STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2014-001235

IN THE MATTER OF THE CARE AND TREATMENT OF
CARL M. ASQUITH,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Appellant's right to assistance of counsel under the SVPA did not require the State to notify Appellant's attorney when Appellant was transported to facilitate the State's independent evaluation, or require his attorney's presence during the evaluation.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On August 9, 2004, Appellant Carl Matthew Asquith pled guilty to two counts of criminal sexual conduct in the first degree, and four counts of criminal sexual conduct with a minor in the second degree, all of which are defined as sexually violent offenses under the South Carolina Sexually Violent Predator Act (SVPA), and was sentenced to twelve years incarceration. Prior to Appellant's release from prison, the State commenced a civil proceeding pursuant to the SVPA, seeking his commitment for long term control, care and treatment as a sexually violent predator. (Petition Pursuant to the Sexually Violent Predator Act [SVPA Petition], with Exhibits, filed April 25, 2012; Record on Appeal [R.], pp. 192-277).

The court appointed evaluator, Marie Gehle, Psy.D, diagnosed Appellant with "pedophilia, sexually attracted to males, limited to incest, non-exclusive type," but based on his score on an actuarial risk assessment tool (the Static-99R), she concluded he was not a risk to reoffend sexually, and therefore, he did not meet the statutory criteria for commitment. The State then retained the Medical University of South Carolina (MUSC) to conduct an independent evaluation of Appellant, and notified the court and Appellant's counsel the State was exercising it right to seek another evaluation. (Notice of Retention of Independent Expert, filed March 14, 2013; R., pp. 275).

William Mulbry, M.D., evaluated Appellant, and concurred with Dr. Gehle's diagnosis, but concluded Appellant was a high risk to reoffend sexually and met the criteria for commitment as a sexual predator. The case was called for a jury trial on June 2, 2014, before the Honorable James R. Barber, III, Circuit Court Judge.

Prior to trial, Appellant moved to exclude any evidence related to Dr. Mulbry's testing and interview with Appellant, arguing his attorney was not informed of the dates Appellant was transported to Charleston for the evaluation, where he signed waivers and consent forms prior to undergoing the evaluation, and further, he was entitled to have his attorney present during the evaluation. The State argued Appellant's statutory right to counsel under the SVPA did not entitle him to counsel's presence during the mental health evaluation. The circuit court denied Appellant's motion, finding Appellant did not have a constitutional right to an attorney in a civil matter, the State had a right to get the evaluation, and even if the attorney was present, he could not do anything, or even be in the examining room. (TT, pp. 31-34; R., pp. 4-7).

The State presented Dr. Mulbry, who was qualified as an expert in psychiatry and forensic psychiatry. He testified MUSC assigned Appellant's case to him for the evaluation, and he followed the psycho-sexual evaluation protocol mandated by the MUSC sexual behaviors lab, which is designed to collect as much information as possible about how the person being evaluated functions and their criminal offenses. The protocol includes examination of trial records, criminal records, police incident reports, medical records, psychiatric records, and military records, as well as a battery of psychological and physiological tests and a face-to-face interview. Appellant was transported to MUSC three times, two times for psychological and physiological testing, and the third time for a four hour interview with Dr. Mulbry. (TT, pp. 52-64, State's Exhibits1-6; R., pp. 17-29; 162-191).

Dr. Mulbry concurred with Dr. Gehle's diagnosis of "pedophilia, attracted to males, limited to incest, non-exclusive type," and testified to a reasonable degree of

medical certainty this mental abnormality causes Appellant significant difficulty controlling his sexual behavior. He further opined to a reasonable degree of medical certainty Appellant's propensity to reoffend sexually posed a menace to the health and safety of others, and Appellant met the criteria for commitment as a sexually violent predator. (TT, pp. 64-107; R., pp. 29-72).

Dr. Mulbry also reviewed Dr. Gehle's evaluation report regarding Appellant. He agreed with her diagnosis, but disagreed with her assessment of Appellant's risk to reoffend using the Static-99R. He testified the Static-99R does not account for acute criminogenic needs, which are existing factors relevant to the particular individual that might make the person recidivate. While Dr. Mulbry agreed Appellant's Static-99R score was three, he disagreed with Dr. Gehle's reliance on Appellant's score to conclude he is not a risk to reoffend sexually in light of Appellant's repeated demonstration of deviant sexual interests against multiple victims. Dr. Mulbry explained his overall conclusion differed from Dr. Gehle's because:

> I think she used the line that there are no risk factors beyond those accounted for in the Static 99. In other words, she indicated in her report that the risk factors for re-offense were adequately accounted for by the Static 99. But again, the Static 99 does not account for acute criminogenic needs and we know that deviant sexual interest is an acute criminogenic need and we know that it is a lead - - a leading correlate of recidivism rate. Based on that fact, I - - I don't think the Static 99 really did accurately reflect his recidivism. I think that deviant sexual interests raises that risk appreciatively and that's the basis of my opinion.

(TT, pp. 107-108; R., pp. 72-73).

Appellant presented Dr. Gehle, who was qualified as an expert in psychology and forensic psychology. She testified her evaluation consisted of reviewing all available documentation, an interview with Appellant and scoring the Static-99R. Dr. Gehle

diagnosed Appellant with pedophilia, but based in large part on the Static-99R score, she opined his mental abnormality did not cause him difficulty controlling his behavior, he was a low risk to reoffend sexually, and he did not meet the criteria for commitment under the SVPA. She disagreed with Dr. Mulbry's conclusion regarding Appellant's deviant sexual interests, stating "research" defines the term differently than Dr. Mulbry's definition. (TT, pp. 123-152; R., pp. 86-115).

On cross-examination, Dr. Gehle testified Appellant denied committing some of the crimes to which he pled guilty, but she discounted his denial as irrelevant. She also testified about some of the sexual acts recited in police reports and referenced in the victims' forensic interviews, which included use of a screwdriver, shoving bread up one victim's anus, tying a victim's penis to a rope, and tying the victims' hands, but she discounted those reports because the specific acts were not stated in the indictments, so they were not "proven in Court per se" by Appellant's guilty pleas. (TT, pp. 153-168; R., pp. 116-131).

The jury found beyond a reasonable doubt Appellant is a sexually violent predator. The circuit court denied Appellant's post-trial motions, and committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (TT, pp. 205-209, Order of Commitment filed June 3, 2014; R., pp. 160, 161; 277). This appeal followed.

ARGUMENT

Appellant's right to assistance of counsel under the SVPA did not require the State to notify Appellant's attorney when Appellant was transported to facilitate the State's independent evaluation, or require his attorney's presence during the evaluation.

Appellant contends the circuit court erred in denying his motion to exclude evidence regarding anything related to the testing performed at MUSC and Dr. Mulbury's interview with Appellant, because the lack of notice to his counsel of when the evaluation occurred and counsel's absence from the evaluation violated his due process and statutory right to counsel. Contrary to this contention, the constitutional counsel requirement does not apply in this civil proceeding, and the SVPA right to counsel does not require notice to counsel of the date an evaluation will be conducted, or entitle the person to have counsel present during the evaluation.

"Although a person committed under the SVP Act has no Sixth **or Fourteenth Amendment** right to counsel, as does an accused in a criminal proceeding, they do have a **statutory** right to counsel." In re McCoy, 360 S.C. 425, 602 S.E.2d 58 (2004) (emphasis added); *see also* In re McCracken, 346 S.C. 87, 551 S.E.2d 235, 240 (2001) (the **only** right to counsel in SVP proceedings is the **statutory** right to the assistance of appointed counsel). Thus, notwithstanding Appellant's attempt to argue around existing precedent, the South Carolina Supreme Court has already determined there is no **constitutional** right to counsel in SVPA cases, and the only remaining question is the

extent of the statutory right.[1]

Under the SVPA, a person subject to the statute is entitled to the assistance of counsel "at all stages of the proceedings." S.C. Code Ann. §44-48-90(B) (Supp. 2014). It is undisputed Appellant received the able assistance of a court appointed attorney throughout this case. Therefore, the issue of his **right** to counsel is arguably moot, and his reliance on cases regarding whether the right exists is misplaced.[2] The real issue in this case is whether a mental health evaluation is a "stage of the proceeding," which entitles the person to counsel's presence during the evaluation.

In a criminal case, counsel's presence is required when procedural steps are taken, or events transpire that are likely to prejudice the ensuing trial. State v. Hardy, 283 S.C. 590, 325 S.E.2d 320, 322 (1985); State v. Williams, 263 S.C. 290, 210 S.E.2d 298, 299 (1974). In Hardy, the trial court ordered a competency/insanity mental health evaluation of the defendant. He was evaluated on three occasions, and the court denied counsel's motion to be present during the third evaluation. Finding the evaluation was not a

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[1]Appellant cites the South Carolina Constitution due process provision as support for his constitutional argument, but he did not raise the applicability of the South Carolina Constitution before the circuit court. Therefore, Appellant assertion the South Carolina Constitution provides a separate basis for his constitutional contentions, the issue is not preserved for appellate review.

[2]Further, the cases Appellant cites involve completely different issues from this case, and are clearly distinguishable. *See* Vitek v. Jones, 445 U.S. 480 (1980) (notice, a hearing and counsel required before transferring an inmate from a penal institution to a mental health facility); Addington v. Texas, 441 U.S. 418 (1979) (minimum standard of proof in involuntary civil commitment proceeding is clear and convincing evidence); In re Ontiberos, 287 P.3 855, 865 (Kan. 2013) (the right to counsel in sexual predator cases flows from the liberty interest, and any ineffective assistance claims can be raised via a habeas corpus petition or a direct appeal **if** the record is sufficient to legitimately evaluate counsel's performance..

critical stage of the proceeding, the Supreme Court observed: "[t]he presence of counsel is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would **undoubtedly** hinder the psychiatrist from effectively examining the defendant." Id. at 322 (emphasis added). *See also* United States v. Bondurant, 689 F.3d 1246, 1249 (1982) (defendant had no constitutional right to counsel's presence during psychiatric examination, and "to do so might well defeat the purpose of the examination"); State v. Schackart, 175 Ariz. 494, 858 P.2d 639, 646 (1993) (majority of courts have determined there is no constitutional right to counsel's presence during mental health examination, and while it may bestow a strategic benefit, counsel's presence is not required to ensure a fair trial).

While the focus of a mental health evaluation in a sexual predator case is undisputedly different from the focus of a competency/insanity evaluation, the ultimate purpose is the same - to determine whether the case will proceed to trial. The mental health evaluation in a sexual predator case is a critical component of the case, however, it is **not** a stage of the proceedings, which include the probable cause hearing, guilt or innocence hearing if the person is incompetent to stand trial and not likely to become competent, motion hearings and trial.[3] No procedural matters are discussed or

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[3]Appellant conflates three very separate sections of the SVPA to conclude the statute "stresses the right to counsel and the need to conform to constitutional requirements.." While there is no doubt the legislature considered the specific right to counsel and general conformance to constitutional requirements important, there is also no doubt the legislature knew how to make it clear when the right to counsel applied under the SVPA. It expressly applies at probable cause hearings, guilt/innocence hearings when the person is incompetent, and trial, essentially all matters involving the court. Nothing in the statute indicates assistance of counsel is required during mental health evaluations.. The overarching provision Appellant cites as an indication the legislature

determined during the evaluation, and before the evaluation begins, the person is advised evidence obtained will be disclosed and may be discussed at trial. Thus, the potentially disruptive effect of counsel's presence during an evaluation is even more pronounced in sexual predator cases. *See* Allen v. Illinois, 478 U.S. 364, 374-375 (1986) (upholding constitutionality of the Illinois "sexually dangerous person" statute, holding the Fifth Amendment right against self-incrimination does not apply in the civil commitment proceedings thereunder, and acknowledging the possibility that denying the evaluating psychiatrist an opportunity to question people alleged to be sexually dangerous would "decrease the reliability of a finding of sexual dangerousness").

In this case, Appellant received notice in March 2013 the State was exercising its right to obtain an independent evaluation. He was transported to MUSC on April 9 and May 3, 2013, for testing, and on June 14, 2013, for the interview. Dr. Mulbry issued a detailed written report in September 2013, which the State immediately forwarded to Appellant's counsel. Therefore, Appellant's counsel knew the evaluation was taking place and it would be at MUSC, its purpose, and how the State intended to use the results, and there was ample time to consult with Appellant before he was transported to MUSC the first time, the second time and the third time. *See* Buchanan v. Kentucky, 483 U.S. 402 (1987) (defendant not entitled to have counsel present during mental health evaluation when his counsel knew about the scope and nature of the examination, as well

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intended to ensure constitutional protections, including the right to counsel, specifically applies to the conditions of confinement and the treatment provided while a person is committed for long term, control and treatment, not the proceedings lead up to commitment. S.C. Code Ann. §44-48-170 (Supp. 2014) ("The involuntary detention and

as its possible uses, and had opportunity to consult with the defendant prior to the examination). Further, there is no evidence Appellant asked to consult with counsel before signing any consent forms or waivers, a request MUSC has honored for others undergoing sexual predator evaluations there.

Appellant did not challenge the validity of Dr. Mulbry's evaluation until the case was called for trial.[4] Significantly, at that time he did not present any evidence, or even allege, anyone at MUSC acted inappropriately, coerced him to sign anything or undergo testing, or denied him basic comforts, such as restroom breaks, and he makes no such allegations in this appeal.

More importantly, Appellant does not indicate how counsel's presence during the testing and interview could have changed the outcome. If counsel had advised him not to sign the consents and waivers, the evaluation would not have proceeded, and the State would seek an order requiring Appellant to cooperate, and a contempt citation if he still failed to cooperate with the evaluation. If counsel advised him to sign the consents and waivers, but then interfered with the evaluation in any way, such as objecting to certain questions or advising Appellant not to answer them, contempt for failure to cooperate would still be an issue. Ultimately, if necessary, the State would present evidence at trial regarding Appellant's failure to cooperate, and its impact on Dr. Mulbry's ability to render an opinion.

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commitment of a person pursuant to this chapter must conform to **constitutional requirements for care and treatment**.") (emphasis added).

[4]It is interesting to note Appellant never complained about a lack of notice or the absence of his attorney when he was transported for the interview with Dr. Gehle, and

Appellant does argue "counsel can be close to invisible, sitting quietly in the corner of the room," and labels the possibility counsel would hinder the evaluation as "unlikely." (Brief of Appellant, p. 13). As discussed herein, however, most courts considering the issue of the right to have counsel present during a mental health examination, including the South Carolina Supreme Court, have found it may well hinder the examination, and Appellant cites no authority to the contrary. At most, counsel's presence might have bestowed some amorphous, unarticulated strategic benefit, but counsel's absence did not deprive Appellant of a fair trial. Schackart, 858 P.2d at 646.

If the testing and interview revealed any information not already contained in the vast documentation Dr. Mulbry reviewed, it was not the basis for his ultimate opinion. Rather, the psychological tests results were generally favorable to Appellant, and the physiological test was inconclusive. Dr. Mulbry's opinion was premised most heavily on the pattern of deviant sexual behavior documented by the records (TT, pp, 63-108; R., pp. 28-73). Since Appellant denied committing most of the sex acts revealed by the victims in the documentation, even in the face of his guilty pleas, it is safe to assume he did not reveal any new or relevant misconduct to Dr. Mulbry during the interview, and Dr. Mulbry did not testify there were any such revelations.[5]

Therefore, counsel's presence during the testing and interview, and arguably exclusion of any testimony regarding them, would not have changed Dr. Mulbry's

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nothing in the record indicates he received prior notice and his attorney was present during the interview.

[5]Appellant also told Dr. Gehle he did not commit those acts. (TT, pp. 163-166; R., pp. 126-129). Therefore, his denial was not new information revealed during the interview with Dr. Mulbry.

opinion or the outcome of the trial.[6] If Appellant had any concerns about Dr. Mulbry's methodology and opinion, he could, and did, challenge them on cross-examination and during Dr. Gehle's testimony. *See* Schackart, 858 P.2d at 647 ("If the defense wishes to challenge the manner in which a mental examination has been conducted, or an expert's conclusions, this can be done on cross-examination or during the testimony of its own witness.") (*citing* United States v. Ash, 413 U.S. 300, 315 [1973] [there are times when a subsequent trial can cure a one-sided confrontation between prosecuting authorities and an uncounseled defendant]).

Appellant's primary goal in this appeal is to have the statutory right to counsel under the SVPA elevated to a due process constitutional right, which the Supreme Court has already decided adverse to Appellant's position, and expand its scope beyond the constitutional requirements in criminal cases. Appellant **did** have the assistance of counsel throughout the circuit court proceedings, and now has the assistance of counsel on appeal, and he does not, and indeed cannot, show how having counsel present during the evaluation would, or even could, change the result.

Finally, even if the statutory right was elevated to a constitutional right in this case, it is of no benefit to Appellant because under existing case law, it would not entitle him to have counsel present during the evaluation. Appellant received the statutory, and arguably any constitutionally required, assistance of counsel he was entitled to receive in

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[6]Even if this Court finds some basis for requiring notice of the evaluation dates and counsel's presence during the evaluation, which the State submits does not exist, any alleged error regarding counsel's notification and presence is harmless in this case. *See* State v. Reeves, 301 S.C. 191, 391 S.E.2d 241, 243 (1990) (error is harmless when it could not reasonably have affected the result of the trial).

this case. He is not entitled to the relief he seeks, and the jury verdict committing him for long term control, care and treatment should be affirmed.

CONCLUSION

Based on the foregoing, Respondent submits the jury verdict finding beyond a reasonable doubt Appellant is a sexually violent predator should be affirmed.

Respectfully submitted,

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February 12, 2016

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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 by depositing a copy in the United States mail, postage prepaid, addressed to:

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

This 12th day of February, 2016.

Sally B. Ellison

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