Cite as 2009 Ark. App. 668

ARKANSAS COURT OF APPEALS

DIVISION II
No. CA09-196

Opinion Delivered October 7, 2009

TIMOTHY GWALTNEY
APPELLANT

V.

SEX OFFENDER ASSESSMENT COMMITTEE
APPELLEE

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT, [NO. CV-07-15662]

HONORABLE TIMOTHY DAVIS FOX, JUDGE

AFFIRMED

WAYMOND M. BROWN, Judge

Appellant Timothy Gwaltney pled guilty to carnal abuse in the third degree on July 1, 1998. He received a suspended imposition of sentence of thirty-six (36) months. He now appeals his Level 2 community notification risk assessment arguing that the Sex Offender Assessment Committee ("SOAC") abused its discretion and arbitrarily and capriciously departed from the actuarial tools results to increase his community notification level from Level 1 to Level 2; that SOAC erred in assigning him a Level 2 community notification because there was not substantial or sufficient evidence to support the assignment of the level as required; and that the trial court erred in denying his request to decrease his community notification level. We affirm.

Appellant was assessed by the Sex Offender Screening and Risk Assessment program ("SOSRA") of the Arkansas Department of Correction pursuant to the Sex Offender Registration Act of 1997 ("the Act"). *See* Ark. Code Ann. §§ 12-12-901 to -920 (Repl. 2003 and Supp. 2009). As part of the assessment, appellant was interviewed by a SOSRA interviewer on July 12, 2007, pursuant to regulations promulgated by SOAC. *See* 004-00-002 Ark. Code R. § 18 (Weil 2007). Based, in part, on that interview, SOSRA determined that appellant's community notification risk assessment should be Level 2 and notified him of that decision in a letter dated August 22, 2007. Appellant administratively appealed the SOSRA assessment to SOAC. Appellant argued that the assessment was not supported by substantial evidence and that the assessment failed to take into consideration additional relevant documents and information. Appellant submitted additional information, consisting of emails from his wife and two step-daughters, to SOAC for its review. After receiving the additional documentation, as well as the SOSRA file with appellant's interview, SOAC upheld the Level 2 assessment.

Appellant next sought judicial review of SOAC's decision in the Pulaski County Circuit Court, which denied and dismissed his complaint. He now appeals the SOAC decision. In sum, appellant argues that his Level 2 assessment should be invalidated because his assessment was not supported by substantial evidence and the assessment by SOAC was arbitrary and capricious. Appellant also contends there was error on the part of the circuit court.

We note that judicial review of the findings by the Committee is governed by the Arkansas Administrative Procedure Act. *See* Ark. Code Ann. § 12-12-922(b)(7)(A)(ii). In such cases, the appellate court's review is directed, not toward the circuit court, but toward the decision of the agency, because administrative agencies are better equipped by specialization, insight through experience, and more flexible procedures than courts, to determine and analyze legal issues affecting their agencies. *See Parkman v. Sex Offender Screening and Risk Assessment Comm.*, 2009 Ark. 205, 307 S.W.3d 6 (quoting *Collie v. Arkansas State Med. Bd.*, 370 Ark. 180, 258 S.W.3d 367 (2007)). Our review of administrative decisions is limited in scope. *See id.* When reviewing such decisions, we uphold them if they are supported by substantial evidence and are not arbitrary, capricious, or characterized by an abuse of discretion. *See id.*

According to the Act, persons convicted of certain enumerated offenses must register as sex offenders. Ark. Code Ann. § 12-12-905 (Supp. 2009). The Act also directed SOAC to promulgate regulations establishing guidelines and procedures for the disclosure of relevant and necessary information regarding sex offenders to the public. *Id.* § 12-12-913(c)(1)(A). These regulations must identify factors relevant to an offender's future dangerousness and likelihood of reoffense or threat to the community. *Id.* § 12-12-913(c)(2)(A). The regulations are required to set forth the extent of information to be made public, depending on the offender's level of dangerousness, pattern of offending behavior, and the extent to which the information will enhance public safety. *Id.* § 12-12-913(c)(2)(B). As part of this process, the

Act further requires that SOAC conduct an individual assessment of each offender's risk to the public. *Id.* § 12-12-917(b).

Under the regulations promulgated by SOAC, SOSRA examiners perform the initial risk assessment, as was done with appellant. 004-00-002 Ark. Code R. § 11 (Weil 2007). They are required to consider, but are not limited to, the following information: (1) the offender's criminal history; (2) the interview with the offender conducted by a SOSRA staff member; (3) a polygraph examination or Voice Stress Analysis, if SOSRA believes they otherwise lack adequate information to assess the offender; (4) a review of any available, relevant mental health records; (5) psychological testing; (6) actuarial instruments designed to assess individuals convicted of sexual offenses; (7) other information relevant to the offender's offense history and/or pattern. *Id.* § 12. Based on this assessment, an examiner determines the appropriate level of risk. *Id.* §§ 14-15. The assessed level of risk determines the amount of information about the offender that is made available to the public. *Id.* § 24.

An offender can challenge his initial assessed risk level as determined by the SOSRA examiner by submitting a written request for administrative review to SOAC. Ark. Code Ann. § 12-12-922(b)(1)(A) (Supp. 2009). Upon request for administrative review, a member of SOAC must conduct the review and respond to the offender within thirty days. *Id.* § 12-12-922(b)(6)(A). The SOAC reviewer can recommend to the full SOAC to set aside the risk level assigned by SOSRA if: (1) it is not supported by substantial evidence, (2) the rules and procedures were not properly followed, or (3) there is new information bearing on the offender's risk to the community. *Id.* § 12-12-922(b)(3)(B). A vote by the full SOAC is

required to change the initial assessment by SOSRA. 004-00-002 Ark. Code R. § 30 (Weil 2007). Following the administrative review by SOAC, an offender may petition for judicial review pursuant to the Arkansas Administrative Procedure Act. Ark. Code Ann. § 12-12-922(b)(7)(A)(ii) (Supp. 2009).

According to appellant, because the actuarial tools used placed his level of re-offending as low, the evidence does not support the Level 2 assessment. Appellant contends that his offense was purely statutory and that his criminal history shows no pattern of illegal sexual behavior. Appellant's arguments are without merit.

Appellant's score on actuarial instruments designed to assess individuals convicted of sexual offenses is one of a number of things an examiner should consider when assigning a community-notification level. 004-00-002 Ark. Code R. § 12 (Weil 2007). Examiners are also allowed to consider other information relevant to the offender's offense history and/or pattern. *Id.*

The SOAC reviewed appellant's case and on October 15, 2007, it voted to let appellant's notification level remain at Level 2. Pursuant to the *Sex Offender Guidelines and Procedures* (Revised Jun. 2004), a risk level of two typically includes offenders who "have a history of sexual offending where notification inside the home is insufficient." *See id.* Notification for offenders in this category extends to "the offender's known victim preference and those likely to come into contact with the offender." *See id.*

The "Background Information" section of appellant's Risk Assessment and Offender Profile Report provided that "Timothy Gwaltney is a 45-year-old Caucasian male. He was

convicted of Carnal Abuse-3rd Degree on 7/1/98. Documentation is very limited but indicates the offender engaged in sexual contact with an individual under age 16."

Additionally, the "Summary of Interview and other Findings" section provided as follows:

> This offender was interviewed on 7/12/07. His interviewer reported he admitted he had sexual contact with his victim "after she asked" him to do so. He described her as a 14-year-old female acquaintance he knew to be sexually active. He stated he had been drinking heavily prior to this incident. He added that during this time he was attracted to 15 to 18 year old females but did not pursue them. He denied having such an attraction currently and denied having other minor victims. He reported he was convicted in 2001 for Interfering with Government Business, which he said was reduced from Failure to Register. No further information is available to SOSRA on this offense and it is not listed on ACIC.

The "Factors Justifying the Community's Need to Know" section provided that

> [d]ocumentation indicates this offender had sexual contact with a minor female outside his home, indicating the need to know necessarily extends to minors and custodians of minors likely to have contact with him. He presented their contact as consensual, however, there is no statement from his victim to support or refute his assertion. He stated that he is not willing to participate in sex offender treatment.

Appellant was given a community-impact risk of two. The "Special Considerations for Community Notification" section included the following:

> This offender's use/abuse of drugs and/or alcohol may increase the risk he poses toward others.
>
> Substance intoxication can impair his judgment and decrease his impulse control.
>
> Unsupervised contact with minors is a high-risk situation for this offender. Adults supervising minors who might have contact with the offender should be aware of his status as a sexual offender.
>
> This offender's lack of cooperation with supervision (registering his address with law enforcement, complying with state laws regarding residency restrictions, Probation/Parole requirements, etc.) can signal an increase in the risk he poses toward others.

In its findings of fact and conclusions of law upon administrative review, SOAC found that the documents it received pursuant to Ark. Code Ann. § 12-12-917(c) reflected:

> a) Petitioner has one (1) known victim;
>
> b) The age of the victim is not known, except to say that the person was under the age of sixteen (16).

The interview conducted on July 12, 2007, revealed:

> a) Petitioner admitted that he had sexual intercourse with a fourteen (14) year old female;
>
> b) Petitioner admitted he had sexual interest in fifteen (15) to eighteen (18) year old females, during the time of his offense, when he was in his thirties; and
>
> c) Petitioner had not participated in sex offender specific treatment and is not willing to do so.

The SOAC upheld appellant's Level 2 assessment.

Although appellant did not have a history of sexual offending, his victim was outside his home. Therefore, a Level 1 assessment, which only requires notification inside the home and to local law enforcement,[1] is not sufficient. Additionally, appellant has indicated his refusal to participate in sex-offender treatment. Based upon this record, we hold that substantial evidence existed to support appellant's Level 2 notification assessment. Because substantial evidence existed to support the assessment, it automatically follows that the assessment cannot be classified as unreasonable or arbitrary. *See Parkman*, *supra*.

Affirmed.

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[1]*See Sexual Offender Guidelines and Procedures, supra*.

PITTMAN and KINARD, JJ., agree.