

VERMONT SUPERIOR COURT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 374-7-11 Wrcv

Daniel Adams, Jr.
Plaintiff

v.

Andrew Pallito, Comm.
Defendant

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This is an appeal under V.R.C.P. 75 of a high-risk sex offender designation made by the Department of Corrections in 2010 concerning Daniel Adams, Jr. The Department originally determined Mr. Adams to be a high-risk on July 23, 2010. Mr. Adams appealed that determination to the Sex Offender Review Committee which affirmed the determination of "high-risk" following a hearing on appeal in a written decision dated August 22, 2011. This appeal followed. A hearing was held on this matter on April 19, 2013 and continued on June 28, 2013. The parties were given until July 31 to submit proposed requests and conclusions. An extension until August 6 was provided. The Department filed its proposed requests on August 7. No submission was received from Plaintiff. Mr. Adams was present at the hearing and represented by his attorney, Patricia Lancaster, Esq. Mr. Pallito (Department of Corrections) was represented by David McLean, Esq. Based upon the evidence at hearing, the Court makes the following findings, conclusions, and order:

Scope and Standard of Review

Title 13, V.S.A. § 5411b requires the Department of Corrections to evaluate sex offenders for the purpose of determining whether the offender is "high risk". "After notice and an opportunity to be heard, a sex offender who is designated as high-risk shall have the right to appeal de novo to the superior court in accordance with Rule 75 of the Vermont Rules of Civil Procedure." *Id.*, § 5411b(b). At the hearing an issue arose over the meaning of that standard of review.

In *State v. Madison*, the Vermont Supreme Court explained that there are two types of "de novo" review, and that the two types of review are distinguished by the use of different terms of art: (1) the terms "de novo," "de novo review," and "de novo appeal" mean that the court is to review the existing administrative record and reach its own independent conclusion as to whether it agrees with the decision that was made by the agency; and (2) the terms "de novo trial" and "de novo hearing" means that the court must hold a new evidentiary hearing and decide the issue anew "as though no action whatever had been held prior thereto." 163 Vt. 360, 370-71 (1995)

FILED
AUG - 9 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT

(quoting *Chioffi v. Winooski Zoning Board*, 151 Vt. 9, 11 n.2 (1989)). Both of these types of review are explained in more detail, as follows.

De Novo Review

The terms “de novo,” “de novo review,” and “de novo appeal” tell the reviewing court to conduct a review of the entire record that was created before the administrative agency and determine whether or not the court agrees with the decision made below. In order to affirm, the court must agree with the factual findings of the agency and with the conclusion reached by the agency. 3 Koch, Administrative Law and Practice § 9:22 (3d ed. Mar. 2013). In other words, the issue in a “de novo” review is not whether the administrative agency made a reasonable decision, but rather whether it made the correct one. *Id.*

The challenger in a “de novo review” bears the burden of establishing by a preponderance of the evidence that the administrative decision was wrong. If the court is persuaded by a preponderance of the evidence that the administrative decision was wrong, the court does not agree with the administrative decision, and should substitute its own judgment instead. *Id.*

The challenger may meet the burden of proof by challenging the existing administrative record or by requesting new or different inferences from the existing administrative record. Or, if the challenger demonstrates good cause to do so, the challenger may also introduce new evidence in the judicial proceeding that tends in some form to establish that the administrative decision was wrong. *Id.* Among the permissible uses of new evidence would be when the new evidence demonstrates that the agency relied on extra-record materials when making its decision, or when the new evidence tends to shed light upon whether the agency considered all of the relevant factors in making its decision. 3 Koch, Administrative Law and Practice § 8:27[1] (3d ed. Mar. 2013).

It must be emphasized that the purpose of the new evidence is to supplement the existing record. A reviewing judge ordinarily has discretion to require that parties show good cause before they will be permitted to supplement the record with new evidence. *State v. Madison*, 163 Vt. 360, 372 (1995); 3 Koch, Administrative Law and Practice § 8:27[5] (3d ed. Mar. 2013). A judge should not permit the possibility of supplemental evidence to transform a “de novo review” into a “de novo trial.” 3 Koch, Administrative Law and Practice § 8:27[5] (3d ed. Mar. 2013). In “de novo” reviews, it is not necessary or even permissible to hold “a second full-blown evidentiary hearing.” *Madison*, 163 Vt. at 370. A “de novo” review is meant to be “an independent determination based [primarily] on the information compiled by the agency.” *Id.*

In the end, therefore, the terms “de novo,” “de novo review,” and “de novo appeal” tell the reviewing court to reappraise the evidence in the record and reach its own independent conclusion on the matter. *Madison*, 163 Vt. at 372.

De Novo Trial

FILED

AUG - 9 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT

The terms “de novo trial” and “de novo hearing,” on the other hand, tell the reviewing court to hold a new evidentiary hearing in which “the case is heard as though no action whatever had been held prior thereto.” *Madison*, 163 Vt. at 370–71. The allocation of the burden of proof is the same as it would have been in the hearing below. In essence, there was no hearing below. The “de novo hearing” is an entirely new determination of the matter. 3 Koch, Administrative Law and Practice § 9:22 (3d ed. Mar. 2013).

Title 13 V.S.A. § 5411b(b) provides for an appeal de novo, thus the challenger, Mr. Adams, bears the burden on appeal. The Superior Court Civil Division must reach its decision based upon review of the administrative record, and the introduction of new evidence is only narrowly allowed. In the instant case, the Court allowed testimony from Dr. Thomas Powell which had not been introduced below in supplementation of the administrative record because his testimony was directed at whether the Department of Corrections considered all of the relevant factors in reaching its conclusion that Daniel Adams, Jr. was a high-risk sex offender.

Findings of Fact in Supplementation to Administrative Record

Dr. Thomas Powell is a forensic psychologist and former employee of the Department of Corrections. At present he has a clinical and forensic consulting practice. He has reviewed the Department’s file concerning its classification of Mr. Adams and disagrees with the determination of “high risk”.

In particular, Dr. Powell offered several opinions on how a current review of Mr. Adams classification should be scored differently than was done in the instant appeal. For example, Mr. Adams current score on the Static 99-R test administered by the Department would be lower now due to Mr. Adams being older now than when the test was previously given. The issue before the Court, however, is not what Mr. Adams would score on tests administered now or their effect on a current classification. The issue is whether the classification made by the Department was correct when made on July 23, 2010. Therefore, Dr. Powell’s opinions about how Mr. Adams would fare under a classification conducted at present are not for the Court’s consideration here.

Dr. Powell believes the Department should have administered the so-called SOTIPS (Sex Offender Treatment Intervention and Progress Scale) evaluation in 2010 as part of its classification consideration. SOTIPS is an evaluation tool which considers risk-relevant factors in a dynamic way as opposed to the static factors used in other evaluations such as the Static 99 and VASOR. SOTIPS evaluations that were conducted after the designation by the Department of “high risk” support a lesser classification. The Court has considered Dr. Powell’s opinion regarding the absence of a SOTIPS evaluation for the purpose of whether the Department’s classification considered all the relevant factors and not for the post-classification result of the SOTIPS.

Dr. Powell also believes the Department could have made a more accurate assessment of risk by combining the use of historical data regarding Mr. Adams with changes that either increase or reduce risk, such as treatment and supervision (dynamic factors). Dr. Powell feels Mr. Adam’s treatment record was given no consideration by the Department in its classification. Mr. Adams has been an active participant in the Department’s sex offender treatment program

FILED

AUG - 9 2013

(VTPSA) with significant benefit to him. Even using the historical data alone the results suggest Mr. Adams presents as a low, or at most, moderate risk. Dr. Powell believes the exclusion of Mr. Adams treatment history has resulted in an entirely subjective assessment of Mr. Adams' risk based, presumably, on his grooming behavior offense pattern at the time of his offenses. As such, Dr. Powell believes the "high-risk" designation by the Department is an overstatement of Mr. Adam's actual risk.

Dr. Powell feels the "override" by the Department of Corrections here based upon a "pattern of predatory sexual offending" lacks precision in the defining of predatory conduct. While Dr. Powell may be correct from an academic point of view that a more precise definition of "predatory" behavior could likely be constructed, it cannot be gainsaid that the conduct undertaken by Mr. Adams over a period of many years, with many victims, all of whom had been selected and groomed by him, as discussed more fully below, would meet even a more narrowly constructed definition of "predatory" behavior.

Administrative Record

Pursuant to 13 V.S.A. § 5411b(a), the Department of Corrections evaluated Daniel Adams for purposes of determining whether he was a "high-risk" sex offender. "Risk" is defined as 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 sexual re-offense. 13 V.S.A. § 5401(16).

In connection with its requirement to conduct evaluations, the Department of Corrections has adopted an administrative directive, #255.01, establishing procedures for "high-risk" designations. The administrative directive provides that the Department may recommend that an offender who scores below 6 on the Static-99R may still be considered for "high-risk" designation due to other risk factors. Included in these additional risk factors is a pattern of predatory sexual offending. Administrative Directive #255.01(11)(a)(iv).

The administrative record here consisted of a record check for Mr. Adams, the Static-99 Scoring Sheet, affidavits concerning the current sexual offenses, a release sensitive notification (RSN) document, and various newspaper articles concerning Mr. Adams' offenses.

The Administrative Record shows that Mr. Adams was convicted of three counts of aggravated sexual assault on a child, one count of lewd and lascivious conduct with a child and one count of sexual assault on a minor. He received a sentence of 8-50 years to serve. The offenses involved victims between the ages of 5-14. The offenses involved four male victims and one female, all of whom were molested several times, some over a period of several years. The offenses continued after Mr. Adams was married and living with his wife. Some of the abuse occurred while Mr. Adams' wife and children were in a different part of the same house.

Mr. Adams spent many hours grooming the victims and befriending their parents, who were members of families visiting the campground owned by Mr. Adams' family, which he ran. He would select families that appeared to be having difficulties and would offer to help them. Once trust had been established, Mr. Adams would begin abusing the victims. The abuse

FILED

AUG - 9 2013

included the viewing of pornography, fondling, digital penetration, and oral and anal sex. This included the victims performing these acts upon Mr. Adams and Mr. Adams performing these acts upon the victims. His offending behavior began in 1995 and ended upon his arrest in 2003.

The Static-99R score for Mr. Adams was 2, placing him in the moderate-low range for sexual reoffending. At the time of his “high-risk” determination, Mr. Adams was compliant with his case plan, had attended educational programs, was completing the VTPSA program, and had obtained employment within the correctional facility.

The administrative record also included several newspaper accounts of Mr. Adams’ sentencing. These articles included one in which the sentencing judge was quoted as calling Mr. Adams a “predator”. “Predatory” is defined, in part, in the sex offender registry statutes as an act directed at person with whom a relationship has been established or promoted for the primary purpose of victimization. 13 V.S.A. § 5401(7).

The administrative record establishes that Mr. Adams’ designation as “high-risk” was as a result of an “override” by the Department. In other words, his risk factors based upon the objective data including his prior record and Static-99R scoring did not place him in a the “high-risk” category. The Department increased his risk classification based solely on his pattern of predatory sexual offending as described in the investigating officer’s affidavit and the RSN document.

The administrative record also shows the Department was aware of the progress Mr. Adams had made in his sex offender education. The Department was concerned that Mr. Adams had not been supervised in the community at the time he challenged his “high-risk” designation. At the point of challenge, all of the supervision of Mr. Adams had occurred while he remained in Department custody.

Discussion

The procedure for review of a “high-risk” designation by the Department of Corrections is a curious one. V.R.C.P. 74 provides the mechanism for appeals of a state department, such as Corrections, where any party is entitled by statute to seek review or appeal. The “high-risk” sex offender statute, 13 V.S.A. § 5411b, specifically provides for the right of an appeal de novo to the superior court. However, although the right is conferred by statute and thus should fall under V.R.C.P. 74, the statute provides that the appeal is “in accordance with Rule 75 of the Vermont Rules of Civil Procedure.” Rule 75 provides a mechanism for appeals of government action where an appeal is not available under V.R.C.P. 74. Thus application of Rules 74 and 75 as intended would suggest that the review here be under V.R.C.P. 74 not V.R.C.P. 75.

This intermingling of procedural rules can lead to confusion. See, e.g. *Rheaume v. Pallito*, 2011 VT 72, where the lower Court denied the appeal of designation brought under Rule 75 under the cases affording the Commissioner programming and classification discretion and applying the availability of a Rule 75 remedy by comparison to the historical extraordinary writs.

FILED

AUG -9 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT

The undisputed record in this case shows a sex offender with five convictions. His offenses involved five child victims between the ages of 8-14. Each victim was abused on multiple occasions. Mr. Adams used his position in the camp he managed to befriend the children's parents and the children, earn a degree of trust, and then began grooming the children for abuse. The abuse he perpetrated on the children took many forms, fondling, digital penetration, and oral and anal sex.

Mr. Adams has taken responsibility for his conduct. The record shows he has done well while in custody. He has gotten a job, engaged in education, and has been fully engaged in his sex offender treatment program. These actions are commendable.

The results of Mr. Adams Static-99R place him in a low-moderate risk category for sexual reoffending. There were other measure which the Department could have considered in its classification of Mr. Adams, including a SOTIPS evaluation, which would have brought more dynamic factors, such as Mr. Adams performance in programming, more clearly into consideration in his assessment. This may not have changed the outcome of the Department's determination in Mr. Adams' case, but it certainly would have improved the quality of the outcome, a point aptly made by Dr. Powell.

Even so, the consideration of additional data would have served merely to reinforce what the Department already knew, namely, that Mr. Adams statistically did not pose a high risk to reoffend. Were testing the only consideration the results of the testing would dictate the outcome. However, the Department's administrative directive provides them the authority to override the results of the Static-99R based upon certain factors, including a pattern of predatory sexual offending.

While there may be room among experts to quibble over whether the statutory definition of "predatory" conduct is as precise as some might like, under any conceivable definition Mr. Adams conduct was predatory. His abuse followed calculated efforts on his part to identify and befriend parents and children who were vulnerable, using his position in the summer camp to do so. His abuse followed that same grooming pattern with multiple victims over multiple years. His abuse of children took place over an eight year period with five different victims. His abuse of each victim occurred on multiple occasions. His abuse involved fondling, digital penetration, and oral and anal sex. In short, his abuse was calculated, widespread, pervasive, and lengthy.

The Department's sex offender treatment program is in place with the hope that treatment will be successful in reducing re-offense. The success of treatment with each offender should be given consideration by the Department at some point in the determination of risk. In this case, however, it given Mr. Adams' abuse history, it was not unreasonable for the Department to override the Static-99R result in an upward direction at least until the Department had the opportunity to monitor Mr. Adams in the community for a period of time. Community supervision will necessarily be less strict than what he has received as an inmate and this, when viewed with Mr. Adams' offending history, makes the "high-risk" designation a reasonable and proper one at the time it was made.

FILED


AUG - 9 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT


ORDER

After consideration of the administrative record, and the additional evidence which the Court has permitted, the Court agrees with the findings and determination made by the Department concerning Mr. Adams' designation as a "high-risk" sex offender.

Dated at Woodstock, VT this 8th day of August, 2013.



Harold E. Eaton, Jr.
Civil Division Judge



Jack W. Anderson
Assistant Judge

FILED

AUG - 9 2013

VERMONT SUPERIOR COURT
WINDSOR UNIT