

ORIGINAL

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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MAY 06 2013

SC Court of Appeals

Appeal from York County

Thomas A. Russo, Circuit Court Judge

IN THE MATTER OF THE CARE AND  
TREATMENT OF O'BRYAN B. WHITLOCK,

APPELLANT

APPELLATE CASE NO. 2012-212021

ANDERS BRIEF OF APPELLANT

LANELLE CANTEY DURANT  
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**STATEMENT OF ISSUE ON APPEAL**

Did the trial court err in not setting aside the jury's verdict and granting a directed verdict that Whitlock was not a sexually violent predator when the state's hired expert's opinion contradicted the state's first expert that Whitlock did not need to be committed to the SVP program?

## STATEMENT OF THE CASE

On April 1, 2003, the Family Court of York County with the Honorable H. Woods presiding found Appellant Whitlock guilty of three counts of criminal sexual conduct (CSC) with a minor after Whitlock pleaded guilty. Whitlock was adjudicated delinquent and committed to the Department of Juvenile Justice (DJJ) for an indeterminate period not to exceed his twenty-first birthday. See P-1, Order of Family Court; Tr. 35, ll. 15 – Tr. 37, ll. 25.

Prior to his release from DJJ in 2011, probable cause was found that he was a sexually violent predator (SVP) pursuant to the Sexually Violent Predator Act at S.C. Code Section 44-48-30. See Probable Cause Order. On May 14-15, 2012, Whitlock proceeded to trial before the Honorable Thomas Russo and a jury. He was represented by Charles T. Brooks, and the state was represented by James G. Bogle, Jr. The jury determined that Whitlock was a sexually violent predator. Tr. 181, ll. 1 – 12. Judge Russo issued an order on May 15, 2012 committing Whitlock to the Department of Mental Health for long term control, care and treatment. Whitlock's attorney filed a notice of appeal. This appeal follows.

## ARGUMENT

The trial court erred in not setting aside the jury's verdict and granting a directed verdict that Whitlock was not a sexually violent predator when the state's second expert's opinion contradicted the state's first expert from the Department of Mental Health that Whitlock did not need to be committed to the SVP program.

At Whitlock's trial, the state called Dr. Leonard Mulbry, Jr. who was the second expert that the state had evaluate Whitlock, to testify. Tr. 41, ll. 1 –Tr. 44, ll. 25; Tr. 72, ll. 17 – 25. Dr. Mulbry interviewed Whitlock on two occasions for a total of five hours. Tr. 47, ll. 1 – 25. Dr. Mulbry described the three CSC with a minor charges that were the qualifying offenses as sexually violent crimes under the SVP Act. Tr. 50, ll. 1 – 25; Tr. 51, ll. 25.

The first offense occurred when Whitlock was twelve years old. Tr. 139, ll. 1 – 9. In this incident, Whitlock was charged with forcing a nine year old boy to perform oral and anal sex in a wooded area behind the apartment complex. When the boy refused to comply, Whitlock struck with his fist and choked him until the boy submitted. This occurred in January 2003. Tr. 52, ll. 12 – 24; Plaintiff's Exhibit 2-3.

The second incident occurred in February 2003, and involved a ten year old boy. Whitlock asked him to perform oral sex. When the boy said he was not like that, Whitlock grabbed him around the neck, forced him to the ground, and performed anal sex. Tr. 52, ll. 25 – Tr. 53, ll. 7; Plaintiff's Exhibit 4.

The third incident occurred in February 2003, and involved a nine year old boy whom Whitlock forced to perform oral sex by hitting the boy in the abdomen with his fist when the boy refused. Tr. 53, ll. 8 – 13; Plaintiff's Exhibit 5.

Dr. Mulbry's opinion was that Whitlock has the mental abnormality of antisocial personality. He defined antisocial personality as a person who does not respect the rights of others and have poor empathy for others. Tr. 81, ll.9 – Tr. 82, ll. 15. Dr. Mulbry testified that Whitlock met the legal criteria to be a sexually violent predator as he had the propensity to be dangerous and commit future sexually violent offenses. Tr. 83, ll. 20 – Tr. 84, ll. 20. The use of violence in all three incidents was significant to Dr. Mulbry. Tr. 62, ll. 1 – Tr. 63, ll. 4.

Whitlock's background was troubled as he was removed from his home when he was eleven and lived in foster homes and group homes. Tr. 63, ll. 5 – 18.

Dr. Mulbry relied on numerous tests he performed as well as the report of Dr. Jeff Musick. Dr. Mulbry explained that Dr. Musick evaluated Whitlock six months earlier and gave the same diagnosis of antisocial personality. However, Dr. Musick determined that Whitlock's risk of re-offending was not severe and that he did not need to be committed for long term treatment. Dr. Mulbry disagreed with this finding as he believed that Whitlock was a sexually violent predator who did need to be committed for long term treatment. Tr. 83, ll. 20 – Tr. 86, ll. 5.

However, Dr. Mulbry also admitted that juveniles make bad decisions and do foolish things on a regular basis, and often grow out of it. Tr. 51, ll. 20 -25.

At the close of the state's case, defense counsel moved for a directed verdict (DV) because the state had not shown that Whitlock had a predisposition to re-offend. The judge denied the motion. Tr. 110, ll. 18 – Tr. 111, ll. 2.

Dr. Jeffrey Musick testified for Whitlock that he evaluated Whitlock and reviewed all of the same documents that Dr. Mulbry reviewed. Tr. 112, ll. 11 – Tr. 114, ll. 23. Dr. Musick concluded that Whitlock did not meet the legal criteria to be a sexually violent predator. He explained that he did believe that Whitlock had the mental abnormality of antisocial personality. However, the

offenses occurred when Whitlock was twelve years old, and he is now twenty-one. Whitlock had committed no other sexually violent offenses. Although he had been in confinement since the age of twelve, he had the opportunity. Whitlock had engaged in non-violent sex as public masturbation while incarcerated, and had engaged in non-sexual violence as fights and assaults, Dr. Musick did not see any other sexually violent offending. Tr. 115, ll. 19 – Tr. 117, ll. 11. His opinion was that Whitlock did not meet the legal criteria to be considered a sexually violent predator. Tr. 118, ll. 3 – 15.

Whitlock testified that he wanted to tell the jury that although they probably think the worst when they hear the sex offenses, he was young when he was convicted of those charges. He is older now and has not committed any sex offenses since then. He made a mistake when he was young. He wants to go to Job Corps or the military and do something with his life. Tr. 138, ll. 1 – Tr. 143, ll. 25.

After the jury found that Whitlock did meet the legal criteria to be a sexually violent predator, defense counsel asked the court to set aside the verdict based on the reasons he made in his directed verdict motion that the state had not shown that Whitlock was likely to re-offend. The judge denied the motion. Tr. 183, ll. 18 – 25.

S.C. Code Section 44-48-30, the Sexually Violent Predator Act, provides that sexually violent predator means a person who has been convicted of a sexually violent offense; and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment.

Section 44-48-100 of the SVP Act provides that if the court or jury determines that the person is a sexually violent predator, the person must be committed to the custody of the Department of Mental Health for control, care and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large.

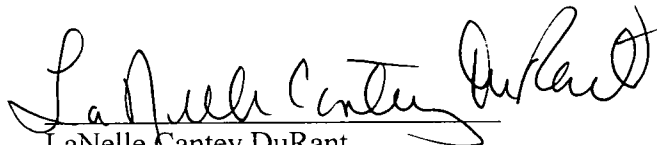
In reviewing a motion for a directed verdict, the trial court is directed to view the evidence in the light most favorable to the state, and if there is any direct or substantial circumstantial evidence tending to prove the guilt of the accused, the case should be submitted to the jury. State v. Pinckney, 339 S.C. 346, 349, 529 S.E.2d 526 (2000). A trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Brannon, 379 S.C. 487, 666 S.E.2d 272 (Ct. App. 2008); State v. Schrock, 283 S.C. 129, 132, 322 S.E.2d 450 (984).

The judge should have set aside the verdict because the state only raised a suspicion that Whitlock met the criteria to be a sexually violent predator after Dr. Musick explained that the qualifying offense occurred when Whitlock was twelve years old. He was not twenty-one and had not re-offended.

CONCLUSION

Based on the above reasons, the order of the trial court should be reversed, and O'Bryan Whitlock should be released.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of May, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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IN THE MATTER OF THE CARE AND  
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APPELLANT

APPELLATE CASE NO. 2012-212021

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for O'Bryan B. Whitlock states:

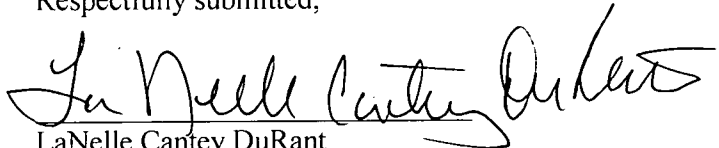
1. She is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. She has reviewed the record of appellant's trial before Judge Thomas A. Russo, which was held on May 14 & 15, 2012, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. She has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for O'Bryan B. Whitlock.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

This 6th day of May, 2013.

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IN THE COURT OF APPEALS

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APPELLANT

APPELLATE CASE NO. 2012-212021

**DESIGNATION OF MATTER TO BE  
INCLUDED IN RECORD ON APPEAL**

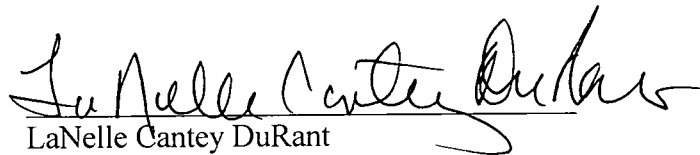
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Appellant proposes the following be included in the Record on Appeal:

- (1) Trial transcript
- (2) Order of Commitment
- (3) Plaintiff's Exhibits P-1 through P-6.
- (4) Probable Cause Order

I certify that this designation contains no matter which is irrelevant to this appeal.

May 6th, 2013



LaNelle Cantey DuRant  
Appellate Defender


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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 6, 2013

  
LaNelle Cantey DuRant  
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CERTIFICATE OF SERVICE

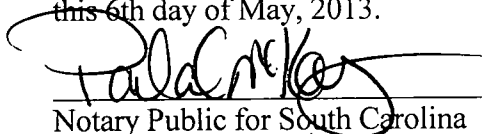
The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on O'Bryan B. Whitlock, #324503 at Broad River Correctional Institution – DMH, 4460 Broad River Road, Columbia, SC 29210, this 6th day of May, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 6th day of May, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.