STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Alison Renee Lee, Circuit Court Judge

Opinion No. 2014-UP-056 (S.C. Ct. App. filed 2/5/2014)

IN THE MATTER OF THE CARE AND TREATMENT OF PATRICK GUESS,

PETITIONER,

APPELLATE CASE NO. 2014-000855

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 3/20/2014.

QUESTION PRESENTED

Whether the Court of Appeals erred by refusing to order a directed verdict of acquittal where the state presented no evidence there was a significant likelihood petitioner would engage in repeated acts of sexual violence where the state's own statistical evidence showed petitioner had a less than one in four likelihood that he would re-offend within five years?

STATEMENT OF THE CASE

In 2002, Petitioner was convicted of criminal sexual conduct with a minor in the second degree. R. 4, ll. 11-18. The state subsequently moved to have petitioner classified and retained in custody as a sexually violent predator.

His case was called to trial on November 14, 2011 before the Honorable Alison Renee Lee. David Belding represented petitioner. Lloyd Flores, Jr. was the assistant attorney general. R. 1.

At the conclusion of the trial on November 15, 2011 the jury found petitioner was a sexually violent predator. R. 112, ll. 7-13.

The Court of Appeals affirmed, without oral argument, in In the Matter of the Care and Treatment of Patrick Guess, 2014-UP-056 (February 5, 2014). App. 1-2. Petitioner filed for rehearing on February 20, 2014, App. 3-7, and the Court denied the petition on March 20, 2014. App. 8.

This petition for a writ of certiorari follows.

ARGUMENT

The Court of Appeals erred by refusing to order a directed verdict of acquittal where the state presented no evidence there was a significant likelihood petitioner would engage in repeated acts of sexual violence where the state's own statistical evidence showed petitioner had a less than one in four likelihood that he would re-offend within five years.

Introduction

This case starkly presents the question of whether petitioner's **24.7 percent chance of re-offending within five years -- based on the opinion of the state's expert --** can be construed to mean he is "**likely** to engage in acts of sexual violence . . . if not confined," and qualifies as him having a "propensity to commit acts of sexual violence. . . . of **such a degree as to pose a menace to the health and safety of others"** as defined in the statutes. R. 44, l. 22 – 45, l. 18. See S.C. Code §44-48-30(1) (Supp. 2013) & S.C. Code §44-48-30(9) (Supp. 2013). Petitioner submits a less than one in four chance he would reoffend does not make him **likely** to engage in acts of future sexual violence, and does not show he has a propensity to commit acts of sexual violence **of such a degree** as to pose a menace to the health and safety of others. He was entitled to a directed verdict if the words in the statute are to have real meaning.

Trial facts

Dr. Kimberly Harrison had a Ph.D in Clinical Psychology. R. 8, ll. 17-24. She testified that: "Psychology in general is the study of behavior, thoughts, emotions, mental disorders . . . and then Forensic Psychology is the application of those psychological principles to questions of law." R. 8, l. 22 – 9, l. 9. She was qualified as an expert in Forensic Psychology without objection. R. 9, ll. 17-22.

Harrison testified she reviewed petitioner's criminal history, and she knew he had been convicted of criminal sexual conduct with a minor in the second degree in 2002. She said the report showed petitioner assaulted a fourteen-year-old female acquaintance from his neighborhood. R. 13, ll. 9-23. Harrison stated she also reviewed petitioner's school records and "interviewed him and conducted what's called the Actuarial Risk Assessment Instrument." R. 11, ll. 6-12.

Harrison was aware when petitioner was fourteen years old in 1996 he sexually assaulted his four-year-old female cousin. R. 14, ll. 4-20. Petitioner pled guilty to ABHAN for this offense, and he was sent to the Department of Juvenile Justice (DJJ). R. 14, ll. 4-20.

Harrison revealed that petitioner said his sexual intercourse with the fourteen-old-girl was consensual. However, she testified that petitioner admitted to fantasizing about other "children." "He admitted to having sexual fantasies of his victim for several months prior to actually committing the offense against her." R. 16, ll. 1-18.

Harrison said petitioner had risk factors including the fact **that he was a male**. He also had never been married or been in any long-term relationship, and he had victims unrelated to him. Harrison said petitioner was considered "to be in the high-risk group" on the Static 99-R test because he "scored higher than about ninety percent of sex offenders in terms of his risk level." R. 19, ll. 6-19.

Harrison said petitioner had an anti-social personality disorder and she opined he had a propensity to commit sexually violent offenses and he was a menace to the health and safety of others. R. 21, l. 10 – 23, l. 22. Harrison said to a reasonable degree of psychological certainty that petitioner's paraphilia and anti-social personality disorder made him likely to engage in acts of sexual violence if he was not confined to a secure facility. R. 24, ll. 11-22.

On cross-examination Dr. Harrison said she received her degree from the University of North Texas, and she studied under a well-known professor of psychology, Dr. Richard Rogers. R. 26, l. 5 – 28, l. 21. Defense counsel questioned Harrison about the meaning of "likely" to re-offend in the statute. Harrison acknowledged this was an ambiguous term "that we struggle with in doing these evaluations." R. 29, l. 18 – 30, l. 4. Harrison said her risk assessments were "complex, multi-faceted decisions." R. 30, ll. 2-10.

Harrison admitted she only talked to petitioner for two and half hours. She acknowledged there was a controversy among psychologists about sexually violent predator evaluations. R. 35, l. 9 – 42, l. 6. She admitted that Webster's dictionary defined likely as "probable, reasonably to be expected." R. 42, ll. 11-18. She said the statute did not define likely to re-offend as there being more than a fifty percent chance. At one point she defensively stated that she did not write the statute at issue here. Harrison testified the statute read "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." R. 43, l. 1 – 44, l. 2. (emphasis added).

Defense counsel asked Harrison if a twenty-five percent chance of something happening meant it was "likely." Harrison acknowledged, while dodging the question, that a fifty percent chance something was probable to happen was more of a chance something would occur than forty-nine percent. R. 44, ll. 3-21. Harrison admitted that she concluded petitioner **had a 24.7 percent chance of re-offending within five years** based on other sex offenders "with his score." R. 44, l. 22 – 45, l. 18.

Harrison explained, "if you had a group of 100 guys who all had the same score, about 25 of them went on reoffend in five years." R. 45, l. 19 – 46, l. 2. Harrison admitted this meant that three out of the four in that pool would not re-offend. R. 46, ll. 3-19. Harrison repeated that petitioner

said that his sex with the fourteen-year-old girl was consensual, and petitioner told her he thought she was seventeen. R. 49, l. 4 – 50, l. 14. The following occurred on cross-examination of Harrison:

Mr. Belding: Okay. Did he receive any sex offender treatment while he was in the Department of Corrections?

Dr. Harrison: The records do not indicate that he did, no.

Mr. Belding: So, really this is just care and control. This is just a way of keeping him off the streets, isn't it?

Dr. Harrison: I don't - - I didn't write the law.

Mr. Belding: Okay.

Dr. Harrison: And they do offer treatment at DMH.

Mr. Belding: One day a week?

Dr. Harrison: That's my understanding of how it is now.

R. 56, l. 18 – 57, l. 2.

On re-direct testimony Harrison claimed it would not "be ethical" to base her opinion on "one objective test" [24.7 chance of reoffending] given to petitioner. R. 61, ll. 9-13. Harrison defended her opinion of petitioner saying it "goes to the diagnosis of the paraphilia, that he was aroused by having sex with a four-year-old." R. 62, ll. 2-18.

Defense counsel moved for a directed verdict noting the state's one witness acknowledged there was a lot of ambiguity in the statute and the one objective factor was the Static-99 test. Petitioner only had a 24.7 likelihood of re-offending in five years and just thirty percent over ten years "so, we're talking about a 1 out of 4 or 1 out of 3 chance. That's the likelihood that she

testified to, Dr. Harrison, on the stand. That's not likely. By any normal definition of likely, that's unlikely." R. 74, l. 8 – 77, l. 5.

Defense counsel argued that petitioner was entitled to a directed verdict based on this statistical unlikelihood petitioner would reoffend, and that giving this case to the jury just invited a verdict based on passion and prejudice. The assistant attorney general argued that the jury could find petitioner was a sexually violent predator when the evidence was viewed in the light most favorable to the state. R. 78, ll. 16-20. The judge stated Dr. Harrison's opinions were not based "solely on objective standards." "I think because the state has recognized that psychology is not an exact science, that there is not an objective way to come to a final conclusion. . . ." The judge ruled there was evidence presented by the state and it was therefore a jury question. R. 78, l. 24 – 81, l. 25.

Court of Appeals

In an unpublished opinion the Court of Appeals wrote:

> Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Brannon*, 379 S.C. 487, 494, 666 S.E.2d 272, 275 (Ct. App. 2008) ("When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight."); *id.* ("When reviewing a denial of a directed verdict, an appellate court views evidence and all reasonable inferences in the light most favorable to the State."); S.C. Code Ann. § 44-48-30(1) (Supp. 2013) (defining 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(9) (Supp. 2013) (providing the phrase "likely to engage in acts of sexual

violence" means a "propensity to commit acts of sexual violence...of such a degree as to pose a menace to the health and safety of others").

Rehearing

Petitioner argued on rehearing that the Court of Appeals misapprehended the fact "petitioner was entitled to a directed verdict because the state's only witness testified that Guess had only *a twenty-five percent chance* of reoffending within five years. R. 44. A fair reading of the Sexually Violent Predator Act mandates that a person who objectively has only a twenty-five percent chance of reoffending should not remain confined indefinitely in the custody of the state.

S.C. Code §44-48-30 provides the following pertinent definitions:

(1) "Sexually violent predator" means 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.

The act defines "likely to engage in acts of sexual violence" to mean the person's propensity "to commit acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9) (2002). The act also requires a determination that "an individual can only be committed if he suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility...." In re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002). The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited sub-class of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003)

A case should be submitted to the jury when the evidence is circumstantial "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which has guilt may be fairly and logically deduced." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Mitchell, 341 S.C. 406, 409, 535 S.E.2d 126, 127 (2000)). "The jury weighs the evidence but when there is an absence of evidence, it becomes the duty of the trial judge to direct a verdict...." State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774 776 (2011) (quoting State v. Schrock, 283 S.C. 129, 134, 322 S.E.2d 450, 452-53 (1984)).

During the trial, defense counsel moved for directed verdict on grounds that the statistical evidence was the only objective evidence of recidivism risk and that Dr. Harrison's testimony that Guess had a one in three or **one in four chance of re-offending was not "likely."** R. 74-75. The judge nonetheless denied the directed verdict motion. R. 78-81.

The issue on appeal is whether the state presented any evidence that there was a **significant likelihood** Guess would reoffend. The state's only witness was Dr. Kimberly Harrison. Dr. Harrison opined that Mr. Guess was considered "to be in the high-risk group of the Static 99-R test because he "scored higher than about ninety percent of sex offenders in terms of his risk level" and Mr. Guess had several risk factors including that he is male, has never married or been in a long-term relationship, and had victims unrelated to him. R. 19. However, on cross-examination, Dr. Harrison admitted that Guess had a relatively low statistical risk of reoffending. R. 44-46. Specifically, Dr. Harrison testified **that her Static 99-R risk assessment indicated that Mr. Guess had only a 24.7 percent chance of reoffending within five years.** R. 44.

Dr. Harrison's statistical evidence is the only objective evidence on the record. Dr. Harrison acknowledged that her conclusion was based on other sex offenders with the same score as Guess. R. 44. She explained, "if you had a group of 100 guys who all had the same

score, about 25 of them went on to reoffend in five years." R. 45. She admitted this meant that *three out of four people in the pool would not reoffend* within five years. R. 46. She admitted that **two-thirds** of sex offenders with Guess' score do not reoffend within ten years. R. 46." Rehearing petition at 1-3. App. 3-5.

Petitioner further argued that "[t]he central issue of this case is the meaning of a 'significant likelihood.' Petitioner Guess was entitled to directed verdict if the evidence in the case because as a matter of law a 25% chance of reoffending is not **likely**. See In re Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118 (2007)." App. 5. As seen, rehearing was denied.

Discussion

The sexually violent predator act is designed to: (1) meet the special needs of sexually violent predators; (2) address the *significant likelihood that 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 a long-term control, care, and treatment. In Re Care and Treatment of Brown v. State, 372 S.C. 611, 616-616, 643 S.E.2d 118, 121 (Ct. App. 2007); In Re Care and Treatment of Canupp, 380 S.C. 611, 618, 671 S.E.2d 614, 617 (Ct. App. 2008).

Again, the issue in this case was and is the meaning of "significant likelihood." Defense counsel Belding argued when moving for a directed verdict that a 24.7 chance of committing another offense was not likely or probable by any definition. Petitioner Guess was entitled to a directed verdict because the objective evidence in this case showed there was not a "significant

likelihood" he would engage in repeated acts of sexual violence if not treated. See In Re Care and Treatment of Brown v. State, 372 S.C. 611, 643 S.E.2d 118 (2007).

The purpose of the requirements in the sexually violent predator act is to ensure that involuntary commitment procedures under the act are *only used to control a limited sub-class of dangerous persons* and not to broadly subject any dangerous person to what may be indefinite terms. In Re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 894 (2003). (emphasis added). The state has the burden of proving beyond a reasonable doubt that the person is a sexually violent offender; See S.C. Code Ann. § 44-48-100 (2002). The act defines "likely" to engage in acts of sexual violence, to mean the person's propensity "to commit acts of sexual violence *is of such degree* as to pose a menace to the health and safety of others." S.C. Code § 44-48-30(9); In Re Care and Treatment of Harvey, 355 S.C. 53, 60 S.E.2d 893, 896 (2003). (emphasis added).

Here, the state failed to prove that petitioner should be committed because he "suffers from a mental illness which he cannot sufficiently control without the structure and care provided by a mental health facility, rendering him likely to commit a dangerous act." In Re Luckabaugh, 351 S.C. 122, 144, 568 S.E.2d 338, 349 (2002).

It is intuitive that any person who commits a particular crime (burglary, rape, drug dealing, etc.) is more likely than a "normal person" to commit that same offense in the future. However, that is not, and cannot be, what "significant likelihood to re-offend" means. Petitioner understands that courts looks at the totality of the evidence when ruling on a directed verdict motion. However, a 24.7 % likelihood to re-offend is not a significant likelihood, and the fact petitioner at one time had sexual intercourse with a four year old cannot be deemed a significant likelihood that he would re-offend. In other words, the sexual offense itself cannot prove a likelihood to reoffend or else any person who ever had sex with a child would never be released.

Further, petitioner was only fourteen-years-old at the time of the offense, and it is now known that teenagers are still developing their minds, and can be expected to exercise better judgment as they grow older. See Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455 (2012). The Court in Miller noted that "children have a `lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking." Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2463 (2012), *citing* Roper v. Simmons, 543 U.S. 551 (2005).

Children also are "are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings . . . [and] a child's character is not as "well formed" as an adult's; his traits are "less fixed" [and] "[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.'" *quoting* Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) Miller v. Alabama, ___ U.S. ___, 132 S.Ct. 2455, 2464 (2012).

Dr. Harrison undoubtedly found petitioner's sexual desires abnormal but her stand-alone opinion that petitioner was sexual predator renders the language of the statute meaningless if **a 24.7 chance** of re-offending is considered a "significant likelihood" within the meaning of the statute. Respectfully, if that is the meaning of the statute then its purpose is to detain persons who have served their sentences **based on a small statistical chance they may reoffend**. This Court has considered the Constitutional issues involving persons with inconsiderable risks of reoffending being forced to wear GPS monitoring for a lifetime. See State v. Nation, Op. No. 27408,

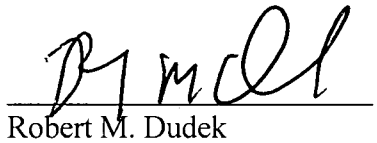
Shearouse's Adv. Sh. #26 at pp. 67-74 (July 2, 2014);[1] State v. Dykes, 403 S.C. 499, 744 S.E.2d 505 (2014). Here the issue is of no lesser moment given that petitioner remains incarcerated even though his statistical likelihood of reoffending is less than 25%, and he has paid his debt to society by serving his prison sentence. Petitioner understands such "civil incarceration" has been held constitutional, and that this is a directed verdict case. However, and respectfully, denying petitioner a directed verdict given the statistical evidence in this case renders the statute allowing release meaningless by failing to give the words of the statute their plain and ordinary meaning.

[1] Rehearing is pending as of the filing of this petition for writ of certiorari.

CONCLUSION

By reason of the foregoing arguments, a petition for writ of certiorari should be granted to allow full briefing on this significant issue.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of July, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
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IN THE MATTER OF THE CARE AND
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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Deborah R.J. Shupe, Esquire at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 23rd day of July, 2014.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of July, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 17, 2021