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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County
The Honorable Edgar W. Dickson, Circuit Court Judge
Court of Appeals Appellate Case No. 2021-000679
S.C. Ct. App. Op. No. 2023- UP-138
On Petition for Writ of Certiorari to the Court of Appeals
Supreme Court Appellate Case No. 2023-000814

In the Matter of the Care and Treatment
of John Shelby Wells,

Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the court of appeals properly find the SVPA commitment proceeding could continue even if Petitioner was unable to assist his trial counsel because a person is not entitled under the SVPA to be competent for commitment proceedings to continue, and the Legislature contemplated the likelihood a person subject to the SVPA would not be competent to assist in his defense?

STATEMENT OF THE CASE

After a bench trial, at which Petitioner John Shelby Wells appeared and was represented by counsel, the Honorable Edgar W. Dickson, Circuit Court Judge, found beyond a reasonable doubt that Petitioner is a sexually violent predator as defined by the South Carolina Sexually Violent Predator Act (SVPA), and committed him to the South Carolina Department of Mental Health for long term control, care and treatment. This appeal followed.

In an unpublished opinion filed April 5, 2023, the court of appeals affirmed Judge Dickson's findings. In re Care and Treatment of John Shelby Wells, Op. No. 2023-UP-138 (S.C. Ct. App., filed April 5, 2023. (Appendix, pp. 1-2). Petitioner filed a Petition for Rehearing on April 14, 2023, which the court of appeals denied by Order filed April 20, 2023. (Appendix, pp. 3-6). Petitioner filed a Petition for Writ of Certiorari to the Court of Appeals on May 22, 2023, seeking review by this Court.

STATEMENT OF FACTS

In June 2012, the Lexington County Grand Jury indicted Petitioner John Shelby Wells on two counts of committing or attempting a lewd act upon a child arising from incidents occurring January 1, 2011, through July 8, 2011, with two victims, ages four and eight years old. Petitioner pled guilty as charged on June 6, 2012, and was sentenced to concurrent fifteen years incarceration on each count.[1] Prior to Petitioner's release from incarceration, Respondent State of South Carolina commenced proceedings pursuant to the Sexually Violent Predator Act (SVPA) seeking Petitioner's commitment to the South Carolina Department of Mental Health (DMH) as a sexually violent predator, for long term, control case and treatment. The matter was called for a bench trial on June 1, 2021, before the Honorable Edgar W. Dickson, Circuit Court Judge.

Prior to trial, Petitioner's counsel informed Judge Dickson Petitioner did not contest the criminal convictions underlying the SVPA proceeding, but counsel argued the case could not move forward because Petitioner was incompetent as a result of some health problems and age, and he was unable to assist counsel in preparing a defense to the SVPA case. As evidence of incompetency, Petitioner submitted the report of William Burke, Ph.D., who did not testify at trial, opining Petitioner was not competent to stand trial and not likely to become competent.[2] (Record on Appeal [R.], pp. 3-5; 80-83). Judge Dickson found competence was not required under the SVPA, and the case could move forward. (R., pp. 6-10).

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[1]Petitioner was also convicted in 1992 of two counts of criminal sexual conduct with a minor, first degree. The victims in those offenses were Petitioner's six and nine year old nieces. (R., pp. 63; 71-72).

[2]The assessment took place on May 20, 2021, and the report was provided to the State on or about May 25, 2021. The hearsay report was entered as a court exhibit, Dr. Burke did not testify at trial, and the State was not able to cross-examine him about the contents of his report, particularly whether Petitioner was truly incompetent or merely recalcitrant.

Rozanna Tross, Psy.D., was qualified as an expert in forensic clinical psychology and sex offender evaluations. She formerly worked for DMH, and in that capacity, was appointed by the court to conduct a forensic evaluation of Petitioner to determine whether he met the criteria for civil commitment pursuant to the SVPA. Her evaluation protocol included reviewing extensive documentation regarding Petitioner, meeting with Petitioner two times in March 2020, and conducting relevant collateral interviews. (R., pp. 13-18).

Dr. Tross testified Petitioner "was difficult," and "not interested in participating." During the first interview, he was "pretty hostile, interrupted often, spoke over, [and] was dismissive of information that was relayed to him about the nature and purpose of the evaluation." Based in part on his demeanor during the interview, Dr. Tross scheduled a second interview to see if Petitioner would react differently. Petitioner was "definitely calmer" during the second interview, but "was still upset about the nature and purpose of the proceedings, [and] resistant to the idea of having an evaluation." Petitioner frequently told Dr. Tross "if he was not going to be released from jail and ultimately committed to the SVP, he would prefer the lethal injection."[3] (R., p. 19).

Petitioner gave differing answers between the two interviews, and Dr. Tross testified the accuracy of the information he provided regarding his history was somewhat limited. He described a tumultuous childhood with an abusive, alcoholic father. He also described a heavy substance abuse history from an early age, including alcohol and drugs, a very limited education history, and a history of chronic medical issues, including mild strokes, and physical injuries causing frequent pain, which Dr. Tross testified "wouldn't impact his volitional control." (R., pp. 19-21).

Based on Petitioner's criminal convictions and history, Dr. Tross diagnosed him with pedophilic disorder, sexually attracted to females, nonexclusive type. She also conducted a risk

[3]Dr. Burke's report indicates Petitioner made similar statements during the interview.

assessment using actuarial tools, which placed Petitioner in the average range of risk compared with other sex offenders with similar scores, but she testified those tools only include detected re-offenses, so the results could underestimate an individual's risk to re-offend. Dr. Tross stated she did not perform any other standardized testing, in part due to Petitioner's "lack of willingness to really participate or engage in testing," so "it was deemed that it wouldn't be fruitful." (R., pp. 27-30; 49 - 62).

Dr. Tross testified there are twelve know dynamic risk factors for re-offending that are not part of the actuarial tests' factors. She determined Petitioner exhibited six of those factors: sexual preference for prepubescent children; offense supportive attitudes, including a belief there was nothing wrong with his conduct and rationalizing his behavior; lack of emotionally intimate relationships with adults; poor problem solving; callous lack of concern for others or callousness in general; and dysfunctional coping. She further testified Petitioner did not have any "protective" factors that would help mitigate his risk to reoffend if released, and his motivation was "simply to avoid being re-incarcerated rather than prevent re-offense." (R., pp. 30-35).

Dr. Tross opined to a reasonable degree of psychological certainty that Petitioner has the mental abnormality of pedophilic disorder, he has serious difficulty controlling his sexual behaviors, and he is likely to re-offend sexually if released into the community. She testified she reviewed Dr. Burke's report concluding Petitioner was not competent to stand trial and stated it did not change her opinion in any way. (R., pp. 35-37; 63-83).

On cross-examination, Dr. Tross testified she met with Petitioner twice "[p]artly because of his cantankerous demeanor during the first interview," and he "was so resistant to being at the interview." At the second interview, Petitioner "was notably calmer and seemed to calm down

faster," but he "was still quite resistant." She further testified "it's fair to say [Petitioner] wasn't trying to help himself." (R., pp. 37-40).

Regarding Petitioner's competency, Dr. Tross testified "there really wasn't an issue or question about competency" when she met with Petitioner, and "[h]is refusal to participate isn't the same thing as lacking capacity to be competent." She stated that during both interviews "[Petitioner] was aware of who he was, where he was, why he was meeting with [her] despite his displeasure at doing so," and "[h]e had an appreciation for the circumstances which is why he seemed to advocate that he would prefer a lethal injection." Dr. Tross acknowledged Petitioner's age and medical issues, including mild strokes while incarcerated, and testified it appeared "he was placed in a wheelchair for his risk for falls," and "as a result of safety and an abundance of caution." (R., pp.40-42).

On re-direct examination, Dr. Tross testified she accounted for Petitioner's hearing difficulty during the interviews by sitting right next to him and shouting. She stated she "knew that he heard [her] because his responses when he gave them were at least in relation to the question asked," and she had no doubt he understood her. She further testified Petitioner's physical mobility issues did not impact his risk to sexually re-offend because he did not need to be able to move around independently in order to re-offend. (R., pp. 42-43).

Judge Dickson court found beyond a reasonable double that Petitioner had two qualifying convictions for criminal sexual conduct with a minor, first degree, he was diagnosed with a mental abnormality (pedophilic disorder) that predisposed him to engage in acts of sexual violence, and he was likely to re-offend if he was around children. He further found Petitioner is a sexually violent predator as defined by the SVPA and ordered his commitment to DMH for long term control, care and treatment. (R., pp. 46; 85). This appeal followed.

By unpublished opinion filed April 5, 2023, the court of appeals affirmed, finding nothing in the SVPA entitled Petitioner to be competent for the commitment trial to proceed and the Legislature contemplated that persons subject to the SVPA may be incompetent to assist in their defense. (Appendix, pp. 1-2). The court of appeals denied Petitioner's Petition for Rehearing by Order filed April 20, 2023. (Appendix, p. 6). Petitioner now seeks review of the court of appeals decision by this Court.

ARGUMENT

The court of appeals properly affirmed Judge Dickson's ruling that the commitment proceeding could continue even if Petitioner was unable to assist his trial counsel because a person is not entitled under the SVPA to be competent for commitment proceedings to continue, and the Legislature contemplated the likelihood a person subject to the SVPA would not be competent to assist in his defense.

Petitioner contends the court of appeals erred in relying on In re Griffin, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021), which he argues was wrongly decided. His entire argument is premised on this Court's reversal of the court of appeals decision in Griffin, as well as the impact of this Court's decision on certiorari in In re Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020) (Supreme Court Appellate Case No. 2020-001278).

"The cardinal rule of statutory construction is that the court ascertain and effectuate the intent of the legislature." In Re Griffin, 434 S.C. 338, 863 S.E.2d 346, 341 (2021), *citing* Odom v. Town of McBee Election Comm'n, 427 S.C. 305, 831 S.E.2d 429, 432 (2019) (*citing* Greene v. S.C. Election Comm'n, 314 S.C. 449, 445 S.E.2d 451, 453 [1994]). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent." Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000).

To ascertain the Legislature's intent to encompass mentally incompetent persons in the class of persons covered under the SVPA, as found by the court of appeals, the Court need look no further than the express purpose of the statute. The Legislature found "a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018) (emphasis added).

The SVPA defines "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons who may not be competent to participate in criminal and SVPA court proceedings.

While §44-48-100(B) does not apply in this case, it clearly evidences the legislative intent to include incompetent individuals in the SVPA process. In 100(B) hearings, all constitutional rights afforded a defendant at criminal trials apply to the hearing "other than the right not to be tried while incompetent." S.C. Code Ann. §44-48-100(B) (2018) (emphasis added).[4] If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt the person actually committed the charged offenses, it is disingenuous to argue the Legislature intended that competency be required for other SVPA proceedings, including a commitment trial, to determine if the person qualifies as a sexually violent predator. Holding otherwise would lead to either: 1) SVPA proceedings pending indefinitely while a person is detained in a secure facility without the statutorily required long term control, care and treatment; or 2) the release of potential sexually violent predators with virtually no supervision and no treatment. Either alternative is an absurd result that undermines the ultimate goals of public safety and treatment of sexually violent predators.[5]

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[4]The statute requires the court to make specific findings on "the extent to which the person's incompetence . . . affected the outcome of the hearing, including its effect on the person's ability to consult with and assist counsel and to testify on the person's own behalf."

[5]*See* In re Sykes, 303 Kan. 820, 367 P.3d 1244 (2016) (analysis of interplay between competency and sexually violent predator civil commitment proceedings); *see also* In re Detention of Morgan, 180 Wash.2d 312, 330 P.3d 774 (2016) (same); Moore v. Superior Court, 237 P.3d 530 (2010) (same); In re Commitment of Weekly, 956 N.E.2d 634 (2011) (same); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (same); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) (same); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App. 2003)

This case presents a prime example of why competency is not required in SVPA proceedings. Petitioner stands convicted of four sexually violent offenses involving prepubescent children spanning at least two decades (two convictions in 1992 and two in 2012). His self-report to Dr. Tross and the medical records indicated he had suffered several "mild" strokes, which, combined with age, appear to be the primary source of his purported incompetency, and his confinement to a wheelchair was more related to safety concerns than an inability to ambulate on his own.

Petitioner's claims his statements that he "would rather receive the lethal injection" than be committed to the SVP treatment program somehow equates to either mental incompetence or inability to assist his attorney. To the contrary, during both Dr. Tross' and Dr. Burke's evaluations, Petitioner clearly understood the State was seeking to commit him for long term control, care and treatment, and adamantly stated his preference to die rather than be "reincarcerated." While his stated preference may seem irrational to others, it does exhibit a mental state fully capable of understanding the process, choosing whether to cooperate or not, and assisting counsel.

Significantly, even though he was resistant to participating in Dr. Tross' interviews, he did eventually provide his version(s) of his family history and lifestyle and sought to rationalize and/or justify his criminal behavior. (R., pp. 20-23; 65-73). Further, to the extent Dr. Burke's report was relevant, it expressly stated Petitioner "did not cooperate with the interview process," but when addressed in a loud voice, Petitioner "appeared to be able to hear and comprehend what was being said to him." (R., p. 8) (emphasis added). Petitioner also appropriately responded to some

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(same); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (same); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (same).

questions in the competency to stand trial assessment, but "refused to answer" other questions. (R., pp. 81-82). Refusal to answer indicates some level of comprehension and an exercise of will.

Petitioner's trial counsel informed the circuit court she could "certainly understand partially [Petitioner's] thought process," but "just not being able to discuss it with him has created a barrier." (R., p. 5). Given his conduct during the evaluations and trial counsel's statements at trial, Petitioner understood the nature of the proceedings against him and chose not to assist in his own defense.

The record is clear Petitioner resisted the entire SVPA process from the very beginning, and his refusal to cooperate with his counsel was an extension of that resistance. Even assuming Petitioner was unable to assist counsel, however, the Legislature clearly intended for incompetent individuals who meet the SVPA criteria to be encompassed within the statute's scope. *See* Griffin, 863 S.E.2d at 348 ("[I]t appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense.")

Griffin addressed an issue almost on-point with the issue in this case. In Griffin, the person pled guilty but mentally ill to crimes constituting qualifying offenses under the SVPA.[6] He participated in the court appointed evaluator's interview, which concluded he met the criteria for civil commitment under the SVPA, but his mental status deteriorated thereafter because he refused to take the medication prescribed to control his schizophrenia. Prior to trial, trial counsel made two motions for competency evaluations, asserting Griffin was incompetent to assist counsel in preparing a defense, and the circuit court denied both motions, finding the SVPA did not require the person to be competent for the case to proceed to trial. The court of appeals affirmed the circuit

[6]Significantly, Petitioner did **not** plead guilty to mentally ill on any of his convictions.

court, holding a person is not entitled to be competent to stand trial under the SVPA. 863 S.E.2d at 347-348.

Petitioner asserts " Griffin was wrongly decided," and argues the right to effective assistance of counsel recognized in In re Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017), has little meaning if a person cannot provide any help to his counsel.[7] Petitioner further asserts his right to due process was violated by his inability to get the independent evaluation, to help his counsel in trial preparation and provide any mitigation evidence, or to convince the court he had a viable plan to prevent re-offending if he was released. (Petition, pp. 5-6).

Petitioner also asserts this Court "will likely reverse the court of appeals decision in In re Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020), which held §44-48-100(B) hearings did not violate due process, and a reversal "will strongly indicate trying [Petitioner] while incompetent also violates due process." (Petition, p, 6). Even assuming Petitioner's speculation regarding this Court's future decision in Oxner is ultimately accurate, the fallacy of his argument is the undeniable distinction between a civil hearing to determine if a person committed alleged crimes for which he was never convicted in criminal court due to his incompetency (a §100(B) hearing), and a civil trial based on crimes for which the person was already convicted in criminal court while competent, but subsequently became mentally incompetent for some reason. Oxner involved the first circumstance, and this case purportedly involves the second.

[7]Notably, there is a Petition for Writ of Certiorari pending in this Court in Griffin, but Petitioner did not seek to hold this appeal in abeyance pending this Court's decision in Griffin even though he claims a reversal in Griffin will require a reversal in this case. Even if this Court reverses Griffin, however, there are factual distinctions between Griffin and this case that may affect the ultimate outcome, including the question of whether Petitioner was truly incompetent or merely recalcitrant during Dr. Burke's evaluation and the difference between a mental incompetency versus physical disability.

The issue in Oxner is whether §100(B) adequately protects the due process rights of someone who was not convicted in criminal court of a qualifying sexual offense due to incompetency. On its face, §100(B) does not apply to this case. Thus, a reversal in Oxner does not mandate reversal in this case.

Significantly, unlike Griffin and Oxner, the purported "incompetency" at issue in this case arises from Petitioner's physical disabilities rather than a mental incompetency. Further, all of the disabilities Petitioner claims take him out of the limited class the Legislature focused on in the SVPA (nearly deaf, age, brain damage, and being in a wheelchair) were facts Dr. Tross expressly considered in reaching her opinion Petitioner meets the criteria for civil commitment under the SVPA. She specifically testified none of Petitioner's disabilities impacted his lack of control over his pedophilic urges and risk to reoffend. (Petition, p. 7; R., pp. 19-21).

Petitioner also asserts the "Attorney General's interest in having an incompetent person confined in the SVP facility is low, especially under the facts of this case." (Petition, p, 7). As a threshold matter, SVPA proceedings are not premised on "the Attorney General's interest." Rather, they are premised on the public safety concerns identified by the Legislature.

Taken to their logical conclusion, Petitioner's assertions would substantially impair the State's compelling interest in protecting the public if an alleged sexual predator can claim he is too incompetent to undergo a sexual predator evaluation and/or trial because of a mental disorder or physical disability, particularly when the alleged predator may just be recalcitrant and uncooperative.[8] Requiring competency, or even restoration to competency, before a sexual

[8]There may well be significant overlaps between mental disorders qualifying someone for commitment as a sexual predator, and those rendering the person unable to comprehend the proceedings or assist in his own defense. *See* Moore, 237 P.3d at 544 (potential overlap exists between sexual predator type mental disorders and those making the person incompetent).

predator trial can proceed would indefinitely or permanently delay sexual predator proceedings, which weighs "heavily, and in fact dispositively, against recognition of a due process right of this kind." *Id.* *See also,* Morgan, 330 P.3d at 779 (recognizing negative impact of requiring competency in sexual predator proceedings); Sykes, 367 P.3d at 1247–48 (same).

Judge Dickson and the court of appeals correctly interpreted the Legislative intent regarding competency in SVPA cases, and concluded competency is not required for SVPA cases to proceed to resolution. Therefore, the Petition for Writ of Certiorari to the Court of Appeals should be denied.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State respectfully submits the Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

Respectfully submitted,

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