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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable Daniel D. Hall, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF MERRILL D. STEWART,

APPELLANT

APPELLATE CASE NO. 2023-000311

ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW3

ARGUMENT

In this sexually violent predator case, the trial court erred in granting the Attorney General’s motion in limine to preclude appellants from questioning the State’s expert witness about the availability of outpatient treatment.4

CONCLUSION.....8

PETITION TO BE RELIEVED AS COUNSEL9

TABLE OF AUTHORITIES

South Carolina Cases

Matter of Snow, 425 S.C. 544, 823 S.E.2d 467 (2019) 5

State v. Oates, 421 S.C. 1, 803 S.E.2d 911 (Ct. App. 2017)..... 3

Other Jurisdictions

In re Detention of Post, 241 P.3d 1234 (Wash. 2010) 5

Statutes

S.C. Code Ann. §44-48-30(1)(b) 5

Rules

SCRE 401..... 5

STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in granting the Attorney General's motion in limine to preclude appellant from questioning the State's expert witness about the availability of outpatient treatment?

STATEMENT OF THE CASE

The Attorney General sought appellant Merrilld C. Stewart's commitment as a sexually violent predator and on February 13, 2023, a trial was held in York County before the Honorable Daniel D. Hall and a jury. R. 1. Suzanne Shaw appeared on behalf of the Attorney General. R. 1. Don Thompson represented appellant. R. 1. The jury found appellant was an SVP and Judge Hall ordered him committed. R. 160, 1. 12 – 161, 1. 11. This appeal follows.

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

In this sexually violent predator case, the trial court erred in granting the Attorney General's motion in limine to preclude appellant from questioning the State's expert witness about the availability of outpatient treatment.

During pre-trial hearings, the Attorney General asked Judge Hall to rule “that there would be no discussion of any future treatment that Mr. Stewart might get either on an inpatient or outpatient basis.” R. 32, l. 10 – 36, l. 3. The Attorney General argued that if the defense were permitted to discuss types of treatment, including the effectiveness of outpatient treatment, “that would confuse the issues here.” R. 32, l. 10 – 36, l. 3. She stated that the jury’s only function was to determine whether appellant had a personality disorder or mental abnormality and whether appellant was likely to reoffend. R. 32, l. 10 – 36, l. 3. Discussion of the availability of outpatient treatment “would effectively create a fourth element” for the State to prove. R. 32, l. 10 – 36, l. 3.

Defense counsel argued that the statute required the jury to determine whether appellant needed to be confined and that meant he could ask whether outpatient treatment “would be appropriate.” R. 32, l. 10 – 36, l. 3. In response, the court asked the Attorney General the relevance of outpatient treatment. R. 32, l. 10 – 36, l. 3. She responded it was not relevant and then paraphrased the statutory provision that the jury must determine whether a person was likely to reoffend “if not committed to a secure facility for long-term control, care, and treatment.” R. 32, l. 10 – 36, l. 3.

Judge Hall ruled the jury is “not to determine whether there are any other alternatives, or whether there’s outpatient treatment may or may not be available. That’s not even an issue for this jury to even consider.” R. 32, l. 10 – 36, l. 3. Defense counsel then argued any questioning

by the Attorney General concerning appellant’s noncompliance with sex offender treatment in North Carolina would open the door, but the trial judge maintained his ruling and forbade such questioning by the defense. R. 32, l. 10 – 36, l. 3.

The trial court erred in preventing questioning about outpatient treatment. Such questioning is relevant to whether a defendant in an SVP case is likely to reoffend unless confined. The SVP Act 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).

The statutory language expressly links the likelihood to reoffend to the need for confinement. “‘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. A defendant’s plan to avoid reoffending, which can include outpatient sex offender treatment, is a valid defense in an SVP case. 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.

The Legislature necessarily believed treatment can help prevent sexual reoffending or it would not have created the SVP program. The reduction in a defendant's risk with inpatient treatment versus outpatient treatment is a matter of degree and a factual issue for the jury when it considers the "likelihood" element. A jury could certainly find that a defendant with a plan to attend sex offender treatment is less risky than a defiant defendant who claims no treatment is necessary.

The Attorney General also opened the door to questions about outpatient treatment. In her opening statement, she told the jury the Legislature enacted the SVP Act for dangerous sex offenders "for an indefinite civil commitment, where they would be offered care and treatment for their mental abnormalities or personality disorders." R. 40, l. 12 – 20. During her questioning of her expert, the Attorney General asked about treatment multiple times. She asked whether appellant attended required sex offender treatment in North Carolina. R. 80, l. 20 – 24. She asked whether "prior sex offender treatment" was "at all relevant in these types of cases" and the expert answered, "It can be." R. 85, l. 7 – 9.

The Attorney General again confirmed that appellant failed to comply with sex offender treatment as a condition of probation. R. 85, l. 10 – 13. She asked whether appellant had "any further sex offender treatment while he's been in prison." R. 85, l. 14 – 15. Then she asked whether the expert asked appellant "whether he felt he needed sex offender treatment." R. 85, l. 17 – 21.

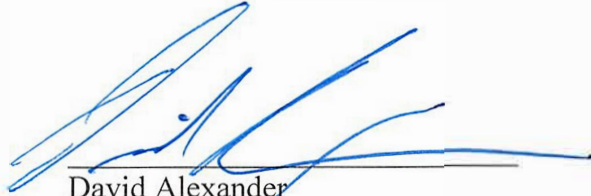
She picked up this line of questioning again later in her direct-examination, asking the expert if she talked with defendants about their "future plans." R. 106, l. 22 – 24. The expert answered that appellant intended to live with his father, work, and reestablish a relationship with a woman. R. 107, l. 4 – 10. The Attorney General's follow-up question characterized

appellant's plan as "to go right back to his old lifestyle." R. 107, l. 11 – 12. She then asked, "Did he express any motivation whatsoever to engage in sex offender treatment?" R. 107, l. 14 – 17.

Despite having won her motion in limine, the Attorney General asked the exact questions she wanted to prohibit the defense from asking. While an SVP defendant does not need to wait for the State to open the door to questions about future plans and outpatient treatment, here the Attorney General kicked the door down herself. The trial court erred in accepting the State's erroneous relevance argument. 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 1st day of February, 2024.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Merrilld C. Stewart 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 Daniel D. Hall, which was held on February 13-14, 2023, 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 Merrilld C. Stewart.

Respectfully Submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of February, 2024.

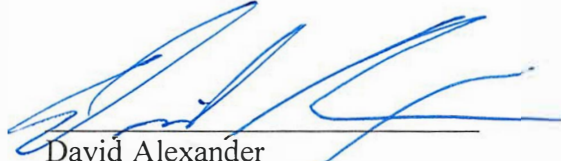
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CERTIFICATE OF COUNSEL

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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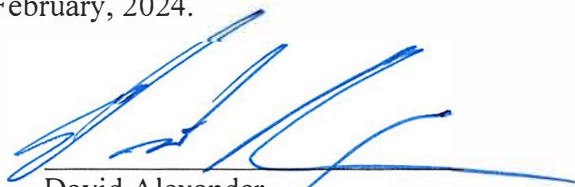
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CERTIFICATE OF SERVICE

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 Merrilld C. Stewart, #, at 4546 Broad River Road, , Columbia, SC 29210, this 1st day of February, 2024.



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