ORIGINAL

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHEROKEE COUNTY
J. Mark Hayes, Circuit Court Judge

Appellate Case No. 2012-213064

THE STATE, ...RESPONDENT

v.

CHRISTOPHER CHAD WESSINGER, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Whether, in conjunction with Appellant's guilty plea to two counts of indecent exposure, the plea judge appropriately found that based on the circumstances of Appellant's case his offenses should be considered sexually violent offenses pursuant to the Sexually Violent Predator Act where: (1) the circuit court had subject matter jurisdiction to make that finding, (2) the plea judge had authority to make that finding, and (3) the plea judge was under no constitutional or statutory mandate to conduct a full evidentiary hearing prior to making that finding?

STATEMENT OF THE CASE

Appellant (Wessinger) was indicted at the April 12, 2012, term of the grand jury for Cherokee County for two counts of indecent exposure (2012-GS-11-362 & -363).[1] He was represented by William Rhoden, Esquire. On September 5, 2012, Wessinger pled guilty as charged before the Honorable J. Mark Hayes, circuit court judge. During the plea proceedings the solicitor asked the judge to make a finding under the Sexually Violent Predator Act (SVP Act) that, based on the circumstances of the case, Wessinger's offense should be considered a sexually violent offense. The court accepted the plea and sentenced Wessinger to three (3) years' imprisonment for one count of indecent exposure and three (3) years' consecutive imprisonment for the second count of indecent exposure. Judge Hayes then made a specific finding on the record pursuant to South Carolina Code Section 44-48-30(2)(o), that Wessinger's offenses should be considered sexually violent offenses. Special conditions of each sentence as indicated on the sentencing sheet included: (1) "evaluate for S.V.P."; (2) "no contact with victims"; and (3) sex offender registration. Wessinger timely filed a notice of intent to appeal and subsequently submitted a Brief. This Brief of Respondent (the State) follows.

[1] Wessinger was also charged with one count of lewd act upon a minor; however, that charge was dismissed by the State upon his entering this plea. (R. p.8, lines 14-22).

STATEMENT OF FACTS

On September 5, 2012, Wessinger appeared before the circuit court during a term of the court of general sessions to enter a guilty plea to two counts of indecent exposure. He was sworn in and testified it was indeed his intent to enter a plea to the charges announced by the solicitor. Wessinger testified nobody had threatened him in any way, or made him any promises in order to get him to plead guilty, and that his decision to enter the pleas was a free and voluntary decision. (R.p.8, line 1-p.11, line 10). The judge explained that Wessinger was entitled to very important constitutional rights associated with his charges, including the right to confront and cross-examine the State's witnesses, but that he would have to give up all of those rights in order to enter the plea. Wessinger testified he understood all of those rights and wanted to give them up and plead. (R.p.12, line 1-p.13, line 4).

According to the solicitor, Wessinger was the boyfriend of a special needs individual living in Gaffney at the home of the victims' grandfather, and Wessinger sometimes watched over the victims when the victims came over to visit. On multiple occasions between February 1, 2009, and February 13, 2010, Wessinger exposed his penis and masturbated in front of thirteen year old female victim #1, primarily in the back room of the home. He also masturbated to the point of ejaculation behind a pool in the backyard and once asked victim #1 to look under the water [in the pool] while he was masturbating. The solicitor stated that at one point victim #1 woke up with Wessinger masturbating over her, and that he had given victim #1 gifts of a sexual nature including a pink thong and a dildo. Victim #1 disclosed the behavior to her parents after the incidents started happening more frequently and after Wessinger once grabbed her shirt

and asked to see her "boobies." During this time period, Wessinger also began exposing his penis and masturbating in front of victim #1 fifteen year old female friend, Victim #2.[2] (R.p.13, line 9-p.15, line 25). When questioned by law enforcement, Wessinger admitted exposing himself in front of the girls. Based on the fact that Wessinger was already on the sex offender registry for a prior conviction and the nature of the current offenses, the solicitor asked the judge to make a finding that the two indecent exposure charges were sexually violent offenses under the SVP Act. (R.p.16, lines 1-19).

When specifically questioned by the judge, Wessinger claimed that most of what the solicitor said "is not right." He testified he did expose himself to the two victims one time, but not multiple times, and denied buying them sexual gifts. (R.p.16, line 20-p.17, line 7). Wessinger admitted he was guilty of both indecent exposure charges, and that all of his answers had been truthful and honest. (R.p.18, lines 1-8). After eliciting victim impact information, including a written statement from victim #2 which was read by her father, a statement from victim #1, and a statement from victim #1 mother, the solicitor repeated his request that the judge find Wessinger's crimes were sexually violent offenses. (R.p.26, line 11-p.27,line 19).

Counsel Rhoden repeated Wessinger's admission that, on one occasion, he exposed himself to the victims. He also repeated Wessinger's assertion that he disputes all other facts alleged by the State, including any alleged threats of violence. (R.p.27, line 24-p.29, line 22). Wessinger refused to concede that his offenses were sexually violent offenses, and argued that before the judge could make such a finding under the

[2] As noted below, many of the alleged facts recited by the solicitor were disputed by Wessinger following the solicitor's presentation.

terms of the SVP Act, Wessinger was entitled to a full evidentiary hearing on the issue, including the presentation of testimony which would be subject to cross-examination. He noted that there were no specific threats of violence or any acts of a violent nature in discovery material he received from the State, and asked for a "full evidentiary hearing" on that issue. Wessinger testified he was sorry for what he had done, that he knew it was wrong, and that he would like to have some help in the form of counseling. He acknowledged he was already required to register as a sex offender but claimed the crime was eighteen to twenty years ago and that since that time, he had not committed any kind of crime. (R.p.33, line 25-p.35, line 19).

The State argued the SVP Act does not require the judge to make "a determination at [the] level" requested by Wessinger prior to making a finding that a non-enumerated offense should be considered sexually violent. The solicitor noted the finding would not make Wessinger a sexually violent predator, but would simply make him eligible for evaluation under the SVP Act. He argued the indecent exposure convictions alone would be enough for the court to make the requisite finding, even without the additional information that Wessinger was already a registered sex offender when he committed these crimes. The solicitor further noted that criminal solicitation of a minor is an enumerated offense, and that indecent exposure is an analogous crime with analogous motivations. (R.p.35, line 24-p.37, line 3). Wessinger responded that he believed the judge would need to weigh and judge the credibility of the evidence presented to the court before making findings of fact that the offenses might be deemed sexually violent.

The court accepted Wessinger's plea and found as follows:

> I have indicated on the sentencing sheet I agree with both the State and the defense. I think that if I were going to make factual determinations based upon what the victims have - - or what's said in court, I think the defendant would have a Constitutional Right to cross-examination. However, for purposes of sexual violent predator evaluation, I believe that the defendant's statements alone and also his history puts him into that category where somebody needs to take a look at it. . . . I have indicated on the sentencing sheet my desire that he be evaluated for the sexually violent predator program and let those people make that determination based on these charges.

(R.p.37, line 25-p.38, line 34) (emphasis added). Wessinger sought clarification as to whether the court was making a specific finding under the SVP Act concerning this particular act as being a sexually violent offense. (R.p.38, line 25-p.38, line 35). The plea judge stated:

> Yes, based upon the information that's been presented to the court. This county [sic] probably does not even consider the actual statements that have been made by the victim. I believe that it's based on the allegations that he has admitted to; his own statements to me that he needs that help; his criminal history; the fact that he's already on the sex offender registry, these charges would put him on the sex offender registry. I think the State has met that burden; that that's enough for me to make that finding for purposes for the evaluation process for the SVP statute.

(R.p.38, lines 4-15).

ARGUMENT

In conjunction with Appellant's guilty plea to two counts of indecent exposure, the plea judge appropriately found that based on the circumstances of Appellant's case his offenses should be considered sexually violent offenses pursuant to the Sexually Violent Predator Act where: (1) the circuit court had subject matter jurisdiction to make that finding, (2) the plea judge had authority to make that finding, and (3) the plea judge was under no constitutional or statutory mandate to conduct a full evidentiary hearing prior to making that finding.

The SVP Act, S.C. Code Ann. §§ 44-48-10 to 44-48-170 (Supp. 2012), provides for the involuntary civil commitment of sexually violent predators who are "mentally abnormal and extremely dangerous." S.C. Code Ann. § 44-48-20 (Supp. 2012). The Act is not intended to be punitive in nature. The purpose of the Act is to: (1) meet the special needs of sexually violent predators; (2) address the significant likelihood they will engage in repeated acts of sexual violence if not treated for their mental conditions; and (3) assess the risks requiring their involuntary civil commitment in a secure facility for long-term control, care, and treatment. In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118 (Ct. App. 2007); S.C. Code Ann. § 44-48-20 (Supp. 2012). Noting "the nature of the mental conditions from which sexually violent predators suffer and the dangers they present," our General Assembly found "it is necessary to house involuntarily committed sexually violent predators in secure facilities separated from persons involuntarily committed under traditional civil commitment statutes." S.C. Code Ann. § 44-48-20 (Supp. 2012).

The SVP Act defines a "sexually violent predator" as a person who: "(a) has been convicted of a sexually violent offense; and (b) 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) (Supp. 2012). A "sexually violent offense," in turn, means one of the specifically enumerated criminal sexual offenses, S.C. Code Ann. § 44-48-30(2)(a) through -30(2)(n) & -30(2)(p) (Supp. 2012), as well as "any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense." S.C. Code Ann. § 44-48-30(2)(o) (Supp. 2012). "Commitment of someone under the SVP Act typically begins when a person convicted of a sexually violent offense is scheduled to be released from custody," In re Brown, supra (emphasis added), and proceeds through a multi-step process of checks and balances culminating in a trial where the State has the burden to prove the person is a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-40 through -100 (Supp. 2012).

Appellant argues the plea judge erred in making a finding, without a full evidentiary hearing, that the offenses to which he pled guilty were sexually violent offenses pursuant to the SVP Act. He contends the plea judge had no jurisdiction to make the requisite findings because "court" as defined in the SVP Act "means the court of common pleas," whereas the plea judge was presiding over the court of general sessions. Appellant further contends that to the extent the plea judge had jurisdiction, due process required a full evidentiary hearing, including the right to cross-examination, before the requisite findings could be made under the SVP Act. The State disagrees and submits Appellant's arguments should be denied and dismissed on several grounds.

Subject Matter Jurisdiction / Authority

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings in question belong. State v. Gentry, 363 S.C. 93, 100, 610 S.E.2d 494, 498 (2005); Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). The South Carolina Constitution establishes the subject matter jurisdiction of the courts in South Carolina and provides that "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases . . . ." S.C. Const. Art. V, § 11. Indeed, the court of common pleas and the court of general sessions are merely sub-sets of the circuit court. S.C. Code Ann. § 14-1-70(4) (Supp. 2012). Thus, regardless of whether the circuit court judge was presiding over a term of the court of common pleas or a term of the court of general sessions, the circuit court clearly has subject matter jurisdiction to make the specific sexually violent offense finding described in the SVP Act. S.C. Code Ann. § 44-48-30 (2012); See State v. Ellis, 397 S.C. 576, 582, 726 S.E.2d 5, 8 (2012) (holding that the circuit court has subject matter jurisdiction to adjudicate probation violation revocations).

Since Wessinger fails to make a valid challenge to the circuit court's subject matter jurisdiction, his contention amounts to nothing more than a claim that the plea judge lacked the authority to make the requisite finding under the SVP Act because he was presiding over a term of the court of general sessions rather than a term of the court of common pleas. The State submits this argument is not preserved for appellate review because it was neither raised to nor ruled upon by the lower court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). While issues related to subject matter jurisdiction may be raised at any time, Brown v. State, 343 S.C. 342, 540 S.E.2d 846

(2001), overruled on other other grounds by Gentry, supra, Wessinger has failed to raise an issue related to subject matter jurisdiction in this appeal. Since Wessinger never challenged the plea judge's authority during the plea proceeding, he may not now raise this argument for the first time on appeal, and it should be dismissed.

To the extent this Court disagrees and determines Wessinger's challenge to the court's authority is preserved for appeal, it is nevertheless without merit. The language of the SVP Act necessarily and logically vests the judge of the court of general sessions with the authority to designate an offense as a "sexually violent offense." The SVP Act defines a "Sexually violent predator" as someone who has been "convicted of a sexually violent offense." S.C. Code Ann. § 44-48-30(1)(a) (Supp. 2012). It then defines "Sexually violent offense" by listing certain crimes, as well as any other "offense" for which the judge makes the requisite finding on the record. S.C. Code Ann. § 44-48-30 (Supp. 2012) (emphasis added). The SVP Act goes on to define "Convicted of a sexually violent offense" to include someone who has pled guilty to a sexually violent offense. S.C. Code Ann. § 44-48-30(6) (Supp. 2012) (emphasis added).

The elementary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Branch v. City of Myrtle Beach, 340 S.C. 405, 532 S.E.2d 289 (2000); State v. Prince, 335 S.C. 466, 517 S.E.2d 229 (Ct. App. 1999). A law must be interpreted reasonably and practically, consistent with the purpose and policy of the General Assembly. Prince, supra; Hay v. S.C. Tax Commission, 273 S.C. 269, 255 S.E.2d 837 (1979). The purpose of enactment always takes precedence over the language employed, and a court will not read into a statute something which is not within the manifest intention of the General Assembly. Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548

(1956); Laird v. Nationwide Ins. Co., 243 S.C. 388, 134 S.E.2d 206 (1964). The Courts are permitted to look to existing circumstances at the time of enactment. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938). Moreover, the meaning of a statute is not to be deemed to depend upon a single part or an isolated sentence. DeLoach v. Scheper, 188 S.C. 21, 198 S.E. 409 (1938). Legislative intent must always be gathered from the statute as a whole, read in light of all circumstances. Creech v. S.C. Pub. Serv. Authority, 200 S.C. 127, 20 S.E.2d 645 (1942). An absurd result not possibly intended by the Legislature will be rejected. Hamm v. S.C. Pub. Serv. Commission, 287 S.C. 180, 336 S.E.2d 470 (1985). Thus, the true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in light of its manifest purpose. City of Columbia v. Niagara Fire Ins. Co., 249 S.C. 388, 154 S.E.2d 674 (1967). Every technical rule as to construction of a statute is subservient to and must yield to the expression of the will of the legislature, since all rules of statutory construction have for their sole object the discovery of the legislative intent and are valuable only insofar as in their application they aid the interpreters in their endeavor to ascertain that intent. Id.

The State submits the legislative intent is clear from the terms used in the SVP Act. Where a person has "pled guilty," and received a "conviction" for a criminal "offense" before a judge in the court of general sessions, it is absurd to assert the legislature intended for a judge in the court of common pleas to then make "a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a sexually violent offense." Indeed, the "circumstances of the case" can only mean the circumstances of the criminal case leading to the conviction,

circumstances which are before the judge of the court of general sessions at the time of the plea. Likewise, the General Assembly's decision to use the term "judge" in Section 44-48-30(2)(o) rather than the term "court" indicates the legislature intended something different from actions taken by the "court," which is defined as "the court of common pleas" in the remainder of the SVP Act. S.C. Code Ann. § 44-48-30(7) (Supp. 2012). Since the finding that an "offense" is sexually violent logically and necessarily flows from an individual being "convicted" of that offense, the "judge" referenced in the SVP Act must be the judge of the court of general sessions.

In any event, the State submits that even if this Court finds that only a judge of the court of common pleas may designate an offense as a sexually violent offense under the SVP Act, the plea judge nevertheless had the authority to act precisely in that capacity by transacting common pleas business during general sessions court. The South Carolina Code specifically provides that: "The court of common pleas shall be open at all terms of the court of general sessions for the transaction of all business of regular terms of the court of common pleas except trial by jury . . . ." S.C. Code Ann. § 14-5-420 (1977). The evident purpose of this enactment was to expedite the hearing of civil matters by enabling litigants to transact civil business during the criminal court, where this can be done without serious interference to the work of the court of general sessions. Stroup v. Duke Power Co., 216 S.C. 79, 56 S.E2d 745 (1949). Here not only did the "civil business" of the judge's finding under the SVP Act not interfere with the criminal business of taking Wessinger's plea, the two pieces of business were inexorably linked together. For all of these reasons, the State submits both that the court had subject matter

jurisdiction and the judge had authority to make specific findings on the record that Wessinger's offenses are sexually violent offenses.

Due Process

Initially, the State submits Wessinger's due process argument should be deemed abandoned on appeal because it is conclusory. See State v. Howard, 384 S.C. 212, 217-218, 682 S.E.2d 42, 45 (2009) (finding "[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority"); State v. Hill, 394 S.C. 280, 297, 715 S.E.2d 368, 377-78 (Ct. App. 2011) (finding an issue is deemed abandoned on appeal where appellate counsel made a "two sentence conclusory argument with citation to only Brady and no analysis whatsoever as to why or how Brady applies"). In his brief, Wessinger argues that "due process requires a full evidentiary hearing" and that "without question, a full evidentiary hearing is constitutionally mandated;" however, he fails to cite authority for this proposition, and provides no analysis as to why or how due process is implicated. Thus, Wessinger's due process claim has been abandoned. In any event, the State submits Wessinger's claim is without merit.

In contrast to the detailed procedures regarding the SVP civil commitment process, no particular procedure is established in the SVP Act for exactly how the judge must evaluate the circumstances of a person's case, and make a specific finding on the record that an offense should be considered a sexually violent offense. Indeed, in describing the hearing where an SVP candidate may contest the court's determination that "probable cause exists to believe that the person named in the petition is a sexually violent predator," the General Assembly specifically established procedural rights,

including the right to counsel, the right to present evidence, and the right to cross-examine witnesses who testify against the person. S.C. Code Ann. § 44-48-80(C) (Supp. 2012). The legislature established no such procedural rights for the preliminary finding that an offense is a sexually violent offense; therefore, the SVP Act itself does not create a due process right to a "full evidentiary hearing."

Similarly, the State submits Wessinger has no constitutional right to a full evidentiary hearing in regard to his offenses being deemed sexually violent. Both the United States and the South Carolina Constitutions provide that "no person shall be deprived of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, § 1, S.C. Const. Art I, § 3. "Substantive due process" relies upon a line of United States Supreme Court cases which interprets the Fourteenth Amendment's guarantee of "due process of law" to include a substantive component which forbids the government to infringe upon certain "fundamental" liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. Reno v. Flores, 507 U.S. 292, 301, 113 S.Ct. 1439, 1447 (1993). Thus, the due process clause protects individual liberty against "certain government actions regardless of the fairness of the procedures used to implement them." Washington v. Glucksberg, 521 U.S. 702, 719, 117 S.Ct. 2258, 2267 (1997) (quoting Daniels v. Williams, 474 U.S. 327, 331,106 S.Ct. 662, 665 (1986).

By comparison: "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the due process clause of the Fifth or Fourteenth Amendment." Mathews v. Eldridge, 424 U.S. 319, 322, 96 S.Ct. 893, 901 (1976). Application of this prohibition requires a

familiar two-stage analysis: the court must first ask whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of "life, liberty or property"; and if protected interests are implicated, the court then must decide what procedures constitute "due process of law." Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401 (1977).

Here, the mere designation of Wessinger's offenses as sexually violent offenses does nothing to deprive him of a liberty or property interest. Instead, it simply means that prior to his release from confinement he will be referred to a multidisciplinary team specially designed to evaluate his case. In re Brown, supra. The multidisciplinary team would review Wessinger's records to determine if he satisfies the definition of a sexually violent predator or not. "These records may include, but are not limited to, the person's criminal offense record, any relevant medical and psychological records, treatment records, victim's impact statement, and any disciplinary or other records formulated during confinement or supervision." S.C. Code Ann. § 44-48-50 (Supp. 2012). Since the plea judge's determination that Wessinger's offenses are sexually violent offenses does not directly deprive him of a liberty or property interest, his due process claim must fail.

To the extent Wessinger does have an attenuated liberty interest because his referral to the multidisciplinary team could ultimately result in his confinement based on either a probable cause finding that Wessinger is a sexually violent predator, or proof at trial beyond a reasonable doubt that he is a sexually violent predator, the State submits due process is already built into the SVP commitment process. The fundamental requirements of due process are fair notice and proper standards for adjudication. State v. Green, 397 S.C. 268, 724 S.E.2d 664 (2012). In order to meet the requirements of

procedural due process, the State must provide adequate notice, adequate opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses. Doe v. S.C. Dep't. of Health and Human Services, 398 S.C. 62, 727 S.E.2d 605 (2011). However, procedural due process requirements are not technical, and no particular form of procedure is necessary. Jones v. S.C. Dep't. of Health and Envtl. Control, 384 S.C. 295, 682 S.E.2d 282 (2009). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. Id. Here, notice, adequate opportunity to be heard, the right to introduce evidence, and the right to confront and cross-examine witnesses are all built into the SVP Act and the existing civil commitment process. Therefore, procedural due process is satisfied, and Wessinger's due process claim should be denied.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the conviction, sentence, and the plea judge's finding that Appellant's offenses should be considered sexually violent offenses for purposes of the SVP Act, all be affirmed.

Respectfully submitted,

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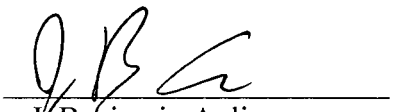
BY: 
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Final Brief of Respondent*, dated February 8, 2013March 27, 2013, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

William G. Rhoden, Esquire
221 E. Floyd Baker Blvd.
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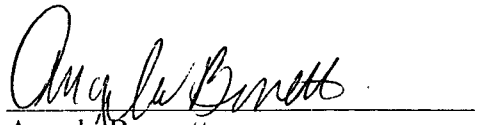
I further certified that all parties required by Rule to be served have been served. This 27th, day of March, 2013.



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