

SUPREME COURT OF VIRGINIA

Townes v. Commonwealth, 269 Va. 234

609 S.E.2d 1 (2005) · No. Record No. 040979 · Decided March 3, 2005

SUMMARY

The Supreme Court of Virginia held that the Sexually Violent Predators Act applies only to a prisoner who is actively serving a sentence for a statutorily defined sexually violent offense when identified for review. Because Lorenzo Townes had completed his sentence for the predicate sexually violent offense, the court reversed the commitment judgment and dismissed the Commonwealth's petition.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                              |
|-----------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Virginia                                                                                                                                                                                                                                                    |
| WRITING FOR THE COURT | Lawrence L. Koontz, Jr.; All the Justices                                                                                                                                                                                                                                    |
| JURISDICTION          | Virginia                                                                                                                                                                                                                                                                     |
| DECIDED               | March 3, 2005                                                                                                                                                                                                                                                                |
| DOCKET                | Record No. 040979                                                                                                                                                                                                                                                            |
| DISPOSITION           | reversed_and_remanded                                                                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | The Commonwealth petitioned the Circuit Court of Campbell County to civilly commit Townes as a sexually violent predator under Virginia's Sexually Violent Predators Act. After the trial court found Townes subject to the Act and ordered his commitment, Townes appealed. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                               |
| PARTIES               | Lorenzo Townes v. Commonwealth of Virginia                                                                                                                                                                                                                                   |

TOPICS

- statutory interpretation
- rule of lenity
- due process
- health law

PRACTICE AREAS

- civil commitment
- statutory interpretation
- constitutional law
- health law

QUESTIONS PRESENTED

1. Whether a prisoner who has completed his sentence for the predicate sexually violent offense but remains incarcerated for other offenses is subject to Virginia's Sexually Violent Predators Act.

## HOLDINGS

1. Under Code §§ 37.1-70.4 and 37.1-70.5, a prisoner must be serving an active sentence for a statutorily defined sexually violent offense at the time the prisoner is identified as subject to the Sexually Violent Predators Act. Because Townes was incarcerated only for other offenses when the Director notified the Commitment Review Committee, he was not subject to the Act.

## KEY QUOTATIONS

*“Accordingly, we are of opinion that, although civil in nature, a statutory scheme such as the SVPA that permits an involuntary commitment process to be initiated by the Commonwealth is subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed.” (\*4)*

*“Accordingly, we hold that since Townes was no longer “incarcerated for a sexually violent offense” at the time of the Director's notice to the Commitment Review Committee in this case, the trial court erred in ruling that Townes was subject to the provisions of the SVPA as a sexually violent predator.” (\*4)*

## FACTUAL BACKGROUND

Townes was convicted of statutory rape in 1973, an offense defined as a predicate sexually violent offense under Virginia law, and completed the sentence for that offense on January 22, 1991. He remained incarcerated until 2002 for other, non-sexually-violent offenses and was scheduled for release in 2003. The Department of Corrections referred him for review under the Sexually Violent Predators Act, and the trial court ultimately found him to be a sexually violent predator requiring inpatient treatment. At the time of the referral, however, Townes was no longer serving a sentence for the 1973 sexually violent offense.

## PROCEDURAL HISTORY

The Commonwealth filed a civil-commitment petition after the Department of Corrections referred Townes for review. The trial court found probable cause, denied Townes's motion to dismiss based on his having completed the sentence for the predicate sexually violent offense, and ultimately ordered his commitment. The Supreme Court of Virginia reversed and dismissed the petition.

## DISPOSITION

reversed\_and\_remanded

## REMAND INSTRUCTIONS

The court reversed the trial court's judgment and dismissed the Commonwealth's petition. No further remand instructions were provided.

## CASES CITED

- Commonwealth v. Allen, 269 Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005)
- McCloud v. Commonwealth, 269 Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005)
- Zinerman v. Burch, 494 U.S. 113, 131, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990)
- Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979)
- Holsapple v. Commonwealth, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003), cert. denied, \_\_\_ U.S. \_\_\_, 125 S. Ct. 164, 160 L. Ed. 2d 39 (2004)
- Burlile v. Commonwealth, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001)

## OPINION

Townes v. Com. 609 S.E.2d 1

KOONTZ, J.

609 S.E.2d 1 (2005)

269 Va. 234

Lorenzo TOWNES v.

COMMONWEALTH OF VIRGINIA.[\*]

Record No. 040979. Supreme Court of Virginia. March 3, 2005. B. Leigh Drewry, Jr. (Cunningham & Drewry, on brief), for appellant. Pamela A. Sargent, Senior Asst. Atty. Gen. (Jerry W. Kilgore, Atty. Gen.; Francis S. Ferguson, Deputy Atty. Gen., on brief), for appellee. Present: All the Justices. LAWRENCE L. KOONTZ, JR., Justice. Pursuant to Code § 37.1-70.6(A), the Commonwealth successfully petitioned the Circuit Court of Campbell County (trial court) to civilly commit Lorenzo Townes as a sexually violent predator. In this appeal, the dispositive issue we consider is whether Townes was \*2 subject to the statutory scheme for the civil commitment of sexually violent predators.

## BACKGROUND

On April 18, 1973, Townes was convicted in the Circuit Court of Campbell County of statutory rape in violation of former Code § 18.1-44 and was sentenced to eighteen years' imprisonment. A conviction under former Code § 18.1-44 is defined as a predicate "sexually violent offense" for the determination of a person as a "sexually violent predator." Code § 37.1-70.1. Townes completed serving his sentence for this offense on January 22, 1991. However, as the result of convictions for other offenses, none of which were sexually violent offenses, committed by Townes while he was in prison, Townes remained continuously in prison until April 2, 2002, when he was granted parole. Townes violated his parole almost immediately and was returned to prison on April 15, 2002 to complete his remaining sentence. On April 2, 2003, the Director of the Virginia Department of Corrections notified the Commitment Review Committee that Townes, who was scheduled to be released from prison on August 15, 2003, was subject to review for civil commitment by the Commitment Review Committee because he had committed a sexually violent offense and had been identified through testing as being likely to re-offend. Code § 37.1-70.4. Following an examination of Townes by Dr. Stephen M. Herrick, a licensed clinical psychologist

and certified sexual offender treatment provider, as required by Code § 37.1-70.5(B), the Commitment Review Committee completed its assessment of Townes and on May 21, 2003 forwarded to the Attorney General a recommendation that Townes be committed as a sexually violent predator. On June 25, 2003, the Commonwealth filed in the trial court a petition for the civil commitment of Townes. By order entered that same day, counsel was appointed for Townes as required by Code § 37.1-70.2. The trial court subsequently entered an order for the appointment of Dr. Evan Nelson, a clinical psychologist, as a mental health expert to aid in Townes' defense. On July 18, 2003, the trial court conducted a probable cause hearing as required by Code § 37.1-70.7. After hearing testimony from Dr. Herrick, the trial court determined that there was probable cause to believe that Townes is a sexually violent predator and ordered that Townes remain in custody until a full hearing on the Commonwealth's petition could be conducted. On September 19, 2003, Townes filed several motions to dismiss the Commonwealth's petition. Townes contended in one of the motions that the trial court lacked jurisdiction because he had completed his sentence for the 1973 rape conviction and, thus, was not incarcerated for a predicate sexually violent offense at the time the Commonwealth's petition was filed.[1] The trial court subsequently ruled that although Townes had completed his sentence for the 1973 rape conviction, he was subject to commitment as a sexually violent predator because he remained incarcerated on other offenses. During the trial on the commitment petition, the Commonwealth presented evidence from Dr. Herrick, a Department of Corrections employee, two probation and parole officers, and the police officer who had arrested Townes on the 1973 rape charge. Townes presented evidence from Dr. Nelson and Townes' aunt and brother. Because our resolution of this appeal does not require an examination of the evidence presented by these witnesses, we need not recount the substance of their testimony. Although the two expert witnesses differed in their opinions, the trial court determined that Townes is a sexually violent predator. \*3 The trial court specifically found that the evidence established that Townes suffers from an antisocial personality disorder that makes it difficult for him to control his predatory behavior, and which makes it likely that he will engage in sexually violent acts in the future. The trial court further determined that Townes was in need of in-patient treatment and that there was no suitable less restrictive alternative to in-patient treatment. Accordingly, in an order dated February 9, 2004, the trial court, pursuant to Code § 37.1-70.10, ordered that Townes be committed to the custody of the Department of Mental Health, Mental Retardation and Substance Abuse Services for appropriate treatment and confinement in a secure facility. We awarded Townes this appeal.

#### DISCUSSION

Along with *Commonwealth v. Allen*, 269 Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005) (today decided) and *McCloud v. Commonwealth*, 269 Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2005) (today decided), this case involves the procedures required to be followed in order for the Commonwealth to have a prisoner who has been convicted of a sexually violent offense declared to be a sexually violent predator and to have that prisoner involuntarily committed to a secure mental health facility at the time of his

release from prison. Those procedures are set out in Chapter 2, Article 1.1 of Title 37.1, commonly referred to as the Sexually Violent Predators Act (SVPA). Code § 37.1-70.1 through Code § 37.1-70.19. We have reviewed those procedures in some detail in McCloud and need not do so again here. Townes contends that the trial court erred in finding that he remained subject to the SVPA despite the undisputed fact that he had completed serving his sentence for the 1973 rape conviction, which the Commonwealth's petition stated was the sexually violent predicate offense supporting the assertion that Townes is a sexually violent predator. The Commonwealth responds that "[t]he General Assembly did not specifically require that the prisoner be currently serving a sentence for the sexually violent offense, only that he be in prison and have [been convicted of] one of the four predicate offenses" identified in Code § 37.1-70.1 that constitute sexually violent offenses. In relevant part, Code § 37.1-70.4 provides: B. The Director of the Department of Corrections shall establish and maintain a database of prisoners in his custody who are incarcerated for sexually violent offenses. C. Each month, the Director shall review the database of prisoners incarcerated for sexually violent offenses and identify all such prisoners who are scheduled for release from prison within 10 months from the date of such review who receive a score of four or more on the Rapid Risk Assessment for Sexual Offender Recidivism or a like score on a comparable, scientifically validated instrument as designated by the Commissioner. Upon the identification of such prisoners, the Director shall forward their name, their scheduled date of release, and a copy of their file to the [Commitment Review Committee] for assessment. (Emphasis added). Code § 37.1-70.5(A) provides: Within 90 days of receiving notice from the Director pursuant to § 37.1-70.4 regarding a prisoner who is incarcerated for a sexually violent offense, the [Commitment Review Committee] shall (i) complete its assessment of such prisoner for possible commitment pursuant to subsection B and (ii) forward its recommendation regarding the prisoner, in written form, to the Attorney General pursuant to subsection C. (Emphasis added). The Commonwealth's contention that the language of these statutes does not limit the application of the SVPA to those prisoners who are currently serving a sentence for a sexually violent offense as defined by Code § 37.1-70.1 ignores the present tense of that language. Grammatically the phrase "who is incarcerated for a sexually violent offense" simply does not purport to include prisoners incarcerated on offenses other than statutorily defined sexually violent offenses. The Commonwealth contends, however, that this Court should accept the Commonwealth's interpretation \*4 of these statutes because to do otherwise would frustrate the purpose of the SVPA. We disagree. It cannot be seriously disputed that a person subjected to an involuntary civil commitment proceeding has a substantial liberty interest in avoiding confinement in a mental hospital. *Zinermon v. Burch*, 494 U.S. 113, 131, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). "Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979). Accordingly, we are of opinion that, although civil in nature, a statutory scheme such as the SVPA that permits an involuntary commitment process to be initiated by the Commonwealth is

subject to the rule of lenity normally applicable to criminal statutes and must therefore be strictly construed. Contrary to the Commonwealth's interpretation, when strictly construed, the clear and unambiguous language of Code §§ 37.1-70.4 and 37.1-70.5 requires that a prisoner must be serving an active sentence for a sexually violent offense as defined by Code § 37.1-70.1 at the time he is identified as being subject to the SVPA. Moreover, the Commonwealth's interpretation of the law would require us to add language and broaden the scope of the act by applying it to prisoners "who are or previously have been incarcerated for sexually violent offenses." Courts cannot add language to the statute the General Assembly has not seen fit to include. *Holsapple v. Commonwealth*, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003), cert. denied, \_\_\_ U.S. \_\_\_, 125 S. Ct. 164, 160 L. Ed. 2d 39 (2004). "Nor are they permitted to accomplish the same result by judicial interpretation." *Burlile v. Commonwealth*, 261 Va. 501, 511, 544 S.E.2d 360, 365 (2001).

[2] The Commonwealth concedes that at the time Townes was identified by the Director and referred to the Commitment Review Committee he had completed serving his sentence for the 1973 rape conviction. Accordingly, we hold that since Townes was no longer "incarcerated for a sexually violent offense" at the time of the Director's notice to the Commitment Review Committee in this case, the trial court erred in ruling that Townes was subject to the provisions of the SVPA as a sexually violent predator.[3]

#### CONCLUSION

For these reasons, we will reverse the judgment of the trial court and dismiss the Commonwealth's petition. Reversed and dismissed.

#### NOTES

[\*] In the trial court this case was styled "Jerry W. Kilgore, Attorney General of Virginia, ex rel. Commonwealth of Virginia v. Lorenzo Townes." While Code § 37.1-70.6 directs the Attorney General to initiate the proceedings for civil commitment of an alleged sexually violent predator, Code § 37.1-70.16 makes clear that in doing so the Attorney General acts as counsel for the Commonwealth in such proceedings. Thus, the Commonwealth is not a relator with only a beneficial interest in the action but is the real party in interest. Accordingly, we have amended the name of this case to reflect the proper style.

[1] Townes also challenged the validity of the 1973 rape conviction because Townes was a juvenile at the time of the offense and allegedly was not afforded adequate due process when he was transferred from the juvenile court to the circuit court for trial as an adult. Although Townes reasserts this argument on appeal, it is not germane to our resolution of the dispositive issue and, accordingly, we will not address it. We note, however, that in 2003 the legislature amended Code § 37.1-70.2 to include the provision that "[i]n no event shall a prisoner or defendant be permitted, as a part of any proceedings under this article, to raise challenges to the validity of his prior criminal sentences or institutional convictions." Acts 2003, chs. 989 and 1018.

[2] Code § 37.1-70.1, the SVPA's definitional statute, does define a "sexually violent predator" as "any person who ... has been convicted of a sexually violent offense." (Emphasis added).

However, the statute's use of the present perfect tense here in a passive construction is not relevant, as the definition describes a person who has been determined to be a sexually violent predator, not a prisoner who is subject to the process for making that determination.

[3] Because Townes was not subject to commitment under the SVPA, we need not consider his further assignment of error challenging the trial court's determination that the evidence was sufficient to declare him to be a sexually violent predator.