

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marion County

D. Craig Brown, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JIMMY MAC MCBRIDE,

APPELLANT

APPELLATE CASE NO. 2012-210127

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in allowing into evidence two offenses which were presented to the grand jury but which the grand jury no-billed because there was no sufficient basis for the charges?

STATEMENT OF THE CASE

In February 2005, the Marion County Grand Jury indicted Jimmy MacBride on the charge of criminal sexual conduct (CSC) with a minor second degree. On May 25, 2005, MacBride pled guilty as indicted and was sentenced to eight years incarceration. State's Exhibit 1. Prior to his release from incarceration, MacBride was referred for an evaluation to determine if there was probable cause that he met the criteria to be a sexually violent predator pursuant to the Sexually Violent Predator Act, S.C. Code Section 44-48-30. Probable cause was found, and he was referred for a forensic evaluation. Dr. Jeffrey Musick was court appointed to complete an evaluation. R. 24, ll. 21 – 23. His opinion was that MacBride did meet the criteria to be a sexually violent predator. R. 50, ll. 17 – R. 51, ll. 1.

On March 19 – 20, 2012, MacBride proceeded to trial before the Honorable D. Craig Brown and a jury. MacBride was represented by Sally Ward Peace and Harry Allen IV, and the state was represented by James Bogle, Jr. The jury found that MacBride was a sexually violent predator pursuant to S.C. Code Section 44-48-30. R. 92, ll. 1 – 10. MacBride's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in allowing into evidence two offenses which were presented to the grand jury but which the grand jury no-billed because there was no sufficient basis for the charges.

Jimmy MacBride pled guilty to having sexual intercourse with his eleven year old biological daughter in July 2003. MacBride allegedly went into the girl's bedroom and asked her to show him how other men had molested her. When she did, MacBride put his penis in her vagina and ejaculated. He gave her five dollars. MacBride told the psychologist during his evaluation that he did not remember the incident due to his intoxication. However, he said that he could not deny it and his daughter would not lie about him. R. 26, ll. 23 – R. 27, ll. 6; R. 34, ll. 3 – 35, ll. 13.

MacBride was also convicted of committing a lewd act on a fourteen year old girl in Florida in February 2004. State's Exhibit 2; R. 27, ll. 7 – 13.

Dr. Jeffrey Musick testified at the jury trial regarding MacBride's sexual history as information he relied on in evaluating MacBride to determine if he met the criteria to be a sexually violent predator. R. 21, ll. 1 – R. 27, ll. 25.

In a pretrial motion, defense counsel asked the court to suppress any mention of offenses where MacBride was charged but not convicted because a person was considered innocent until proven guilty constitutionally. She argued it would be more prejudicial than probative. The state argued that that issue had already been decided in the cases of In the Matter of the Care and Treatment of Kenneth White, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007); In the Matter of the Care and Treatment of James P. Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008); In the Matter of the Care and Treatment of John Phillip Corley, 353

S.C. 202, 577 S.E.2d 451 (2003). The state argued that those cases held that both convictions as well as charges that did not result in convictions could be considered by the doctor, the court, and the jury. R. 6, ll. 1 – R. 9, ll. 25.

Defense counsel argued that three of the offenses that were of a sexual nature were no-billed by the grand jury. Counsel stated: “I mean it’s not that he was not convicted. They just were no-billed by the grand jury. So you know, formal charges were never even brought.” R. 9, ll. 5 – 16. The judge denied defense counsel’s motion. R. 11, ll. 8 – R. 12, ll. 3.

Dr. Musick then proceeded to describe MacBride’s prior criminal history. Defense counsel renewed her objection. R. 25, ll. 6 – 19. He described the oldest one as occurring in 1988 when MacBride was nineteen. He allegedly had sex with a fourteen year old girl. The grand jury did not see a sufficient basis to continue with the charge so it was no-billed: R. 29, ll. 19 – R. 30, ll. 20.

The second offense occurred in February 2003 when MacBride took a twenty-four year old female acquaintance to a remote location and allegedly forced her to have sex. That charge did not go any further because the victim did not want to appear before the grand jury. R. 31, ll. 1 – 25.

The third offense occurred in July 2003 where he was charged with CSC first degree. The victim was his twenty-six year old ex-girlfriend. This charge was later dismissed due to a lack of cooperation from the alleged victim. MacBride said the sex was consensual. R. 32, ll. 1 – R. 33, ll. 22.

The fourth offense occurred in August 2004 when MacBride gave a twenty-four year old female acquaintance a ride. He took her to a remote location and allegedly forced

her to have sex. MacBride denied the incident. The grand jury did not think there was a sufficient basis for the charge so it was no-billed. R. 41, ll. 7 – R. 42, ll. 5.

Dr. Musick diagnosed MacBride as having an antisocial personality which could set him up for sexually reoffending. Dr. Musick testified that MacBride had a propensity to commit future sexually violent offenses and posed a menace to the health and safety of others. The doctor said that MacBride met the legal requirements to be found a sexually violent predator. R. 48, ll. 3 – R. 51, ll. 1.

Defense counsel renewed all of her prior objections at the close of the state's case and again after the verdict. The judge denied all of the objections. R. 63, ll. 19 – R. 64, ll. 13; R. 95, ll. 3 – R. 97, ll. 19.

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.

In the case of In the Matter of the Care and Treatment of Kenneth J. White, *supra*, the Court of Appeals held that the SVP statute provided that a "person's records" including the person's criminal offense record could be considered by the multidisciplinary Committee and the Prosecutor's Review Committee in determining whether the person was a sexually violent predator. The Court wrote that because the Legislature was silent in the Act on whether offenses included only convictions, the Court assumed that the legislature intended to include both convictions and offenses not resulting in convictions.

The Court further wrote that the Act did not define “offense” so the court relied on the definition from Black’s Law Dictionary 885 (7th ed.2000) which provided that an offense was commonly defined as “a violation of the law; a crime, often a minor one.”

The case of White is distinguished from MacBride because White concerned a probable cause hearing, and not a jury trial to determine the initial commitment to the SVP program as a sexually violent predator.

In the case of In the Matter of the Care and Treatment of James P. Ettel, *supra*, the Court of Appeals held that testimony concerning defendant’s prior sexual offenses, which did not result in criminal convictions, and his prior murder conviction, was relevant and admissible. There were three sexual offenses that did not result in offenses which the expert discussed at the trial. The first one occurred when he worked at an appliance store and grabbed a customer’s breasts. He was charged with assault and intent to commit gross indecency and kidnapping. He was found not guilty.

The second offense when he kidnapped a hitchhiker, took her to his house, and tried to grope her breasts. He was charged with sexual misconduct but the charge was dropped. The third one occurred when Ettel attempted to sexually assault a woman who worked at the animal hospital he was visiting. He was charged with sexual intercourse without consent. These charges were dropped when he was extradited to South Carolina.

Ettel’s case is distinguished from MacBride’s in that there is no evidence the charges went before the grand jury and were no-billed. The definition of “no-billed” as provided in Black’s Law Dictionary 720 (6th ed. 1991) means “not found”, “no indictment”, or “not a true bill.” “It means that in the opinion of the jury, evidence was insufficient to warrant the return of a formal charge.”

If the grand jury determines there can be no formal charge, then the incident can not meet the definition of an “offense” which requires that a violation of the law occurred. This is different from a charge just being dropped or a victim not going forward with the charge. The action of the grand jury in hearing the evidence, and then deciding there is no case, is distinguished from a charge being dropped. It is also distinguished from a person going to trial and being found not guilty because the grand jury in that case determined a violation of law had occurred. There could be numerous reasons jury found the person not guilty.

The SVP Act at 44-48-90 (C) provides: “All examiners are permitted to have reasonable access to the person for the purpose of examination, as well as access to all relevant medical, psychological, criminal offense, and disciplinary records and reports.”

Therefore, the two offenses that were no-billed by the grand jury should not have been admitted.

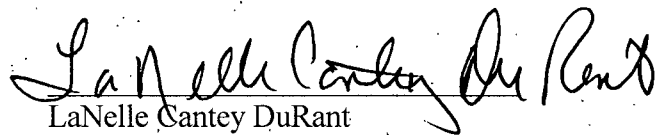
The state also argued the case of In the Matter of the Care and Treatment of John Phillip Corley, *supra*, which held that indictments outlining details underlying assault and battery of a high and aggravated nature and criminal sexual conduct convictions were admissible to issue of whether defendant was likely to engage in acts of sexual violence again. The Supreme Court wrote that the details of the appellant’s prior offenses found in the indictments were relevant to the issue of whether the appellant was likely to engage in acts of sexual violence again.

Corley is distinguished from MacBride’s case in that the two offenses at issue in MacBride’s case were never indicted.

CONCLUSION

Based on the above reasons, the order of the trial court should be reversed, and the case dismissed, and MacBride released.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

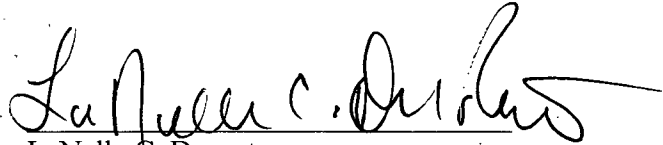
ATTORNEY FOR APPELLANT

This 10th day of June, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

June 10th, 2013



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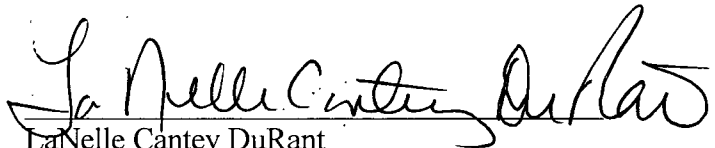
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CERTIFICATE OF SERVICE

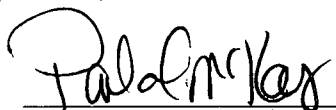
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of June, 2013.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 10th day of June, 2013.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.