

JAN 29 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>RICHARD GARRETT TURAY,</p> <p>Plaintiff - Appellant,</p> <p>v.</p> <p>HENRY RICHARDS, Ph.D.; JOHN TAYLOR-ANDERSON, individually and his marital community and in his official capacity at the Special Commitment Center at Monroe, WA; JOAN KIRCHOFF KAREN SULLIVAN; PETE HAZEL, each in their individual capacity and in their official capacity as employees of the Dept of Social and Health Services; RICHARD BOSSE, in his individual capacity and in his official capacity as an employee of the Dept of Corrections; ANDRE SIMON; DENNIS BRADDOCK, Secretary of the Dept of Social and Health Services,</p> <p>Defendants - Appellees.</p>
--

No. 07-35309

D.C. No. CV-91-00664-RSM

MEMORANDUM*

Appeal from the United States District Court

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

for the Western District of Washington
Ricardo S. Martinez, District Judge, Presiding

Argued and Submitted October 20, 2008
Seattle, Washington

Before: SILVERMAN, McKEOWN and BERZON, Circuit Judges.

Plaintiff-Appellant Richard Turay is a resident at the Washington State Special Commitment Center (“SCC”), a secure confinement and treatment facility for persons civilly committed as “sexually violent predators” under Wash. Rev. Code ch. 71.09. This case arises from injunctive relief, first imposed nearly fifteen years ago, to remedy constitutional violations in the mental health treatment program at the SCC. Turay appeals from the district court’s order dissolving the single remaining component of the injunction and discontinuing federal court supervision of the facility. Specifically, Turay argues that the SCC has not complied with the remaining components of the injunction, relating to the off-island Less Restrictive Alternative (“LRA”) facility and the LRA protocol. Turay further contends that the district court erred in removing court supervision, given the SCC’s backsliding since the bulk of the injunction was lifted in 2004, the SCC’s history of non-compliance with court orders, and a lack of constitutionally sufficient oversight mechanisms.

We review the district court's decision to dissolve the injunction for abuse of discretion. *Tracer Research Corp. v. Nat'l Env'tl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1994). We defer to the district court's findings of fact underlying its decision unless they are clearly erroneous. *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). We affirm.

1. The district court did not abuse its discretion in dissolving the last remaining components of the injunction relating to the off-island LRA and the LRA protocol. The parties stipulated that the facility had been built and that the LRA protocol had been in place since 2004, three years before the district court's order finally dissolving the injunction. The alleged deficiencies Turay cites as evidence that the off-island LRA has not been effective do not persuade us that the facility fails to meet the injunction's requirements.

The parties stipulated that the facility meets statutory requirements for the training of rehabilitation counselors. Given that stipulation, the facility's location close to potential employment opportunities, its sufficient current capacity to accommodate qualified LRA placements, and Judge Martinez's personal inspection of the facility, we cannot say that the district court abused its discretion in holding that the SCC had complied with this last remaining component of the injunction. In particular, on this record, the district court could properly conclude

that the difficulties faced by off-island LRA residents in obtaining employment are more likely the result of the residents' offense history and public notification requirements than of deficiencies in the required vocational programs.

2. Nor did the district court abuse its discretion in failing to reinstate injunctive relief relating to components of the treatment program that the district court, and this court on appeal, previously had found in compliance with the injunction. Although the evidence submitted by Dr. Briody and the IOCC demonstrate that conditions at the SCC are far from ideal, we are not persuaded that the conditions of the treatment program represent a substantial departure from professional standards, such that committed persons are denied treatment giving them a realistic opportunity to be cured or to improve their mental condition.

Youngberg v. Romeo, 457 U.S. 307, 323 (1982); *Ohlinger v. Watson*, 652 F.2d 775, 778 (9th Cir. 1981).

The IOCC's 2006 report notes with regard to several matters that there is room for improvement in the facility's treatment program, and also reports some discouraging trends, including decreasing treatment program participation rates and rising allegations of staff abuse. Ultimately, however, the IOCC report does not conclude that any particular component of the program fails to meet minimum standards. Also, the SCC officials responding to the IOCC's observations offer

explanations that mitigate the negative implications of some of the IOCC's criticisms. For instance, the SCC officials provide alternative explanations for the decline in the treatment program participation rates and identify plausible reasons for the increases in abuse complaints other than an increase in actual abuse. For example, SCC officials suggest that residents used the abuse complaints system to assert more mundane concerns that had previously gone through the grievance system. The district court was entitled to credit those explanations.

Furthermore, although the IOCC report as well as Dr. Briody's declaration harshly criticize the current treatment program, they do not identify significant ways in which the program has deteriorated since 2004, when the district court adjudged the program to be in compliance with the injunction, in a decision this court upheld on appeal. Finally, as the district court observed, residents may bring new actions seeking injunctive relief if the conditions of the treatment program deteriorate to below constitutional standards.

3. The district court also acted within its discretion in refusing to reinstate injunctive relief because of the SCC's past history of non-compliance with prior court orders. We have observed, including in the context of the Turay Injunction, that a history of non-compliance can justify greater court involvement in the supervision of a government program than would otherwise be appropriate. *See*

Sharp, 233 F.3d at 1173. But the recent history of the Turay Injunction does not demonstrate a level of non-compliance requiring continued federal court involvement.

Previous court-imposed sanctions were eliminated in 2004. In both its 2004 and 2005 orders, the district court noted the SCC's progress and good faith efforts to comply with the remaining requirements of the injunction. Federal court intervention in state institutions is a temporary measure and may extend no longer than necessary to cure constitutional violations. *See Bd. of Ed. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 248 (1991); *Toussaint v. McCarthy*, 801 F.2d 1080, 1087 (9th Cir. 1986). The district court therefore did not abuse its discretion in failing to order injunctive relief anew based solely on past history of substantial non-compliance.

4. The district court also considered Turay's concerns about the inadequacy of oversight mechanisms at the SCC and acted within its discretion in dissolving the injunction notwithstanding these concerns. The district court had previously determined that the oversight mechanisms satisfied constitutional demands. The alleged deficiencies cited by Turay do not demonstrate that the treatment program suffers from constitutionally inadequate oversight. Nothing in the record establishes that any of the existing oversight mechanisms will be discontinued in

the absence of court supervision. It was not an abuse of discretion for the district court to deny continuing supervision on the ground that oversight could become deficient in the future.

5. Finally, the district court did not abuse its discretion in failing to hold an evidentiary hearing on the issue of backsliding. After reviewing the evidence submitted, including the IOCC report and Dr. Briody's declaration, the district court was not persuaded that an evidentiary hearing would materially alter its conclusion that the deficiencies in the treatment program did not rise to the level of constitutional violations. *See In re Aimster Copyright Litigation*, 334 F.3d 643, 653-54 (7th Cir. 2003). In fact, the district court concluded that even if Turay could prove all of the allegations he raised, none of them would amount to a constitutional violation. The evidence before the district court adequately supports this view, particularly the failure of the IOCC report to identify any specific areas in which the treatment program's performance failed to meet minimum standards. We therefore hold that the district court acted within its discretion in refusing to hold an evidentiary hearing on the issue of backsliding.

AFFIRMED.