

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

OCT 30 2014

SC Court of Appeals

Appeal From Oconee County
The Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2014-001913

THE STATE,

Respondent,

v.

MICHAEL E. HAMM,

Appellant.¹

RESPONDENT'S MEMORANDUM REGARDING APPEALABILITY

In December 2010, prior to Appellant's release from confinement on a qualifying 2005 conviction, the State filed a Petition pursuant to the SVP Act, seeking a determination that Appellant is a sexually violent predator, and civilly committing him to the Department of Mental Health's Sexually Violent Predator Treatment Program ("SVPTP") for long term control, care and treatment. On September 7, 2011, Appellant waived his right to a jury trial, and voluntarily committed to the SVPTP.

The Department of Mental Health reviewed Appellant's mental status in July 2013, and determined his mental status had not so changed he was safe to be at large. Appellant

¹This arises in the context of a sexually violent predator action, and the correct caption is In the Matter of the Care and Treatment of Michael Hamm.

obtained an independent evaluation in September 2013, and after consulting with his court appointed counsel, Appellant waived an annual review hearing by consent order in January 2014. (Exhibit A). Appellant did not appeal from that order.

On February 4, 2014, Appellant moved to proceed *pro se* with “second chair counsel.” After a hearing on March 18, 2014, the circuit court granted Appellant’s request to proceed *pro se*, but denied the request for appointed counsel as “second chair counsel.” The circuit court filed an Order Relieving Counsel on May 9, 2014, and Appellant filed this appeal from that Order. (Exhibit B). Respondent submits Appellant is not an “aggrieved party” under the Order Relieving Counsel, and further, even if Appellant could appeal, the Order is not immediately appealable.

A. Appellant is not an “aggrieved party.”

“Any party aggrieved may appeal in the cases prescribed in this title.” S.C.Code Ann. § 18–1–30 (2014); *see also* Rule 201(b), SCACR (“Only a party aggrieved by an order, judgment, or sentence may appeal.”). “Thus, a party ordinarily may not appeal from a judgment, order, or decree in his own favor.” Way v. State, 2014 WL 4347510, 5 (S.C. Sup. Ct. 2014). When an appellant has not been prejudicially or injuriously affected by the judgment, the party has no standing to appeal, and it is the appellate court’s duty to reject an appeal by a party who is not aggrieved by the judgment of the lower court. *Id.*; *see also* Hudson ex rel. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E.2d 486, 490 - 491 (2014) (same).

Appellant moved to relieve his court appointed counsel and proceed *pro se*. At the hearing on his motion, the circuit court advised him against proceeding *pro se*, but

Appellant insisted. He also told the court “he knew how to represent himself and voluntarily waived his right to appointed counsel and all future appointed counsel.” (Exhibit B).²

In short, the circuit court ruled in Appellant’s favor, and gave him the relief he requested. Accordingly, he is not an “aggrieved party” for appeal purposes.

B. Interlocutory Appeal

Even if Appellant could be considered an “aggrieved party” for purposes of this appeal, however, the Order Relieving Counsel was not a final order subject to immediate appeal. Further, it does not fall within any category allowing interlocutory appeals.

“Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C. Code Ann. § 14-3-330 (1976 & Supp. [2002]).” Baldwin Constr. Co. v. Graham, 357 S.C. 227, 593 S.E.2d 146, 147 (2004) (*quoting* Woodard v. Westvaco Corp., 319 S.C. 240, 242, 460 S.E.2d 392, 393 [1995]). “Usually, an order that does not finally end a case or prevent a final judgment from which a party could appeal is not immediately appealable.” *Id*; *see also* Watson v. Underwood, 407 S.C. 443, 756 S.E.2d 155, 163 (Ct. App. 2014) (same).

The SVP Act provides a statutory right to counsel. Appellant had appointed counsel representing him, but expressly waived the statutory right to counsel by requesting to proceed *pro se*. Nothing in the statute provides a right to hybrid representation, such as

²Indeed, Appellant is such a prolific *pro se* litigant, the South Carolina Supreme Court requires him to pay filing fees “[d]ue to the repetitive and frivolous nature of [Appellant’s] prior filings.” The Court also warned Appellant further frivolous petitions may lead to contempt or other sanctions. (Exhibit C).

proceeding *pro se* with “second chair counsel.” Therefore, the appealability of the Order Relieving Counsel must be determined under the general appeal statute.

Intermediate judgments and orders involving the merits, and final orders affecting a substantial right, are appealable. S.C. Code Ann. §14-3-330(1) and (3) (1976). In addition, orders affecting a substantial right are appealable when they: a) in effect determine the action or prevent a judgment from which an appeal may be taken; b) grant or refuse a new trial; or c) strike a pleading or any part thereof. S.C. Code Ann. §14-3-330(2) (1976).

The Order Relieving Counsel did not address the merits of, or make any final determinations regarding Appellant’s commitment or annual review status. Rather, the sole issue addressed in the Order was Appellant’s request to proceed *pro se*. Nothing in the Order ends the case, or precludes Appellant from pursuing his annual review rights in the future.

Based on the foregoing, Respondent respectfully submits Appellant is not an “aggrieved party” from the Order Relieving Counsel, but even if he is, the Order Relieving Counsel is an interlocutory order that cannot be immediately appealed. Accordingly, the appeal should be dismissed for lack of appellate jurisdiction.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

SIGNATURE ON NEXT PAGE

BY: Deborah R.J. Shupe
DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

October 30, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Oconee County
The Honorable Deadra L. Jefferson, Circuit Court Judge
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THE STATE,

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v.

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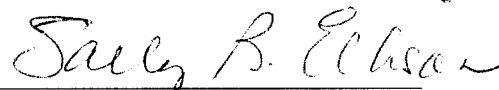
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Respondent's Memorandum Regarding Appealability on Appellant by depositing a copy in the United States mail, postage prepaid, addressed to:

Michael E. Hamm, *Pro Se*
SVPTP
7901 Farrow Road
Columbia, SC 29203

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

This 30th day of October, 2014.



SALLY B. ELLISON
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELY)
)
IN THE MATTER OF THE CARE)
AND TREATMENT OF)
)
MICHAEL HAMM,)
RESPONDENT.)
_____)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-08-4436

CONSENT ORDER WAIVING ANNUAL
REVIEW HEARING

RW
FILED
BERKELEY COUNTY S.C.
CLERK OF COURT
JAN 31 2014
AM 11:00


This matter comes before the Court to consider Respondent Michael Hamm's consent to his waiver of his Annual Review hearing, which covers the period from September 8, 2011 through July 13, 2013. Respondent is represented by Charles T. Brooks III., Esquire. The State is represented by Senior Assistant Attorney General James G. Bogle, Jr.

Mr. Brooks represents to this Court by his signature below that he has fully discussed with his client his rights under the statute, has obtained an independent psychiatric evaluation of his client, and that the Respondent has voluntarily and intelligently waived his rights to an Annual Review hearing and to Petition for Release, and has not been coerced, pressured, or offered any reward to waive these rights, has had an opportunity to consult with his attorney, and is satisfied with the services of his attorney.

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED the Respondent shall continue to be confined in a secure facility of the Department of Mental Health for long term control, care and treatment pursuant to the Sexually Violent Predator Act, S.C. Code Ann. Sections 44-48-10 *et seq.*

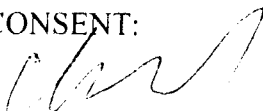
IT IS FURTHER ORDERED that the Respondent continues under the jurisdiction of this Court.

AND IT IS SO ORDERED.


The Honorable Stephanie P. McDonald
Chief Administrative Judge Ninth Judicial
Circuit Court of Common Pleas

January 31, 2014
Charleston, South Carolina

WE CONSENT:


Charles T. Brooks, III.
Attorney for Respondent

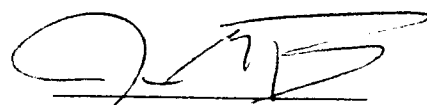

James G. Bogle, Jr.
Attorney for the State

EXHIBIT B

STATE OF SOUTH CAROLINA)
)
COUNTY OF BERKELEY)
)
In the Matter of the Care and Treatment)
of:)
)
MICHAEL HAMM,)
)
Respondent)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2010-CP-08-4436

ORDER RELIEVING COUNSEL

Presiding Judge:
Attorney for the State:
Respondent's Attorney:
Date of Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
James Bogle, Esq.
Charles T. Brooks, Esq.
March 18, 2014
Karen V. Andersen

2014 MAY -9 PM 1:38
MADEIRA P. BRUNN
CLERK OF COURT
BERKELEY COUNTY, SC
FILED
BW

This matter came before the Court during the March 18, 2014 common pleas non-jury term for a hearing on Respondent's Motion to Proceed *Pro Se* with Second Seat Counsel, filed February 4, 2014. Department of Mental Health transported Respondent for the hearing on March 18, 2014. Respondent's Attorney and Attorney for the State participated in the hearing via telephone conference without objection.

The South Carolina Constitution provides no right to hybrid representation. State v. Stuckey, 333 S.C. 56, 57-58, 508 S.E.2d 564 (1998). See Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975) (citing McKaskle v. Wiggins, 465 U.S. 168, 183, 104 S. Ct. 944, 953 (1984)); Jones v. State, 348 S.C. 13, 13, 558 S.E.2d 517, 517 (2002). "A trial judge is not required to permit hybrid representation, i.e. representation partially *pro se* and partially by counsel." State v. Reed, 332 S.C. 35, 43, 503 S.E.2d 747, 751 (1998). See Richardson v. State, 377 S.C. 103, 659 S.E.2d 493 (2008) (While an applicant seeking postconviction relief, related civil action, may have the right to reject or discharge court-appointed counsel and proceed *pro se* or retain his own counsel, he does not have the right, without a showing of satisfactory cause, to refuse or

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2014

dismiss the counsel appointed and have other counsel appointed). Therefore, Respondent's Motion to Proceed Pro Se with Second Seat Counsel is hereby denied.

At the hearing, Respondent argued he was denied an annual review as required under S.C. CODE ANN. § 44-48-110 (2013) and, therefore, alleged ineffective assistance of counsel. Respondent was voluntarily committed on September 8, 2011. While committed, he received his first hearing. Thereafter, Respondent's prior counsel filed a motion to compel the South Carolina Department of Mental Health to perform Respondent's annual review on July 13, 2013. Subsequently, Respondent's doctor evaluated Respondent on September 17, 2013. On January 16, 2014, Respondent advised his attorney that he wished to waive his annual review. Based on the South Carolina Department of Mental Health's pro rated scheduling system, Respondent's annual review is currently scheduled for July, 2014. After a hearing on the matter, Respondent informed the Court that he wished to proceed *pro se*.

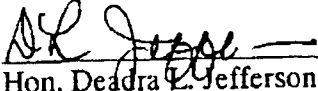
"It is well-established that a defendant may waive the right to counsel and proceed *pro se*." Dearybury v. State, 367 S.C. 34, 39, 625 S.E.2d 212, 215 (2006) (citing Faretta, 422 U.S. at 834, 95 S.Ct. at 2525). "Although a defendant's decision to proceed *pro se* may be to the defendant's own detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. (citing Faretta, 422 U.S. at 834, 95 S.Ct. 2525). "The trial judge has the responsibility to ensure that the accused is informed of the dangers and disadvantages of self-representation, and makes a knowing and intelligent waiver of the right to counsel." Id.

The Court advised Respondent against self-representation, but Respondent insisted. The Court inquired further and the Respondent indicated that he knew how to represent himself and voluntarily waived his right to appointed counsel and all future appointed counsel. Thus, this Court finds that Respondent knowingly, intelligently, and voluntarily waived his right to counsel.

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RTO

THEREFORE, IT IS ORDERED:

That Charles T. Brooks, III be relieved of any further services for the Respondent and that the Respondent will proceed with this matter *pro se*. Further, the Respondent understands that he will not be appointed another counselor and that if he wishes to obtain counsel, he must retain a private attorney. It is so ordered.



Hon. Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

May 2, 2014
Charleston, South Carolina
At Chambers


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EXHIBIT C

PH

The Supreme Court of South Carolina

Michael E. Hamm, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-000918

ORDER

The following matter is dismissed pursuant to *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991), because no extraordinary reason exists to entertain it in this Court's original jurisdiction.

Michael E. Hamm v. State of South Carolina. Certified Question of Law dated April 20, 2013. Appellate Case No. 2013-000918. —————

Due to the repetitive and frivolous nature of petitioner's prior filings, we hereby direct the Clerk of Court not to accept any further petitions from petitioner asking the Court to entertain matters in our original jurisdiction unless he pays the \$25 filing fee generally required for the filing of motions and petitions with this Court under Rule 240(d), SCACR. *In re Maxton*, 325 S.C. 3, 478 S.E.2d 679 (1996). Additionally, any future petitions from petitioner must be accompanied by a properly notarized affidavit by petitioner which certifies that he in good faith believes the matter raised in the petition is nonfrivolous and proper for this Court to consider in its original jurisdiction. *Id.* Petitioner is warned that should he continue to file frivolous petitions which are not proper for this Court in its original jurisdiction, he may be held in contempt or sanctioned under Rule 269, SCACR.

IT IS SO ORDERED.


C.J.

John R. ... J.
Donald W. Bentley J.
John ... J.
Wayne L. Hamm J.

Columbia, South Carolina

May 17, 2013

cc:

Michael E. Hamm

Office of the Attorney General



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OCT 30 2014

SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

October 30, 2014

Michael E. Hamm, *Pro Se*
SVPTP
7901 Farrow Road
Columbia, SC 29203

Re: The State v. Michael E. Hamm
Appellate Case No. 2014-001913

Mr. Hamm:

Enclosed herewith and served upon you is a copy of the Respondent's Memorandum Regarding Appealability, with proof of service, in the above-referenced appeal.

Sincerely,

Deborah R.J. Shupe
Senior Deputy Assistant Attorney General

DRJS/sbe

enclosure

cc: The Honorable Jenny A. Kitchings (original and 7 copies enclosed)