

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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SC Court of Appeals

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

APPELLATE CASE NO. 2020-001551

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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When presented with a novel question of law, the court of appeals erred in affirming the trial court’s order denying Petitioner’s petition for a release trial under S.C. Code Ann. § 44-48-110 and erred in affirming the trial court’s decision that Petitioner failed to meet his burden of proof that probable cause existed to believe his mental abnormality or personality disorder had so changed that he was safe to be at large, and, if released, would not likely to commit acts of sexual violence.

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on January 20, 2022

QUESTION PRESENTED

When presented with a novel question of law, did the court of appeals err in affirming the trial court's order denying Petitioner's petition for a release trial under S.C. Code Ann. § 44-48-110 and err in affirming the trial court's decision that Petitioner failed to meet his burden of proof that probable cause existed to believe his mental abnormality or personality disorder had so changed that he was safe to be at large, and, if released, would not likely to commit acts of sexual violence.

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 Petitioner 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 Petitioner'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 Petitioner. Dr. Christopher Gillen was the State's only witness and E. Selman Watson, Ph.D. was Petitioner'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. (R. p. 135 l. 1-2).

On October 28, 2020 Judge McCoy entered an order finding that Petitioner failed to meet his burden and that probable cause did not exist to believe that Petitioner'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.

In a *per curiam* opinion filed December 14, 2022 (Unpublished Opinion No. 2022-UP-452) the Court of Appeals affirmed Judge McCoy's decision.

RELEVANT FACTS

Summary of testimony at annual review hearing

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 17.

The Court granted Petitioner'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.

The State then offered Dr Christopher Gillen to testify in the field of forensic psychology. R. p. 74 line 22. During *voir dire* Petitioner's counsel challenged Dr Gillen's relative lack of

practical experience in the field of forensic psychology. Dr Gillen's evaluation of Petitioner was one of Dr Gillen's the 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 Petitioner'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 Watson opined that Petitioner 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 Petitioner which included about six hours of interviews. R. p. 15 lines 4- 8. Dr Watson met with Petitioner four times between July 2018 and February 2020. R. p. 15 line 23 – p. 16 line 7. These interviews included discussions of Petitioner's treatment level, treatment progress, mental health and sexual offender history. R. p. 15 lines 14- 16. Dr Watson also reviewed Petitioner's treatment notes and prior evaluations. R. p. 15 l. 16-18; p. 16 lines 19-22.

Dr Watson opined that Petitioner did not have a personality defect R. p. 17 line 12 through p. 18 line 8 but that Petitioner did suffer from pedophilia. R. p. 18 lines 15-16. Dr Watson assessed Petitioner under the Static 99R criteria and opined that on average Petitioner 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 Petitioner was consistent with assessments conducted by previous experts who evaluated Petitioner R. p. 19 line 24-25.

In response to the question why, despite a pedophilia diagnosis, Petitioner 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.* R. 25 lines 18-21. In support of his opinion Dr Watson noted that: Petitioner has had seven years of treatment. R. p. 20 line 17. ; 2; Petitioner does not have the full slate of dynamic risk factors; R. p. 20 lines 19- 23; and, Petitioner 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 Petitioner 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 Petitioner suffered from a cognitive distortion that his victims enjoyed Petitioner's assaults. R. p. 26 lines 6- 16. However Petitioner 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.

Dr Gillen's testimony was consistent with the options he expressed in his July 21, 2020 report. Dr Gillen opined that Petitioner continued to meet diagnostic criteria for Pedophilic disorder. Dr Gillen testified that Petitioner had made some progress in treatment (R. p. 100 line 14), however Petitioner'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 Petitioner'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 Petitioner failed to meet his burden, and concludes, at this time, there is no probable cause to believe Petitioner'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.

R. 167

ARGUMENT

When presented with a novel question of law, the court of appeals erred in affirming the trial court's order denying Petitioner's petition for a release trial under S.C. Code Ann. § 44-48-110 and erred in affirming the trial court's decision that Petitioner failed to meet his burden of proof that probable cause existed to believe his mental abnormality or personality disorder had so changed that he was safe to be at large, and, if released, would not likely to commit acts of sexual violence.

Reasons to grant certiorari

This Court's certiorari review of the court of appeals opinion in this case is appropriate and necessary because: 1) there is no South Carolina case law which addresses the quantum of proof necessary for a person committed to the Sexually Violent Predator Treatment Program (SVP resident) to establish probable cause under S.C. Code 44-48-110; and, 2) after having produced evidence at a hearing under S.C. Code 44-48-110 sufficient to establish probable cause, the trial court's refusal to set a release trial infringed upon Petitioner's rights under the Due Process Clause of the Fifth Amendment. Petitioner raised this issue in its Petition to Reconsider. Therefore Petitioner now petitions this Court for a writ of certiorari to the court of appeal for the Court to review the court of appeals decision and correct the errors therein.

Discussion

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 fact finder at a subsequent release trial. 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 appeared to use a "preponderance of the evidence standard" in determining that Petitioner 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 Petitioner.

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).

In litigation under the SVP Act there are two instances where the moving party must show probable cause. The first is at the initial stage of the litigation when S.C. Code Ann. § 44-48-80 requires the State to prove *whether probable cause exists to believe that the person named in the petition is a sexually violent predator*. The second is at an annual review hearing under S.C. Code

Ann. § 44-48-110 where the SVP resident has the opportunity to show *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.*

There are no reported cases discussing the quantum of proof necessary for an SVP resident to establish probable cause under S.C. Code Ann. § 44-48-110, however there are cases that discuss the State's burden of proof under S.C. Code Ann. § 44-48-80. South Carolina courts have likened the State's probable cause burden in a hearing under S.C. Code Ann. § 44-48-80, to its probable cause burden in criminal cases. 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 Brown Court recognized that probable cause at a preliminary hearing in a criminal may be found somewhere between suspicion and sufficient 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). The Brown 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). Similarly in In re Care and Treatment of

Chandler v. State, this court recognized that probable cause at a hearing under S.C. Code Ann. § 44-48-80 does not demand any showing that such a belief be correct or more likely true than false. 382 S.C. 250, 257-258, 676 S.E.2d 676, 680 (2009).

Courts in both Kansas and Washington require that before a release trial is granted an SVP resident need establish probable cause that their condition has changed. Because of the similarity between the South Carolina and Kansas SVP statutes, 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).

Kansas courts hold that the probable cause showing required from an individual seeking a release trial 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 these probable cause hearings Kansas courts must consider the evidence in the light most favorable to the committed person and resolve all 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).

Similarly, Washington courts hold that at an annual review hearing the court's probable cause analysis looks only to the existence of proof and does not include weighing the relative credibility of the proof offered at the hearing. *State v. McCuiston*, 174 Wash. 2d 369, 382, 275 P.3d

1092, 1099 (2012). The McCouston described a committed person's burden of proof at an annual review hearing as:

[t]he probable cause standard is not a stringent one, it allows the court to perform a critical gate-keeping function. Under this standard, a court must assume the truth of the evidence presented; it may not "weigh and measure asserted facts against potentially competing ones. At the same time, the court can and must determine whether the asserted evidence, if believed, is sufficient to establish the proposition its proponent intends to prove. *Id.*

Dr Watson's testimony would have been to sufficient to establish probable cause had the trial court under the same probable caused standard used to evaluate the State's case in criminal preliminary hearing. By requiring Petitioner at his probable cause hearing to offer proof that is more credible than the State's proof, the trial court effectively held Petitioner to a preponderance of the evidence standard as opposed to merely a probable cause standard.

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); In re Bilton, 432 S.C. 157, 164, 851 S.E.2d 442, 445 (Ct. App. 2020). Petitioner 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 Petitioner from the SVPTP. The Court's resolution of this factual issue constituted a significant deprivation of Petitioner's liberty. The trial Court violated Petitioner's due process rights when it deprived Petitioner of the right to have a jury decide whether he was now safe for release.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. If this Court grants the petition, but dispenses with further briefing, Petitioner respectfully requests this Court reverse and remand for a new trial.

Respectfully Submitted,

s/ James K. Falk

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February 21, 2023.

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February 21, 2023

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SC Court of Appeals

Re: In the Matter of Kevin Wright Appellate Case No. 2020-001551

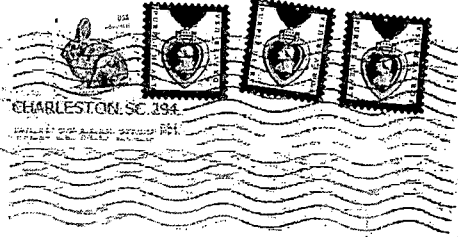
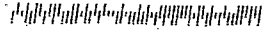
Dear Clerk

I enclosed a copy of the Petition for Writ of Certiorari I filed in with the Supreme Court in the above case.

Regards



James Falk



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