STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2021-000679

In the Matter of the Care and Treatment
of John Shelby Wells,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly found the SVPA does not require the person to be competent before SVPA proceedings can move forward.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

In June 2012, the Lexington County Grand Jury indicted Appellant John Shelby Wells on two counts of committing or attempting a lewd act upon a child arising from incidents occurring January 1, 2011, through July 8, 2011, with two victims, ages four and eight years old. Appellant pled guilty as charged on June 6, 2012, and was sentenced to concurrent fifteen years incarceration on each count.[1] Prior to Appellant's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Appellant's commitment to the South Carolina Department of Mental Health (DMH) as a sexually violent predator, for long term, control case and treatment. The matter was called for a bench trial on June 1, 2021, before the Honorable Edgar W. Dickson, Circuit Court Judge.

Prior to trial, Appellant's counsel informed the court Appellant did not contest the criminal convictions underlying the SVPA proceeding, but argued the case could not move forward because Appellant was incompetent as a result of some health problems and age, and he was unable to assist counsel in preparing a defense to the SVPA case. As evidence of incompetency, Appellant submitted the report of William Burke, Ph.D., who did not testify at trial, opining Appellant was not competent to stand trial and not likely to become competent.[2] (Trial Transcript [TT], pp. 3-5, Court's Exhibit 1; Record on Appeal [R.], pp. 3-5; 80-83). The court found competence was not required under the SVPA, and the case could move forward. (TT, pp. 6-10; R., pp. 6-10).

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[1]Appellant was also convicted in 1992 of two counts of criminal sexual conduct with a minor, first degree. The victims in those offenses were Appellant's six and nine year old nieces. (State's Exhibit 5, pp. 9-10; R., pp. 63; 71-72).

[2]The assessment took place on May 20, 2021, and the report was provided to the State on or about May 25, 2021. The report was entered as a court exhibit, but not entered as evidence. Since Dr. Burke did not testify at trial, the State was not able to cross-examine him about the contents of his report, particularly whether Appellant was recalcitrant or truly incompetent.

Rozanna Tross, Psy.D., was qualified as an expert in forensic clinical psychology and sex offender evaluations. She formerly worked for DMH, and in that capacity, was appointed by the court to conduct a forensic evaluation of Appellant to determine whether he met the criteria for civil commitment pursuant to the SVPA. Her evaluation protocol included reviewing extensive documentation regarding Appellant, meeting with Appellant two times in March 2020, and conducting relevant collateral interviews. (TT, pp. 13-18; R., pp. 13-18).

Dr. Tross testified Appellant "was difficult," and "not interested in participating." During the first interview, he was "pretty hostile, interrupted often, spoke over, [and] was dismissive of information that was relayed to him about the nature and purpose of the evaluation." Based in part on his demeanor during the interview, Dr. Tross scheduled a second interview to see if Appellant would react differently. Appellant was "definitely calmer" during the second interview, but "was still upset about the nature and purpose of the proceedings, [and] resistant to the idea of having an evaluation." Appellant frequently told Dr. Tross "if he was not going to be released from jail and ultimately committed to the SVP, he would prefer the lethal injection."[3] (TT, p. 19; R., p. 19).

Appellant gave differing answers between the two interviews, and Dr. Tross testified the accuracy of the information he provided regarding his history was somewhat limited. He did describe a tumultuous childhood with an abusive, alcoholic father. He also described a heavy substance abuse history from an early age, including alcohol and drugs, a very limited education history, and a history of chronic medical issues, including mild strokes, and physical injuries causing frequent pain, which Dr. Tross testified "wouldn't impact his volitional control." (TT, pp. 19-21; R., pp. 19-21).

[3]Dr. Burke's report indicates Appellant made numerous similar statements during the interview.

Based on Appellant's criminal convictions and history, Dr. Tross diagnosed him with pedophilic disorder, sexually attracted to females, nonexclusive type. She also conducted a risk assessment using actuarial tools, which placed Appellant in the average range of risk compared with other sex offenders with similar scores, but she testified those tools only include detected re-offenses, so the results could underestimate an individual's risk to re-offend. Dr. Tross stated she did not perform any other standardized testing, in part due to Appellant's "lack of willingness to really participate or engage in testing," so "it was deemed that it wouldn't be fruitful." (TT, pp. 27-30, State's Exhibits 1-4 [Certified Convictions]; R., pp. 27-30; 49 - 62).

Dr. Tross testified there are twelve know dynamic risk factors for re-offending that are not part of the actuarial tests' factors. She determined Appellant exhibited six of those factors: sexual preference for prepubescent children; offense supportive attitudes, including a belief there was nothing wrong with his conduct and rationalizing his behavior; lack of emotionally intimate relationships with adults; poor problem solving; callous lack of concern for others or callousness in general; and dysfunctional coping. She further testified Appellant did not have any "protective" factors that would help mitigate his risk to reoffend if released, and his motivation was "simply to avoid being re-incarcerated rather than prevent re-offense." (TT, pp. 30-35; R., pp. 30-35).

Dr. Tross opined to a reasonable degree of psychological certainty that Appellant has the mental abnormality of pedophilic disorder, he has serious difficulty controlling his sexual behaviors, and he is likely to re-offend sexually if released into the community. She testified she reviewed Dr. Burke's report concluding Appellant was not competent to stand trial, and stated it did not change her opinion in any way. (TT, pp. 35-37, State's Exhibit 5 [Forensic Evaluation]; R., pp. 35-37; 63-83).

On cross-examination, Dr. Tross testified she met with Appellant twice "[p]artly because of his cantankerous demeanor during the first interview," and he "was so resistant to being at the interview." At the second interview, Appellant "was notably calmer and seemed to calm down faster," but he "was still quite resistant." She further testified "it's fair to say [Appellant] wasn't trying to help himself." (TT, pp. 37-40; R., pp. 37-40).

Regarding Appellant's competency, Dr. Tross testified "there really wasn't an issue or question about competency" when she met with Appellant, and "[h]is refusal to participate isn't the same thing as lacking capacity to be competent." She stated that during both interviews "[Appellant] was aware of who he was, where he was, why he was meeting with [her] despite his displeasure at doing so," and "[h]e had an appreciation for the circumstances which is why he seemed to advocate that he would prefer a lethal injection." Dr. Tross acknowledged Appellant's age and medical issues, including mild strokes while incarcerated, and testified it appeared "he was placed in a wheelchair for his risk for falls," and "as a result of safety and an abundance of caution." (TT, pp. 40-42; R., pp.40-42).

On re-direct examination, Dr. Tross testified she accounted for Appellant's hearing difficulty during the interviews by sitting right next to him and shouting. She stated she "knew that he heard [her] because his responses when he gave them were at least in relation to the question asked," and she had no doubt he understood her. She further testified Appellant's physical mobility issues did not impact his risk to sexually re-offend because he did not need to be able to move around independently in order to re-offend. (TT, pp. 42-43; R., pp. 42-43).

The circuit court found Appellant had two qualifying convictions for criminal sexual conduct with a minor, first degree, he was diagnosed with a mental abnormality (pedophilic disorder) that predisposed him to engage in acts of sexual violence, and he was likely to re-offend

if he was around children. The court further found Appellant is a sexually violent predator as defined by the SVPA, and ordered his commitment to DMH for long term control, care and treatment. (TT, p. 46, Order of Commitment dated June 2, 2021; R., pp. 46; 85). This appeal followed.

STANDARD OF REVIEW

"In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law." Okatie River, L.L.C. v. Se. Site Prep, L.L.C., 353 S.C. 327, 577 S.E.2d 468, 472 (Ct. App. 2003). Questions of statutory construction are a matter of law, and the appellate court reviews questions of law *de novo*. Milliken & Co. v. Morin, 399 S.C. 23, 731 S.E.2d 288, 291 (2012).

ARGUMENT

The circuit court properly found the SVPA does not require the person to be competent before SVPA proceedings can move forward.

Appellant contends the circuit court erred by trying him while incompetent because Appellant was unable to obtain an independent evaluation and/or assist his counsel in preparing a defense. His contentions are based on a purported right to a hearing pursuant to S.C. Code §44-48-100 (B), and an expansion of the right to effective assistance of counsel recognized in In re Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017), to include the right not to be tried while incompetent. These arguments are meritless.

A. Applicability of §44-48-100(B)

As a threshold matter, the contention Appellant was entitled to a hearing pursuant to §44-48-100(B) is nothing more than a distraction from the real issue. Appellant was competent in 2012 when he pled guilty to two counts of criminal sexual conduct with a minor, first degree, and in this case, he did not challenge the fact he was convicted of the qualifying offenses. (TT, p. 8; R., pp. 8).

On its face, §44-48-100(B) applies only when the individual was not convicted in a criminal court proceeding due to the individual's incompetence at the time of the criminal proceeding. Since Appellant was competent at the time he was convicted of the criminal charges at issue, 100(B) does not apply.

B. Statutory Construction

"The cardinal rule of statutory construction is that the court ascertain and effectuate the intent of the legislature." In Re Griffin, 434 S.C. 338, 863 S.E.2d 346, 341 (2021), *citing* Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 831 S.E.2d 429, 432 (2019) (*citing* Greene v. S.C. Election Comm'n, 314 S.C. 449, 445 S.E.2d 451, 453 [1994]). "What a legislature says in

the text of a statute is considered the best evidence of the legislative intent." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000).

To ascertain the Legislature's intent to encompass mentally incompetent persons in the class of persons covered under the SVPA, the Court need look no further than the express purpose of the statute. The Legislature found "a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018) (emphasis added).

The SVPA defines "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons whose relevant mental abnormalities render them incompetent to participate in criminal court proceedings.

While §44-48-100(B) does not apply in this case, it further evidences the legislative intent to include incompetent individuals in the SVPA process. In 100(B) hearings, all constitutional rights afforded a defendant at criminal trials apply to the hearing "other than the right not to be tried while incompetent." S.C. Code Ann. §44-48-100(B) (2018) (emphasis added).[4] If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable

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[4]The statute requires the court to make specific findings on "the extent to which the person's incompetence . . . affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf."

doubt the person actually committed the charged offenses, it is disingenuous to argue the Legislature intended that competency be required for other SVPA proceedings, including a commitment trial, to determine if the person qualifies as a sexually violent predator. Holding otherwise would lead to either: 1) SVPA proceedings pending indefinitely while a person is detained in a secure facility without the statutorily required long term control, care and treatment; or 2) the release of potential sexually violent predators with virtually no supervision and no treatment. Either alternative is an absurd result that undermines the ultimate goals of public safety, and treatment of sexually violent predators.[5]

This case presents a prime example of why competency is not required in SVPA proceedings. Appellant stands convicted of four sexually violent offenses involving prepubescent children spanning at least two decades (two convictions in 1992 and two in 2012). His self-report to Dr. Tross and the medical records indicated he had suffered several "mild" strokes, which, combined with age, appear to be the primary source of his purported incompetency, and his confinement to a wheelchair was more related to safety concerns than an inability to ambulate on his own.

Further, Appellant's contention he "would rather receive the lethal injection" than be committed to the SVP treatment program does not equate to either mental incompetence or inability to assist his attorney. To the contrary, Appellant clearly understood during both Dr.

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[5]*See* In re Sykes, 303 Kan. 820, 367 P.3d 1244 (2016) (analysis of interplay between competency and sexually violent predator civil commitment proceedings); *see also* In re Detention of Morgan, 180 Wash.2d 312, 330 P.3d 774 (2016) (same); Moore v. Superior Court, 237 P.3d 530 (2010) (same); In re Commitment of Weekly, 956 N.E.2d 634 (2011) (same); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (same); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) (same); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App. 2003) (same); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (same); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (same).

Tross' and Dr. Burke's evaluations that the State sought to commit him for long term control, care and treatment, and adamantly stated his preference to die rather than be committed.

Significantly, even though he was resistant to participating in Dr. Tross' interviews, he eventually provided his version(s) of his family history and lifestyle, and sought to rationalize and/or justify his criminal behavior. (TT, pp. 20-23, State's Exhibit 5, pp. 3-11; R., pp. 20-23; 65-73). Further, Dr. Burke's report expressly states Appellant "did not cooperate with the interview process," but when addressed in a loud voice, Appellant "appeared to be able to hear and comprehend what was being said to him." Appellant also appropriately responded to some questions in the competency to stand trial assessment, but "refused to answer" other questions. (Court's Exhibit 1, pp. 2-3; R., pp. 81-82). Refusal to answer indicates some level of comprehension and an exercise of will.

In short, Appellant understood the nature of the proceedings against him and chose not to assist in his own defense. His trial counsel informed the circuit court she could "certainly understand partially [Appellant's] thought process," but "just not being able to discuss it with him has created a barrier." (TT, p. 5; R., pp. 5). The record is clear Appellant resisted the entire SVPA process from the very beginning, and his refusal to cooperate with his counsel was an extension of that resistance. Even assuming Appellant was unable to assist counsel, however, the Legislature clearly intended for incompetent individuals who meet the SVPA criteria to be encompassed within the statute's scope. *See* Griffin, 863 S.E.2d at 348 ("[I]t appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense.")

C. Oxner and Griffin

Appellant asserts a Supreme Court reversal of this Court's decision in In re Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020), finding §44-48-100(B) hearings did not violate due process, will "strongly indicate that trying [Appellant] while incompetent also violates due process." (Brief of Appellant, p. 6). The fallacy of Appellant's argument is the undeniable distinction between a civil hearing to determine if a person committed alleged crimes for which he was never convicted in criminal court due to his incompetency (a §100(B) hearing), and a civil trial based on crimes for which the person was already convicted in criminal court while competent, but subsequently became mentally incompetent. Oxner involved the first circumstance, and this case purportedly involves the second.

The issue in Oxner is whether §100(B) adequately protects the due process rights of someone who was not convicted in criminal court of a qualifying sexual offense due to incompetency. As discussed above, §100(B) does not apply to this case. Thus, a reversal of this Court's opinion in Oxner has no bearing on the outcome of this case.

Appellant does acknowledge Griffin addressed an issue virtually identical to the issue in this case. In Griffin, the person pled guilty but mentally ill to crimes constituting qualifying offenses under the SVPA. He participated in the court appointed evaluator's interview, which concluded he met the criteria for civil commitment under the SVPA, but his mental status deteriorated thereafter. Prior to trial, the person made two motions for competency evaluations, asserting he was incompetent to assist his counsel in preparing a defense, and the circuit court denied both motions, finding the SVPA did not require the person to be competent for the case to proceed to trial. This Court affirmed the circuit court, holding a person is not entitled to be competent to stand trial under the SVPA. *Id.* at 347-348.

After acknowledging Griffin is directly applicable to this case, however, Appellant then asserts "Griffin was erroneously decided," and notes there is a petition for writ of certiorari pending in the Supreme Court.[6] He argues the right to effective assistance of counsel recognized in In re Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017), has little meaning if a person cannot provide any help to his counsel. He asserts counsel's ability to "create a battle of the experts" is the best defense, though not the only defense, but Appellant's lack of participation in Dr. Burke's evaluation precluded counsel from getting an independent evaluation. Appellant further asserts his right to due process was violated by his inability to get the independent evaluation, and his inability to help his counsel in trial preparation, provide any mitigation evidence, or convince the court he had a viable plan to prevent re-offending if he was released.

Taken to its logical conclusion, Appellant's contentions would substantially impair the State's compelling interest in protecting the public if an alleged sexual predator can claim he is too incompetent to undergo a sexual predator evaluation and/or trial because of his mental disorder, particularly when the alleged predator may just be recalcitrant and uncooperative. There may well be significant overlaps between mental disorders qualifying someone for commitment as a sexual predator, and those rendering the person unable to comprehend the proceedings or assist in his own defense. *See* Moore, 237 P.3d at 544 (potential overlap exists between sexual predator type mental disorders and those making the person incompetent). As discussed above, requiring competency or even restoration to competency before a sexual predator trial can proceed could

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[6]Notably, Appellant has not sought to hold this appeal in abeyance pending the Supreme Court decision in Griffin even though he claims a reversal in Griffin will require a reversal in this case. In the event the Supreme Court does grant a writ of certiorari and ultimately reverses Griffin, it will no doubt directly impact this case. There are factual distinctions between Griffin and this case, however, particularly the question of whether Appellant was truly incompetent or merely recalcitrant, that may affect the ultimate outcome.

indefinitely, or permanently, delay sexual predator proceedings, which weighs "heavily, and in fact dispositively, against recognition of a due process right of this kind." *Id.* *See also,* Morgan, 330 P.3d at 779 (recognizing negative impact of requiring competency in sexual predator proceedings); Sykes, 367 P.3d at 1247–48 (same). Therefore, the circuit court's ruling should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court's ruling that the trial could proceed, and ultimate determination committing Appellant for long term control, care and treatment as a sexually violent predator, should be affirmed.

Respectfully submitted,

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June 16, 2022

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CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order from the South Carolina Supreme Court entitled, "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.:

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