STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals

Appeal from Charleston County

Honorable Jennifer B McCoy, Circuit Court Judge

Op. No. 2022-UP-452 (S.C. Ct. App. filed Dec. 14, 2022)

2012-CP-10-1719

IN THE MATTER OF THE CARE AND
TREATMENT OF KEVIN LAMAR WRIGHT

RESPONDENT

APPENDIX

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s/*James K Falk*
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B McCoy

IN THE MATTER OF THE CARE AND
TREATMENT OF KEVIN LAMAR WRIGHT

APPELLANT

APPELLATE CASE NO. 2020-001551

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

At Appellant's Sexually Violent Predator annual review hearing under SC Code § 44-48-110, whether the trial court applied the wrong burden of proof, in violation of due process, when it looked beyond the mere existence or non-existence of evidence and instead considered the weight of the evidence that Appellant presented to determine whether Appellant provided probable cause that his condition had so changed that he was safe to be released from the Sexually Violent Predator Treatment program.

STATEMENT OF THE CASE

After a jury trial in Charleston Court of Common Pleas, the Honorable Roger M Young Sr., on June 9, 2013 committed Appellant to the Department of Mental Health as a sexually violent predator. On July 21, 2020 Dr. Christopher Gillen, Ph.D. of the South Carolina Department of Mental Health completed the Annual Review report covering Appellant's March 1, 2019 through June 18, 2020 review period.

On October 2, 2020 an annual review hearing was held via video/WebEx before the Honorable Jennifer B McCoy. Deborah R.J. Shupe, Senior Assistant Deputy General appeared on behalf of the State and James Falk appeared on behalf of Appellant. Dr. Christopher Gillen was the State's only witness and E. Selman Watson, Ph.D. was Appellant's only witness. The court permitted both witnesses to testify as experts in forensic psychiatry. After hearing from both witnesses and arguments of counsel, the Court asked both parties to submit proposed orders. (Transcript p. 135 l. 1-2).

On October 28, 2020 Judge McCoy entered an order finding that Appellant failed to meet his burden and that probable cause did not exist to believe that Appellant's mental abnormality or personality disorder had so changed he is safe to be at large and, if released not likely to commit acts of sexual violence.

This appeal follows.

ARGUMENT

At Appellant's Sexually Violent Predator annual review hearing under SC Code § 44-48-110 the trial court applied the wrong burden of proof, in violation of due process, when it looked beyond the mere existence or non-existence of evidence and instead considered the weight of the evidence that Appellant presented to determine whether Appellant provided probable cause that his condition had so changed that he was safe to be released from the Sexually Violent Predator Treatment program.

Individuals committed to the Sexually Violent Predator Treatment Program (SVPTP) must receive an annual evaluation to review whether that person's *mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence*. S.C. Code Ann. § 44-48-110. At an annual review hearing a person committed under the SVP Act may petition the court for a release hearing. *id*. If at the annual review hearing the individual establishes probable cause that his condition has changed, the court must schedule a release hearing. *id*. At the October 2, 2020 Annual Review hearing Appellant was seeking an order directing the clerk to schedule a release hearing.

Relevant Facts

At the annual hearing Appellant called Dr. E. Selman Watson. Dr Watson received his doctorate in clinical psychology from the University of South Carolina and participated in over 500 hours of training through the American Academy of Forensic Psychology. R. p. 13 lines 12-15. Dr. Watson was the acting director of the SVP treatment program from January 2003 until January 2007. R. p. 13 lines 18-20. As acting director of the SVP treatment program Dr. Watson's responsibilities included both sex offender treatment and conducting the participants' annual

evaluations. R. p. 15 line 23- p. 16 line l7. The Court granted Appellant's motion to admit Dr Watson to testify as an expert in the fields of forensic psychology and in sexually violent predator evaluations. R. p. 14 lines 14 -25. The State did not object to Dr Watson's qualifications nor did it conduct any additional voir dire. R. p. 14 line 21.

Dr Watson opined that Appellant was not likely to reoffend if released from the SVP treatment program. R. p. 16 lines 17-18. Dr Watson reached this conclusion after having seven to eight hours of direct contact with Appellant which included about six hours of interviews. R. p. 15 lines 4- 8. Dr Watson met with Appellant four times between July 2018 and February 2020. R. p. 15 line 23 – p. 16 line 7. These interviews included discussions of Appellant's treatment level, treatment progress, mental health and sexual offender history. R. p. 15 lines 14- 16. Dr Watson also reviewed Appellant's treatment notes and prior evaluations. R. p. 15 l. 16-18; p. 16 lines 19-22.[1]

Dr Watson opined that Appellant did not have a personality defect (R. p. 17 line 12 through p. 18 line 8) but that Appellant did suffer from pedophilia. R. p. 18 lines 15-16. Dr Watson assessed Appellant under the Static 99R criteria and opined that on average Appellant had a 9% chance to reoffend within the next 5 years. R. p. 20 lines 7- 9. Dr Watson noted that his risk assessment of Appellant was consistent with assessments conducted by previous experts who evaluated Appellant. R. p. 19 line 24-25.

In response to the question why, despite a pedophilia diagnosis, Appellant no longer likely to reoffend, Dr Watson testified: *Because he's learning skills to manage that behavior. That's what the program is all about is teaching skills so you can manage that behavior in the community*.

[1] Dr Watson noted that Dr Gehle, the court-appointed expert in Appellant's initial commitment proceeding, opined that Appellant did not meet commitment criteria. R. p. 16 line 24 -26.

Transcript p. 25 lines 18-21. In support of his opinion Dr Watson noted that: Appellant has had seven years of treatment. R. p. 20 line 17. ; 2); Appellant does not have the full slate of dynamic risk factors; R. p. 20 lines 19- 23; and, Appellant harbors no hostility toward women and has reasonable problem solving skills. R. page 20 lines 21-23. Dr Watson noted that while at the SVP treatment program Appellant regularly participated in group sessions and had positive interactions with other participants in these sessions. R. p. 22 line 6- p. 23 line 1. Dr Watson recognized that initially Appellant suffered from a cognitive distortion that his victims enjoyed Appellant's assaults. R. p. 26 lines 6- 16. However Appellant now feels shameful about the assaults, and has shifted his focus to now empathize with his victim's fear. R. p. 26 lines 21 – 25.

The State then offered Dr Christopher Gillen to testify in the field of forensic psychology. R. p. 74 line 22. During voir dire Appellant's counsel challenged Dr Gillen's relative lack of practical experience in the field of forensic psychology. Dr Gillen's evaluation of Appellant was one of Dr Gillen's first evaluations he was permitted to perform without supervision from more senior South Carolina Department of Mental Health (DMH) employees, R. p. 81 line 12 – p.84 line 11. Dr Gillen's primary area of research and his post-doctoral publications and conference publications have focused on adolescent psychopathy and not sexually violent adult offenders. R. p. 79 line 22 – p. 80 line 20. Over Appellant's objection and after conducting its own voir dire, the Court admitted Dr Gillen to testify as an expert in forensic psychology over R. p. 85 line 8 – p. 87 line 11. Dr Gillen testified that Appellant had made some progress in treatment (R. p. 100 line 14), however appellant's mental abnormality has not so changed that he is safe to be at large and if released he is likely to engage in acts of sexual violence. R. p. 107 line 19 – p. 108 line 1.

In denying Appellant's request to schedule a review hearing the trial court stated:

> After weighing the expert testimony offered at the hearing, the Court finds the testimony of the State's expert, Dr. Gillen, to be more credible. In addition, the Court carefully considered the documents received into the record, and the arguments of counsel. Based on this review, the Court finds the Respondent failed to meet his burden, and concludes, at this time, there is no probable cause to believe Respondent's mental abnormality or personality disorder has so changed he is safe to be at large, and, if released, not likely to commit acts of sexual violence.

(Judge Jennifer McCoy's October 28, 2020 order at page 3)

Legal analysis

All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold. State v. Cain, 413 S.C. 508, 520, 776 S.E.2d 374, 380 (Ct. App. 2015). At an annual review hearing the trial court's role must be limited to the exercise of its gatekeeper function by making a determination of whether either party's evidence is admissible under the South Carolina Rules of Evidence. In exercising this gatekeeper function the court should have limited its consideration to whether Dr Watson was qualified to testify as an expert in forensic psychology, and whether the underlying science he used was reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (discussing the criteria under Rule 702 SCRE for admission of scientific testimony). Once the court admitted Dr Watson to testify as an expert in forensic psychology and SVP evaluations, then the ultimate weight given to his testimony should be left to the exclusive province of the jury empaneled at a subsequent annual release hearing, *See* Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174-75 (2010). However, the trial court judge based her decision upon her own determination of the relative weight and credibility to be given to Dr Watson's testimony. The trial court

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appeared to use a "preponderance of the evidence standard" in determining that Appellant failed to establish probable cause. Therefore the trial court went beyond its gatekeeper role and usurped the authority of a jury to determine whether it was safe to release Appellant.

The SVP Act provides no specific definition of the term probable cause. *When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.* S.C. Energy Users Comm. v. S.C. PSC, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) *citing* Branch v City of Myrtle Beach, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000). This court has looked to criminal case law when considering the State's burden of proof in establishing probable cause under S.C. Code Ann. § 44-48-80[2]. In Brown v State, the State appealed the trial court's dismissal of an SVP action for lack of probable cause under § 44-48-80. 372 S.C. 611, 643 S.E.2d 118, (Ct. App. 2007). In reversing the trial court's decision, the appellate court in Brown cited three South Carolina criminal cases which recognized that probable cause is a flexible, common-sense standard and that very term itself, "probable cause," does not import absolute certainty. *id*. 372 S.C. at 619, 643 S.E.2d at 122 *citing*, State v. Bowie, 360 S.C. 210, 220, 600 S.E.2d 112, 117 (Ct. App. 2004); State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971); and State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995). The court in Brown further recognized that *probable cause may be found somewhere between suspicion and sufficient*

[2]S. C. Code § 44-48-80 (A) Upon filing of a petition, the court must determine whether **probable cause** exists to believe that the person named in the petition is a sexually violent predator. If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility.
(**emphasis added**)

evidence to convict. *id* 372 S.C. at 620, 643 S.E.2d at 122 *citing* State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540-41 (Ct. App. 1999). Under similar circumstances the South Carolina Supreme Court recognized *that probable cause does not demand any showing that such a belief be correct or more likely true than false*. In re Care and Treatment of Chandler v. State, 382 S.C. 250, 257-258, 676 S.E.2d 676, 680 (2009).

Appellant is unaware of any published South Carolina decision addressing the appropriate probable cause standard under S.C. Code Ann. § 44-48-110. Because of the similarity between the South Carolina and Kansas SVP statues and in the absence of South Carolina precedents this court should consider Kansas state court decisions on this issue as authoritative. *See*, In re Treatment & Care of Luckabaugh, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) (recognizing that a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences). In Brown, this court looked to case law under the Kansas SVP to support its decision that probable under S.C. Code Ann. § 44-48-80 merely requires *evidence sufficient for a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the person in question is a sexually violent predator*. *id* Brown, 372 S.C. at 620, 643 S.E.2d at 123 *citing* Matter of Hay, 263 Kan. 822, 953 P.2d 666, 676 (Kan. 1998). On the basis of Dr Lockard's testimony, Appellant established probable cause under the probable cause standard used to evaluate a SVP petition under S.C. Code Ann. § 44-48-80.

Kansas courts hold that the probable cause showing required from an individual seeking a release hearing from SVP confinement is comparable to the probable cause determination made at the preliminary hearing stage of a criminal proceeding. In re Miles, 47 Kan. App. 2d 429, 434-435, 276 P.3d 232, 236, (Kan. Ct. App. 2012). At theses probable cause hearing Kansas court's *must consider the evidence in the light most favorable to the committed person and resolve all*

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conflicting evidence in that person's favor. In re Sipe, 44 Kan. App. 2d 584, 592, 239 P.3d 871, 877 (Kan. Ct. App. 2010). At an SVP annual review hearing Kansas courts must determine whether *there is sufficient evidence to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the committed person's mental abnormality or personality disorder has so changed.* In re Miles, 47 Kan. App. 2d 429, 434, 276 P.3d 232, 236 (Kan. Ct. App. 2012). Dr Lockard's testimony was sufficient to show probable cause under the standard used to evaluate the State's case in criminal preliminary hearing.

Defendants in SVP trials are entitled to protection under the Due Process Clause. Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). Appellant was denied due process at the January 16, 2020 annual review hearing because the trial court evaluated his proof under a standard more akin to a preponderance of evidence standard as opposed to *the usual and customary meaning* of the probable cause standard. The conflict in the testimony between Dr. Watson and Dr Gillian created a factual issue of whether it was safe to release Appellant from the SVPTP. The Court's resolution of this factual issue constituted a significant deprivation of Appellant's liberty. The trial Court violated Appellant's due process rights when it deprived Appellant of the right to have a jury decide whether he was now safe for release.

CONCLUSION

For the reasons set forth above, Appellant asks that this matter be remanded to the Berkeley Circuit Court to set this matter for an annual release hearing in accordance with S.C. Code Ann. § 44-48-110.

/s/ *James Falk*

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ATTORNEY FOR APPELLANT

This August 5, 2021

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2020-001551

In the Matter of the Care and Treatment
of Kevin Lamar Wright,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large.

STATEMENT OF THE CASE

In April 2017, a jury found Appellant Kevin Lamar Wright is a sexually violent predator beyond a reasonable doubt, and he was civilly committed pursuant to the South Carolina Sexually Violent Predator Act (SVPA). As required by the SVPA, the Department of Mental Health (DMH) reviewed Appellant's mental status annually, and in July 2019, a DMH psychologist issued an annual review report concluding Appellant's mental status had not so changed he is safe to be at large.

After an evidentiary hearing, at which Appellant appeared and was represented by counsel, the Honorable Jennifer B. McCoy, Circuit Court Judge, found there was no probable cause to believe Appellant's mental status had so changed he is safe to be at large, and continued Appellant's civil commitment for long term, control, care and treatment. This appeal followed.

STATEMENT OF FACTS

In April 2017, a jury found beyond a reasonable doubt Appellant met the criteria for civil commitment as a sexually violent predator pursuant to the SVPA, and he was committed to DMH's Sexually Violent Predator Treatment Program (SVPTP) for long term control, care and treatment. Thereafter, as required by the SVPA, DMH reviewed Appellant's mental status annually, and each review found Appellant's mental status had not so changed he is safe to be at large.

Appellant sought, and was granted, an independent evaluation after DMH's 2018-2019 annual review report recommended continued confinement for treatment. Appellant retained E. Selman Watson, Ph.D, to perform the independent evaluation, which was not completed until August 2020, and Appellant sought release from the SVPTP without DMH authorization.[1] In the interim, DMH issued a 2019-2020 annual review report prepared by Christopher Gillen, Ph.D., which also recommended continued confinement for treatment. With all parties' consent, the court conducted an annual review evidentiary hearing via video/Webex on October 2, 2020.

Appellant presented Dr. Watson, who was qualified as an expert in forensic psychology and sexually violent predator evaluations. Dr. Watson testified he interviewed Appellant several times (July 2018, June 2019 and February 2020) for a total of seven to eight hours, during which they discussed Appellant's sex offender history, his mental health and legal history, his progress in treatment, and the exercises included in each level of the treatment program. Dr. Watson also administered a couple of psychological tests, and reviewed "group notes" provided to him in June 2020. (Hearing Transcript [HT], pp. 13-16; Record on Appeal [R.], pp. 13-16).

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[1]The DMH Director did not authorize Appellant to file a release petition. *See* S.C. Code Ann. §44-48-120(A) (2018) (Director certifies in writing the resident is safe to be at large and authorizes resident to petition the court for release).

Dr. Watson opined that Appellant's mental status had changed such that he was not likely to reoffend sexually if released. He further testified that Appellant is a pedophile, but he did not believe Appellant ever met the statutory criteria for civil commitment under the SVPA. He stated Appellant has only a few dynamic risk factors for reoffending, but does still have the dynamic risk factor of "emotional congruence with children." (HT, pp. 16-21; R., pp. 16-21).

As to Appellant's future plans if released, Dr. Watson testified Appellant "mentioned he would like to live at Shields Ministries," but Dr. Watson understood that facility might not accept sex offenders as residents. Dr. Watson testified there was a family member Appellant "might be able to live with," Appellant expressed an interest in continuing treatment on an out-patient basis, he would be on lifetime GPS monitoring if released, and Dr. Watson hoped Appellant "would be able to find a mental or an accountability partner" who "would be available to him if he were to have any change in his dynamic risk factors." (HT, p. 21; R., p. 21).

Dr. Watson stated Appellant actively participated in group therapy sessions, and had never missed a group meeting or refused an assignment while in the SVPTP. Appellant provided Dr. Watson with "a huge binder full of homework assignments, articles, scales that he submitted, [and] coping log[s]." Based on the contents of the binder and his interviews with Appellant, Dr. Watson opined Appellant was "learning skills to manage" his pedophilic urges if released, and he would learn additional skills if he continued in an outpatient treatment setting. He stated Appellant had certain cognitive disorders when he entered the SVPTP, but now he "feels shameful," and "feels sorry that he engaged in [pedophilic] behavior." (HT, pp. 21-27; R., pp. 21-27).

On cross-examination, Dr. Watson stated there were some annual review reports and documents from the original commitment proceeding he did not review because "they were not made available" to him. He also acknowledged he performed a "brief psychological" evaluation

of Appellant in 2011 while Appellant was in the South Carolina Department of Corrections (SCDC), which included a personality assessment indicating Appellant strongly underreported symptoms and concerns, and tended "to present himself in an overly positive light." He also acknowledged at least one of the multiple SVPA evaluation reports he reviewed specifically referred to that 2011 evaluation. In spite of his 2011 findings, Dr. Watson testified he "thought [Appellant] had a genuine interaction" with him during the evaluation, and he did not think deception was part of Appellant's personality. In addition, even though his report stated Appellant did "not appear overly deceptive" during the interviews, Dr. Watson testified he "just didn't find [Appellant] to be a deceptive individual." (HT, pp. 28-44; R., pp. 28-44).

Dr. Watson ultimately acknowledged there were discrepancies between Appellant's sexual offense disclosures to previous evaluators and his disclosures to Dr. Watson about those offenses. One significant disclosure involved the ending of Appellant's relationship with a girlfriend, which Appellant claimed led to some of his sexual offenses. He told previous evaluators the relationship ended when the girl moved away, but told Dr. Watson it ended when he caught her having sex with his best friend. Another discrepancy involved a behavioral infraction involving possession of contraband, specifically pictures of children. Appellant told Dr. Watson the infraction involved possession of one magazine containing a picture of a child, but the available documentation indicated Appellant possessed six magazines and a news article, all containing pictures of children of various ages. Dr. Watson stated he did not recall an annual review report that discussed a behavioral infraction involving Appellant sharing with another resident a floppy disk that included pictures of women in G strings, pictures of children, pornographic movie titles and descriptions, so of which described deviant content. (HT, pp. 44-51; R., pp. 44-51).

Over the course of the four interviews with Dr. Watson, with the last one in February 2020, Appellant told Dr. Watson he never missed a group meeting or refused an assignment. Dr. Watson acknowledged the most recent annual review report by Dr. Gillen, which Dr. Watson received two weeks before the probable cause hearing, indicated Appellant had five unexcused absences from group meeting in the 2019-2020 review period. Dr. Watson testified he did not recall any annual review reports indicating Appellant got some homework assignments completed by another resident and then presented them as his work. (HT., pp. 51-52; R., pp. 51-52).

Dr. Watson testified there are thirteen identified risk factors for sexually reoffending, and acknowledged a person does not have to have all thirteen risk factors to be considered a risk to reoffend. Dr. Watson did not address specific dynamic risk factors in his report, but previous evaluations identified seven dynamic risk factors associated with Appellant, including: sexual preoccupation; a sexual preference for pubescent or pre-pubescent children; offensive supportive attitudes; an emotional congruence with children; a lack of emotionally intimate relationships with adults; poor problem solving; and resistance to rules and supervision. Dr. Watson agreed with the listed dynamic risk factors, but testified Appellant no longer exhibited some of them and had progressed on the others. (HT, pp. 52-61; R., pp. 52-61).

Dr. Watson acknowledged he did not attempt to discuss Appellant's mental status or treatment progress with any treatment providers or the doctors who completed the pre-commitment or annual reviews regarding Appellant. His opinion was primarily based on Appellant's statements during the four interviews, Dr. Watson's assessments of the written documents he reviewed, and the binder of "work" Appellant provided him as evidence of Appellant's participation in and commitment to treatment. Dr. Watson ultimately acknowledged the underlying premise of his

opinion was his belief Appellant never met the criteria for commitment under the SVPA, which was a factor in every part of the evaluation he performed. (HT., pp. 62-64; R., pp. 62-64).

The State presented Dr. Gillen, who was also qualified as an expert in forensic psychology. Dr. Gillen testified he was assigned to complete Appellant's annual review, and had no previous contact with Appellant. His evaluation protocol includes an extensive file review (original commitment documents, criminal records, SCDC records, SVPTP treatment records that include treatment assignments, group notes, case management notes, treatment plans and annual treatment summaries), and a clinical interview of the individual he is evaluating. In addition, he will contact collateral sources as necessary, and review prior annual review reports. (HT, pp. 71-89; R., pp. 71-89).

After reviewing all relevant records, Dr. Gillen interviewed Appellant for approximately three hours on July 10, 2020. During the interview, Appellant recounted his offenses against six pre-pubescent girls, and stated he started molesting the children because of feelings of betrayal and loneliness, fear of rejection and perceived rejection, and feelings of trust at the children's level. Appellant also endorsed several offense supportive attitudes, including a belief children wanted to engage in sex with him, or they liked sex, or their wearing of certain types of clothing indicated they were interested in sex with him, and he had difficulty controlling his sexual arousal to children. Appellant also "explicitly endorsed a sexual attraction to two of the victims." (HT, pp. 89-91; R., pp. 89-91).

Dr. Gillen also reviewed records regarding Appellant's behavioral infractions at the SVPTP, which included a 2018 citation for an interpersonal relationship with another SVPTP resident that was deemed problematic and inappropriate, and he possessed letters containing

romantic content from the resident. He was also cited in 2018 for possessing several newspapers and magazines that contained pictures of children. (HT, pp. 91-92; R., pp. 91-92).

During the 2019-2020 review period, Appellant was cited in 2020 for exchanging contraband material with the same resident, which was captured on video, even though they had been physically separated within the facility, and for possessing another depiction of a child. Dr. Gillen found these recurring behavioral issues problematic in light of Appellant's history. (HT, pp.91-94; R., pp. 91-94).

Dr. Gillen testified he completed the Static-99R and Static-2002R actuarial risk assessment tools, and Appellant scored a four on the Static-99R, and a five on the Static-2002R. He stated the two scores are combined to generate an absolute risk number when compared to a specific reference sample of sex offenders who were charged or convicted of a new sex offense within a designated timeframe. He testified the risk assessment tools do not make any allowances for unreported offenses, so the absolute risk score generated is 'likely an underestimation [of actual risk] given that it only follows a five year period and it only counts with charges and convictions." (HT, pp. 94-96; R., pp. 94-96).

Dr. Gillen further testified Appellant has multiple dynamic risk factors that increase his likelihood of reoffending, including a sexual preference for pre-pubescent or pubescent children, sexual preoccupation, dysfunctional and sexualized coping, poor problem solving, and resistance to rules and supervision. As to his sexual preoccupation with pre-pubescent and pubescent children, the 2019-2020 treatment records included a notation Appellant "denied that pedophilic disorder was a disorder or that his sexual behaviors were a product of or influenced by that diagnosis." In addition, Dr. Gillen stated Appellant "hasn't learned any specific arousal management techniques in his treatment to date or at least to the time I reviewed his record that

would allow him to manage that deviant arousal when he is exposed to high risk situations out in the community." (HT, pp. 96-98; R., pp. 96-98).

Dr. Gillen also indicated another risk factor was Appellant's "lack of intimate emotional relationships and emotional congruence with children." Appellant told Dr. Gillen "these were resolved and historical issues in his life," but was unable to state how or why the issues were resolved, or talk about any strategies he developed in treatment to work on them, which was problematic in light of his behavioral record involving another resident in the treatment program. Appellant also stated he tried to form relationships with and talk to treatment program staff members, which was "directly contradictory to what is reported in the record about his engagement and social interaction with staff on the unit."

Appellant did identify specific coping skills he learned in treatment to deal with his risk factor of dysfunctional and sexualized coping, but admitted "those skills have not helped him target some of the specific emotions that were most directly related with his offending to include feelings of perceived rejection, loneliness, [and] fear of rejection." Dr. Gillen testified Appellant's difficulty managing those emotions "was one of the reasons that led [Appellant] to sexually act out against children," and the coping skills Appellant had developed "have insufficiently addressed those." Independent ability in the community to identify those types of thoughts, recognize them as distortions, challenge them and restructure them is "what is going to be important for someone like [Appellant]." (HT, pp. 98-100; R., pp. 98-100).

Dr. Gillen testified another risk factor for Appellant is "poor problem solving." While Appellant had made some progress on that risk factor and seemed to understand some of the factors involved in his sexual offending, Dr. Gillen stated Appellant needed further work on this factor, particularly in developing an ability "to apply those risk factors to his current behavior, future

risks," . . . and "come up with a wide variety of potential solutions to manage high-risk situations." Specifically, while Appellant showed some insight into potential barriers in the community (i.e., his tendency to be stubborn or feeling ignored), he was unable "to articulate how he would overcome those barriers out in the community outside of relying on external supports and constraints." (HT, pp. 100-101; R., pp. 100-101).

Dr. Gillen testified Appellant's participation in treatment was "variable" during the period Dr. Gillen reviewed. A positive indication was Appellant "largely attending his treatment groups outside of those five unexcused absences that were documented in the record," and "[a]t times he is providing relevant commentary in groups," and there were "a few indications that he was able to link up some of his feedback with his offense history." (HT, pp. 101-102; R., pp. 101-102).

On the negative side, there were "instances spanning the review period that talked about minimal engagement," and staff asked Appellant to increase the consistency of his participation. Also, there were some notable problems during the review period, including Appellant shutting down emotionally and stopped participating when a peer or facilitator challenged him about sexually problematic behaviors, or the discussions turned to Appellant's own offenses, he stopped participating. (HT, pp. 102-103; R., pp. 102-103).

Dr. Gillen testified Appellant needs to continue in the treatment program to work on developing arousal management techniques that are directly relevant to his sexual attraction to pre-pubescent and pubescent children, and how to manage some of that arousal when it becomes difficult to handle out in the community where he has access to children. Appellant also needs to develop strategies and skills to handle his feeling of perceived rejection, betrayal and inadequacy, and work on problem solving beyond "simply avoiding high-risk situations and relying on others to further develop coping skills." (HT, pp. 103-105; R., pp. 103-105).

Dr. Gillen diagnosed Appellant with pedophilic disorder. He testified to a reasonable degree of psychological certainty that Appellant's mental abnormality "has not so changed that he is safe to be at large," if released, he "is likely to engage in acts of sexual violence," and Appellant "needs to remain in the program for further treatment." (HT, pp. 105-108; R., pp. 105-108).

The circuit court found there was sufficient evidence presented to support the State's contention Appellant still met the criteria for confinement and continued treatment under the SVPA. The court discussed the testimony of both Dr. Watson and Dr. Gillen, and found Dr. Gillen was more credible. In addition, the court "carefully considered the document received into the record, and the arguments of counsel." Based on its review of the record, the court found Appellant failed to meet his burden of proof to establish probable cause that his mental abnormality has so changed he is safe to be at large, and ordered his continued confinement ina DMH secure facility for long term control, care and treatment. (Order Denying Annual Review Trial for 2018-2019 and 2019-2020, filed October 28, 2020; R., pp. 165). This appeal followed.

STANDARD OF REVIEW

"On review, the appellate court will not disturb the hearing count's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." In re Care and Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003); *see also* In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 342 (2002) (on appeal of a non-jury law case, the findings of fact will not be disturbed unless found to be without evidentiary support); In re Care & Treatment of Corley, 365 S.C. 252, 616 S.E.2d 441, 444 (Ct. App. 2005) (trial court's probable cause ruling in SVPA annual review hearing will not be disturbed unless there is no evidence reasonably supporting it). When reviewing a trial court's rulings in a SVPA case, the appellate court will only reverse the trial court if there is no evidence to support the trial judge's ruling. In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 896 (2003) (*citing* In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 315 [2001]); Care & Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 120–21 (Ct. App. 2007) (same). The appellate court is concerned with the existence of evidence, not its weight. Brown, 643 S.E.2d at 121.

ARGUMENT

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status has so changed he is safe to be at large.

Appellant contends the circuit court erred in finding no probable cause to believe his mental status has so changed he is safe to be at large. Appellant maintains the mere fact he presented expert testimony indicating he was safe to be at large mandates a finding of probable cause, and the circuit court "went beyond its gatekeeper role [under Rule 702, SCRE] and usurped the authority of a jury to determine whether it was safe to release Appellant. This argument both undermines the purpose of an annual review hearing under the SVPA, and renders the presiding judge irrelevant by reducing the probable cause determination to a mere ministerial act.

In a SVPA annual review probable cause hearing, the committed person has the burden to show there is probable cause to believe his mental condition has so changed he can safely be released from civil commitment. Tucker, 578 S.E.2d at 722; S.C. Code. Ann. §44–48–110 (2018).[2] "'In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator.'" Care & Treatment of Chandler v. State, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (*quoting* In re the Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 122–23 [Ct.App.2007]). "Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" Brown, 643 S.E.2d at 123 (*quoting* Texas v. Brown, 460 U.S. 730,

[2]Appellant's brief indicates he "is unaware of any published South Carolina decision addressing the appropriate probable cause standard under S.C. Code §44-48-110." (Brief of Appellant, p. 8). To the contrary, Tucker expressly addresses that issue.

742 [1983]). "The very term itself, 'probable cause,' does not import absolute certainty." *Id.* at 118, 122.

Under the SVPA, the original commitment proceedings establish the person has a mental abnormality or personality disorder that makes him likely to commit future acts of sexual violence if not confined for long term, control care and treatment. S.C. Code §§44-48-90-100 (2018). After commitment, the person is entitled to annual reviews of his mental status, and probable cause hearings on those reviews. At an annual review hearing, the committed person has the burden to present evidence that his mental status has so changed he is safe to be at large, and circuit court must determine whether the person's evidence would lead a reasonable person to believe and conscientiously entertain a suspicion the person's mental status has so changed he is now safe to be at large. S.C. Code §44-48-110 (2018).

Unlike the probable cause determinations under S.C. Code §44-48-80 (2018) (pre-commitment), making a probable cause determination in annual review hearings necessarily requires consideration of more than the mere existence of evidence. Rather, the court must consider the credibility of the witnesses and evidence presented. *See* State v. Keith, 356 S.C. 219, 588 S.E.2d 145, 147 (Ct.App.2003) (probable cause determination requires a practical, common-sense decision based on the totality of evidence presented, "including the veracity and basis of knowledge of persons supplying information").

If, as Appellant argues, merely presenting an expert at an annual review hearing mandates a finding of probable cause, conducting the hearing itself becomes a meaningless exercise, and the circuit court's role is reduced to a ministerial function. Such a result would be absurd in light of the SVPA's express public safety purpose.

Appellant's reliance on In re Sipe, 239 P.3d 871 (Kan. Ct. App. 2010), and In re Miles, 276 P.3d 232 (Kan. Ct. App. 2012), is unavailing. In both cases, the lower court's annual review probable cause determinations were based solely on the reports prepared and submitted by experts for the state and the committed person, and the appellate court applied a *de novo* standard of review.[3] Sipe, 239 P.3d at 877; Miles, 276 P.3d at 236.

As in this case, SVPA annual review probable cause hearings are generally full evidentiary hearings with witness testimony rather than determinations based solely on expert reports, and South Carolina appellate courts apply a deferential standard of review for circuit court annual review probable cause determinations. *See* Tucker, 578 S.E.2d at 721-722. Given the circuit court's ability to hear direct and cross-examination of witnesses as well as review submitted reports, the circuit court has an inherent ability to consider the credibility and weight of the evidence before it, and the deferential standard of review recognizes that ability.

In this case, the circuit court received evidence from Dr. Gillen detailing Appellant's progress in treatment since he entered the treatment program, including specific notes by his direct treatment providers, the current status of his mental abnormality and personality disorder, his numerous dynamic risk factors, and the multiple issues he needed to continue addressing in treatment to reduce his risk of reoffending sexually. Dr. Gillen's report and testimony referenced specific parts of Appellant's treatment records, and called Appellant's self-serving statements to Dr. Gillen in doubt. Like the expert in Tucker, Dr. Gillen testified that although Appellant had

[3]Appellant correctly asserts South Carolina's SVPA was originally premised on the Kansas sexually violent predator statute, and South Carolina appellate courts relied heavily on Kansas case law in interpreting the SVPA. Since originally enacted, however, both the Kansas and South Carolina statutes have been significantly amended, and South Carolina's case law regarding the SVPA no longer relies as heavily on Kansas law. One major difference is South Carolina's appellate standard of review for probable cause determinations.

made some progress in treatment, there were treatment goals he needed to meet before his mental abnormality and personality disorder have so changed he could be safe to be at large and released from the SVPTP. Tucker, 578 S.E.2d @ 722. (Order Denying Annual Review Trial, p. 2; R., p. 166).

In contrast, Dr. Watson relied primarily on Appellant's version of his treatment progress and current status, reviewed limited records regarding Appellant's treatment progress that did not include treatment staff notes regarding Appellant's participation, or lack thereof, in treatment, and he never addressed Appellant's dynamic risk factors. When asked about reviewing the treatment records, Dr. Watson claimed he only received treatment summaries a couple of months before he issued his report, and he did not receive the staff notes. When pressed, Dr. Watson admitted he did not believe Appellant ever met the criteria for commitment under the SVPA, which further called his opinion regarding Appellant's risk to reoffend sexually into doubt.

The totality of the evidence presented substantiated Dr. Gillen's findings questioning Appellant's self-report regarding his treatment progress and current mental status, determining Appellant's mental status had not so changed he is safe to be at large. The evidence also seriously undermined Dr. Watson's opinion and credibility. The circuit court properly considered the totality of the evidence presented, including the credibility of the witnesses, in concluding there was no probable cause to believe Appellant failed to meet his burden to establish probable cause to believe his mental status has so changed he is safe to be at large.

There is ample evidence in the record supporting the circuit court's finding of no probable cause to believe Appellant's mental status has so changed he is safe to be at large. Accordingly, the Court should affirm the circuit court's ruling and Appellant's continued confinement under the SVPA for long term control, care and treatment.

CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court finding of no probable cause and Appellant's continued commitment for treatment pursuant to the SVPA.

Respectfully submitted,

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Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
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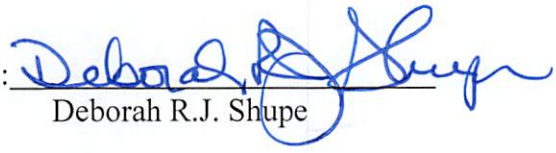
BY: 
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ATTORNEYS FOR RESPONDENT

August 20, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
The Honorable Jennifer B. McCoy, Circuit Court Judge
Appellate Case No. 2020-001551

In the Matter of the Care and Treatment
of Kevin Lamar Wright,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that 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 Appellant Court Filings."

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Kevin Lamar Wright, Appellant.

Appellate Case No. 2020-001551

Appeal From Charleston County
Jennifer B. McCoy, Circuit Court Judge

Unpublished Opinion No. 2022-UP-452
Submitted November 1, 2022 – Filed December 14, 2022

AFFIRMED

James Kristian Falk, of Falk Law Firm, LLC, of Charleston, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

PER CURIAM: Kevin Wright appeals the circuit court's order denying his request for a jury trial to determine his fitness for release from the South Carolina Sexually Violent Predator Treatment Program. On appeal, Wright argues the circuit court erred by finding that "no probable cause [existed] to believe [his] mental abnormality or personality disorder ha[d] so changed [that] he was safe to be at large and, if released, was not likely to commit [additional] acts of sexual violence." We affirm pursuant to Rule 220(b), SCACR, and the following

authorities: *In re Care & Treatment of Tucker*, 353 S.C. 466, 470, 578 S.E.2d 719, 721 (2003) ("On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding."); *id.* at 470, 578 S.E.2d at 722 ("In a [section] 44-48-110 probable cause hearing, the committed person has the burden of showing the hearing court that probable cause exists to believe that his mental condition has so changed that he is safe to be released."); S.C. Code Ann. § 44-48-110 (2018) ("If the court determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence, the court must schedule a trial on the issue.").

AFFIRMED.[1]

WILLIAMS, C.J., THOMAS, J., and LOCKEMY, A.J., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B McCoy, Circuit Court Judge

Appellate Case No. 2020-1551

IN THE MATTER OF THE CARE AND TREATMENT OF KEVIN WRIGHT, APPELLANT

APPELLANT'S PETITION FOR REHEARING

Rehearing is appropriate and necessary in this case because the panel misapprehended appellant's burden of proof under SC Code § 44-48-110 necessary to establish that probable cause exists to believe that appellants mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence. By affirming the trial court's decision denying appellant's request for a release trial under SC Code § 44-48-110, the panel misapprehended the quantum of proof necessary to establish probable cause under this statute. The trial court considered the testimony from both appellant's and the State's expert and decided that the State's expert was more credible. The trial court failed to follow the probable cause standard of proof in evaluating appellant's evidence. In considering whether appellant satisfied his probable cause burden, the trial court should have focused its attention upon the existence of appellant's proof as opposed to the relative weight to be given to the proof. *Probable cause does not demand any showing that such a belief be correct or more likely true than false*. In re Care & Treatment of Chandler v. State, 382 S.C. 250, 257-58, 676 S.E.2d 676,

680 (2009) By weighing the relative credibility of the testimony from the two competing experts, the trial court appeared to follow a preponderance of the evidence standard and not a mere probable cause standard to evaluate appellant's proof. If left to stand, the trial court's decision creates a unique definition of probable cause for use under § 44-48-110.

In drafting the Sexually Violent Predator Act, the legislature adopted "probable cause" as the relevant burden of proof for two separate proceedings under the Act. A release hearing under § 44-48-110 and a probable cause determination and hearing under SC Code §§ 44-48-070 and 44-48-080. There is no evidence that the legislature intended for the quantity and quality of proof necessary to establish probable cause burden under § 44-48-110 to be any different than would be required under §§ 44-48-070 and 44-48-080.

The term probable cause is not defined by the act The SVP Act, thus its meaning must *be interpreted in accordance with its usual and customary meaning. Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.* S.C. Energy Users Comm. v. S.C. PSC, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) *citing* Branch v City of Myrtle Beach, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000). In considering if the State met its probable cause burden under § 44-48-80, probable cause has been described *as a flexible, common-sense standard and that very term itself, "probable cause," does not import absolute certainty*. Brown v State, 372 S.C. 611, 619, 643 S.E.2d 118, 122 (Ct. App. 2007). In Brown the State appealed the trial court's decision that State failed to establish probable cause under § 44-48-80. The Brown court explained the probable cause standard under the statue as follows: *In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and*

conscientiously entertain suspicion that the person meets the definition of a sexually violent predator. Id. Brown v. State, 643 S.E.2d 118, 122-23.

Dr Selman Watkins testified as appellant's expert at the hearing. Dr Watson interviewed and evaluated appellant, and who opined that appellant no longer was a threat to reoffend. Dr Watson credentials as an expert on the subject cannot be in dispute. He received his doctorate in clinical psychology from the University of South Carolina and participated in over 500 hours of training through the American Academy of Forensic Psychology. Additionally he was the acting director of the SVP treatment program from January 2003 until January 2007. If the panel were to apply the same probable cause burden on appellant as stated in Brown, the issue becomes whether Dr Watson's testimony would be sufficient to lead a reasonable person to believe and conscientiously entertain **suspicion** that appellant no longer met the definition of a sexually violent predator. Therefore in order to affirm the trial court's decision, the panel had to have determined that Dr Watson's testimony was so lacking in value that it was insufficient to create even a reasonable suspicion that appellant was no longer a sexually violent predator.

If the trial court had found that appellant met its probable cause burden, the Court then must set a date for a release trial. At a release trial under § 44-48-110 the State must prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and, if released, is likely to engage in acts of sexual violence. If the trial court had found that appellant met his probable cause burden, then the fact finder would hear both Dr Watson's testimony and that of the State's expert Dr. Gillen. The fact finder would then have the opportunity to weigh the credibility of the experts' testimony in reaching its verdict. However, by ruling that appellant failed to establish probable cause, the trial court usurped the factfinder's prerogative to consider the credibility of the witnesses' testimony.

CONCLUSION

Based upon the foregoing matter set forth in the Brief of Appellant, appellant respectfully requests that the panel reverse its unpublished opinion, and remand this matter back to the trial court to set a date for a release trial pursuant to SC Code § 44-48-110.

s/ *James Falk*
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December 26, 2022

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Dec 28 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B McCoy, Circuit Court Judge

Appellate Case No. 2020-1551

IN THE MATTER OF THE CARE AND TREATMENT OF KEVIN WRIGHT

KEVIN WRIGHT, APPELLANT

CERTIFICATE OF SERVICE

The undersigned certifies that on December 26, 2022 he deposited a true and accurate copy of the PETITION TO RECONSIDER with the United States Post Office, sufficient first class postage affixed, and addressed to Deborah R.J. Shupe, Esquire. Office of the South Carolina Attorney General PO Box 11549 Columbia SC 29211-1549 and, to Appellant at WellPath Solutions, 4546 Broad River Road, Columbia, SC 29210.

December 26, 2022

s/ *James Falk*
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The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Kevin Lamar Wright, Appellant.

Appellate Case No. 2020-001551

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ C.J.

_____ J.

_____ A.J.

Columbia, South Carolina

cc:
James Kristian Falk, Esquire
Deborah R.J. Shupe, Esquire
Alan McCrory Wilson, Esquire
The Honorable Jennifer B. McCoy

FILED
Jan 20 2023