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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B. McCoy, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF ANTONIO D. PATTERSON,

APPELLANT

APPELLATE CASE NO. 2022-001219

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial judge err in overruling appellant's objection to the State's expert testifying about expunged convictions after the State initially agreed pre-trial that it would not be using them?

STATEMENT OF THE CASE

The Attorney General sought appellant Antonio Patterson's commitment under the SVP Act after he completed his criminal sentence and on July 25, 2022, a bench trial was held before the Honorable Jennifer B. McCoy. July 25, 2022, Tr. 1. Suzanne J. Shaw and Christopher Runyan represented the Attorney General. Tr. 1. Melissa Gay and Sarah Norton represented appellant. Tr. 1. At the conclusion of the trial, Judge McCoy did not pronounce a verdict from the bench and said she would render a written decision. Tr. 165, l. 22 – 166, l. 4. Two days after the trial ended, Judge McCoy issued an Order of Commitment finding that appellant was a sexually violent predator. R. ___ (July 28, 2022, Order). This appeal follows.

STANDARD OF REVIEW

The admission of evidence is governed by the abuse of discretion standard. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

ARGUMENT

In this sexually violent predator case, the trial judge erred in overruling appellant's objection to the State's expert testifying about expunged convictions after the State initially agreed pre-trial that it would not be using them.

In the realm of SVP cases, the Attorney General's case against appellant Antonio Patterson was not strong and had trouble differentiating Patterson from someone with a medical condition versus a common criminal. Patterson had two qualifying sexual convictions against adult victims. Tr. 23, l. 21 – 23, l. 7. The Attorney General's expert witness, Dr. Marie Gehle ("Gehle"), could only diagnose Patterson with antisocial personality disorder ("ASPD"), a diagnosis that while qualifies as a personality disorder for SVP commitment, would apply to the vast majority of prison inmates, and substance abuse disorder related to Patterson's drinking. Tr. 38, l. 18 – 21. Tr. 44, l. 8 – 10. See Kansas v. Crane, 534 U.S. 407, 412 (2002) (noting that 40-60% of the male prison population is diagnosable with ASPD); United States v. Antone, 742 F.3d 151, 169-70 (4th Cir. 2014) (criticizing the use of ASPD for sex offender commitments, writing, "What's more, Antone's civil commitment is based on two mental disorders that are undisputedly prevalent in the nationwide prison population."); compare In the Matter of Snow, 425 S.C. 544, 823 S.E.2d 467 (2019) (holding that "other specified personality disorder" is a sufficient diagnosis for SVP commitment).

Dr. Gehle's diagnosis of ASPD was based in part on conclusions she drew from her three-hour interview with Patterson. Tr. 18, l. 11 – 19, l. 13. A diagnosis of ASPD requires evidence of conduct disorder before the age of fifteen. Tr. 69, l. 12 – 71, l. 2. Dr. Gehle said Patterson admitted to bullying kids, taking lunch money, giving teachers a hard time, cutting class, calling people

names, and teasing people. Tr. 18, l. 15 – 19, l. 13. She said Patterson described being physically cruel to people, telling lies, and getting in trouble at home and at school. Tr. 18, l. 15 – 19, l. 13.

On cross-examination, Dr. Gehle initially said she did not have the opportunity to review any records related to Patterson's adolescence or youth. Tr. 64, l. 8 – 15. But Dr. Gehle had some school records "and there was no evidence in those records of excessive absences." Tr. 65, l. 1 – 11. None of these records included any disciplinary history. Tr. 65, l. 12 – 16. She had no evidence of any juvenile criminal history. Tr. 66, l. 9 – 16. When asked if Patterson's description of his childhood behavior was "just a typical adolescent acting out," Dr. Gehle responded, "It is a criteria for conduct disorder, so that is what I was assessing for." Tr. 69, l. 12 – 15.

Patterson testified that he used to do magic tricks in school which the doctor interpreted as "conning people." Tr. 101, l. 8 – 103, l. 7. He never had to go to the principal's office and was never suspended. Tr. 101, l. 8 – 103, l. 7. He graduated from high school and immediately went to work at a Charleston restaurant and then at a tire store, where he progressed from sweeping floors to manager. Tr. 104, l. 18 – 105, l. 24. Patterson's employer at the tire store testified that he was a very good employee, that customers loved him, and that he planned to hire Patterson back if he was not committed. Tr. 83, l. 9 – 89, l. 10. His employer continued a personal relationship with Patterson during Patterson's incarceration and said that he had promised to go to church with him if released. Tr. 89, l. 1 – 14.

Dr. Gehle used two actuarial instruments for assessing Patterson's likelihood to reoffend. Tr. 48, l. 14 – 52, l. 6. On one of the instruments, Dr. Gehle said Patterson did not have "a very high score" and that it was not clearcut "that this person has absolutely a likelihood just on that one test." Tr. 48, l. 14 – 52, l. 6. On the other instrument which had a "much higher score" and placed

Patterson "in above average risk," his chance of reoffending within five years was still only 13.8%.[1] Tr. 51, l. 14 – 52, l. 1.

During pretrial hearings, appellant asked for the exclusion of any uncharged conduct or offenses that did not result in a conviction. July 25, 2022, Tr. 44, l. 25 – 47, l. 14. The Attorney General replied that they could "short-circuit" a potential issue and said "we're actually not going to contest exclusion of the expunged charges. We're not even going to discuss them. They're not going to be part of Dr. Gehle's testimony, she did not rely on those expunged charges, so that's not an issue." July 25, 2022, Tr. 47, l. 17 – 48, l. 1. In response to defense counsel's request to clarify the State's position, the Attorney General responded, "Yeah, to the extent that other conduct that was or was not charged, was relied upon by Dr. Gehle, we will be discussing that, but anything that was expunged and has a formal expungement order, we will not be discussing at all." July 25, 2022, Tr. 49, l. 19 – 23.

Defense counsel stated that appellant had a CSC with a minor "contempt charges" that were "dismissed due to false allegations and records were expunged." July 25, 2022, Tr. 52, l. 4 – 15. Appellant also had a "26-year-old misdemeanor conviction" that had been expunged. July 25, 2022, Tr. 52, l. 4 – 15.

Despite this agreement before the trial, when asked to discuss Patterson's criminal history, Dr. Gehle said, "He also had a number of charges that were expunged---" and appellant immediately objected. Tr. 21, l. 16 – 22. Judge McCoy ruled, "So to the extent they are in the

[1] One of the elements the Attorney General must prove beyond a reasonable doubt is that an SVP defendant is "likely to engage in acts of sexual violence" if not confined. S.C. Code Ann. § 44-48-30(1)(b). The Legislature recently amended the SVP Act and defined "likely to engage in acts of sexual violence" as "more probably than not will engage in acts of sexual violence," which resembles the preponderance of the evidence standard in civil cases. S.C. Code Ann. § 44-48-30(9). The preponderance of the evidence standard is usually described in mathematical terms to juries as 51%.

record and filed, your objection is overruled. I'll give it the proper weight that it deserves under the statute. She can answer." Tr. 22, l. 3 – 6. Dr. Gehle continued to describe appellant's criminal history and added, "Again, there were some expunged charges that were significant, but." Tr. 22, l. 17 – 20.

Dr. Gehle later stated that appellant "had charges for criminal domestic violence" and appellant objected and moved to strike because "that is an expunged event." Tr. 40, l. 23 – 41, l. 7. The Attorney General replied that Dr. Gehle "got an order from the Court to look at that, and she used them in a risk assessment, she's not discussing them." Tr. 40, l. 23 – 41, l. 7. The court said it would "allow it for the purposes it is being introduced. She can go ahead." Tr. 40, l. 23 – 41, l. 7.

Dr. Gehle again brought up the expunged charges when describing what she used to calculate appellant's score on the actuarial risk instruments. Tr. 49, l. 19 – 50, l. 11. She said that the "coding rules" of the actuarial instruments say to use expunged charges and that if she had more information, appellant's score of three could have been as high as seven. Tr. 49, l. 19 – 50, l. 11. When Dr. Gehle again referenced the expunged CDV shortly after this questioning, appellant again objected. Tr. 55, l. 13 – 16. The judge said that the actuarial rules "specifically instructs her to consider expungements, so I'll overrule your objection for the purposes of being used for today's hearing." Tr. 55, l. 17 – 21.

The trial court erred in allowing the Attorney General's expert to testify about appellant's expunged charges. Rule 703 does not allow an expert witness, even in an SVP trial, to become an unfettered conduit for hearsay. See Matter of Bilton, 432 S.C. 157, 851 S.E.2d 442 (Ct. App. 2020). In Bilton, this Court rejected an expert testifying about a purported scientific test administered by another expert. Id. The Court emphasized the reliability requirement of Rule 703. Id. Dr. Gehle

admitted that the information she had about the expunged charges was incomplete. This information was not reliable and appellant's objection should have been sustained.

Appellant argued that mention of expunged conduct was more unfairly prejudicial than probative. See Rule 403, SCRE. As stated in the juvenile code, the purpose of an expungement "is to restore the person in the contemplation of the law to the status the person occupied before being taken into custody." S.C. Code Ann. § 63-19-2050(E). Allowing the expert to testify about expunged charges eviscerates this purpose and is unfairly prejudicial with no probative value. Furthermore, the trial judge allowed the expert's testimony about "coding rules" to usurp the court's decision to make decisions based on evidentiary rules.

The Attorney General capitalized on this error in closing argument. Faced with an actuarial score that equated to only a 13.8% chance to reoffend, the Attorney General argued that if the expunged charges were considered that appellant's score would have been much higher. Tr. 137, l. 20 – 138, l. 22. Appellant's only diagnosis is the broadly applicable ASPD, and Dr. Gehle's diagnosis was shaky because the evidence of conduct disorder was sorely lacking. Appellant is not a pedophile. Nothing distinguishes appellant's conduct from common criminal behavior. Without using these expunged charges—which the Attorney General repeatedly stated before the trial it would not do—appellant would not have been found to be a sexually violent predator. This Court should reverse.

CONCLUSION

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

s/David Alexander_____
David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of July, 2023.