 204b. Mr. Lockwood challenged that designation administratively without success and has sought review here. See 13 V.S.A. § 5411b(b). He argues that the designation is not properly predicated on a specific "threshold" finding and generally is not supported by the record. Mr. Lockwood and the State have filed cross-motions for summary judgment addressing the matter.

To properly understand the issues on appeal, it is first necessary to understand the considerable breadth of the DOC's discretion when making high-risk determinations and the nature of the court's review under 13 V.S.A. § 5411b(b).

The DOC is directed to designate appropriate offenders convicted of certain predicate offenses as high-risk by 13 V.S.A. § 5411b(a): "The Department of Corrections shall evaluate a sex offender for the purpose of determining whether the offender is 'high-risk' as defined in section 5401 of this title. The designation of high-risk under this section is for the purpose of identifying an offender as one who should be subject to increased public access to his or her status as a sex offender and related information, including Internet access." As indicated above, the designation (subject to reconsideration every two years) also subjects the offender to the 70% Rule. Under 13 V.S.A. § 5401(16), "'Risk' means the degree of dangerousness that a sex offender poses to others. 'High-risk' means a high degree of dangerousness that a sex offender poses to others. Dangerousness includes the probability of a sexual reoffense."

So, the DOC makes the determination, risk refers to dangerousness (which can

[1] One so designated may petition the DOC every two years to revisit the matter. Code of Vt. Rules 13-30-025 § 4.6.

refer, among other things, to the probability of sexual reoffense), and high-risk means a lot of risk of dangerousness. Relevant statutes provide no other standards as to how the DOC ought to make such a determination. It bears noting, however, that "risk" generally refers to the chance of something (usually something bad) happening in the future. See Black's Law Dictionary, risk (7th ed. 1999); Merriam-Webster Dictionary, risk (online). A high-risk determination therefore necessarily is a prediction as to the odds of the offender doing something dangerous in the future.

The legislature left to the DOC's discretion how such a determination might be made by generally directing it to "adopt rules for the administration of this section." 13 V.S.A. § 5411b(c). Though the statutory definitions of risk and high-risk provide some guidance to the DOC, this is an extremely broad, though not entirely standardless, delegation of authority to an agency.

In response, the DOC promulgated its High-Risk Rule, available at Code of Vt. Rules 13-30-025.[2] The regulatory definitions of risk and high-risk are borrowed from the statute and are not otherwise explicitly refined or explicated. High-Risk Rules 3.5, 3.6. Otherwise, the Rule creates a process, and includes some guidance as to how determinations are made, but it does little in the way of establishing any concrete standards by which to assess dangerousness.

For incarcerated offenders, DOC staff make an initial referral to the Sex Offender Review Committee. High-Risk Rule 4.1.

> In making this initial referral to the Committee, DOC staff shall utilize current objective risk assessment instruments to identify or exclude a sex offender as high risk. DOC staff may also consider other appropriate factors relevant to the offender's risk to re-offend.
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> "Other appropriate factors" *may include, but are not limited to*, [the] offender's age, physical conditions (such as sickness, age, etc.)[,] pattern of sexual offending, nature of sex offense(s), pattern of cooperation while under correctional supervision and recent behavior, recent threats, or expressions of intent to commit additional offenses.

High-Risk Rules 4.1.1–4.1.2 (emphasis added). While the initial referral depends on an assessment of "objective risk assessment instruments," there are no express standards as to the instruments used or the results they produce. The "other appropriate factors" list gives an idea of what factors are appropriate to consider, but it is a non-exclusive list, giving the referrer discretion to apply other appropriate factors that are not described. There are no explicit standards as to how to evaluate such factors.

Some additional guidance is available in the DOC's Sex Offender Registry Requirements Manual, which is an internal guidance document, not an enforceable APA-adopted rule. The Manual reflects that referrals will be made for all qualifying offenders

[2] For ease of reference, the court will refer to the DOC's APA-adopted "Administrative Rule on Determination of High Risk and Failure to Comply with Treatment for Purposes of Sex Offender Internet Registry" as the High-Risk Rule.

with a "Static-99R score of 6 or above, or who have a conviction for kidnapping, a conviction, past or present for a crime in which the offender used a deadly weapon, engaged in sexual sadism, or caused serious bodily harm to the victim." Manual at 27. However, a referral *may* be made regardless of the Static-99 score "due to the nature of other risk factors, such as a pattern of predatory sexual offending, continued failure to cooperate with DOC supervision, or recent threats of intent to commit additional offenses." *Id.* Staff also have discretion to *not* make a referral regardless of Static-99 score if other factors point toward diminished risk. *Id.*

Upon receiving the referral, the Committee spontaneously determines whether "by a preponderance of the evidence that the offender poses a high degree of dangerousness to others." High-Risk Rule 4.4.1. Nothing in the Rule explicitly constrains the Committee's discretion except to the extent that one presumes that it will be informed by the same risk assessment instruments and appropriateness factors applicable to a referral decision. Nothing indicates that the Committee is in any way bound by the staff decision to make the referral or its apparent rationale.

If a designated offender appeals, the Committee conducts a hearing at which the offender or his attorney may present evidence and otherwise be heard. High-Risk Rule 4.5.2. The implication is that the hearing is an opportunity for offender to persuade the Committee to change its mind, but it is not an adversarial proceeding in any classic sense; no one appears on behalf of the DOC or in favor of the designation and in opposition to the offender, and the Committee is not a neutral decisionmaker. Following that hearing, the Committee issues a written decision, High-Risk Rule 4.5.3, and the offender's administrative remedies are exhausted, High-Risk Rule 4.7.

While the High-Risk Rule thus gives some guidance as to what the DOC contemplates as high-risk, by providing few and vague standards as to its assessment, the Rule ultimately gives staff broad discretion over whether to make the referral and the Committee broad discretion over whether to make the designation.

An ordinary layperson has some sense of what dangerousness means. But no ordinary layperson knows how to properly use corrections industry "objective risk assessment instruments," much less convert their results, after consideration of the evidence and other factors, into a reasonable but inherently subjective determination of high-risk as envisioned by 13 V.S.A. § 5411b(a) and the High-Risk Rule, particularly without expert guidance.

The Committee, on the other hand, possesses that expertise itself. The DOC Commissioner selects the members of the Committee, and they are "composed of at least the Director of the DOC sex offender treatment program, the DOC Program Executive, a member from the Vermont Criminal Information Center, the Director of DOC or other Victim Service's and a Vermont Sex Offender Treatment Provider." High-Risk Rules 5–5.1. That is no list of laypersons.

If the offender is dissatisfied with the Committee's decision, he may appeal to the Superior Court. 13 V.S.A. § 5411b(b). The statute describes the review as "appeal de novo" and provides no further standards. Appeal de novo essentially is a synonym for review de novo. Black's Law Dictionary, appeal de novo (11th ed. 2019). Both terms contemplate that

the reviewing court will not conduct a new evidentiary proceeding and generally will not defer to the lower tribunal. See *State v. Madison*, 163 Vt. 360, 368–70 (1995).

Although the expression de novo connotes some form of generally non-deferential review, deference remains appropriate when reviewing administrative matters within agency expertise.[3] See *In re ANR Permits in Lowell Mountain Wind Project*, 2014 VT 50, ¶¶ 15–16, 196 Vt. 467; *Mollica v. Division of Property Valuation and Review*, 2008 VT 60, ¶ 8, 184 Vt. 83. A prominent administrative law treatise, referring to de novo review as "agreement review," amplifies this point as follows:

> Under agreement review of facts, the administrative record becomes an object of attack along with the relevant final decision. The challenger, like any other plaintiff, must show by a preponderance in the judicial record that the agency decision is wrong. In doing so, the challenger may introduce into the judicial record other evidence or request new or different inferences from the administrative record. Usually, however, . . . additional evidence is not taken in review of administrative decisions. The term "de novo review" tells the court to do agreement review of facts on a judicial record which is almost always the original administrative record.
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> The principles surrounding agreement or de novo review moderate it through the concepts of deference and presumption of regularity. Thus, even where agreement review is prescribed, the law requires the reviewing court to give deference or respect to agency decisionmaking. The law also requires the court to start from the presumption that the agency made the correct decision. Thus, although the other review instructions bind a court to the agency's judgment, agreement review, while not going that far, still demands that the court give the agency's decision due respect and presumption of regularity.

3 Admin. L. & Prac. § 9:22 (3d ed.) (footnotes omitted). The court bears these principles in mind as it considers the parties' arguments.

The charges to which Mr. Lockwood pled guilty stemmed from the egregious and frequent sexual abuse of his wife's granddaughter while he was acting as her caretaker for approximately 5 years starting when she was only 5 years old. Upon being incarcerated, he was referred to the Committee, and the Committee designated him a high-risk sex offender. He challenged that designation and, after a hearing, the Committee issued a written decision maintaining the designation.

The Committee indicates that in making the decision, it relied on two police affidavits, the court-ordered psychosexual evaluation, the presentence investigation report, and a "record check," presumably referring to criminal records, as well as "all information used during the initial designation meeting." Its briefly stated rationale for maintaining the designation is as follows:

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[3] Mr. Lockwood cites *Madison* for the proposition that de novo review does not contemplate any sort of deference under any circumstances. *Madison*, however, addressed single-justice review of a trial court's bail decision only. It did not address deference to an agency, the issue here, which is an entirely different matter.

> The committee agreed Mr. Lockwood repeatedly threatens to hurt and kill the victim and, on several occasions, displays different weapons in the context of his offending. The victim described seeing guns and knives Mr. Lockwood put in special places in the rooms he committed the abuse in. She goes on to describe one gun he showed her specifically in a small box. She went on to describe Mr. Lockwood had knives too, "sometimes he had them on his belt". Mr. Lockwood told the victim that she was building her own coffin. When he found out she disclosed the abuse.

The Committee agreed with Mr. Lockwood that he does not "meet the definition of having a pattern of predatory sexual offending," but this had no impact on the designation.

Mr. Lockwood raises two principal arguments on appeal: (1) there was no evidence of use of a deadly weapon, and (2) the record generally fails to demonstrate any high degree of dangerousness.

Use of a deadly weapon

The DOC's Sex Offender Registry Requirements Manual at 33 says that a conviction for a past or present crime "in which the offender used a deadly weapon" is a factor that might warrant a referral to the Committee regardless of Static-99 score and that appears in a worksheet used for referrals as well. Mr. Lockwood argues that this is a threshold finding that the Committee must make, use of a deadly weapon must be an essential element of the crime, and there is no evidence of use of a deadly weapon in this case, much less a conviction for which it is an essential element.

Use of a deadly weapon is not a threshold finding that the Committee had to make. It is one factor that staff might rely upon in making a referral to the Committee regardless of Static-99R score. It thus is a factor that the Committee might consider in making a designation, but it is not some required threshold finding without which there could be no designation. Moreover, nothing in the manual or elsewhere says anything about the use of a weapon being an essential element of the crime. The relevant inquiry is into circumstances that might reflect dangerousness, not a legalistic determination of the elements of the offender's criminal convictions.

Moreover, the record is replete with the evidence that Mr. Lockwood used displays of deadly weapons in a manner that could only have terrified and intimidated a small child being repeatedly sexually abused by an otherwise grandfatherly caretaker. That there is no evidence that Mr. Lockwood more concretely attempted to physically wound the victim with those weapons is beside the point.

The record generally

Otherwise, the court is not persuaded that the record is insufficient to show a high degree of dangerousness. Mr. Lockwood's Static-99R score and his psychosexual evaluation overall appear to put him somewhere in the range of a moderate risk to reoffend, and his advanced age presumably points toward diminished risk, though that likely already is reflected in the score and evaluation.

However, his PSI reflects that he scored high on other risk assessment instruments, and that he has a previous conviction for felony sexual assault that consisted of intercourse with a child victim considered to be a stranger. He also has a conviction for being a felon in possession of a firearm, among others. According to his PSI: "Based upon the risk assessment scores and criminal history, Mr. Lockwood would likely be referred to the DOC High Risk Designation Committee for review."

His psychosexual evaluation reflects that he "takes some responsibility for his offense behavior, but also clearly blames the victim." Moreover, well *before* the events of this case, he had participated in treatment for individuals who have sexually offended. It apparently had little impact on him. "[H]is sexual risk management is . . . considered poor." Also, his "emotion management skills appear to be poorly developed."

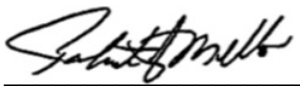
Additionally, one explicit appropriateness factor is the nature of the offense. The conduct giving rise to Mr. Lockwood's convictions was extreme and egregious. To briefly summarize, as described in the PSI, it includes "rape by vaginal penetration with Mr. Lockwood's penis, tongue, and foreign objects." Behaviors included "forcing the victim to touch Mr. Lockwood's penis and use of a vibrator on the victim by touching the child's genital opening or vagina while Mr. Lockwood masturbated." "Threats and inferences of violence were tools used to gain compliance." "Mr. Lockwood gained the assistance of his wife . . . in his offense pattern over the course of his crimes." This conduct occurred over a 5-year period to a young child between the ages of 5 and 10. The evidence indicates that it occurred frequently over that period.

The court has reviewed the entire record in detail. On balance, it is not persuaded that the Committee got it wrong and sees no reason to substitute its own judgment for that of the Committee.

Order

For the foregoing reasons, Mr. Lockwood's motion for summary judgment is denied, and the State's is granted. The State shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 28th day of October, 2022.



Robert A. Mello
Superior Judge