STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From York County
The Honorable Daniel B. Hocker, Circuit Court Judge
Appellate Case No. 2013-002459

THE STATE,

Respondent,

v.

MICHAEL RAMEY,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court did not err in considering information from Appellant's sex offender treatment counselor because it provided relevant and essential information necessary for sentencing, specifically the extent of his treatment and the nature and extent of Appellant's mental and emotional condition.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF THE FACTS

On July 18, 2013, the York County Grand Jury indicted Appellant Michael Ramey on one count of second degree criminal sexual conduct with a minor, arising from Appellant's sexual molestation of a thirteen year old boy (Victim) in September, 2012. Appellant appeared before the Honorable Daniel B. Hocker, Circuit Court Judge, on November 7, 2013, and pled guilty to one count of assault with intent to commit second degree criminal sexual conduct with a minor.

At the plea hearing, the solicitor advised the circuit court that law enforcement responded to a sexual assault report on September 18, 2012, and Victim stated Appellant molested him at a friend's house on two separate incidents. In the first incident, Appellant came into the room where Victim was sleeping and started to "touch on him and rub his legs." He attempted to push him away, but Appellant continued to rub Victim's leg, "grabbed [Victim's] penis on the outside of [his] clothing" and told him "he wanted to F him." Appellant left the room after Victim was able to successfully push him away. Victim did not report the incident because "he was embarrassed and upset, that he thought [Appellant] was his friend." (Hearing Transcript [HT], pp. 9-11; Record on Appeal [R.], pp. 9-11).

The second incident occurred while Victim was in the bathroom at his friend's house getting ready to go to bed. Appellant came in the bathroom, "pulled his shorts down... pushed [Victim] onto the bed, held [him] down, climbed on top of him and pulled out his penis and tried to put it in [Victim's] mouth," telling him to "suck my dick," but Victim was able to push Appellant away. (HT p. 11; R., 11).

The mother of Victim's friend told police she met Appellant at a church vacation Bible school, where he was serving as a teacher, and she allowed him to live in her house

from August – September of 2012. She learned Appellant sent numerous "questionable" text messages to Victim, starting the day before the second incident occurred. Law enforcement recovered text messages from Appellant to Victim between September 7, 2012 and September 15, 2012. Some were innocuous, but they soon transitioned to multiple ones imploring Victim to come over to sleep, and "when you come in, come in and lay down." When police interviewed Appellant, he claimed he was drunk, Victim came on to him first, and the sexual encounter was consensual, but he really did not remember what happened. (HT. pp. 13-14; R., pp. 13-14).

The solicitor further informed the court Appellant had a prior North Carolina juvenile adjudication for first degree sexual assault involving a minor. On September 14, 2006, Appellant was sentenced to an indefinite commitment not to exceed his twenty-first birthday, suspended to supervision with specific conditions, including outpatient sex offender treatment. (HT, p. 15, Court's Exhibit 1; R., pp. 15, 36-41).

After the circuit court accepted Appellant's guilty plea and moved to sentencing, Appellant objected to the court considering information obtained from a counselor associated with the sex offender treatment Appellant received in connection with the North Carolina adjudication. He argued consideration of the information for sentencing purposes would "have a chilling effect for future cases for those who are similarly situated as [Appellant] in trying to get treatment," and Appellant's revelations to the counselor did not result in any criminal charges. The circuit court overruled the objection, finding the parties should not be handicapped in presenting information concerning sentencing, and the court could determine what weight to give the information presented in light of Appellant's objection. (HT. pp. 19-20; R., pp. 19-20).

Appellant then asked for leniency in sentencing based on his difficult childhood, his low intelligence level, and his own sexual molestation by a neighbor when Appellant was nine years old. He requested restricted house arrest, contending a long prison sentence would "destroy a 23 year old man's life," or in the alternative, "a potential split sentence of significant time hanging over [Appellant's] head with probation to follow." (HT. pp. 20-24; R., pp. 20-24).

The solicitor requested a sentence, if not "the maximum," close to the upper end of the sentencing range, stating Appellant was a "tremendous danger to the community." She advised the court a counselor from New Hope Treatment Center, where Appellant was housed and treated after violating his North Carolina probation, expressed concerns about Appellant's lack of progress in two years at the Center, his continued misconduct involving inappropriate touching of classroom peers while in the facility, his anti-social behavior, his lack of empathy, and his statements he could not control himself and wanted to continue acting out sexually. The solicitor further noted that after his release from New Hope, Appellant got involved in a church, volunteered for Bible school, thus putting himself in the company of children, and committed the instant offense less than one year after his release. (HT. pp. 25-31; R., 25-31).

After considering all the arguments and information, and noting its responsibility to protect the public, the circuit court sentenced Appellant to twelve years incarceration. (HT, p. 33; R., p. 33). This appeal followed.

ARGUMENT

The circuit court did not err in considering information from Appellant's sex offender treatment counselor because it provided relevant and essential information necessary for sentencing, specifically the extent of his treatment and the nature and extent of Appellant's mental and emotional condition.

Appellant asserts the trial court erred in considering the information from a New Hope counselor, contending it was "privileged under the psychotherapist-patient privilege set forth in S.C. Code Ann. §19-11-95." As a threshold matter, this issue is not preserved for appellate review. Further, simply stated, Appellant's contention is just flat wrong because the cited statute does **not** create such a "privilege."

A. Preservation

"Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review." In re Walter M., 386 S.C. 387, 688 S.E.2d 133, 136 (Ct. App. 2009). This preservation requirement enables the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 725 (2000). To that end, a party may not raise one ground in the trial court, and assert a different ground on appeal. *See* State v. Patterson, 324 S.C. 5, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); State v. Holland, 385 S.C. 159, 682 S.E.2d 898, 905 (Ct. App. 2009) (issue not preserved for review because appellant did not raise the specific ground before the trial court); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

Appellant never raised, or even alluded to, §19-11-95 as a bar to disclosure of the treatment information. The only grounds asserted before the circuit court were 1) the potential chilling effect of disclosure on similarly situated defendants, and 2) none of the

information resulted in a criminal charge. (HT, p. 19; R., p. 19). Further, he never claimed the information was "privileged" under either common or statutory law.

Therefore, the issue he now raises on appeal is not preserved for appellate review. Even if preserved, however, it is meritless.

B. Statute

"The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature," and when the statute's terms are clear and unambiguous, "a court must apply it according to its literal meaning." Sloan v. Hardee, 371 S.C. 495, 640 S.E.2d 457, 459 (2007). In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* Further, "'the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect.'" Doe v. South Carolina Department of Social Services, 407 S.C. 623, 757 S.E.2d 711, 717 (2014) (*quoting* S.C. State Ports Auth. v. Jasper Cnty., 368 S.C. 388, 629 S.E.2d 624 [2006]).

It is well-established appellate courts will not construe a statute by concentrating on an isolated phrase. Amisub of South Carolina, Inc. v. South Carolina Dept. of Health and Environmental Control, 407 S.C. 583, 757 S.E.2d 408, 416 (2014). "'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 the light of its manifest purpose, . . ., and the courts may not give to particular words a significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.'" *Id.* (*quoting* Laurens Cnty. Sch. Dists. 55 & 56 v. Cox, 308 S.C. 171, 417 S.E.2d 560 [1992]).

Courts must construe statutory language in context. Hudson ex rel. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486, 492-493 (2014). "Further, statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction." Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992); *see also* Hembree v. One Thousand Eight Hundred Forty-Seven Dollars (1,847.00), U.S. Currency, 404 S.C. 241, 743 S.E.2d 864, 866 (Ct. App. 2013) (court must read statute such that no word, clause, sentence, provision or part is rendered surplusage, or superfluous, because when the legislature enacted the statute into law, it obviously intended the statute to have some efficacy).

South Carolina does not recognize a physician/patient testimonial privilege, either common law or statutory. See Peagler v. Atlantic Coast Line R. Co., 232 S.C. 274, 101 S.E.2d 821, 825-826 (1958) (no physicial/patient testimonial privilege under common law or by statute); Snavely v. Amisub of South Carolina, Inc., 379 S.C. 386, 665 S.E.2d 222, 225 (Ct. App. 2008) (*citing* Peagler). "The terms 'privilege' and 'confidences' are not synonymous, and a professional's duty to maintain his client's confidences is independent of the issue **whether he can be legally compelled** to reveal some or all of those confidences, that is, whether those communications are privileged." South Carolina State Bd. of Medical Examiners v. Hedgepath, 325 S.C. 166, 480 S.E.2d 724, 726 (1997) (emphasis added); Snavely, 665 S.E.2d at 225, n. 5.

Title 19, Chapter 11 of the South Carolina Code is entitled "Competency of Witnesses." Section 19-11-95 is entitled "Confidences of patients of mental illness or emotional conditions," and prohibits providers from knowingly and voluntarily revealing

patient confidences "[e]xcept when permitted or required by statutory or other law." S.C. Code Ann. § 19-11-95(B) (2014). Significantly the statute expressly requires disclosure of confidences "**by court order for good cause shown to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding.**" S.C. Code Ann. §19-11-95(D) (2014) (emphasis added).

Contrary to Appellant's contention, §19-11-95 does not establish a psychotherapist/patient "privilege." Rather, it merely protects mental patients from a provider's knowing and voluntary disclosure of "confidences" in the absence of some legal basis for disclosure, and provides patients a private cause of action for violations. S.C. Code §19-11-95(H) (2014) (patient has cause of action for damages for violations); *see also* McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 435 (Ct. App. 1997) (majority of jurisdictions have recognized a cause of action against a physician for the unauthorized disclosure of confidential information unless the disclosure is compelled by law, or is in the public interest). Unlike "privileged" communications that cannot be compelled as a matter of law, the confidences covered by §19-11-95 can be legally compelled.

The specific legislative intent not to create a testimonial privilege under §19-11-95 is amply demonstrated by considering it in light of other sections of Chapter 11. Section 19-11-30 states no husband or wife "may be required to disclose any confidential or, in a criminal proceeding, and communications made by one to the other during their marriage," and applies to "any trial or inquiry in any suit, action, or proceeding in any court." (emphasis added). Section 19-11-50 provides a criminal defendant's testimony

"shall not be afterwards used against the defendant in any other criminal case." (emphasis added).

Even more significant, §19-11-80 is entitled "**Privilege** against self-incrimination," and provides no person "shall be required to answer any question tending to incriminate himself." (emphasis added). Section 19-11-90, which is entitled "Priest-penitent **privilege**," provides "no regular or duly ordained minister, priest or rabbi shall be required, in giving testimony, to disclose any confidential communication entrusted to him in his official capacity," and applies to "any legal or quasi-legal trial, hearing or proceeding before any court, commission or committee." (emphasis added). Finally, §19-11-100 is entitled "Qualified **privilege** against disclosure for news media; waiver," and provides "a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any judicial, legislative, or administrative proceeding" when the person asserting the privilege is not a party in interest. (emphasis added).

When Chapter 11 is viewed in its entirety, the legislature clearly knew how to create a testimonial "privilege" when it intended to do so. The fact the word "privilege" is in subsections before and after §19-11-95, but not in §19-11-95 itself, manifests the legislative intent to afford some protection for communications between mental patients and their treatment providers, but not to make them absolutely privileged communications that cannot be disclosed in judicial proceedings.

To the extent §19-11-95 applied to the communications at issue in this case, which is not clear given the fact they were revealed in the course of court ordered treatment, the statute requires disclosure of such communications "when required by

statutory law or by court order . . . to the extent that the patient's care and treatment or the nature and extent of his mental illness or emotional condition are reasonably at issue in a proceeding." S.C. Code §19-11-95(D)(1) (2014) (emphasis added). In this case, there can be no doubt information regarding Appellant's mental status, particularly his progress in sex offender treatment, was crucial in determining an appropriate sentence.

"Generally, the circuit court may conduct an inquiry broad in scope, largely unlimited either as to the kind of information it may consider or the source from which the information may come, to assist it in determining the sentence to be imposed." State v. Thomason, 355 S.C. 278, 584 S.E.2d 143, 147 (Ct. App. 2003) (*citing* State v. Gulledge, 326 S.C. 220, 487 S.E.2d 590 [1997]). "In sentencing a convicted defendant a trial court is only limited by constitutional provisions that require the evidence to be relevant, reliance and trustworthy." State v. Hutto, 356 S.C. 384, 589 S.E.2d 202, 204 (Ct. App. 2003) (*citing* Gulledge).

This case is similar to State v. Terry, 339 S.C. 352, 529 S.E.2d 274 (2000), a capital murder case, in which the State sought medical records from Charter Rivers Hospital pertaining to treatment the defendant received approximately three months after the murder. The State argued "the records were relevant to the penalty phase of a capital trial insofar as they reflected the character of the defendant." *Id.* at 277. Relying on §19-11-95(D)(1), the Supreme Court found the defendant's mental and emotional status were "reasonably at issue" in that the jury was required to assess his character, and therefore, disclosure was appropriate. *Id.* at 278.

The instant case also involves a situation where the nature and extent of Appellant's mental and emotional condition needed to be examined for sentencing

purposes. Appellant received sex offender specific treatment from 2006-2011, which was outpatient treatment until 2008 when he violated probation by molesting girls at school. In 2010, after four years of treatment, including two years in a residential facility, his counselor expressed significant concerns regarding Appellant's lack of treatment progress, his admission he still could not control himself, and his desire to continue acting out sexually. (HT. p. 27; R., p. 27). These concerns were apparently justified, because Appellant committed another sexual offense against a minor less than a year after his release from the treatment facility. Clearly, the counselor's information served an important purpose in helping the circuit court determine the appropriate severity and structure of Appellant's sentence, particularly in light of Appellant's request for a probationary sentence.

Appellant contends allowing disclosure of treatment information will "chill communications between individuals and their providers," because "treatment can only be effective where patients know that what they reveal to treatment professionals will remain confidential and will not be used against them in the future." (Brief of Appellant, p. 13). Even assuming this may be true to a certain extent, South Carolina's courts and legislature have determined the information is not "privileged," and society's interest in the courts having access to particularly relevant information regarding a convicted defendant's mental/emotional condition may be paramount.

As provided by case law and statute, the decision regarding disclosure of patient confidences is committed to the circuit court's discretion, and those rulings should only be reversed for an abuse of discretion. The circuit court in this case properly exercised its discretion to consider information related Appellant's prior sex offender treatment, which

was highly relevant for sentencing purposes. Accordingly, the circuit court ruling should be affirmed

CONCLUSION

The record amply supports the circuit court's consideration of information related to Appellant's prior sex offender treatment, and the State submits Appellant's conviction and sentence should be affirmed.

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August 6, 2014

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR and the August 13, 2007, order from the South Carolina Supreme Court entitled, "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing 2 copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 6th day of August, 2014.

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