STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Clarendon County
The Honorable W. Jeffrey Young, Circuit Court Judge
Appellate Case No. 2013-000183

IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL LAWYER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court applied the appropriate standard to determine whether there was probable cause to believe Appellant's mental status had so changed he is safe to be at large, and there was ample evidence to support the circuit court's finding of no probable cause.

STATEMENT OF THE CASE

Appellant was civilly committed pursuant to the Sexually Violent Predator Act, S.C Code Ann §44-48-10 through -170 (Supp. 2013), on April 6, 2009, after a jury trial before the Honorable F. Ferrell Cothran, Jr., Circuit Court Judge, in Clarendon County, South Carolina.

In accordance with statutory requirements, Appellant's mental status was reviewed annually after his commitment. On April 17, 2013, Kimberly Harrison, Ph.D., issued a report concluding Appellant's mental status had not so changed he is safe to be at large. Appellant requested a hearing to determine if there was probable cause to believe his mental status had so changed he is safe to be at large.

On January 22, 2014, a hearing was held before the Honorable W. Jeffrey Young, in Clarendon County. On February 26, 2014, the court issued an order finding no probable cause, and ordered Appellant's continued confinement under the statute. This appeal followed.

STATEMENT OF FACTS

Prior to Appellant's release from prison, Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Appellant's civil commitment for long term control, care and treatment as a sexually violent predator. The matter was called for a jury trial on April 6, 2009, and the jury found Appellant to be a sexually violent predator. Appellant was committed to the SC Department of Mental Health ("SCDMH") for long term control, care and treatment.

Pursuant to statute, SCDMH reviewed Appellant's mental status annually after his commitment. On April 17, 2013, Kimberly Harrison, Ph.D., Chief Psychologist with SCDMH, issued a report concluding Appellant's mental status had not so changed he is safe to be a large. Appellant requested a hearing to determine if there was probable cause to believe his mental status had so changed he is safe to be at large. (Letter to The Honorable George C. James, Jr., dated May 3, 2013, with attachments; Record on Appeal [R.], pp. ____). The matter was called for a probable cause hearing in Clarendon County on January 22, 2014, before the Honorable W. Jeffrey Young.

Appellant offered testimony from Thomas V. Martin, MD, and the State presented Dr. Harrison's testimony (HT, pp. 6-47; R., pp. ____). Both Dr. Martin and Dr. Harrison testified Appellant suffers from the relevant mental abnormality of paraphilia, not otherwise specified, he has progressed in treatment, but he needs continued treatment to reduce his risk to re-offend. (HT, pp. 9, 11, 16, 28, 32-35; R., pp. ____). Dr. Martin opined Appellant can receive his treatment in an outpatient setting, but Dr. Harrison opined Appellant should remained confined to get the treatment he needs. (HT, pp. 16, 46; R., pp. ____) .

The court took the matter under advisement, and by Order dated February 26, 2014, the court found no probable cause to believe Appellant's mental status had so changed he is safe to be at large,, and ordered Appellant's continued confinement under the statute (Order dated 2/26/14; R., pp. ____). This appeal followed.

ARGUMENT

The circuit court applied the appropriate standard to determine whether there was probable cause to believe Appellant's mental status had so changed he is safe to be at large, and there was ample evidence to support the circuit court's finding of no probable cause.

South Carolina Code § 44-48-110 mandates an annual review of the mental status of persons committed under the SVPA. The circuit court then conducts a hearing to determine whether there is probable cause to believe the person's mental status has so changed he is safe to be at large.

At an annual review probable cause hearing under the SVPA, the committed person bears the burden to show probable cause exists to believe his mental condition has so changed he is safe to be released. In Re: Care and Treatment of Billy Ray Tucker, 353 S.C. 466, 578 S.E.2d 719, 722 (2003) (citing People v. Hardacre, 90 Cal.App.4th 1392, 109 Cal.Rptr.2d 667 (2001)). "Probable cause" in the sexual predator context is a state of facts that would lead a reasonable person to believe and conscientiously entertain a strong suspicion of the fact to be proved. Hardacre, 90 Cal.App.4th at 1400, 109 Cal.Rptr.2d at 673. While the threshold of proof at a probable cause hearing is undoubtedly lower than proof beyond a reasonable doubt or by a preponderance of the evidence, the probable cause determination must be made in light of the totality of the evidence presented, rather than with a "tunnel vision" focus on one isolated part of the evidence.

Appellant avers the circuit court improperly weighed the evidence at the probable cause stage, and essentially argues that in making a probable cause determination, the circuit court must accept any evidence presented by Appellant as valid, and equally credible. A trier of fact is not compelled to accept an expert's opinion, but may give it the

weight the trier determines it deserves. Florence County Dept. of Social Services v. Ward, 310 S.C. 69, 425 S.E.2d 61, 63 (Ct. App. 1992). Taken to its logical conclusion, Appellant's argument makes the SVPA annual review probable cause hearing a purely academic and meaningless proceeding by removing all discretion from the circuit court, and requiring the court to accept any evidence, regardless of its credibility, as a basis for finding probable cause, which is contrary to the legislative intent of the SVPA and court precedent.

The circuit court's annual review probable cause determination in SVPA proceedings will not be reversed on appeal if there is evidence in the record that reasonably supports it. Tucker, 578 S.E.2d at 721; In Re: Care and Treatment of John Phillip Corley, 365, S.C. 252, 616 S.E.2d 441, 444 (Ct. App. 2005) (same); *see also* Hardacre, 109 Cal.Rptr.2d at 674 (trial court's findings of fact in the process of determining whether probable cause exists are conclusive if supported by the evidence). In this case, the record before the circuit court at the probable cause hearing amply supports the court's no probable cause determination.

Both Dr. Martin and Dr. Harrison testified Appellant suffers from the relevant mental abnormality of paraphilia, not otherwise specified, and has progressed in treatment, but requires continued treatment to further reduce his risk to re-offend. While Dr. Martin testified Appellant can receive treatment in an outpatient setting, Dr. Harrison testified Appellant needs continued confinement to get the necessary treatment. (HT, pp. 6-47; R., pp. ____). This conflicting testimony may appear to establish probable cause at first blush, but as shown below, Dr. Martin's testimony was insufficient for the court to find probable cause in the context of a sexually violent predator annual review hearing.

In Tucker, the committed person appealed a circuit court's finding of no probable cause at his annual review hearing. Much as he did in this case, Dr. Martin testified the person took responsibility for his sexual offending, and was "capable and motivated towards continued sex offender treatment, he should continue his treatment in an outpatient setting." 578 S.E.2d at 722. SCDMH determined, however, the person had additional treatment goals he needed to meet before he would be safe to be at large. The Supreme Court upheld the circuit court's denial of probable cause, holding while there was evidence the person could continue treatment in an outpatient setting, he must still show his condition has so changed he is safe to be at large, and if released, unlikely to commit acts of sexual violence. *Id.*

There is ample evidence in the instant case to support the circuit court's no probable cause determination. Dr. Martin never testified Appellant's mental abnormality had so changed he is safe to be at large. Rather, he merely agreed with a statement by Appellant's defense counsel that "[Appellant's] level has now been reduced to where it's manageable for him on the outside." (HT, pp. 14; R., pp. ____). A change in the mental abnormality, not progress in the program, is the statutory standard.

More significantly, Dr. Martin testified on cross-examination that Appellant required additional treatment on recognizing cognitive distortions and relapse prevention tools. He also acknowledged Appellant could not be compelled to attend outpatient sex offender treatment if released, and expressly refused to testify to a reasonable degree of medical certainty Appellant is safe to be at large if he does not attend outpatient treatment. Dr. Martin conceded Appellant would be at risk to re-offend if he did not receive the additional treatment he needs. (HT, pp. 18-20; R., pp. ____).

As in Tucker, Appellant has progressed in treatment, but there are additional treatment goals he needs to meet before he can be considered for release. Both experts agreed Appellant needs additional sex offender treatment to reduce his risk to re-offend, and whether Appellant **could** continue his treatment in an outpatient setting is not relevant. Progress in treatment and an opportunity for outpatient treatment is **not** a *prima facie* case for probable cause to believe Appellant's mental status has so changed he is safe to be at large. If that was the standard for probable cause, the court would have to find probable cause in every annual review hearing for people committed under the SVPA, because progress in treatment is encouraged and outpatient sex offender treatment is always available.[1]

Appellant failed to meet his burden to show his mental abnormality has so changed he is safe to be at large. On the contrary, all the evidence presented indicated Appellant needed further treatment to reduce his risk to re-offend, and he could not be forced to attend outpatient treatment if released. The evidence supports the circuit court's determination of no probable cause, and the circuit court's finding should be affirmed.

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[1] The only cases in which the court could not find probable cause are ones involving committed persons who are refusing to participate in the treatment program.

CONCLUSION

Based on the foregoing, Respondent submits the Court should affirm the circuit court's finding of no probable cause to believe Appellant's mental status has so changed he is safe to be at large.

Respectfully submitted,

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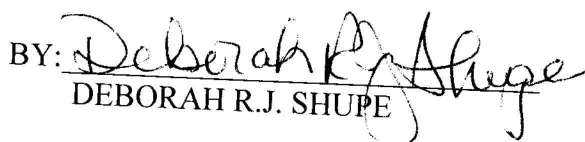
BY: 
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August 26, 2014

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August 26, 2014

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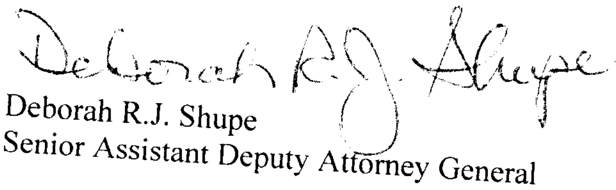
Re: <u>In the Matter of the Care and Treatment of Michael Lawyer</u>
Appellate Case No. 2014-000449

Dear Mr. Brooks:

Enclosed is a copy of the Initial Brief of Respondent and Designation of Matter, with proof of service, in the above-referenced case.

Sincerely,



Deborah R.J. Shupe
Senior Assistant Deputy Attorney General

DRJS/sbe

Enclosures

cc: The Honorable Jenny A. Kitchings (original and 2 copies enclosed)
Victim Services (with enclosures)