

RECEIVED

Jul 06 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
The Honorable Jocelyn J. Newman, Circuit Court Judge
Appellate Case No. 2019-001817

In the Matter of the Care and Treatment
of Ronald Garrard,

Appellant.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STATEMENT OF FACTS3

STANDARD OF REVIEW8

ARGUMENT9

 I. The circuit court did not abuse its discretion or violate Appellant's procedural due process rights by denying his motion to dismiss and proceeding with the trial in this SVPA case. 9

 II. The circuit court did not err in denying Appellant's directed verdict motion based solely on Appellant's age and physical disability because the question of whether Appellant's physical limitations obviated his diagnosed mental abnormality or his ability and propensity to commit future acts of sexual violence was a question of fact for the jury..... 11

CONCLUSION.....14

TABLE OF AUTHORITIES

CASES:

Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272 (2003) 8

Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797 (2022)..... 8

In re Chapman, 419 S.C. 172, 796 S.E.2d 743 (2017)..... 9

In re Griffin, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021)..... 9, 10, 11

In re Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020)..... 9, 10, 11

McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249,
768 S.E.2d 389 (2015)..... 13

RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166 (2012)..... 12

Sabb v. S.C. State Univ. 350 S.C. 416, 567 S.E. 2nd 231 (2002)12

STATEMENT OF ISSUES ON APPEAL

I. The circuit court did not abuse its discretion or violate Appellant's procedural due process rights by denying his motion to dismiss and proceeding with the trial in this SVPA case.

II. The circuit court did not err in denying Appellant's directed verdict motion based solely on Appellant's age and physical disability because the question of whether Appellant's physical limitations obviated his diagnosed mental abnormality or his ability and propensity to commit future acts of sexual violence was a question of fact for the jury.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

In January 2002, Appellant Ronald Garrard was convicted at trial of one count of lewd act on a child under sixteen, and one count of criminal sexual conduct with a minor, first degree. He was sentenced to six years incarceration, and completed his sentence on March 1, 2006. An evaluation conducted pursuant to the South Carolina Sexually Violent Predator Act (SVPA) prior to Appellant's release concluded he did not meet the criteria for civil commitment.

In September 2017, Appellant pled guilty to one count of assault and battery second degree. The original charges were criminal sexual conduct with a minor third degree and lewd act on a minor under sixteen years of age. Prior to Appellant's release from incarceration, Respondent State of South Carolina initiated a civil action pursuant to the SVPA in January 2018, seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. An evaluation was ordered in June 2018, and a evaluation report recommending commitment was issued in August 2018. The matter was scheduled for trial in May 2019, but was continued. It was rescheduled for June 2019, but was continued again after Appellant suffered a stroke. (Record on Appeal [R.], pp. 7, 40). The matter was subsequently called for a jury trial in October 2019 before the Honorable Jocelyn Newman, Circuit Court Judge.

Prior to trial, Appellant moved to dismiss the case based on his inability to assist counsel as a result of medical issues related to his stroke. He argued the stroke caused a condition known as global aphasia, which limited his ability to speak or cognitively understand things said to him. Appellant's counsel stated "although there is some question about his competence, it's really his ability to assist not only me but the jury in making their decision," and "clearly [Appellant's] frustrated because he can't express himself." (R., pp. 9-12).

After hearing argument, the court took the matter under advisement to review Appellant's medical records and relevant case law. For purposes of ruling, the court assumed as fact that Appellant could not communicate and assist in his defense, and found the issue was not whether Appellant could participate in treatment or even be treated, but the question was whether he needed treatment. The court denied the motion to dismiss, finding it was not appropriate to release Appellant or dismiss the case, which would undermine the purposes of the SVPA.¹ (R., pp. 32-37).

Gordon Edgar Brown, Jr., Psy.D., was qualified as an expert in forensic psychology, and testified he was appointed by the court to conduct a pre-commitment evaluation of Appellant pursuant to the SVPA. His standard evaluation protocol included reviewing all available records, including criminal history records, completing a risk assessment, utilizing psychological testing if indicated, and interviewing the person. Dr. Brown testified the best way to predict future behavior is to look at how the person has typically behaved in the past, and most people generally keep acting in the same way. (R., pp. 122-132).

On January 10, 2002, Appellant was convicted at trial in Richland County of criminal sexual conduct with a minor, first degree, and lewd act upon a child, which are sexually violent offenses under the SVPA. (R., pp. 134, 389-394). Both offenses involved fondling and performing oral sex on Appellant's four year old daughter between January 1997 and July 1999. (R., pp. 136-138). Appellant was also charged with similar offenses against his daughter in Lexington County,

¹The court subsequently stated it had considered the possibility of appointing a guardian *ad litem*, but determined it was not appropriate to appoint one because Appellant's counsel was protecting Appellant's interests. Appellant's counsel stated "a guardian ad litem would be in the same boat that we all are and that it's not that he's not competent," but "[h]e just simply cannot communicate." (R., pp. 59-62).

which were subsequently *nolle prossed*. Dr. Brown testified it was important to consider unconvicted charges to help assess the risk to reoffend. (R., pp.143-145).

On September 14, 2017, Appellant pled guilty to assault and battery second degree. The original charge was criminal sexual conduct with a minor, third degree, involving fondling the pubic area of an eight year old female under her nightgown. On the same date, Appellant pled guilty to a sex offender registry violation, first offense. (R., pp. 139-143). Dr. Brown testified the sex offender registry violation was important because it relates to whether the person follows the rules and does what is expected under supervision. (R., pp. 140-143).

Dr. Brown testified Appellant did not receive any sex offender treatment during his incarceration after his 2002 convictions, but per Appellant's self-report, he attended outpatient sex offender treatment for approximately one year after he was released on probation. When Dr. Brown interviewed Appellant after the 2017 convictions, Appellant stated he did not think he needed any sex offender treatment. (R., pp. 148-150).

Dr. Brown diagnosed Appellant with pedophilic disorder, nonexclusive type, sexually attracted to females. The diagnostic criteria for pedophilia require a period of recurrent sexually arousing fantasies, sexual urges, or sexual behavior involving prepubescent children. Dr. Brown found evidence of the required six month period via the approximately thirty month period of offenses against Appellant's prepubescent daughter that resulted in his 2002 convictions, and the offense committed against the eight year old victim that resulted in Appellant's 2017 conviction. (R., pp. 152-155).

In evaluating Appellant's risk to reoffend, Dr. Brown utilized well-established actuarial tools, the Static-99 and the Static-99R, which involved studies of convicted sex offenders who had been charged with new sex offenses. The Static scores range from minus 3 to twelve, and

Appellant's score on both instruments placed him in the above average risk to reoffend category. (R., pp. 155-161).

In addition to the risk factors included in the Static instruments, Dr. Brown identified five dynamic risk factors associated with Appellant that are not considered in the Static. Those risk factors included: 1) a sexual preference for prepubescent children; 2) a lack of emotionally intimate relationships with adults; 3) poor problem solving evidenced by him choosing to spend time with children after being convicted of sexual offenses involving a child and having outpatient sex offender treatment; 4) resistance to rules and supervision; and 5) grievance hostility (blaming others for his situation). (R., pp. 162-163).

Based on all the factors considered in the evaluation, Dr. Brown opined to a reasonable degree of psychological certainty that Appellant has pedophilic disorder, which seriously affects his emotional and volitional capacity such that he is likely to commit future acts of sexual violence if not confined for treatment. Dr. Brown further opined that Appellant met the criteria for civil confinement pursuant to the SVPA. (R., pp. 163-165).

Dr. Brown also testified he met with Appellant after Appellant suffered a stroke, and Appellant "seems to have recovered well, at least from the first stroke except for the fact that he, he can't speak." He further testified nothing in the records caused him to change his original conclusions and opinion. (R., pp. 165-167). On cross-examination, Dr. Brown testified it was "a fair statement" that there was no way to know the complete cognitive effect of Appellant's strokes. (R., pp. 192-193).

Appellant moved for a directed verdict on the ground the 2006 mental evaluation of Appellant after his 2002 convictions did not diagnose pedophilia, and the only change since that evaluation was his conviction of a sexually related offense in 2017, and therefore, the State failed

to prove the required six month period for a pedophilia diagnosis. The circuit court denied the motion, finding Dr. Brown's evaluation included information regarding events occurring after the 2006 evaluation. (R., pp. 212-217).

The jury found beyond a reasonable doubt that Appellant is a sexually violent predator. Appellant moved to set aside the verdict on the ground that Appellant's medical condition made it impossible for him to participate in treatment, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

Questions of statutory construction are review *de novo*. Garrison v. Target Corp., 435 S.C. 566, 869 S.E.2d 797, 803 (2022). When reviewing the trial court's ruling on a motion for a directed verdict/JNOV motion, the appellate court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, and the court's sole task is deciding whether any evidence reasonably supports the jury's verdict. Curcio v. Caterpillar, Inc., 355 S.C. 316, 585 S.E.2d 272, 274 (2003); Garrison, 869 S.E.2d at 803.

ARGUMENT

I. The circuit court did not abuse its discretion or violate Appellant's procedural due process rights by denying Appellant's motion to dismiss and proceeding with the trial in this SVPA case.

Appellant contends the circuit court erred in denying his motion to dismiss the SVPA case entirely premised on Appellant's medical condition and resulting inability to assist counsel in preparing his defense.² Relying primarily on In re Chapman, 419 S.C. 172, 796 S.E.2d 743 (2017), Appellant asserts his inability to assist counsel deprived him of due process and rendered the entire SVPA proceeding constitutionally invalid. To the extent the issue raised by this Court is whether the SVPA can be construed to apply to Appellant in light of his inability to assist counsel, it is a statutory construction issue.

The circuit court properly found there is no mechanism in the SVPA or relevant case law to dismiss the case and release Appellant prior to trial, and doing so would undermine the statutory purpose. The court further found the question for the jury would be whether the State met its burden of proof to show Appellant met the criteria for commitment under the SVPA. (R., pp. 35-36).

Appellant acknowledges the issue of competency to assist counsel in SVPA proceedings was decided adverse to his position in In re Griffin, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021).³ He also acknowledges this case will be impacted by a decision from the Supreme Court in In re

²The State did not contest the medical records regarding Appellant's condition as set forth in Respondent's Exhibit 1 (R., pp. 270-359). Respondent's Exhibit 2 (R., pp. 360-388) is a collection of articles and information Appellant's counsel found on the Internet that include general information regarding global aphasia, but there was no evidence submitted regarding how the information related specifically to Appellant's condition. Dr. Brown candidly admitted there was no way to adequately measure Appellant's post-stroke cognitive abilities, but when he met with Appellant after the stroke, Appellant was ambulatory, recognized Dr. Brown and seemed to have recovered well except for his ability to speak,. (R., pp. 166, 192-193)

³A Petition for Writ of Certiorari is currently pending in the South Carolina Supreme Court.

Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020), *cert. granted* August 25, 2021, regarding the due process issue arising from SVPA proceedings in which the person was found incompetent and not likely to become competent to stand trial on the underlying sexually violent offense.⁴

In Griffin, the person was competent and participated in the court-ordered evaluation, but stopped taking the medication for his schizophrenia after he was transferred from the Department of Corrections to a local detention center pending resolution of the SVPA proceeding. As a result, his schizophrenia worsened and he was unable to assist counsel when the matter was called for a trial. On appeal, this Court held:

In construing the Act in its entirety, we can find no statutory requirement of competence for proceedings arising under the Act. Rather, it appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense. This is apparent from the numerous safeguards the Legislature included to ensure an individual's constitutional right to procedural due process is not violated, such as the opportunity for appointed counsel, the requisite probable cause hearing, the appointment of qualified experts for psychological examinations, the right to a jury trial in which a unanimous verdict is required, the imposition on the State of the highest burden of proof of beyond a reasonable doubt, the ability to appeal, the ability to petition for release, annual examinations, etc. We find such protections sufficiently satisfy the requirements of procedural due process.

863 S.E.2d at 348.

As in Griffin, Appellant was able to communicate with Dr. Brown during the court-ordered evaluation, but when the case was called for trial, a stroke had limited his ability to speak and apparently impacted his cognitive abilities to some extent. Significantly, Appellant's counsel did not contend Appellant was incompetent, but argued the case should be dismissed because he was unable to communicate with counsel or tell the jury his version of the prior convictions, what he learned in sex offender treatment, and his future plans. (R., pp. 11-13).

⁴Oxner was argued in the Supreme Court on March 15, 2022.

Appellant simply argues this Court's opinions in Griffin and Oxner were wrong, and his commitment should be reversed because he was unable to assist counsel. Until and unless those decisions are reversed, however, they are controlling, and the circuit court's denial of Appellant's motion to dismiss the SVPA proceeding and release him based on his inability to assist counsel should be affirmed.

II. The circuit court did not err in denying Appellant's directed verdict motion based solely on Appellant's age and physical disability because the question of whether Appellant's physical limitations obviated his diagnosed mental abnormality or his ability and propensity to commit future acts of sexual violence, was a question of fact for the jury.

Appellant contends the circuit court erred in denying his directed verdict motion because his age and disability made his likelihood to reoffend low. Notably, Appellant does not contend there was no evidence to support the jury's verdict.

For purposes of ruling on a directed verdict motion, the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the non-moving party. Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231, 236 (2002). The trial court has no authority to decide credibility issues, or resolve conflicts in the testimony or evidence, and must deny the motions when the evidence yields more than one inference or its inference is in doubt. RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 732 S.E.2d 166, 171 (2012); Sabb, 567 S.E.2d at 236.

All of the evidence Appellant cites as supporting his directed verdict motion was before the jury for consideration, and created a question of fact reserved for jury determination. In finding beyond a reasonable doubt that Appellant is a sexually violent predator as defined by the SVPA, the jury necessarily found Appellant's age and medical condition did not sufficiently reduce his risk to reoffend sexually if not confined for long term control, care and treatment.⁵ A jury's factual finding will not be disturbed unless a review of the record discloses that there is no evidence which

⁵Appellant contends Dr. Brown "failed to use the beyond a reasonable doubt standard" regarding the definition of "likely" as used in the SVPA. Beyond a reasonable doubt is a legal evidentiary standard of proof, and is irrelevant to a mental health professional's findings and conclusions for evaluation purposes. Dr. Brown's conclusions regarding Appellant's risk to reoffend were based on a reasonable degree of psychological certainty, and the weight of his testimony was a decision for the jury in determining whether the State met its burden to prove the issue beyond a reasonable doubt.

reasonably supports the jury's findings. McNaughton v. Charleston Charter Sch. for Math & Sci., Inc., 411 S.C. 249, 768 S.E.2d 389, 395 (2015).

There was evidence in the record from which the jury could find beyond a reasonable doubt that Appellant has the mental abnormality of pedophilia (which was virtually undisputed), and even with his medical issues, his pedophilia makes it likely he will reoffend sexually if not confined for treatment pursuant to the SVPA. Appellant was ambulatory, and nothing prevented him from grooming and molesting prepubescent females to whom he had access, even if his verbal ability was limited. The circuit court properly denied Appellant's directed verdict motion, and its ruling should be affirmed.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court's denial of Appellant's motion to dismiss and motions for directed verdict/JNOV, and the jury's verdict finding Appellant is a sexually violent predator as defined by the SVPA.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098



BY: _____

Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 6, 2022

Sally Ellison

From: Sally Ellison
Sent: Wednesday, July 6, 2022 12:02 PM
To: 'dalexander@sccid.sc.gov'; Matthews, Lindsey
Cc: Deborah Shupe; Sally Ellison; Victim Services
Subject: In the Matter of the Care and Treatment of Ronald Garrard Appellate Case No. 2021-000733

Follow Up Flag: Worldox

Good Afternoon:

Attached for service this date is the Brief of Respondent with Proof of Service, in the above appeal which will be filed today with the Court of Appeals through the AIS system. A copy of the Brief will also be served as indicated on the Proof of Service. Please acknowledge receipt of the above attachments.

Thank you.

SALLY ELLISON, Legal Assistant
South Carolina Attorney General's Office
Criminal Division – SVP Unit | Office 803-734-4156
P.O. Box 11549 | Columbia, SC 29211
scag.gov



This email, along with any attachments, is considered confidential and may be legally privileged. If you have received it in error please notify the sender immediately by reply email and then delete this message from you system. Please do not copy it or use it for any purposes, or disclose its contents to any other person. This email, and attachments, are subject to FOIA requests. Thank you for your cooperation.