Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

Court Copy

July 28, 2012

Hon. Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Col., S.C. 29211

RECEIVED
AUG 0 2 2012
SC Court of Appeals

Re.: In re Burns, Appellate Case No.: 2012-212383

Dear Ms. Kitchings:

Enclosed you will find the original copy of my Memorandum To Appeal and certificate of service.

You will also find an addition copy of each please clock and return that copy to me in the enclosed self address stamped envelope.

Also you will find two (2) duplicate copies of my *Respondent's Brief and Supplemental Respondent's Brief*, each bearing an original signature. These documents were originally sent to the Supreme Court for filing, I found out after the fact that this case had been transfered to your court.

Would you please clock and return one (1) copy of these documents.

Thank you in advance.

Sincerely,

ALB/alb
Enclosure
cc: James G. Bogle, Esq.

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of Comman Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-004134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

CERTIFICATE OF SERVICE

Respondent above named hereby certifies that he served the state of S.C., a copy of the Memorandum To Appeal, by depositing same in the U.S. Mail, postage prepaid on this 28th day of July 2012 addressed as follows:

James G. Bogle, Assistant Attorney Gen., P.O. Box 11549 Col., S.C. 29211.

I so certify:
Dated: July 28, 2012

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of Commom Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-04134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

MEMORANDUM TO APPEAL

Rule 201 (a),(b), **SCACR**, states in part

"(a) *RIGHT TO APPEAL, Judgments, Orders and Decisions.* Appeal may be taken, as provided by law, from any final judgment, appealable order or decision. ——"

"(b) *Who May Appeal.* Only **a party aggrieved by an order, judgment, sentence or decision may appeal.**"

Emphasis added.

When it is clearly obvious that the lower court has abused its discretion in issuing a clearly erroneous order that creates unending prejudice to a party, that party should have the right to seek immediate review to correct the error and to prevent himself from suffering

Court Copy

further injury, damage and prejudice.

This appeal seeks such review only to prevent further injury, damage and perjudice that will continue to mount unless intervention steps are taken.

The Supreme Court has ruled in, *In re Miller*, 393 S.C. 248, 259, 713 S.E.2d 253, 258 (2011), cert. denied, 132 S.Ct. 774, 181 L.Ed.2d 496 (U.S.S.C. 2011) (citing *In re Matthews*, 345 S.C. 638, 644, 550 S.E.2d 311, 313 (2001), that the proper course of action in a case such as this instant case is for the person/Respondent to file a motion for dismissal.

The Supreme Court further held that the lower court should grant the dismissal because to deny it would create a situation of unending prejudice brought on by a denial of due process and equal protection and treatment. Ibid.

This instant appeal should therefore be given at the very least, a prima facie review of the issue and merit for any clear and obvious errors of law or due process violations that creates unending prejudice.

CONCLUSION

Respondent ask that this Honorable Court make a prima facie review of the issue and merit for clear and obvious errors or violations that creates prejudice.

Respondent ask that a prima facie review be made of ~~these~~ Respondent's Brief and Attachments, and of the Supplemental Respondent's Brief.

Court Copy

Dated:
July 28, 2012

s/ Alan L. Burns

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29401-7469

1

Alan L. Burns Court
3841 Leeds Avenue Copy
N. Chas., S.C. 29405-7469

July 3, 2012

Clerk's Office
S.C. Supreme Court
P.O. Box 11330
Col., S.C. 29211

Re.: In re Burns C/A: 2010-CP-10-004134
Respondent's Brief

Dear Mr. Shearouse:

Enclosed for filing you will find the Respondent's Brief and Certificate of Service for same.

You will also find an additional copy please clock and return that copy to me.

Thank you in advance.

Sincerely,

ALB/alb
Enclosures
cc: James G. Bogle, Jr., Esq.
Samuel K. Allen, Esq.

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of Commom Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-004134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

CERTIFICATE OF SERVICE

Respondent above named hereby certifies that he served the state of S.C, a copy of the Respondent's Brief, by depositing same in the U.S. Mail, postage prepaid on this 3rd day of July, 2012 addressed as follows:

James G. Bogle, Assistant Attorney Gen., P.O. Box 11549 Col., S.C. 29211.

I so certify:
Dated: 7/3/12

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of Commom Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-004134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

RESPONDENT'S BRIEF

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

Respondent

Other Counsel of Record:
James G. Bogle, Jr., Esq.
Office of S.C. Attorney General
P.O. Box 11549
Col., S.C. 29211

Court Copy

This matter comes before the court on appeal of the order of Judge Stephanie P. McDonald, to hold the sexually violent predator case in abeyance, in violation of the S.C. Code of Laws § 44-48-90(B) which states in part;

"If no request is made, the trial must be before a judge in the county where the offense was committed within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator, pursuant to Section 44-48-80(D), or, if there is no term of court, the next available date thereafter."

Back Ground / Factual Basis

1) This action was initiated by the state in April 2010.

2) On June 28, 2010, a probable cause hearing was held and it was order that the Respondent be evaluated.

3) On July 28, 2010 the Respondent was evaluated by Dr. Rebecca L. Jackson, PH.D., Chief Psychologist, at the S.C. Department of Mental Health's Forensic Evaluation Service.

4) On September 3, 2010, Dr. Jackson made her report and concluded that, "insufficient evidence exists to opine that he has a relevant mental abnormality."

5) The state took no action in this action for the next ful year.

Court Copy

6) On June 24, 2011, the Respondent mailed to the court for filing, a Motion for Summary Judgement/ Motion To Dismiss (Was not filed until Dec. 7, 2011)

7) After receiving the copy of request served upon them, the state then filed a motion to hold the case in abeyance.

8) On August 16, 2011, a hearing was held, Respondent's counsel, David M. Low, was release and new counsel appointed. The court did not rule on the state's motion or Respondent's motion for Summary Judgment.

9) Mr. Samuel K. Allen, was appointed to represent Respondent. Immediately upon appointment Mr. Allen, requested a summary judgement motion's hearing.

10) The clerks of court refused to set a hearing date in accordance with Rule 79(e), SCRCivP, and instead allowed the state attorney general's office to control the file book and motion calendar.

11) Finally, after much haggling, begging and arguing for a hearing, a hearing was scheduled and held on April, 30, 2012.

12) In Open Court, the judge stated that the state was to have 45 days extension to try the case.

13) The state delayed in preparing the order for 30 days and then included facts and events that occured after the

Court Copy

hearing in other unrelated proceedings which could not have been discussed, argued, objected too, or ruled on by the judge.

This brief follows.

ARGUMENT

There is no other way of putting it but to state plainly that the order is faulty and erroneous at best.

In the order, it states that the cause is to be held in "Abeyance is granted for a period of 45 days from the new "trial not before" date of July 1, 2012." On the day of hearing April 30th, the criminal trial was scheduled for May 7th. The date July 1st, was never mentioned as there were no request or motions made or at play in the criminal case at that time.

The court stated on record April 30th, that it was granting 45 days from that date April 30th, based upon the fact that the criminal trial was to commence on May 7th. The court specifically stated that the state would only have until June 14, 2012, and that if the state had not taken action by that date, Respondent's appointed counsel was to contact her (the judge) personally and that she would immediately convene a hearing to resolve this case.

Even so, the order is clearly erroneous for two (2) legal reasons which can not be excused away. (1) The statute provides that this type case must be tried within a drop dead specific

Court Copy

time. Please see S.C. Code of Law § 44-48-90(B).

Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. Catawba Indian Tribe vs. State, 372 SC. 519, 524, 642 S.E. 2d 751, 753 (2007).

Further, "a statute is enacted as a whole with a general purpose and intent, and each part should be considered in connection with every other part to produce a harmonious whole". State ex rel. Appleby vs. Recht, 577 S.E. 2d 734 (2002).

This Court went on to state, "The general intention of a statute is the key to the whole, and the interpretation of the whole controls the interpretation of its parts. Id.

S.C. Code of Law §§ 44-48-10, et seq, makes clear the intent of the S.C. Legislature. That an action brought under this section ~~was~~ is to be expedited and tried within a set time frame.

In this case there is a clear show of an abuse of discretion. There is no statute or case law that supports the order to hold this case in abeyance pending the outcome of a criminal trial.[1]

Foot Note 1] If the criminal trial ends with a guilty verdict and the respondent is sentence to prison time, this civil action becomes moot pursuant to § 44-48-40, et seq., if the respondent is acquitted the state will be as they presently are without sufficient evidence. Regardless to which outcome the state will be disadvantage from ever trying this action.

Court Copy

In *Matthews*, this Court held that where a civil commitment trial is not conducted within sixty (60) days of the probable cause hearing and no continuance has been granted, the proper procedure is for an inmate to file a motion to dismiss. *Matthews*, 345 S.C. at 645, 550 S.E.2d at 314 (2001).

Respondent in this instant cause filed a motion for summary judgment/motion to dismiss. After the state was served a copy of the Respondent's motion, they then filed a request to hold the case in abeyance indifinitely. Please see the attached Motion For Summary Judgment/Motion To Dismiss.

No hearing was held on these motions until April 30, 2012. A total of twenty-two (22) months after the probable cause hearing. And a total of twenty (20) months after the report of the evaluation was filed.

Therefore, no continuance was granted until 22 months ~~later~~ later and 10 months after Respondent submitted his request for Summary Judgment/Motion To Dismiss.[2]

More importantly, this Court stated;

"Even though we find the court of common pleas had subject matter jurisdiction to hear Matthews' case,

---

Foot Note 2 | This action was initiated in April 2010

Court Copy

we do find the legislature's use of the term "shall" in section 44-48-90 indicates the holding of a trial within sixty days of the probable cause hearing is mandatory." See, eg., 314 South Carolina Police Officers Retirement Sys. vs. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990), ("shall" is considered mandatory under principles of statutory interpretation); South Carolina Dept. of Hwys & Pub. Transp. vs. Dickinson, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (Ordinarily the use of the word 'shall' in a statute means that the action referred to is mandatory).

Here, in this instant case they are brazen disregard for the statutory requirement. In this case the court clearly abused its discretion in granting the state's request. They're request was made wholly 22 months after the probable cause hearing, and then it was only done because the Respondent had properly requested dismissal pursuant to this Courts holding in *In re Matthews*, supra, and *In re Miller*, supra.

Additionally the order attempts to incorporates events that occured after the April 30th, hearing as the basis of the order. The judge initially granted the state forty-five (45) days from April 30th. Please see Hearing Transcript pg. ... lines ...

However, when the Attorney General, prepared the proposed order, they interjected events and facts that did not occur until weeks after the April 30th hearing.

The bare facts of the matter is this, the state is caught

Court Copy

in a quagmire. It wants to keep this case open in abeyance pending the outcome of the criminal charges currently pending against the Respondent. However, regardless to what the outcome they won't be able to proceed. If Respondent is found guilty of any of the criminal charges he will undoubtedly receive a life sentence or a very stringent sentence at the very least. This means that the state will the be procedurally barred from prosecuting this instant case. (Prison inmates can not be committed and housed with SVP patients, and SVP patients can not be imprisoned with criminal inmates). It is for this reason why the legislature mandated that SVP actions only be commenced at the conclusion of an inmate's prison sentence prior to release.

On the other hand, because the court appointed psychiatric examiner has already determined that at present Respondent does not meet the requirements to be a judge a SVP, if he is acquitted not only will the state lack a cause of action but, they will also lack a basis to request another evaluation.

In short the state has a case open that they have requested to remain open in abeyance that they will never be able to prosecute. This is why they have failed to prosecute for the ful two (2) years that this action has been pending.

The time allowed for trying this case has long since past and Judge McDonald should have dismissed. At the very least she should have dismissed without prejudice even though the proper course of action would have been to dismiss with prejudice. Considering the fact that the present quagmire will still stand for the state at the conclusion of the criminal trial, regardless to what the outcome.

So what can be gain for the state by simply having this

Court Copy

case to remain pending? This matter is highly prejudicial in the criminal case. Just as the criminal charges are prejudicial in this case. The state is using the criminal charge as the sole basis to keeping this case pending.

An example of the prejudicial harm this case is causing is as follows; On May 29, 2012, Respondent had a Bond Hearing, to set, modify or reduce his bond. The bond judge initially was prepared and stated that he was ~~[illegible]~~ setting Respondent's bond at $150,000.00, The prosecuting solicitor (Ms. Deborah Herring-Lash) then informed the court of this pending SVP action and that this action was contingent upon the criminal trial. The judge then revised ~~[illegible]~~ the bond and set it at $750,000.00.

Additionally, the order supports the above argument. See Order pg 4, item 11 and footnote 2.

The state is using this case to intentionally prejudice the criminal cases pending against Respondent and at the same time they are also using the criminal cases to intentionally prejudice this instant action.

CONCLUSION

Wherefore, based upon the above facts and arguments in conjunction with written record, the order to hold this case in abeyance indifinitely should be reversed and/or overruled as an abuse of discretion. The decision to hold this case in abeyance is based on unsupported factual conclusions.

1 Court Copy

The SVPA was enacted as is specifically to prevent persons like this Respondent from being incarcerated beyond their release date, and thus this court should not only grant Respondent's appeal but should exercise its sovereignty power and dismiss this action sua sponte with prejudice.

Meaning this with the utter most profound respect but, to mandate that the circuit court dismiss an action of this nature without prejudice makes a farce out of the ruling that an individual should move for dismissal.

When this type instances arise, it is because the state lacks evidence and facts sufficient to try the person. Surely this most Honorable and Noble Court realizes that the reason the state most often don't proceed with trial within the statutory time frame is because the state lacks sufficient evidence to proceed. Point in light — this very action;

1) The court appointed psychiatrist has concluded that this Respondent does not have an abnormality or disorder
2) The Respondent has completed his sentence (Nov. 2010)
3) Most of the elements the state listed as causes of actions has been completely expunged from Respondents records
4) The state want the case to be held in abeyance pending the outcome of present pending criminal charges which will
   a) render this action moot if convicted at criminal trial, or
   b) further eradicate any viable semblance evidence, if acquitted.

So then, if a circuit court judge has these facts as is in this instant action peering him/her in the eyes, it would seem rather pointless that they be mandated to dismiss without prejudice a case that is completely

1 Court Copy

meritless rather than dismiss with prejudice.

This Most Honorable and Noble Court, has afore pronounced as a sound principle of our jurisprudence that courts cannot ignore or capriciously disregard meritorious, statutorile, and constitutional defects in order to reach a more desirable result.

Dated: July 3, 2012

S/

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405 - 7469

Court Copy

State Of South Carolina County Of Charleston	In The Court Of Common Pleas Ninth Judicial Circuit
In The Matter Of The Care And Treatment Of Alan L. Burns, Respondent.	C/A No.: 2010-CP-10-4134 Request For Hearing On All Outstanding And Pending Motions

Comes Now The Respondent above named who hereby moves this Court for an immediate hearing on the herewith *Motion For Summary Judgement* and all other outstanding motions.

Please Take Notice That Respondent has had several motion on file and pending since mid 2010 and that he is severely prejudice by this unprecedented and bias delay in having his motions heard.

Please Take Further Notice That Respondent avers that in all fairness and for the sake of and in the name of true justice, motion in this case should be heard and decided in the order of filing.

Please Take Further Notice That Respondent avers that his motions were pending long before the states and that the court has in an abused it discretion in not calling those motions to bar and has in so doing caused greater prejudice while at the same time it was connivingly giving secret aid to the state.

I so move:

Dated: June 24, 2011

S/ Alan L. Burns

Alan L. Burns
3841 Leeds Avenue
North Chas., S.C. 29405-7469

Court Copy

State Of South Carolina County Of Charleston	In The Court Of Common Pleas Ninth Judicial Circuit
In The Matter Of The Care And Treatment Of Alan L. Burns, Respondent.	C/A No.: 2010-CP-10-4134 Motion For Summary Judgement Motion To Dismiss

FILED
DEC 17 2010
CLERK OF COURT
CHARLESTON COUNTY, SC

Comes Now, the Respondent above named who hereby moves this Most Honorable Court for an Order of Summary Judgement, dismissing this action for lack of cause of action stemming from no genuine issue of a material fact and overall claims or claim that are not factually developed to a point where this case can be brought to trial.

Statement Of The Case And Supporting Facts For Motion

In April 2010, the State started proceedings to have Respondent committed as a Sexually Violent Predator (SVP).

On April 15, 2010, a Multidisciplinary Team met and assessed that the Respondent satisfied the definition of a SVP.

On May 4, 2010, the Prosecutor's Review Committee found probable cause to believe that Respondent suffers from a mental abnormality or personality disorder that would make him likely to engage in acts of sexual violence.

On May 18, 2010, the State of S.C., petitioned this Court for an order of commitment.

On May 26, 2010, this Court (R. Markley Dennis, Jr., Judge) ordered that a Probable Cause Hearing be held for the purpose of determining whether Respondent should remain in custody and be evaluated by an appointed expert.

On June 28, 2010, the Court found probable cause and ordered a mental health evaluation to determine whether Respondent has a mental abnormality or personality disorder that satisfies the definition of a Sexually Violent Predator.

On July 28, 2010, the Respondent was evaluated on an outpatient basis at the Forensic Evaluation Service of the South Carolina Department of Mental Health by Dr. Rebecca L. Jackson, PH.D., Chief Psychologist.

On September 3, 2010, Dr. Jackson made her report and concluded that, *"insufficient evidence exists to opine that he has a relevant mental abnormality."*

1 Court Copy

Memorandum In Argument

In the State of South Carolina, a party bringing a Civil Action must when making his complaint, make a short and plain statement of facts outlining the alleged violation. This will enable the Respondent/Defendant as to what and how he should make his ultimate plea to the allegation/charges. Clark vs. Clark, 293 S.C. 415, 416, 361 S.E.2d 328 (1987).

In the case presently before this Court, the State made its charges against this Respondent. That charge is stated in a complexed statement in the petition filed by the State on May 18, 2010 (Respondent's Exhibit 01).

In the petition the state outlines six (6) cause's of action, namely those listed at number 6 (a) (b) (d) (e) (f) and (g). (Exhibit 01)

It is these causes of action for which the evaluation was ordered. And it was these causes of action forwhich the evaluation was conducted. Rule 35, SCRCivP, states in part;

"*the court in which the action is pending may order the party to submit to a physical or mental examination by a physician or to produce for examination the person in his custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made ——.*" Ibid, Rule 35 (a). Emphasis added.

It was the above listed number of causes of action that the evaluation report was rendered.

The Evaluator, without a doubt placed the assertions made in the six (6) causes of action at the forefront of her inquiries. It was these assertions inwhich she used in formulating her overall interview. Please see Respondent's Exhibit 02, Page 1, Section 1 'Referral Information'.

The Evaluator then went beyond the mere assertions made in the petition and included other matters not mentioned in the pleadings. Still yet, with all this she concluded that there was insufficient evidence inexistence to opine that Respondent has a relevant mental abnormality. At present, there is an absolute absence of evidence to support the state's case.

Court Copy

The Respondent in this action, having met the initial burden of demonstrating the absence of a genuine issue of material fact ("*insufficient evidence exist to opine that he has a relevant mental abnormality*"), is now beyond the need of affidavits or other similar materials to support this motion negating the state's claim. *Midland Mutual Life Ins. Co. vs. Harrell*, 331 S.C. 394, 503 S.E. 2d 189, 190-91 (Ct. App. 1998).

The State, in violation of **S.C. Code of Laws §44-48-90**, which specifically states,

"*the person or the Attorney General may request, in writing, that the trial be before a jury. If no request is made, the trial must be before a judge in the county where the offense was committed within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator, pursuant to section 44-48-80 (D), or, if there is no term of court, the next available date thereafter.*" Emphasis added.

is now holding this case in ABEYANCE in hopes that a factual basis for further prosecution (a trial) will develope.

This violation of **§44-48-90**, is substantially prejudiced to Respondent on several fronts. First, the factual basis inwhich the ~~the~~ state is hoping that will develope is not a part of or incorporated in any of the pleadings or the order of the court for the mental examination.

The developement the state is now hoping for, as far as this case is concerned can only be found in the report of the Evaluator, and even with this information she concluded that "*insufficient evidence exist to opine that he has a relevant mental abnormality.*"

Furthermore, the Evaluator went beyond the limit of the scope of the examination as was order by the court.

"*Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.*" ***Fleming vs. Rose***, 338 S.C. 524, 526 S.E. 2d 732 (Ct. App. 2000); ***Bravis vs. Dunbar***, 316 S.C. 263, 265, 449 S.E. 2d 495, 496 (Ct. App. 1994) holding that, "*Thus, the existence of a mere scintilla of evidence in support of the nonmoving party's position is not*

Court copy

sufficient to overcome a motion for summary judgement." See also, First Savings Bank vs. Capital Investors, 450 S.E.2d 83, 86 (Ct. App. 1994); Wortman vs. City of Spartanburg, 310 S.C. 1, 425 S.E.2d 18, 20 (1992).

Conclusion

The conclusion of the Evaluator clearly eliminates any and all lingering semblance of a genuine issue of material fact as such Summary Judgement should be granted and this action should be dismissed accordingly.

"Insufficient evidence exist to opine that he has a relevant mental abnormality."

I so move:

Dated: June 24, 2011

s/ Alan L. Burns

Alan L. Burns
3841 Leeds Avenue
North Charleston, S.C. 29405-7469

Court Copy

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

July 9th, 2012

Clerk's Office
S.C. Supreme Court
P.O. Box 11330
Col., S.C. 29211

Re: In re Burns C/A: 2010-CP-10-4134
Supplemental Respondent's Brief

Dear Mr. Shearouse:

Enclosed for filing you will find the Supplemental Respondent's Brief and Certificate of Service for same.

You will also find an additional copy, please clock and return that copy to me.

Thank you is advance.

Sincerely,

ALB/alb
Enclosures
cc: Samuel K. Allen, Esq.,
James G. Bogle, Jr., Esq.

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of
Commom Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-004134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

CERTIFICATE OF SERVICE

Respondent above named hereby certifies that he served the state of S.C., a copy of the Respondent's Supplemental Brief, by depositing same in the U.S. Mail, postage prepaid of this 9th day of July 2012 addressed as follows:

James G. Bogle, Jr., Assistant S.C. Attorney Gen., P.O. Box 11549 Col., S.C. 29211

I so certify:
Dated: July 9, 2012

S/ Alan L. Burns

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

State Of South Carolina
Supreme Court

Court Copy

Appeal From Charleston County Court Of Commom Pleas
Stephanie P. McDonald, Cir. Court Judge

Case No.: 2010-CP-10-004134

In The Matter Of The Care And Treatment Of Burns, Alan L.,
Respondent.

SUPPLEMENTAL RESPONDENTS BRIEF

Alan L. Burns
3841 Leeds Avenue
N. Chas., S.C. 29405-7469

Respondent

Other Counsel of Record:
James G. Bogle, Jr.
Office of the S.C. Attorney General
Post Office Box 11549
Col., S.C. 29211

Court copy

MEMORANDUM

SUBJECT: Alan Burns – Memorandum in Support of Motion to Dismiss SVP Action

---

Facts

Argument

"Where a civil commitment trial is not conducted within sixty days of the probable cause hearing and no continuance has been granted, the proper procedure is for an inmate to file a motion to dismiss." In re Miller, 393 S.C. 248, 259, 713 S.E.2d 253, 258 (2011), cert. denied, 132 S. Ct. 774, 181 L. Ed. 2d 496 (U.S.S.C. 2011) (citing In re Matthews, 345 S.C. 638, 644, 550 S.E.2d 311, 313 (2001)) ("[T]he legislature's use of the term 'shall' in [S.C. Code] section 44-48-90 indicates the holding of a trial within sixty days of the probable cause hearing is mandatory."). When deciding whether to grant a motion to dismiss for failure to timely prosecute a sexually violent predator (SVP) the South Carolina Supreme Court has enunciated three factors: 1) did the State properly move for a continuance?; 2) did the State establish that there was good cause for the delay?; and 3) was the defendant substantially prejudiced by the continuance? If any one of the factors is not present the case should be dismissed.

The Sexually Violent Predator Act's (SVPA) procedures were "promulgated in order to avoid due process violations and to prevent inmates from being arbitrarily incarcerated beyond

Court Copy

their release dates." In re Miller, 393 S.C. at 258, 713 S.E.2d at 258 (2011); see also In re Luckabaugh, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002) ("[The] Act itself provides for constitutional safeguards such as probable cause hearings to ensure individuals are not arbitrarily held beyond their release dates."). The SVPA provides clear substantive and procedural guidelines for adjudicating whether an individual is a SVP. See S.C. Code Ann. § 44-48-10 et seq. (West 2012). Specifically, the SVPA states that the court must conduct a trial "***within ninety days of the date the court appointed expert issues the evaluation as to whether the person is a sexually violent predator. . . .***" § 44-48-90(B). However, the SVPA also provides that "[t]he trial may be continued upon the request of either party and a *showing of good cause*, or by the court on its own motion in the due administration of justice, *and only if the respondent will not be substantially prejudiced*." Id.

Looking to clarify the SVPA, the South Carolina Supreme Court recently opined on two issues surrounding the appropriate remedy when the State fails to timely conduct a civil commitment trial. In re Miller, 393 S.C. at 258, 713 S.E.2d at 258. First, the court determined "whether a motion to dismiss should be granted with or without prejudice to the State." Id. Second, "where the motion to dismiss is granted without prejudice, [the court decided] whether an inmate should be detained or released while the State re-file[d] with the circuit court the petition that precipitates a civil commitment trial." Id. In formulating its opinion, the court weighed the "interests of the State in pursuing SVPs and protecting the public versus the offender's rights not to be indefinitely detained and to have a timely adjudication of his status as an SVP." [1] Id. The court concluded that a motion to dismiss shall be granted without prejudice

[1] Here, the court noted that two-thirds of SVPs are subjected to unjustified, prolonged terms of incarceration. In re Miller, 393 S.C. at 258 n. 15, 713 S.E.2d at 258 n. 15.

Court Copy

and the inmate should be released if he was not serving any other criminal sentences. Id. at 260, 258-59.

The Supreme Court decision, In re Miller, provides a clear procedural map for handling a SVP's motion to dismiss. There, the the motion to dismiss was brought by Mr. Miller after the State failed to try his case within the statutorily mandated sixty day[2] period after his probable cause hearing. Id. at 253, 255. The State rebutted his motion by showing: 1) it *filed* for a continuance within the sixty day time period; 2) it could not proceed to trial due to a delay in receiving evidence from North Carolina concerning Mr. Miller's past convictions; and 3) Miller was not substantially prejudiced by the delay. Id. at 254-55, 256. Thus, the Supreme Court upheld the Court of Appeals finding that the State "properly moved for a continuance, the State established that there was good cause for the delay, and that Miller was not substantially prejudiced by the continuance." Id. at 251, 254.

Unlike In re Miller, the State in Mr. Burns' case failed to establish any of the three requirements needed to prove a motion to dismiss should be denied. The State did not move for a continuance within the statutorily mandated time frame or show reason for the delay. Moreover, and most significantly, the State substantially prejudiced Mr. Burns and violated his rights to Due Process by using the SVPA as a vehicle to keep him incarcerated while it pursues other criminal charges. Mr. Burns was scheduled for release in November 2010, but currently remains imprisoned without yet having a civil commitment trial. The SVPA was enacted specifically to prevent persons like Mr. Burns from being incarcerated beyond their release date, and thus this court should grant Mr. Burns motion to dismiss *with prejudice* for such a substantial violation of his constitutional rights.

---

[2] Despite the continued reference to a sixty day time limit the statute gives the State has ninety days to bring their case to trial. While not an issue in this case, it should be corrected for future litigation.

Court Copy

Dated: July 9th, 2017 S/

Alan L. Burns
3841 Leeds Avenue
N. Chas., S. C. 29405-7469