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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County

Honorable R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF TYRONE MAURICE MOORE, A/K/A TYRONE MOORE,

APPELLANT.

APPELLATE CASE NO. 2022-000547

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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Division of Appellate Defense
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying appellant's directed verdict motion because appellant did not qualify for a diagnosis of pedophilic disorder and the leading actuarial instrument used in sexually violent predator cases only predicted an 11% recidivism rate?

STATEMENT OF THE CASE

The Attorney General filed a petition seeking appellant's commitment under the Sexually Violent Predator Act and on April 18, 2022, a trial was held before the Honorable R. Lawton McIntosh and a jury. R. 1. Christopher S. Runyan represented the Attorney General. R. 1. James K. Falk represented appellant. R. 1. The jury found appellant met the definition of an SVP and Judge McIntosh ordered him committed. This appeal follows.

STANDARD OF REVIEW

"A case should be submitted to the jury when the evidence is circumstantial 'if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced.'" State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "Evidence must constitute positive proof of facts and circumstances which reasonably tends to prove guilt." Id. "Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error." Id. at 139, 708 S.E.2d at 776-777. "On appeal of the denial of a directed verdict of acquittal, this Court must look at the evidence in the light most favorable to the state." Id. at 139, 708 S.E.2d at 777; see also State v. Hepburn, 406 S.C. 416, 429 753 S.E.2d 402, 409 (2013). If the state failed to present any direct evidence or any substantial circumstantial evidence reasonably tending to prove guilt of the accused, the appellate court must reverse the lower court's denial of the directed verdict motion. Hepburn, 406 S.C. at 416, 429 S.E.2d at 409.

ARGUMENT

The trial court erred in denying appellant's directed verdict motion because appellant did not qualify for a diagnosis of pedophilic disorder and the leading actuarial instrument used in sexually violent predator cases only predicted an 11% recidivism rate.

The State's only witness was Dr. Marie Gehle. She diagnosed appellant with the mental abnormality of pedophilic disorder. R. 129, l. 3 – 133, l. 9. She stated that in order to diagnose someone with pedophilia, they must show "a six-month pattern of intense arousal, sexual fantasies or behaviors that's focused on a pre-pubescent child." R. 130, l. 23 – 131, l. 2.

Petitioner's victims from his qualifying offenses ranged in age from 6 to 13. R. 130, l. 23 – 131, l. 2. Dr. Gehle looked to see whether any doctors had used a tool called the Tanner Scale to determine whether any of the victims had progressed in sexual development beyond the pre-pubescent stage. R. 131, l. 3 – 132, l. 19. She admitted none of the victims had been rated on the Tanner Scale. R. 131, l. 3 – 132, l. 19. Because of the ages of the victims, Dr. Gehle found that she could only assume that one of the victims was pre-prubescent, a girl who was from 6 to 9 during the offenses. R. 132, l. 3 – 19.

On cross-examination, Dr. Gehle admitted that the only possible victim who would qualify for the diagnosis of pedophilia occurred when appellant was in his early twenties. R. 158, l. 12 – 24. Appellant was 54 years old during the trial. R. 163, l. 16 – 21. Dr. Gehle also admitted that the leading actuarial instrument predicted only an 11% recidivism rate for a sexual offender with appellant's characteristics. R. 160, l. 12 – 163, l. 4.

Appellant moved for a directed verdict. R. 223, l. 11 – 224, l. 10. Appellant noted that Dr. Gehle knew nothing about whether all but one of his victims was pre-pubescent and assumed that the remaining victim was pre-pubescent solely because of her age. R. 223, l. 11 –

224, l. 10. That offense was remote and occurred over thirty years before the trial. R. 223, l. 11 – 224, l. 10. Combined with the low recidivism rate prediction, no rational factfinder could find appellant met the definition of an SVP. R. 223, l. 11 – 224, l. 10. Judge McIntosh denied appellant's motion. R. 223, l. 11 – 224, l. 10.

The trial court erred in denying appellant's directed verdict motion. The State bears the burden of proving a defendant meets each of the three elements of the definition of a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-100(A). "'Likely to engage in acts of sexual violence' means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9). The statute does not further define "likely." The statute also requires that the State prove appellant has a mental abnormality. S.C. Code Ann. § 44-48-30(1)(b).

The State in this case failed to prove beyond a reasonable doubt that appellant was likely to reoffend sexually unless confined. In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (reversing denial of directed verdict on appeal). A directed verdict should be granted if the State's evidence only raises a suspicion that a defendant will reoffend. See id. at 22, 774 S.E.2d at 465.

The beyond a reasonable doubt standard is more rigorous than the preponderance of the evidence standard. Judges in this state frequently define the preponderance standard by asking juries to imagine the scales of justice, even at the beginning of the case, tipping ever so slightly one way or another. This standard implies a numerical value of 51%. Therefore, the beyond a reasonable doubt standard necessarily must be a percentage greater than 51% if assigned a numerical value.

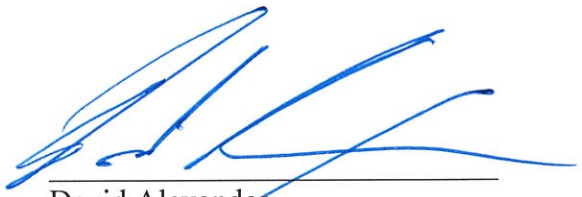
Here, the numerical value given appellant's likelihood to reoffend was only 11%. An 11% value on this important element of the statute could not even satisfy the preponderance

standard, much less the beyond a reasonable doubt. Proof beyond a reasonable doubt means jurors must be "firmly convinced" of the proposition and it must eliminate any "real possibility" of the opposite proposition. See State v. McHoney, 344 S.C. 85, 98-99, 544 S.E.2d 30, 36-37 (2001).

The statute also requires linkage between the mental abnormality and the likelihood of reoffending. S.C. Code Ann. § 44-48-30(1)(b). Dr. Gehle could only guess about whether appellant qualified for the diagnosis of pedophilia, much less link the offense and condition from thirty years ago to his current likelihood to reoffend. An 89% chance that appellant would not reoffend is far more than a real possibility, especially when combined with the speculative testimony on the element of the mental abnormality. As a matter of law, appellant was entitled to a directed verdict because the State's burden of proof failed on these critical elements. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of November, 2022.

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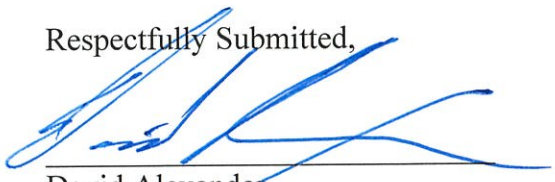
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Tyrone Maurice Moore states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge R. Lawton Mcintosh, which was held on April 18 & 19, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He 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, he asks the Court to relieve him as counsel for Tyrone Maurice Moore.

Respectfully Submitted,



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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Trial Transcript dated April 18, 2022 (Vol. 1 of 2); and
(2) Trial Transcript dated April 19, 2022 (Vol. 2 of 2)

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

David Alexander
Appellate Defender

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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 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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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies 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 primary e-mail address listed in the Attorney Information System (AIS); and on Tyrone Maurice Moore, at 4546 Broad River Road, , Columbia, SC 29210, this 30th day of November, 2022.

David Alexander
Appellate Defender

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