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Nov 28 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Brooks P. Goldsmith, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF PERRY GUSTUS PHILLIPS,

APPELLANT

APPELLATE CASE NO. 2022-001804

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in refusing to allow the defendant to call his brother as a witness who would testify about the defendant's plans if he were to be released?

STATEMENT OF THE CASE

The Attorney General sought appellant's commitment under the SVP Act in Dorchester County and on December 5, 2022, appellant was tried before the Honorable Diane S. Goodstein and a jury. R. 1. Suzanne Shaw represented the Attorney General and James K. Falk represented appellant. R. 1. The jury determined appellant was an SVP and Judge Goodstein ordered him committed. R. 361.

STANDARD OF REVIEW

The trial court's decision on the admission of evidence is reviewed under an abuse of discretion standard, and an error of law constitutes an abuse of discretion. State v. Oates, 421 S.C. 1, 13, 803 S.E.2d 911, 918 (Ct. App. 2017).

ARGUMENT

The trial court erred in refusing to allow the defendant to call his brother as a witness who would testify about the defendant's plans if he were to be released.

Despite not serving any discovery, the Attorney General demanded before trial that appellant proffer the testimony of a witness, appellant's brother. R. 33, l. 14 – 36, l. 5. The Attorney General argued that the testimony of appellant's brother was irrelevant and then said, "I just don't know what he's going to say." R. 33, l. 14 – 36, l. 5. Appellant's counsel had emailed the Attorney General the week before the trial that he intended to call the brother, Julius Stewart ("Stewart"), as a witness. R. 33, l. 14 – 36, l. 5.

Appellant responded to the judge's inquiry about relevance that Stewart would be testifying about appellant's future plans. R. 35, l. 11 – 22. Defense counsel cited the Attorney General's expert's report that discussed community support being a protective factor against re-offending. R. 35, l. 11 – 22. Defense counsel also argued that in other SVP cases, his clients had been attacked by the Attorney General for not having a realistic plan not to re-offend if released. R. 35, l. 11 – 22. Judge Goodstein indicated that it was not relevant and granted the Attorney General's motion to bar Stewart's testimony. R. 35, l. 23 – 36, l. 5.

After the Attorney General rested, appellant proffered the testimony of Stewart. R. 276, l. 11 – 280, l. 23. Stewart was appellant's older brother and owned a metal recycling business in Atlanta. R. 276, l. 11 – 280, l. 23. Stewart offered appellant the opportunity to come live with him and his wife in Atlanta and work in the metal business. R. 276, l. 11 – 280, l. 23. After concluding the direct examination, defense counsel argued the testimony was relevant in showing that appellant would "have a place to stay and a place to work." R. 276, l. 11 – 280, l.

23. On cross-examination, the Attorney General attacked Stewart for not knowing the details of appellant's criminal history. R. 281, l. 6 – 284, l. 1.

After the proffer, the Attorney General argued that Stewart should not be allowed to testify because he had “no knowledge of his sexual crimes.” R. 284, l. 23 – 285, l. 12. She further argued that, “All he can do is offer him a place to stay if his probation can be transferred to Georgia. That is not an issue that this jury needs to consider. It could potentially confuse them and prejudice them against the state since he does have supportive family, **which is certainly a positive and can be a protective factor.**” R. 284, l. 23 – 285, l. 12 (emphasis added). Defense counsel argued the State's witness testified about appellant's plans for the future and that his due process right to present a complete defense allowed him to rebut the expert's testimony about the defendant's recklessness, impulsivity, and failure to make plans. R. 285, l. 14 – 293, l. 23. He also cited the expert's report that contained “four pages” about “community support and plans for the future.” R. 286, l. 2 – 4. Judge Goodstein reaffirmed her prior decision that the testimony was irrelevant and did not let Stewart testify. R. 293, l. 1 – 25.

The trial court erred in determining Stewart's testimony was not relevant. Whether appellant would be employed and have a safe place to live is directly relevant to his likelihood to reoffend, which is an element the Attorney General must prove. Section 44-48-30 defines a sexually violent predator as someone who “suffers from a mental abnormality or personality disorder that makes the person **likely to engage** in acts of sexual violence **if not confined in a secure facility for long-term control, care, and treatment.**” S.C. Code Ann. §44-48-30(1)(b) (emphasis added). The emphasized portion of the statute has been referred to by our Supreme Court as the third element the State must prove in an SVP case. See Matter of Snow, 425 S.C. 544, 548, 823 S.E.2d 467, 469 (2019).

“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” SCRE 401. Appellant’s future plans and the credibility of these plans were highly relevant to show that he was unlikely to reoffend if released. Stewart’s testimony would have given the jury confirmation that appellant had family support, a residence, and a job waiting for him. See In re Detention of Post, 241 P.3d 1234, 1240 (Wash. 2010).

In Post, the defendant presented testimony about his plans for treatment with a doctor, where he would live, where he would work, and a community group in which he would participate. Id. The defendant also presented “numerous witnesses” who testified “that they would support him in the community.” Id. The Washington Supreme Court found, “This evidence was all relevant to the likelihood that Post would reoffend, as it has some tendency, if believed, to show that Post was less likely to do so.” Id.

Defense counsel was also correct that the testimony by the Attorney General’s expert showed the relevancy of Stewart’s testimony. The Attorney General asked the expert if a person has risk management needs, could they manage the risks on their own or whether they needed treatment. R. 226, l. 1 – 4. The expert answered that a change in environment was frequently necessary. R. 226, l. 5 – 8. The expert added that risk factors included “community support, or really, lack of it” and impulsivity. R. 226, l. 15 – 18. She testified that all of these risk factors applied to appellant and made him more likely to reoffend. Re. 226, l. 21 – 22. She further explained that “the final risk factor is release to a high-risk situation.” R. 228, l. 8 – 15. The expert said appellant’s release situation “does not look markedly different from when he was engaging in sexual offending behavior.” R. 228, l. 8 – 15. Another problem related to

reoffending was not having a close person in whom a defendant could confide or help with their problems, which leads to stress and sexual crimes. R. 230, 1. 4 – 12.

Stewart's testimony about appellant's future plans was relevant to his likelihood to reoffend, an element straight from the SVP statute. The trial court erred in sustaining the Attorney General's objection. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed and this case remanded for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of November, 2023.

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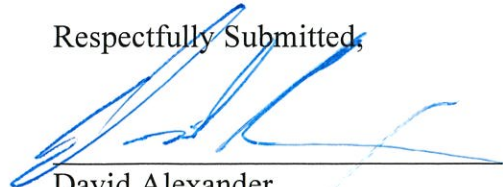
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Perry Gustus Phillips states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Brooks P. Goldsmith, which was held on December 7, 2022, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

Wherefore, he asks the Court to relieve him as counsel for Perry Gustus Phillips.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of November, 2023.

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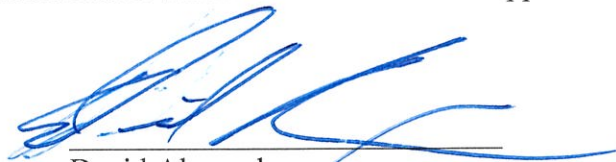
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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript.

I certify that this designation contains no matter which is irrelevant to this appeal.



David Alexander
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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 Appellate Court Filings."



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CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter 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 on Perry Gustus Phillips, #, at 4546 Broad River Road, , Columbia, SC 29210, this 28th day of November, 2023.



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