

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND TREATMENT OF
CHRISTOPHER TAFT,

APPELLANT

APPELLATE CASE NO. 2011-199986

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

RECEIVED
AUG 29 2013

SC Court of Appeals

Opinion No. 2013-UP-334

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on August 7, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Taft argued on appeal that (1) the trial court erred in denying appellant's motion for directed verdict and judgment notwithstanding the verdict (JNOV) when the state did not provide reliable expert testimony that Taft met the criteria to be a sexually violent predator pursuant to the Sexually Violent Predator Act, South Carolina Code Section 44-48-30; (2) the trial court erred in allowing the case to proceed without good cause when the state exceeded the 90 day time line for the trial

after receiving the initial report of the court appointed evaluator because the state sought a second independent evaluation which was not begun within the 90 days and the statute does not clarify if that second evaluation should occur within the 90 days.

The Court of Appeals held on Issue One that the state presented evidence that Taft suffered from pedophilia based on Dr. Geoff McKee's 2009 evaluation of Taft where Dr. McKee found Taft was in a moderate to high risk of reoffending. On Issue Two, The Court of Appeals affirmed the circuit court's finding that the unforeseen delays of the court appointed expert caused by the expert's relocating his laboratory from Columbia to Charleston was "good cause" to grant the state a continuance to proceed with a second evaluation.

The Court misapprehended the issues.

ISSUE ONE: Christopher Taft grew up in a home where multigenerational incest was a normal family function. R. 141, ll. 1 –23. Taft was sexually abused by numerous aunts and uncles beginning at age five until around fourteen. R. 105, ll. 4 – R. 107, ll. 13. Consequently, Taft sexually abused his two younger sisters when they were ages five and six the first time, and his younger brother. R. 100, ll 18 – R. 102, ll. 19. As a result, he pled guilty in Family Court in 2006 to three counts of assault and battery of a high and aggravated nature (ABHAN), and served his sentence at the Department of Juvenile Justice (DJJ). R. 102, ll. 20 – R. 104, ll. 3.

Upon his release from DJJ in 2008, he was sent back to this same family environment where his sisters lived. R. 99, ll. 1 – 5; R. 153, ll. 1 – 24. He engaged in sexual activity with both of them again, who were now eight and nine. R. 140, ll. 8 – 15. In 2009, he pled guilty in General Sessions Court to two counts of committing a lewd act on a minor, and was sentenced to DOC. R. 139, ll. 1 – 10; R. 94, ll. 8 – R. 97, ll. 7.

Prior to his release, he was evaluated to determine if there were probable cause that he was a sexually violent predator pursuant to the SVP Act, S.C. Code Section 44-48-30. Probable cause was found by the Circuit Court on October 6, 2010. R. 3, ll. 15 – 25. The Circuit Court appointed Dr. Rebecca Jackson of the Department of Mental Health (DMH) to complete an evaluation of Taft. R. 3, ll.15 – 25; R.4, ll. 1. Dr. Jackson issued a report on November 19, 2010 where she found that Taft had a mental abnormality of pedophilia limited to incest. However, her opinion was that he did not meet the criteria to be a sexually violent predator because he did not need confinement in a secure facility for long term control, care and treatment. R. 148, ll. 1 – 10; R. 4, ll. 2 – 10.

On March 2, 2011, the state requested a hearing which was held before Judge Alison Renee Lee for the purpose of the state requesting a continuance in order for the state to obtain an additional evaluation as the ninety days for the trial began November 19, 2010.¹ R. 3, ll. 1 – 11. The state's attorney argued that after receiving Dr. Jackson's report on November 19, 2010, the state decided to obtain a subsequent evaluation as allowed by Section 44-48-90 (c), and on November 30, 2010, retained Dr. Dwyer of the USC School of Medicine to perform the evaluation. After that, Dr. Dwyer changed his employment to MUSC in Charleston. He had delays in establishing his laboratory, and could not begin the evaluation of Taft. Dr. Dwyer could begin his evaluation of Taft on March 13, 2011, and should complete it by May 15, 2011. R. 4, ll.4 – R. 5, ll. 11; R. 7, ll. 18 – 22.

Judge Lee said there had been sufficient time for the state to obtain a subsequent evaluation. She noted that Taft had been in the county detention center since his release from DOC on October 1, 2010. She also noted that Taft had been examined by two other forensic psychologists prior to his guilty plea. They gave an opinion that Taft's conduct was consistent with that of someone with a

¹ The ninety days for the trial as required by Section 44-48-90 began November 19, 2010. The state filed a motion for continuance on February 18, 2011. See Taft's Memorandum Against the

mental abnormality that would make likely that he would commit acts of violence of a sexual nature. R. 12, ll. 1 – R. 13, ll. 25. However, Judge Lee set the trial for May 23, 2011, and ordered that the evaluation be completed by May 2, 2011 and presented to opposing counsel by May 9, 2011. R. 15, ll. 1 – 11.

On May 23, 2011, in pretrial motions, Taft's attorney moved the court to strike the report of the state's retained expert because the report listed Dr. L. William Mulbry as the state's expert instead of Dr. Dwyer although Dr. Dwyer was listed as a co-author of the report. Respondent's counsel argued that he did not know a different expert from the one approved by the court was going to perform the state's evaluation. R. 34, ll. 4 – R. 38, ll. 12.

The state argued that Dr. Dwyer could not get the evaluation done in time to meet the trial date so the state obtained Dr. Mulbry, a forensic psychiatrist with Dr. Dwyer's lab, to perform the evaluation. R. 38 ll. 14 – R. 41, ll. 20. The judge asked if the state did not think they needed to come back to the court and inform the court of the circumstances. The judge then ruled that Dr. Mulbry would be excluded from testifying at trial because he was not the expert approved by the court. The judge stated that Taft's attorney had a right to know who was going to do Taft's evaluation. R. 41, ll. 21 – R. 51, ll. 25.

At the beginning of the trial, the state asked to proffer the report of Dr. Mulbry which the judge allowed as Taft's attorney did not object. The report was marked as Court's Exhibit 1. R. 75, ll. 1 – 25.

At the jury trial, Dr. Geoff McKee testified for the state that he did an evaluation of Taft in 2009 at the request of Taft's attorney, before Taft's guilty plea to the lewd act charges, as an aid in sentencing. At that time, Taft had pled guilty to the ABHAN charges three years earlier in Family

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Court, but had not pled guilty to the lewd act charges. R. 84, ll. 14 – 25; R. 90, ll. 21 – R. 91, ll. 25.; R. 94, ll. 8 – 19.

Dr. McKee described the different sexual recidivism guides he used to evaluate Taft. Taft scored in the moderate range on two of them, and in the high range on two others. R. 107, ll. 20 – R. 109, ll. 11. His opinion at the time of the testing in 2009 was that Taft suffered from pedophilia, sexually attracted to females. His opinion in 2009 was also that Taft did meet the statutory definition of a sexually violent predator, and needed treatment in a confined facility. R. 114, ll. 1 – R. 117, ll. 20.

However, Dr. McKee admitted that he could not give a current and active opinion as to say whether Taft was a sexually violent predator now because he had not seen him in two years and did not have the personal contact and interview to form a current opinion. He would have to evaluate the person. R. 119, ll. 7 – R. 120, ll. 4. On cross examination, Dr. McKee again confirmed that he could not give an opinion whether Taft was a sexually violent predator. R. 132, ll. 14 – 25.

Dr. Rebecca Jackson testified and described the instruments she used to evaluate Taft. R. 143, ll. 11 – R. 147, ll. 19. Her opinion was that Taft had a mental abnormality of pedophilia, sexually attracted to females, limited to incest. She explained that there was no indication that he was aroused to other children outside the family. R. 147, ll. 20 – R. 148, ll. 17. Critically, she testified that Taft did **not** meet the legal criteria to be a sexually violent predator as he was not likely to engage in acts of sexual violence if not confined in a secure facility for long term control, care, and treatment. R. 152, ll. 1 – R. 153, ll. 25.

Taft's attorney moved for a directed verdict (DV) at the close of the state's case on the basis that the state had not offered any testimony that Taft was a sexually violent predator. Counsel

argued that Section 44-48-30 provided that a sexually violent predator was a person (A) convicted of a sexually violent offense; and (B) **suffers** from a mental abnormality that would make them re-offend with a sexually violent act if not confined. Counsel argued that the statute used the present tense of the word “suffers.” Dr. McKee could not say that Taft currently is a sexually violent predator. R. 162, ll. 24 – R. 164, ll. 13. The judge denied the DV motion. R. 166, ll. 25 – R. 170, ll. 6.

At the close of the trial following the verdict, Taft’s counsel renewed all of his previous objections and made a post-trial motion for a JNOV or in the alternative, for a new trial, on the ground that the court made “an error of law” in submitting the case to the jury. He argued that the 2009 report and testimony was not in line with the statute which used the present tense. The judge then asked the attorneys to submit a memorandum on the issue as to whether the court whether there was a threshold that had to be presented before the case could be submitted to the jury. Then she would rule. R. 202, ll. 6 – R. 203, ll. 25.

On August 29, 2011, the trial judge issued an order denying counsel’s post-trial motions. See August 29, 2011 Order. R. 317.

The SVP Act at Section 44-48-30 provides that a sexually violent predator has been convicted of a sexually violent offense and “suffers” from a mental abnormality that makes a person likely to engage in sexually violent offenses if not confined in a secure facility for long term control, care and treatment.

On appeal of a denial of a directed verdict of acquittal, the Supreme Court must look at the evidence in the light most favorable to the state. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004).

Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, *supra*. A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

A party making a motion for a directed verdict must state the specific grounds relied upon therefore, and the trial court may grant the motion when the case presents only issues of law. Rule 50(a), SCRPC. If the motion is denied, the party may thereafter move for a JNOV in order to have the verdict and judgment set aside and a judgment entered in accordance with the party's directed verdict motion. Rule 50 (b), SCRPC. A motion for a JNOV is merely a renewal of the directed verdict motion. Wright v. Craft, 372 S.C. 1, 20, 640 S.E.2d 486 (Ct. App. 2006). An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below. Welch v. Epstein, 342 S.C. 279, 536 S.E. 2d 408 (Ct. App. 2000).

In the case of In the Matter of the care and Treatment of Bobbie Manigo, 398 S.C. 149, 728 S.E.2d 32 (2012), the Supreme Court ruled that the cardinal rule of statutory construction is that the intent of the legislature must prevail if it reasonably can be discerned from the words used in the statute. The Court wrote that if the language is plain and unambiguous, we must enforce the plain and clear meaning of the words used.

The Court of Appeals misapprehended the issue as shown by their holding that Dr. Geoff McKee's 2009 report was sufficient to show that Taft was a sexually violent predator. In Taft's case, the trial court had the gate keeping role to ensure the expert's testimony was reliable. Dr. McKee stated himself that his report may not be reliable for the current status of Taft as he said he could not render a current opinion without currently evaluating Taft. The trial court erred in allowing this old, unreliable evidence go to the jury.

The statutory language in the SVP statute is very plain when it used the word “suffers”. The word plainly means currently. Dr. McKee’s testimony was that he could not say what the current status of Taft was.

The trial court erred in not granting the DV motion, and then in not granting the JNOV motion because there was no testimony presented that fit the statute of currently “suffers” that proved Taft met the legal criteria to be a sexually violent predator. Dr. Jackson’s report indicated Taft did not meet the criteria. Therefore, the trial court erred in sending this case to the jury, and in not granting the DV and JNOV.

ISSUE TWO: Following his conviction for two counts of committing a lewd act on a child and upon completing his sentence, just prior to his release, he was evaluated to determine if there were probable cause that he was a sexually violent predator pursuant to the SVP Act, S.C. Code Section 44-48-30. Probable cause was found by the Circuit Court on October 6, 2010. R. 3, ll. 15 – 25. The Circuit Court appointed Dr. Rebecca Jackson of the Department of Mental Health (DMH) to complete an evaluation of Taft. R. 3, ll.15 – 25; R. 4, ll. 1. Dr. Jackson issued a report on November 19, 2010 where she found that Taft had a mental abnormality of pedophilia limited to incest. However, her opinion was that he did not meet the criteria to be a sexually violent predator because he did **not** need confinement in a secure facility for long term control, care and treatment. R. 148, ll. 1 – 10; R. 4, ll. 2 – 10.

On March 2, 2011, the state requested a hearing which was held before Judge Alison Renee Lee for the purpose of the state requesting a continuance in order for the state to obtain an additional evaluation as the ninety days for the trial began November 19, 2010.² R. 3, ll. 1 – 11. The state’s

² The ninety days for the trial as required by Section 44-48-90 began November 19, 2010. The state filed a motion for continuance on February 18, 2011. See Taft’s Memorandum Against the

attorney argued that after receiving Dr. Jackson's report on November 19, 2010, the state decided to obtain a subsequent evaluation as allowed by Section 44-48-90 (c), and on November 30, 2010, retained Dr. Dwyer of the USC School of Medicine to perform the evaluation. After that, Dr. Dwyer changed his employment to MUSC in Charleston. He had delays in establishing his laboratory, and could not begin the evaluation of Taft. Dr. Dwyer said he could begin his evaluation of Taft on March 13, 2011, and should complete it by May 15, 2011. R. 4, ll.4 – R. 5, ll. 11; R. 7, ll. 18 – 22.

Defense counsel made a motion for the court to deny the state's motion for a continuance and dismiss this cause of action against Taft. R. 9, ll. 9 – 12. Counsel argued that the SVP statute required that the trial be held within ninety days of the receipt of the court appointed expert's report which was received on November 19, 2010. Counsel argued that the state's reasons were inexcusable because they could have obtained another expert. During this time, Taft's constitutional rights were being violated because he was incarcerated at the detention center since his release from DOC. The judge asked when he was released from DOC, and the state responded on October 1, 2010. R. 7, ll.23 – R. 9, ll. 13.; See Taft's Memorandum Against the Petitioner's Motion for Continuance and in Support of the Motion For Summary Judgment, p. 2. R. 250.

The judge told the state that Taft had been examined by two other forensic psychologist so why was there a need for a fourth evaluation. The state replied that they were just following the statutory guidelines to obtain another evaluation when the court appointed evaluator recommended Taft not be committed to the SVP program. The state argued that it was a genuine issue of material fact. R. 9, ll. 14 – R. 10, ll. 17.

The judge discussed Section 44-48-90 which required the trial be held within the ninety days, and went through subsection C which allowed either party to obtain another expert. She

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stated that the statute provided that the ninety days could be extended as long as the person was not prejudiced. R. 10, ll. 18 – R. 11, ll. 25.

The judge said the problem was that the statute was not clear as to when the trial should be held in light of a subsequent evaluation. Her question was whether the trial should still be held within the ninety days or within what period of time following the ninety days. Defense counsel said the ninety days ended February 16, 2011, and the state filed their continuance February 18, 2011. R. 15, ll. 1 – R. 18, ll. 9.

The judge told the state that Dr. Dwyer had ample time to complete the evaluation as he could have used another lab to do the work. She said at the least he had had time to review the file and reports on Taft. The judge then ordered that the evaluation be completed by May 2, 2011 and presented to opposing counsel no later than May 9, 2011. She set the trial for May 23, 2011. R. 12, ll. 12 – R. 15, ll. 11.

South Carolina Code Section 44-48-90(C) provides:

Upon the receipt of the evaluation issued by the court appointed expert as to whether the person is a sexually violent predator pursuant to Section 44-48-80 (D), the person or the attorney General may retain a qualified expert to perform a subsequent evaluation.

South Carolina code Section 44-48-90 (A) provides in part:

Within thirty days after the determination of probable cause by the court pursuant to Section 44-48-80, the person or the Attorney General may request in writing, that the trial be before a jury.The trial may be continued upon the request of either party and a showing of good cause, or by the court on its own motion in the due administration of justice, and only if the respondent will not be substantially prejudiced.

The Supreme Court in the case of In the Matter of the Care and Treatment of James Carl Miller, 393 S.C. 248, 713 S.E.2d 253 (2011), ruled that the proper remedy when the state fails to

March 2, 2011. R. 249

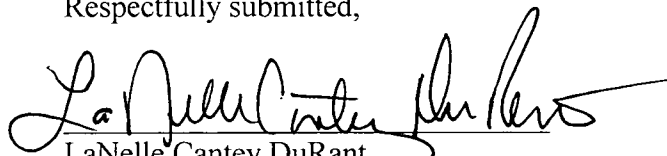
conduct the trial within the time period is for the inmate to file a motion to dismiss pursuant to Rule 41, SCRPC. The Court held that a grant of the motion to dismiss would be without prejudice to the state who could refile the petition. The Court wrote that once the motion to dismiss was granted, the inmate should be released. The Court also held that the state had "good cause" for continuance in Miller because there was only one court-appointed psychiatrist employed to handle all SVP evaluations at that time.

The Court of Appeals misapprehended the issue as shown by their affirming the circuit court's finding that the unforeseen delays of the court appointed expert caused by the expert's relocating his laboratory from Columbia to Charleston was "good cause" to grant the state a continuance to proceed with a second evaluation. The state's reasons were inexcusable because the state had time to obtain another expert. The delay was prejudicial to Taft because he had served his sentence, but continued to be incarcerated at the county detention center

The trial court in Taft's case erred in continuing the case because the state did not show "good cause" for continuance. The judge said in Taft's case that the expert, Dr. Dwyer, had time to complete the evaluation or the state could have obtained someone else. The trial was held six months after the court appointed expert rendered her report. Taft's attorney filed a motion to dismiss which the trial court should have granted, and Taft should have been released.

WHEREFORE, we respectfully request the Court of Appeals to reconsider its decision.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 20th day of August, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Alison Renee Lee, Circuit Court Judge

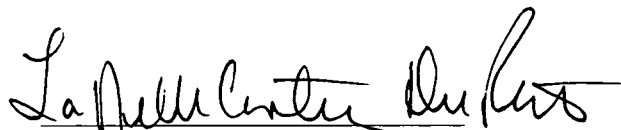
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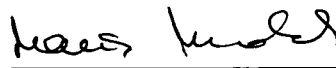
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, and Mr. Christopher Taft, at Sexual Violent Predator Program, 7901 Farrow Road, Columbia, SC 29203, this 20th day of August, 2013.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 20th day
of August, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.