

RECEIVED

May 22 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Edgar W. Dickson, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN SHELBY WELLS,

APPELLANT.

Opinion No. 2023-UP-138 (S.C. Ct. App. Filed April 5, 2023)

APPELLATE CASE NO. 2021-000679

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

INDEX i

CERTIFICATE OF COUNSEL1

QUESTION PRESENTED2

STATEMENT OF THE CASE.....3

ARGUMENT

In this sexually violent predator case, the Court of Appeals erred in
finding the trial court could try petitioner while he was
incompetent.....4

CONCLUSION.....8

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on April 20, 2023. App. 6.

QUESTION PRESENTED

In this sexually violent predator case, did the Court of Appeals err in finding the trial court could try petitioner while he was incompetent?

STATEMENT OF THE CASE

The Attorney General petitioned for John Shelby Wells' commitment as a sexually violent predator and on June 1, 2021, a bench trial was held before the Honorable Edgar W. Dickson in Lexington County. R. 1. Aimee J. Zmroczek represented petitioner and Suzanne J. Shaw appeared on behalf of the Attorney General. R. 1. Judge Dickson found petitioner was an SVP and ordered him committed. R. 84.

On April 5, 2023, a panel of the Court of Appeals affirmed petitioner's commitment in an unpublished opinion. App. 1. The panel consisted of Judges Thomas, McDonald, and Hewitt. App. 1. On April 20, 2023, the court denied Wells' petition for rehearing. App. 6. This petition for certiorari follows.

ARGUMENT

In this sexually violent predator case, the Court of Appeals erred in finding the trial court could try petitioner while he was incompetent.

At the time of his SVP bench trial, petitioner John Shelby Wells (“Wells”) was seventy-three (73) years old, could barely hear, was in a wheelchair after suffering several strokes, and undisputedly incompetent to stand trial. R. 41, l. 11 – 43, l. 12. R. 80. R. 6, l. 1 – 14. R. 9, l. 5 – 9. The Attorney General’s expert, Dr. Rozanna Tross (“Tross”), opined Wells met the definition of an SVP and was “likely to reoffend if he is released into the community.” R. 35, l. 16 – 37, l. 11. When Dr. Tross tried to explain the commitment process to Wells during their interview, he said he would “prefer the lethal injection.” R. 19, l. 17 – 22. During Dr. Tross’s redirect, the Attorney General clarified that someone does not need to be mobile or move about independently “to sexually recidivate.” R. 43, l. 5 – 12. Judge Dickson ordered him indefinitely confined in the SVP facility. R. 84.

Wells’ attorney objected to the trial on the grounds that Wells was incompetent. R. 3, l. 21 – 5, l. 19. Judge Dickson accepted trial counsel’s statement that she was unable to have any meaningful communication with Wells. R. 4, l. 11. R. 5, l. 20 – 22. Trial counsel attempted to have an independent SVP evaluation performed, but Wells “couldn’t even get through” it. R. 4, l. 4 – 11. Trial counsel instead had the evaluator, Dr. William Burke (“Burke”) perform a competency evaluation. R. 4, l. 1 – 11. R. 80.

Dr. Burke found that Wells was incompetent to stand trial and “that competency cannot be restored with psychiatric and competency restoration treatment.” R. 82 - 83. Nor was Wells likely to be restored to competency “in the foreseeable future.” R. 82 - 83. Dr. Burke found

“objective evidence of brain damage” likely due to Wells’ strokes and recommended a neuropsychological evaluation for more specific data on the damage to Wells’ brain. R. 82 - 83.

The Attorney General did not contest the issue of Wells’ competency, but argued it made no difference in whether he could be tried or committed as an SVP. R. 6, l. 1 – 8, l. 10. Both lawyers discussed the import of this Court’s opinion in In the Matter of Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020) cert. granted Aug. 25, 2021, argued March 15, 2022. Judge Dickson ruled “competency is not an issue in this” and Wells was tried before the court instead of a jury. R. 9, l. 5 – 9.

Wells filed an appeal challenging the court’s ruling that he could be tried while incompetent. The Court of Appeals affirmed Wells’ commitment. App. 1. The court cited as precedent its holding in In the Matter of Griffin, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021). Griffin held that “a prisoner is not entitled to be competent to stand trial under” the SVP Act. Griffin at 341, 863 S.E.2d at 348. A petition for certiorari and the return have been filed with this Court in Griffin. (Appellate Case No. 2021-001228).

The Court of Appeals erred in affirming Wells being tried while incompetent. The Court of Appeals also wrongly decided Griffin. The due process right to counsel has little meaning if an SVP defendant cannot provide any help. In all SVP trials, the Attorney General will present an expert who says the defendant meets the definition for commitment. While not the only defense, counsel’s ability to present a counter-expert is the best defense to create a battle of the experts. Wells could not participate in an evaluation nor help his attorney in this regard. Nor could Wells provide any mitigation, which is another potential defense. Finally, Wells could not give his attorney any help to convince the court a plan existed for Wells’ release that would prevent him from reoffending. All Wells could say was that he wanted “the lethal injection.”

Without the ability to communicate with her client, defense counsel could mount no effective defense. SVP defendants have the right to the effective assistance of counsel that flows both from the SVP statute and due process. In the Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). Without any ability to assist counsel, it was impossible for counsel to perform effectively. See State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (stating test for competency which includes the ability to consult with counsel); Drope v. Missouri, 420 U.S. 162, 171 (1975) (stating person who cannot assist in preparing his defense may not be subjected to trial).

The SVP Act contains a provision applicable to persons incompetent to stand trial on their underlying criminal charges that would qualify them for confinement under the act. S.C. Code Ann. § 44-48-100(B). This provision dictates that the court should conduct a bench trial on whether the SVP defendant committed the underlying criminal charges. Id. If the court finds the person committed the acts, then the SVP trial proceeds. Id.

The constitutionality of this provision was challenged in Oxner, which awaits a decision from this Court. The Court of Appeals rejected the argument that procedural due process protects incompetent persons from being tried under the SVP Act for the underlying qualifying criminal charges. Oxner at 566-69, 846 S.E.2d at 371-72. The Court of Appeals wrongly decided Oxner. This Court will likely reverse and find that due process prevents a trial on the underlying criminal charges while incompetent. Such a reversal in Oxner would strongly indicate that trying Wells while incompetent also violates due process. Wells' liberty interest is the highest possible—his personal freedom, perhaps for the rest of life—is at stake.

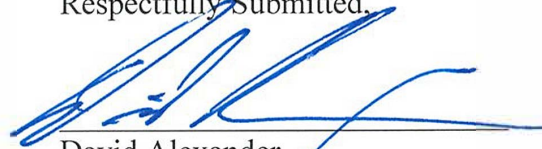
Without any ability to participate in his defense, the risk that he has been erroneously deprived of his liberty is high. He could provide no mitigating evidence or even participate in an independent SVP evaluation by Dr. Burke. The SVP Act specifically provides for an independent evaluation. S.C. Code Ann. § 44-48-90(B). This evaluation is a vital part of the procedural protections under the SVP Act so that persons can defend themselves and not be erroneously deprived of their freedom after serving their sentences. Wells had no such ability, and his attorney could summon no defense because of the lack of any ability to have him evaluated.

The Attorney General's interest in having an incompetent person confined in the SVP facility is low, especially under the facts of this case. Wells is nearly deaf, is over seventy years old, has organic brain damage, and is in a wheelchair. Certainly, Wells is not a member of the limited class of the "extremely dangerous group of sexually violent predators" envisioned for indefinite incarceration under the SVP Act. S.C. Code Ann, § 44-48-20. Should this Court reverse Oxner and/or Griffin, Wells will also be entitled to reversal of his commitment.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse appellant's commitment.

Respectfully Submitted,



David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

This 22nd day of May, 2023.

RECEIVED

May 22 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Edgar W. Dickson, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN SHELBY WELLS,

APPELLANT.

Opinion No. 2023-UP-138 (S.C. Ct. App. Filed April 5, 2023)

APPELLATE CASE NO. 2021-000679

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Writ of Certiorari to the Court of Appeals and Appendix 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 the South Carolina Court of Appeals; and on John Wells, at 4546 Broad River Road, , Columbia, SC 29210, this 22nd day of May, 2023.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER