STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CHRISTOPHER T. WILDER,

APPELLANT

APPELLATE CASE NO. 2023-001108

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in not directing a verdict in this sexually violent predator case where one of the experts testified that appellant would more likely than not fail to reoffend sexually?

STATEMENT OF THE CASE

The Attorney General sought appellant's confinement under the SVP law and on June 26, 2023, appellant was tried before the Honorable R. Scott Sprouse and a jury. R. 1. Suzanne Shaw appeared for the Attorney General. R. 2. Don A. Thompson represented appellant. R. 2. The jury found appellant met the definition of an SVP and Judge Sprouse ordered him indefinitely committed. R. 269-71. This appeal follows.

STANDARD OF REVIEW

"When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law." McKaughan v. Upstate Lung & Critical Care Specialists, P.C., 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) quoting Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). "When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Id. "The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt." Id.

ARGUMENT

The trial court erred in not directing a verdict in this sexually violent predator case where one of the experts testified that appellant would more likely than not fail to reoffend sexually.

The dueling experts in this case disagreed about whether appellant was likely to commit another sexual offense if released. The court appointed Dr. Christopher Gillen from the Department of Mental Health to evaluate appellant. R. 179. Dr. Gillen determined that appellant did not meet the definition of an SVP because his lifetime risk to reoffend sexually was beneath the statutory threshold. R. 191-94. The statute, which was amended by the Legislature shortly before this trial took place, reworded the applicable definition. Compare S.C. Code Ann. § 44-48-30(9) ("'Likely to engage in acts of sexual violence' means that a person is predisposed to engage in acts of sexual violence and more probably than not will engage in acts of sexual violence to such a degree as to pose a menace to the health and safety of others.") amended 2023 Act. No. 19 (S.146), §§ 1, 2, eff. May 16, 2023 with S.C. Code Ann. § 44-48-30(9) ("'Likely to engage in acts of sexual violence' means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others.").

Using actuarial risk assessments, Dr. Gillen opined that appellant's lifetime risk to commit another sexually violent crime was 37.4%. R. 191-94. Dr. Gillen testified that "more probably than not" in the amended statute meant that a person's lifetime risk must be over 50%. R. 194. Because appellant was "quite a bit below 50," Dr. Gillen found appellant did not meet the statutory definition. R. 194.

Dr. Gillen further explained that appellant had only one sexual conviction in a very extensive criminal history. R. 199-200. The Attorney General's hired expert, Dr. Emily Gottfried, testified that appellant had "about five" juvenile convictions and "approximately 29 or

30" adult criminal convictions. R. 79. Both experts agreed appellant has antisocial personality disorder. R. 73. R. 179. Dr. Gillen explained the significance of "the one data point" represented by appellant's single sexually violent conviction in the context of his criminal history and diagnosis, stating, "the research talks about trying to differentiate people with antisocial personality disorder who are predisposed to commit sex crimes versus those who are just more antisocial, kind of an equal opportunity offender, so to speak, committing all sorts of crimes. Mr. Wilder is in that latter category." R. 199.

Dr. Gottfried disagreed with the notion that a lifetime risk needed to be reduced to a percentage. R. 155-56. She agreed that her score on the actuarial table gave appellant a 23.4% risk of sexually reoffending within twenty years. R. 139. Her opinion that he was more likely than not to reoffend was based on appellant's masturbating in prison, the combination of his sexual and non-sexual criminal history, and "predatory nonviolent sexual offenses." R. 119.

The two experts scored appellant differently on the primary actuarial table used to evaluate the recidivism risk for sex offenders. Dr. Gottfried gave appellant a score of five, which equated to a five-year reoffense rate of between 12.2% to 15.6%. R. 104-05. Dr. Gillen gave appellant a score of four. R. 187. Dr. Gillen explained the discrepancy in the scores was because Dr. Gottfried counted episodes of appellant masturbating in prison against him. R. 210. Dr. Gillen said such behavior "is explicitly ruled out as being counted as a new sexual offense." R. 207.

Without objection and in front of the jury, the Attorney General cross-examined the psychologist about the recent change in the law:

> Q. And you testified at length that it has to be 50 percent or more. That is brand new.

A. It is brand new here in the state, but it is not brand new in the United States of America.

Q. And this is, in fact, the very first time we have tried one of these cases since that law has changed, right?

A. Yes, that is my understanding.

Q. Okay. And DMH is taking the position that they are going to follow Washington case law rather than any case law, statute, regulation, administrative regulation promulgated here in South Carolina, so this is just DMH's opinion as to what that needs to be?

A. No. As I testified to earlier, this is not just a DMH opinion, this is based on case law that the courts have decided in Washington. Again, that is the only other state that uses that specific language about what more probably than not means. They say explicitly that it is more than 50 percent . . . .

R. 225-226. The Attorney General continued down this line of questioning, asking whether Washington's case law was binding on a jury in South Carolina, whether there was anything "in the State of South Carolina that would require a jury or a Court to define it in that manner," whether "any case law would confirm" Dr. Gillen's testimony, and, after Dr. Gillen cited a case from Washington, asking, "So that is only one case, one state, on the west coast, which is not even in the fourth circuit, which is where South Carolina lies, correct?" R. 226-29.

Again without objection, the Attorney General referenced this questioning in her closing argument when she told the jury:

> It does not mean that they are less likely than not to reoffend. If anything, it requires further inquiry and more in-depth analysis, especially when those numbers are not quite what another state might want. DMH is essentially asking you to enforce an interpretation of the law from another state which is in a minority of states that have an SVP law. You don't have to do that. This is South Carolina, we have our own laws. **This is the first time this law has ever been interpreted by a jury.** And it is up to you to use your judgment on whether you think an actuarial approach is appropriate, or a global approach is.

R. 241 (emphasis added). She further argued:

> So one other thing I wanted to mention to you, is that DMH is now interpreting our new statute to require 50 percent or more. When Congress [sic] was drafting this statute, if that is what they had wanted, they very easily could have put it in there. They are aware of other states' laws. There is a lot of research into it, but they specifically did not. And that is because, it is your call. A single number does not dictate the outcome of these cases.

R. 244. Defense counsel also told the jury that they were "the first jury in this state to handle a case under the new law. So you are going to have to make some decisions as to what the statute means."[1] R. 245.

Appellant moved for a directed verdict at the close of the Attorney General's case. R. 160-63. Appellant argued that Dr. Gottfried's testimony that appellant had a "one in four chance of being a recidivist" along with its speculative nature meant the Attorney General had not carried its burden. R. 160-63. Judge Sprouse denied the directed verdict motion. R. 160-63. Appellant renewed the motion at the close of his case. R. 233-34.

The trial court erred in denying appellant's motion for a directed verdict. While Dr. Gottfried testified that appellant met the criteria for commitment, as defense counsel argued, her testimony was speculative and the actuarial assessments did not support her opinion. The SVP statute requires that a defendant must be likely to engage in acts of sexual violence and the likelihood must be "more probably than not." S.C. Code Ann. § 44-48-30(9). The Attorney General must prove this element beyond a reasonable doubt. S.C. Code Ann. § 44-48-100(A). Here, the Attorney General's proof failed on appellant's likelihood to reoffend.

No reasonable juror could conclude that a less than fifty percent chance to reoffend within a defendant's lifetime satisfied the likelihood of reoffending element. See State v.

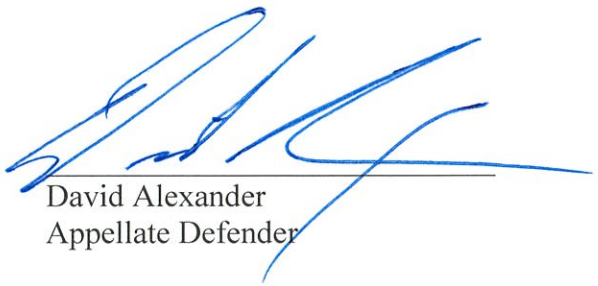
[1] Our state's issue preservation rules combined with the ability to raise ineffective assistance of counsel claims under a specific provision of the SVP Act mean this Court, even under the Anders procedure, likely cannot address the propriety of arguing to a jury that it can interpret the law. See S.C. Code Ann. § 44-48-115; Matter of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017).

Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) ("Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.").

The Attorney General's highly improper argument telling the jury that it could interpret a statute, which is the sole province of the trial judge, also weighs in favor of reversal. "The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement." In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted) (emphasis added). Appellant was not a pedophile, had one sexual conviction in a long criminal history, and was diagnosed with antisocial personality disorder, which is too imprecise to distinguish appellant from a common criminal. See Kansas v. Hendricks, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring); United States v. Antone, 742 F.3d 151, 169-70 (4th Cir. 2014) ("What's more, Antone's civil commitment is based on two mental disorders that are undisputedly prevalent in the nationwide prison population."). This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's decision and grant appellant a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2024.

STATE OF SOUTH CAROLINA

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher T. Wilder 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 R. Scott Sprouse, which was held on June 26-27, 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 Christopher T. Wilder.

Respectfully Submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of April, 2024.

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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 June 26-27, 2023

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

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 APPELLANT

This 3rd day of April, 2024.

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."

David Alexander
Appellate Defender

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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 Christopher T. Wilder, #10605894, at 4546 Broad River Road, , Columbia, SC 29210, this 3rd day of April, 2024.

David Alexander
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