THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND
TREATMENT OF DUSTY A. CYR,

APPELLANT

APPELLATE CASE NO. 2012-211486

Appeal from Lexington County

William P. Keesley, Circuit Court Judge

Opinion No. 2014-UP-111

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SC Court of Appeals

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's commitment to the Sexually Violent Predator Program on March 12, 2014. 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:

Cyr argued on appeal that the trial court erred in allowing the forensic expert to testify about the details of the sexually violent offenses that Appellant Cyr pled guilty to during his trial for commitment to the Sexually Violent Predator Program because the details included in the indictments were sufficient to satisfy the requirements of a sexually violent predator.

The Court of Appeals held that the admission of evidence was within the sound discretion of the trial court and would only be disturbed upon a showing of an abuse of discretion. An abuse of

discretion occurs when the trial court's decision either lacked evidentiary support ot was controlled by an error of law. The Court also ruled that past criminal history is directly relevant to proving a person is a sexually violent predator.

The Court of Appeals misapprehended the issue.

ISSUE : At the beginning of Cyr's trial, defense counsel made a motion for a bench trial instead of a jury trial. She related that Cyr wanted a bench trial, and the state had not requested a jury trial within thirty days of the probable cause hearing as required by statute. R. 44, ll. 11 – 23. The judge granted Cyr's request for a bench trial. R. 50, ll. 14 – R. 51, ll. 7.

Dr. Peggy Wadman, the forensic psychiatrist who evaluated Cyr, testified at his trial, that Cyr had three convictions for committing a lewd act on a child. R. 57, ll. 4 – R. 61, ll. 25. While he was incarcerated on these three charges, he was indicted in the state of Connecticut for sexual assault in the first degree, and sexual assault in the second degree involving three young male relatives. These occurred when Cyr was approximately 12 – 14 years old. R. 71, ll. 2 – R. 72, ll. 15.

As Dr. Wadman started to describe the details of the six offenses, defense counsel objected to the details of the offenses being admitted. Counsel argued that the state had to prove only that he had the conviction, and that he suffered from a mental abnormality or personality disorder that would make him more likely to engage in sexually violent acts. Counsel argued that the details did not go to the fact of whether he had a mental abnormality or personality disorder. The details only went towards prejudicing the judge about the facts of the case. R. 62, ll. 24 – R. 63, ll. 12.

The state argued that the Supreme Court held that the details were relevant and the prejudicial value was outweighed by the probative value under Rule 403, SCRE. The state also argued that the details were significant as the psychiatrist relied on these to make her evaluation. The state cited the cases of <u>In re Luckabaugh</u>, 351 S.C. 122, 568 S.E.2d 338 (2002), <u>and</u> <u>In the</u>

Matter of the Care and Treatment of James P. Ettel, 377S.C. 558, 660 S.E.2d 285 (Ct. App. 2008). R. 63, ll. 13 – R. 64, ll. 4.

Defense counsel argued in response that the indictments contained all the details that were needed for the doctor to make her evaluation. The trial judge overruled the objection. R. 64, ll. 6 – 14.

Dr. Wadman described the first incident as occurring in August 2000 when Cyr was approximately eighteen years old. R. 65, ll. 2 – 8; R. 87, ll. 19 – R. 88, ll. 1. The victim was a ten year old girl who told her mother that Cyr tried to put his hand down the back of her pants when he was baby-sitting her. Then on another occasion, he made her lay down and humped her. This was a guilty plea also. R. 67, ll. 1 – R. 68, ll. 19.

The second incident involved a five year old girl who was in a shed with Cyr who allegedly made the girl lay down. He then thrust his pelvis and genital area against her genital area. The girl said he "humped" her. Cyr pled guilty to this offense. R. 65, ll. 9 – 25; R. 12 – R. 67, ll. 15.

The third incident involved a seven year old girl whose aunt was Cyr's girlfriend. The girl said that Cyr touched her genital area with her clothes on several times between July 1, 2004 and December 31, 2004. Cyr denied these allegations but said he gave her baths. R. 69, ll. 6 – 25.

The Connecticut incidents involved his sister's three sons ages three, four, and five. R. 71, ll. 14 – R. 72, ll. 18.

Dr. Wadman diagnosed Cyr as having a mental abnormality of pedophilia which is an attraction to prepubescent children. R. 106, ll. 16 – 23. She said he also suffered from a bipolar disorder. R. 107, ll. 1 – 25. She also diagnosed him as having an antisocial personality disorder. This meant that he exhibited behavior that included a disregard for the rights of others, failure to conform to social norms, and a lack of concern for the welfare of others. R. 108, ll. 14 – 22.

Dr. Wadman testified that Cyr met the legal criteria to be a sexually violent predator and was likely to commit future acts of sexual violence unless he was committed to a facility for long-term control, care, and treatment. R. 111, ll. 1 – 25.

The trial judge found that the state had established that Cyr met the criteria to be a sexually violent predator. R. 147, ll. 14 – R. 148, ll. 25.

The sexually violent predator act at S.C. Code Section 44-48-30 provides that a sexually violent predator had to have convicted of a sexually violent offense as provided in the statute and has a mental abnormality or personality disorder that would make him likely to commit sexually violent acts in the future unless he was committed to a facility for long-term care, control and treatment.

In the case of In the Matter of the Care and Treatment of James P. Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008), the Court of Appeals ruled that prior incidents that did not result in a conviction could be admitted. The court ruled they were relevant and admissible. However, there was no discussion of whether the details of the offenses and incidents were at issue.

In the case of In re Luckabaugh, 351 S.C. 122, 568 S.E.2d 338 (2002), the Supreme Court ruled that the state did not prove that Luckabaugh was a sexually violent predator and remanded the case for a new hearing. The main issues dealt with the constitutionality of the SVP statute, and that the trial judge did not include sufficient facts in his order.

Cyr's case is distinguished from both as the issue of the details of the offense being admitted was not specifically addressed in either case with sufficient specificity

In the case of In the Matter of the Care and Treatment of John Phillip Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), the Supreme court held that indictments outlining details underlying the defendant's convictions for assault and battery of a high and aggravated nature (ABHAN) and

criminal sexual conduct (CSC) were admissible. The Court wrote that the probative value of the details underlying the ABHAN and CSC convictions, as presented in the indictments, outweighed the danger of prejudice.

Defense counsel in Cyr's case argued to the court that the indictments contained sufficient details for the evaluation, and that more in-depth details were not needed. It is clear from the ruling in Corley, id. that the Supreme Court believed the details in the indictments were sufficient. The Court made no ruling that testimony of the details beyond the indictments were necessary.

The Court of Appeals misapprehended the issue. The Court's holding that past criminal history is relevant to proving a person is a sexually violent predator did not address the issue of whether the details of the criminal history were admissible. Cyr does not argue that past criminal convictions should not come in as evidence. He argued that the details of the sexual offenses were not needed, and that the indictments were sufficient in this regard.

In State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987), Johnson was on trial for a murder, and the state wanted to introduce evidence of a prior murder charge. The Supreme Court, in examining whether the prejudicial effect outweighed the probative value, wrote that once the trial court determined that evidence of prior bad acts or criminal behavior was admissible, "a clear distinction must be made between the amount of proof required to adequately establish a material fact or element of the crime charged and the point at which such prior-acts evidence becomes prejudicial." The Court concluded: "The admission of extensive evidence in detail of appellant's prior criminal conduct was an abuse of discretion, prejudiced the jury, and constitutes reversible error."

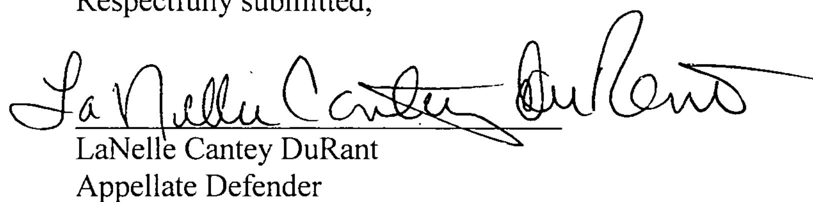
An analogy can be made to the details of Cyr's past criminal convictions being admitted. The Court of Appeals also held that to warrant reversal based on the wrongful admission of

evidence, the complaining party must prove prejudice. It was prejudicial to Cyr for the details of his committing a lewd act on a child to be admitted. Since this was a bench trial, the judge is presumed to know the law. The judge was presumed to know what a lewd act entails.

The trial court erred in allowing the prejudicial details which were outside the indictments to be admitted.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 21st day of March, 2014.

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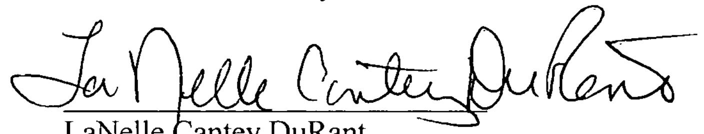
CERTIFICATE OF SERVICE

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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Dusty A. Cyr, at 7901 Farrow Road, Bldg. 3, 3rd Floor, Columbia, SC 29203, this 21st day of March, 2014.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of March, 2014.

_______________(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.

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