ORIGINAL

RECEIVED
MAR 02 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF CALVIN JOE MILLER,

APPELLANT

APPELLATE CASE NO. 2014-001735

FINAL REPLY BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

ARGUMENT IN REPLY

In the Brief of Appellant, appealing his civil commitment under the Sexually Violent Predator (SVP) Act, Appellant Calvin Miller raised the following issue:

> Whether the trial court erred in failing to conduct the requisite analysis under Rule 401, SCRE, and Rule 403, SCRE, and admitting testimony regarding Appellant's prior charges and convictions for non-sexual conduct?

During Miller's civil commitment hearing, the State's expert was permitted to testify on direct regarding Miller's prior 1992 charges for breaking and entering and larceny, both of which were dismissed; 1995 and 2009 convictions for criminal domestic violence; a 2005 conviction for possession of marijuana; and 1999, 2003, and 2005 convictions for failing to register as a sex offender. The trial court failed to conduct any balancing test regarding the probative value versus unfair prejudice before determining that the prior, non-sexual charges and offenses were admissible. R. 31, l. 5 – 36, l. 17. As more fully discussed in Appellant's Brief, the admittance of the prior, non-sexual charges and convictions was improper because of the substantial risk that the jury based its finding on what it viewed as Miller's general danger to society rather than the narrow question of whether he was "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(1)(b). This danger was exacerbated by the conflicting expert testimony regarding Miller's risk to reoffend.

Respondent argues that admission of the non-sexual charges and convictions was proper because the State's expert, Dr. Susan Knight, considered the convictions in reaching her diagnoses and assessing Miller's risk to reoffend. "Even if admissible under Rule 703[, SCRE] or Rule 705, [SCRE,] however, the determination of whether an expert may

testify to the facts underlying an opinion must include an analysis under Rule 403, SCRE." State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999). Under Rule 403, SCRE, the testimony "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Id. at 628m 521 S.E.2d at 512.

Respondent quotes In re Corley, 353 S.C. 202, 577 S.E.2d 451 (2003), for the proposition that "a person's dangerous propensities are the focus of the SVP Act." Respondent's Brief, p. 11. The full paragraph from which that quotation was excised reads:

> Moreover, appellant's offer to stipulate to the requirement in section 44-48-30(1)(a), with the details of the offenses suppressed, would have hampered the State's ability to establish the requirement in section 44-48-30(1)(b). The Act defines "[l]ikely to engage in acts of sexual violence" to mean"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." § 44-48-30(9) (emphasis added). Therefore, a person's dangerous propensities are the focus of the SVP Act.

Corley, 353 S.C. at 206-07, 577 S.E.2d at 453-54. Thus, when read in context it is clear that the Court meant that the focus of the SVP Act is a person's dangerous propensities "to commit acts of sexual violence." Later the same year as its opinion in Corley, our Supreme Court reiterated in In re Harvey, 355 S.C. 53, 61 n.7, 584 S.E.2d 893, 897 n.7 (2003), that "the purpose of the requirements in the SVP Act is to ensure that these involuntary commitment procedures are "**only** used to control a 'limited subclass of dangerous persons' and **not to broadly subject any dangerous person to what may be indefinite terms.**" (emphasis in original). See also Kansas v. Crane, 534 U.S. 407, 412-

13, 122 S.Ct. 867, 870 (2002) ("[T]here must be proof of serious difficulty in controlling behavior. And this, when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, **must be sufficient to distinguish the dangerous sexual offender** whose serious mental illness, abnormality, or disorder subjects him to civil commitment **from the dangerous but typical recidivist convicted in an ordinary criminal case.**" (emphasis added)).

Respondent points to two out-of-state cases – In re Altman, 723 N.W.2d 181 (Iowa 2012), and In re Hooker, 968 N.E.2d 1087 (Ill. 2012) – in support of its argument that admission of Miller's prior, nonsexual offenses was proper. Obviously neither case is mandatory authority and a full review reveals that they are inapposite.

Unlike the present case, the defendant in In re Altman, 723 N.W.2d 181, 183 (Iowa 2012), did not seek to exclude his lengthy history of over forty arrests and multiple convictions, all but two of which related to non-sexual offenses. Instead, Altman welcomed their introduction in support of his argument that the State did not present sufficient evidence that his mental condition "predisposed him to commit sexually violent offenses to a degree that would constitute a menace to the health and safety of others." 723 N.W.2d at 183. The Altman court concluded that the "the State need only establish that more likely than not the respondent will commit additional sexually violent offenses." Id. at 188. The court accordingly rejected Altman's contention that the State was required to "prove his *greatest* risk to the public is the likelihood of future sexual offenses." Id. at 187-88 (emphasis in original). It was in that context that the Court wrote: "The fact that it is likely he will also commit other crimes does not detract from his risk as a sexual predator." Id. at 188. Here, Miller is not arguing for judgment not

withstanding the verdict in light of the testimony, but rather he is arguing that the testimony should never have been admitted.

In In re Hooker, 968 N.E.2d 1087 (Ill. 2012), the Illinois Supreme Court considered whether the trial court erred in allowing the State's expert witnesses at the SVP hearing to testify to certain facts underlying their opinions, which included Hooker's prior arrests and allegations that did not result in arrest. 968 N.E.2d at 1098. Significantly, the trial court gave the following limiting instruction to the jury:

> Ladies and gentlemen, I am going to allow the witness to testify as to what he considered, and the information that he considered is going to be allowed by me for a limited purpose, and it's permitted for you to weigh and evaluate the opinion that is going to be given by this witness. The material itself that's referred to is not evidence in this case, and that material can't be considered by you as evidence. You may consider the material for the purpose of deciding what weight, if any, to give the opinions that are going to be made by this witness.

Id. at 1091. The Hooker court noted a decreased risk of prejudice in light of the court's limiting instruction that the testimony was not substantive evidence. Id. at 1101. However, the Hooker court took the opportunity to clarify that such a limiting instruction was not necessary in an SVP hearing because the Illinois SVP Act expressly authorized the State to "introduce evidence of the commission by the respondent of any number of crimes together with whatever punishments, if any, were imposed." See ILL. COMP. STAT. 207/35(b) (West 2002). Notably, no such provision is contained in South Carolina's SVP Act and no such limiting instruction was given in Miller's case. See S.C. CODE ANN. § 44-48-10, et seq.

With respect to the prejudice to Miller from the testimony, Respondent noted that other factors beyond the non-sexual charges and convictions were considered by Dr.

Knight in reaching her diagnosis and opinion. Respondent's Brief, pp. 12-13. In In re Ettel, 377 S.C. 558, 563, 660 S.E.2d 285, 288 (2008), this Court found that Ettel's prior sexual offenses not resulting in convictions and prior murder conviction were relevant to Dr. Pamela Crawford's opinion and diagnosis. The Ettel Court aptly noted that Dr. Crawford testified that her opinion remained the same even without that information and also relied on several other factors. 377 S.C. at 563, 660 S.E.2d at 288. Conversely, no such testimony was presented in Miller's case. While Dr. Knight admitted that she did not rely "solely upon his criminal past" in reaching her "ultimate decision," she testified that she found them to be "significant." R. 35, l. 2 – 36, l. 17.

Further, Ettel's prior conviction "stemmed out of a sexual assault in which he bound and gagged the victim, choked and beat her, and then forced the victim to perform oral sex on him after raping her." 377 S.C. at 560, 660 S.E.2d at 286. He threatened to "cut her [the victim] into pieces" if she did not remain silent during the ordeal. Id. Ettel also admitted to three other sexual offenses that did not result in convictions, which were committed against a customer in an appliance store where he worked in Michigan, a hitchhiker whom he kidnapped in Montana, and co-worker at an animal hospital where he worked in Montana. Id. Additionally, Dr. Crawford testified to a possible sexual motivation related to Ettel's 1962 murder conviction. Id. at 560-61 n.2, 660 S.E.2d at 287 n.2. Thus, there was not the same danger in Ettel that the jury based its decision on the offender's general criminal propensity rather than his danger "to engage in acts of sexual violence." S.C. CODE ANN. § 44-48-30(1)(b).

Lastly, Respondent argues that a favorable ruling for Appellant "will put every evaluator in the position of either ignoring non-sexual offenses regardless of their relevance

to diagnosis and risk to reoffend, or rendering an opinion they cannot support at trial because they cannot testify about those offenses." Respondent's Brief, p. 14. Respondent claims that such would "deprive[] the jury of vital information regarding the person's mental status and risk to reoffend, which is contrary to the legislative intent of the SVPA." Respondent's Brief, pp. 14-15. On the contrary, it is the improper admission of such evidence that detracts from the purpose of the SVP Act, which is to "control a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be indefinite terms." Harvey, 355 S.C. at 61 n.7, 584 S.E.2d at 897 n.7.

It cannot be disputed that facts or data relied upon by experts are not automatically admissible, but must instead be subject to a balancing test under Rule 403, SCRE. See State v. Slocumb, 336 S.C. 619, 627, 521 S.E.2d 507, 511 (1999); see also United States v. Gillis, 773 F.2d 549 (4th Cir. 1985). Since the analysis of whether probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues "turns on the facts of each case," a favorable decision for Miller does not mean that evidence of prior, non-sexual crimes could not be admissible under different circumstances. See State v. Kirton, 381 S.C. 7, 24, 671 S.E.2d 107, 115 (Ct. App. 2008) ("The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case."). That said, there is a serious danger in an SVP hearing that the State will seek to bolster feeble evidence of a person's risk to reoffend sexually by introducing evidence of the person's prior, non-sexual conduct, as it did in

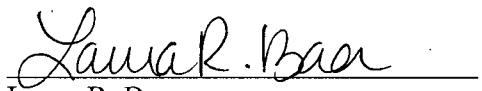
the present case. [1] See In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) ("A civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an **extraordinary remedy**. Although this Court has repeatedly held the Act constitutional, we decline to construe it in a manner which would lessen the State's burden of proof. The General Assembly has carefully written our SVP Act to lay out exactly what is required to establish that someone is a sexually violent predator; **the State must prove, beyond a reasonable doubt that the individual is *presently* a sexually violent predator**." (additional emphasis added)).

[1] The experts agreed that the risk to reoffend sexually based on the Static-99 test was 12% of the next 5 years and 18% over the next ten years. R. 45, l. 6 – 47, l. 13; R. 156, l. 17 – 162, l. 18; R. 176, l. 8 – 177, l. 16. Obviously troubled by the low statistic, Assistant Attorney General Bogel posed a question to the defense expert, Dr. Kimberly Harrison, regarding whether she would get on her plane to fly back home if she found out it had a twelve percent chance of crashing. R. 177, ll. 9-16. The implication was that *any* risk to reoffend is too high. However, the SVP Act requires a finding that the person is "*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.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Calvin Miller respectfully requests that this Court reverse his commitment and remand his case for a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 2nd day of March, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Reply Brief complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

March 2nd, 2016

Laura R. Baer

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

R. Lawton McIntosh, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF CALVIN JOE MILLER,

APPELLANT

APPELLATE CASE NO. 2014-001735

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of March, 2016.

Laura R. Baer

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 2nd day of March, 2016.

Maria Murdock (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.