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questioned Banks' motives, which should not have been an issue before the court.

The district court stated, "Instead of contesting the eviction proceeding in court, Banks chose to vacate the premises." Banks argues that this is a finding of fact that goes beyond the hearing officer's order. However, this finding had been made by the hearing officer, who stated that Banks turned in his keys prior to the court date, which resulted in OHA's dismissal of the court proceedings. The district court's comment was merely part of its analysis. It was not a new finding of fact or the result of de novo review.

CONCLUSION

The decision of OHA to terminate Banks' housing benefits was not arbitrary or capricious. The evidence showed that he had been involved in criminal activity, and federal regulations provide that a public housing agency may deny or terminate benefits on that basis. The judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF C.R., ALLEGED TO BE DEVELOPMENTALLY DISABLED AND A THREAT OF HARM TO OTHERS.
STATE OF NEBRASKA, APPELLEE, V.
C.R., APPELLANT.

793 N.W.2d 330

Filed January 28, 2011. No. S-10-307.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Mental Health: Proof.** The Developmental Disabilities Court-Ordered Custody Act requires that the State prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment.
4. **Mental Health: Public Health and Welfare: Proof: Words and Phrases.** A threat of harm to others, as contemplated by the Developmental Disabilities

Court-Ordered Custody Act, can be shown by proof that the subject committed an act that would constitute a sexual assault or attempted sexual assault.

5. **Mental Health: Public Health and Welfare: Proof.** The Developmental Disabilities Court-Ordered Custody Act does not require proof of future harm before a court determines that the subject is in need of court-ordered custody and treatment.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Jessica L. Milburn for appellant.

Jon Bruning, Attorney General, and J. Kirk Brown for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

The State filed a petition pursuant to the Developmental Disabilities Court-Ordered Custody Act (DDCCA), Neb. Rev. Stat. § 71-1101 et seq. (Reissue 2009), in which the State alleged that C.R. is a person with a developmental disability who poses a threat of harm to others and is in need of court-ordered custody and treatment. C.R. filed a motion asking the Lancaster County District Court to hold the DDCCA unconstitutional. The court held the DDCCA to be constitutional and determined that C.R. is a person in need of court-ordered custody and treatment. C.R. appeals.

SCOPE OF REVIEW

[1,2] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

FACTS

C.R. is an adult male who has a developmental disability consistent with a diagnosis of mild mental retardation, as defined by § 71-1110. He has significantly subaverage general intellectual functioning which exists concurrently with deficits in adaptive behavior.

In April 2007, C.R. subjected C.L. to sexual penetration without her consent. C.R. admitted that he committed the sexual act even though C.L. told him to stop.

On May 31, 2007, C.R. was charged with first degree sexual assault. On November 15, the court determined that C.R. was not mentally competent to stand trial. C.R. was committed to the Lincoln Regional Center. After periodic review hearings over the next 2 years, the court found that C.R. remained incompetent to stand trial and continued his commitment to the Lincoln Regional Center for treatment.

On October 6, 2009, the State, pursuant to the DDCCA, requested a determination whether C.R. is a person with a developmental disability who poses a threat of harm to others and whether he is in need of court-ordered custody and treatment. The district court found that C.R. remained incompetent to stand trial and that there was not a substantial probability that he would become competent to stand trial in the foreseeable future.

C.R. moved the district court to declare the DDCCA unconstitutional because it does not require the State to prove at trial that a substantial likelihood exists that a person with developmental disabilities will engage in dangerous behavior in the future. C.R. also alleged the act violates substantive due process by allowing the court to determine that a subject is in need of court-ordered custody and treatment without first finding that the subject poses a risk of future harm to others. In addition, C.R. claimed the DDCCA violates his right to due process because it does not require the State to prove at trial a nexus between the developmental disability and the risk of harm.

At a hearing on the State's petition, Mario Scalora, Ph.D., testified that he evaluated C.R. in 2007 for competency to stand

trial. His report stated that C.R. had an IQ of 62, which was in the extremely low range of functioning and qualified for a diagnosis of mild mental retardation.

There was no dispute that C.R. had sexual intercourse with C.L. in April 2007, but the evidence was in conflict whether the intercourse was consensual. The district court found that C.R. is a person with developmental disabilities as defined by the DDCCA; that in April 2007, he subjected C.L. to sexual penetration without her consent; and that C.R. poses a threat of harm to others. The court found no merit to C.R.'s constitutional arguments. It ordered the Nebraska Department of Health and Human Services (DHHS) to evaluate C.R. and submit within 30 days a plan for the custody and treatment of C.R. in the least restrictive alternative. C.R. appeals.

ASSIGNMENT OF ERROR

C.R. asserts that the district court erred in concluding that the DDCCA is constitutional. He argues that it violates substantive due process in two respects: Under the DDCCA, (1) the State is not required to prove that a person with developmental disabilities poses a risk of future harm to others before the court imposes involuntary custody or treatment and (2) the State is not required to prove a nexus between a person's developmental disability and his prior actions that required involuntary commitment.

ANALYSIS

This case presents our first opportunity to review the DDCCA. The act was passed in 2005 to provide a procedure for court-ordered custody and treatment for a person with developmental disabilities when he or she poses a threat of harm to others. § 71-1103. The Attorney General or a county attorney may file a petition in the district court alleging that the subject is a person in need of court-ordered custody and treatment. § 71-1117. The petition shall state that the subject has a developmental disability and poses a threat of harm to others, and the petition shall include a factual basis to support the allegations. *Id.*

The DDCCA defines a "[d]evelopmental disability" as "mental retardation or a severe chronic cognitive impairment, other

than mental illness, that is manifested before the age of twenty-two years and is likely to continue indefinitely." § 71-1107. "Mental retardation" is defined as "a state of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which originates in the developmental period." § 71-1110.

"Threat of harm to others" is defined as

> a significant likelihood of substantial harm to others as evidenced by one or more of the following: Having inflicted or attempted to inflict serious bodily injury on another; having committed an act that would constitute a sexual assault or attempted sexual assault; having committed lewd and lascivious conduct toward a child; having set or attempted to set fire to another person or to any property of another without the owner's consent; or, by the use of an explosive, having damaged or destroyed property, put another person at risk of harm, or injured another person.

§ 71-1115.

[3] The DDCCA requires that the State prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment. § 71-1124. Under the act, the district court shall make specific findings of fact and state its conclusions of law. *Id*. If the court finds that the subject is in need of court-ordered custody and treatment, DHHS shall, within 30 days of such finding, evaluate the subject and submit a plan for custody and treatment in the least restrictive alternative. *Id*. A dispositional hearing shall be held within 15 days after receipt of DHHS' plan, unless continued for good cause shown. *Id*.

C.R. asserts that the DDCCA violates his substantive due process rights because it does not require the State to prove that C.R. poses a future threat of harm to others before the court imposes involuntary custody or treatment and it does not require the State to prove a nexus between the disability and the prior action subjecting C.R. to commitment. Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Interest of J.R.*, 277

Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

C.R. contends that the DDCCA violates due process because it does not require completion of the risk analysis of the subject's potential for future dangerous behavior toward others until after the subject has been found to be in need of court-ordered custody and treatment. We disagree.

[4,5] We examine the DDCCA in the language in which it is presented, not as interpreted by C.R. The act places the burden on the State to prove by clear and convincing evidence that the subject is a person who has a developmental disability, is in need of court-ordered custody and treatment, and "poses a threat of harm to others." See §§ 71-1103 and 71-1124. The threat of harm to others can be shown by proof that the subject "committed an act that would constitute a sexual assault or attempted sexual assault." See § 71-1115. Thus, to meet its burden of proof, the State must provide clear and convincing evidence that a person with developmental disabilities demonstrates a "significant likelihood of substantial harm to others" if he or she commits one of the acts listed in § 71-1115. The DDCCA does not require proof of future harm before the court determines that the subject is in need of court-ordered custody and treatment.

The parties stipulated that C.R. has a developmental disability. C.R. does not dispute that he sexually assaulted C.L. Under the DDCCA, sexual assault is one of the manners in which a threat of harm to others can be shown.

As noted above, this court has not previously considered the DDCCA and its constitutionality. However, we have addressed a similar argument related to civil commitment under a prior version of the Nebraska Mental Health Commitment Act (MHCA), now codified at Neb. Rev. Stat. § 71-901 et seq. (Reissue 2009), in *In re Interest of Blythman*, 208 Neb. 51, 302 N.W.2d 666 (1981).

The purpose of the MHCA is to provide for the treatment of persons who are mentally ill and dangerous, § 71-902, while the DDCCA provides a procedure for court-ordered custody

and treatment for a person with developmental disabilities when he or she poses a threat of harm to others, § 71-1103.

In *In re Interest of Blythman, supra*, the board of mental health of Lincoln County (Board) found clear and convincing evidence that the subject was a mentally ill dangerous person and that the least restrictive treatment available was involuntary commitment to the Lincoln Regional Center. The district court affirmed the finding of the Board.

In considering the subject's appeal in *In re Interest of Blythman*, we stated: "In order for a subject to be civilly committed pursuant to the [MHCA], there must be both a finding that the subject is mentally ill as well as a finding that he is dangerous, either to himself or to others." 208 Neb. at 55, 302 N.W.2d at 670. "For there to be compliance with the fourteenth amendment's due process clause, there must be an independent finding of dangerousness." *Id*., citing *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972). At the time, the MHCA provided that dangerousness must be shown by a recent act or threat, and the subject in *In re Interest of Blythman* argued that the Board's decision was based on his actions from 5 years earlier, which were not "'recent acts.'" 208 Neb. at 55, 302 N.W.2d at 670.

We stated, "The key to confinement of one who is mentally ill lies in the finding that he is dangerous, i.e., that absent confinement, he is likely to engage in particular acts which will result in substantial harm to himself or others." *Id*. at 56, 302 N.W.2d at 670-71. We held:

> To comply with due process, there must be a finding that there is a substantial likelihood that dangerous behavior will be engaged in unless restraints are applied. "While the actual assessment of the likelihood of danger calls for an exercise of medical judgment, the sufficiency of the evidence to support such a determination is fundamentally a legal question. . . . To confine a citizen against his will because he is likely to be dangerous in the future, it must be shown that he has actually been dangerous in the recent past and that such danger was manifested by an overt act, attempt or threat to do substantial harm to himself or to another."

Id. at 57, 302 N.W.2d at 671, quoting *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

"In order for a past act to have any evidentiary value it must form some foundation for a prediction of future dangerousness and be therefore probative of that issue." *In re Interest of Blythman*, 208 Neb. 51, 58, 302 N.W.2d 666, 671 (1981). We determined there was sufficient evidence to support the Board's conclusion that the subject was a mentally ill dangerous person, and we held that proof of acts committed more than 5 years prior to the filing of the mental health proceedings did not contravene due process and equal protection guarantees where there was sufficient evidence that the acts were still probative of the subject's present state of dangerousness. *Id*.

The MHCA and the DDCCA both concern persons who present a risk of serious harm to another person. See §§ 71-908 and 71-1103. The MHCA governs individuals who are mentally ill and dangerous, while the DDCCA provides custody and treatment for persons with developmental disabilities. The DDCCA does not specifically require a finding of future harm, but it defines a threat of harm as a "significant likelihood" of harm as evidenced by past conduct. See § 71-1115. Thus, the two statutes serve similar purposes but are intended for persons with different conditions.

In *In re Interest of Blythman, supra*, we held that due process is satisfied if there is a finding that a person who is mentally ill is substantially likely to engage in dangerous behavior unless restrained or confined. We determined that a dangerous act in the recent past can demonstrate a likelihood to commit a dangerous act in the future. Here, C.R. committed the sexual assault in 2007. This act fits within the statutory definition of a threat of harm to others. See § 71-1115.

C.R. refers us to our previous consideration of the constitutionality of the Sex Offender Commitment Act (SOCA), Neb. Rev. Stat. § 71-1201 et seq. (Reissue 2009), in *In re Interest of J.R.*, 277 Neb. 362, 762 N.W.2d 305 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96, and *In re Interest of O.S.*, 277 Neb. 577, 763 N.W.2d 723 (2009), *cert. denied* 558 U.S. 857, 130 S. Ct. 148, 175 L. Ed. 2d 96. However,

the constitutional challenges in those cases did not argue that the statutes violated due process, but, instead, alleged that the SOCA violated equal protection and double jeopardy guarantees and that it was an impermissible ex post facto law. In addition, neither case concerned an individual with a developmental disability. Therefore, the cases are of limited value in our analysis here.

The SOCA is similar to the DDCCA in that it imposes a high standard of proof upon the State. "To subject a dangerous sex offender to inpatient treatment, the State must prove by clear and convincing evidence that involuntary treatment is the least restrictive alternative." *In re Interest of J.R.*, 277 Neb. at 378-79, 762 N.W.2d at 320. The DDCCA also requires the State to prove by clear and convincing evidence that the subject is a person in need of court-ordered custody and treatment, and the DHHS plan for custody and treatment must be the least restrictive alternative. § 71-1124. We have noted that "[p]ersons committed under [the] SOCA are suffering from a mental disorder or personality disorder that *prevents them from exercising control over their actions*." *In re Interest of J.R.*, 277 Neb. at 378, 762 N.W.2d at 320 (emphasis supplied). Persons with a developmental disability may also have difficulty exercising control over their actions.

In *In re Interest of J.R.*, we stated that the focus in determining whether a person is dangerous must be on the person's condition at the time of the commitment hearing and that the actions and statements of the person prior to the commitment hearing are probative of the person's present mental condition. We did not decide whether the "recent act" requirement of the MHCA was necessary for the subject in *In re Interest of J.R.* to be adjudged a dangerous sex offender, but we concluded that the evidence was sufficient to prove that he remained a danger.

We addressed the "recent act" argument in *In re Interest of O.S., supra*, in which we noted that the SOCA and the MHCA both aim to confine and provide treatment to mentally ill persons who pose a risk to society. However, those acts focus on individuals with different profiles, providing critical distinctions and differing conditions for commitment.

Under the MHCA, a mentally ill and dangerous person is defined as a person who is mentally ill or substance dependent and whose condition presents "[a] substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . ." § 71-908(1). The SOCA does not require proof of a recent act of violence or threats. *In re Interest of O.S., supra*. "[I]t satisfies due process by requiring the State to prove that a substantial likelihood exists that the individual will engage in dangerous behavior unless restraints are applied." *Id.* at 584, 763 N.W.2d at 729.

The DDCCA requires that the State prove by clear and convincing evidence that the subject is a person with a developmental disability, is in need of court-ordered custody and treatment, and poses a threat of harm to others. It does not require a finding of future harm prior to the entry of a court order for custody and treatment. The DDCCA does not violate due process.

C.R. also contends that the DDCCA violates substantive due process because the State is not required to prove a nexus between a person's developmental disability and his prior actions that required involuntary commitment.

"Although freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,' . . . that liberty interest is not absolute." *Kansas v. Hendricks*, 521 U.S. 346, 356, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997), quoting *Foucha v. Louisiana*, 504 U.S. 71, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992). "[A]n individual's constitutionally protected interest in avoiding physical restraint may be overridden even in the civil context." *Hendricks*, 521 U.S. at 356. "States have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety." *Id.*, 521 U.S. at 357. The Court has "consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards." *Id.*

In *Hendricks*, 521 U.S. at 350, the statutes under attack allowed for involuntary confinement of persons found to have a "'mental abnormality'" or a "'personality disorder'" and likely to engage in "'predatory acts of sexual violence.'" The Court determined that the relevant act's definition of "'mental abnormality'" satisfied substantive due process requirements. *Hendricks*, 521 U.S. at 356.

The act at issue in the case at bar, the DDCCA, concerns individuals with developmental disabilities. The U.S. Supreme Court was asked to determine the constitutionality of Kentucky statutes that provided separate procedures for involuntary civil commitments of those alleged to be mentally ill and those alleged to be mentally retarded. See *Heller v. Doe*, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). The Court held that a lower standard of proof is permissible in commitments for mental retardation, which it concluded is "easier to diagnose than is mental illness." *Id.*, 509 U.S. at 322. The Kentucky statutes also provided a second prerequisite to commitment: that the person presented a danger or threat of danger to self, family, or others. The Court stated that the finding of danger is "established more easily, as a general rule, in the case of the mentally retarded." *Heller*, 509 U.S. at 323. "Mental retardation is a permanent, relatively static condition, . . . so a determination of dangerousness may be made with some accuracy based on previous behavior." *Id.*, 509 U.S. at 323.

The Court also stated that "because confinement in prison is punitive and hence more onerous than confinement in a mental hospital, . . . the Due Process Clause subjects the former to proof beyond a reasonable doubt, . . . whereas it requires in the latter case only clear and convincing evidence . . . ." *Heller*, 509 U.S. at 325 (citations omitted). The Court noted that a "large majority of States have separate involuntary commitment laws" for individuals who are mentally retarded and those who are mentally ill. *Id.*, 509 U.S. at 327.

Under the DDCCA, the State must prove by clear and convincing evidence that the subject is a person with a developmental disability who is in need of court-ordered custody and treatment and who poses a threat of harm to others. §§ 71-1117 and 71-1124. The DDCCA provides procedures and evidentiary

standards which protect an individual's constitutionally protected liberty interest. It does not violate the subject's due process rights.

CONCLUSION

The DDCCA is constitutional, and the decision of the district court is affirmed.

AFFIRMED.