STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable Donald B. Hocker, Circuit Court Judge
Appellate Case No. 2015-001955

IN THE MATTER OF THE CARE AND TREATMENT OF RONALD OWEN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly found there was no probable cause to believe Appellant's mental abnormality had so changed he was safe to be released and was not likely to commit acts of sexual violence, and properly denied Appellant's request for an annual review trial by jury pursuant to the South Carolina Sexually Violent Predator Act.

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 February 3, 2010, after a jury trial.

Pursuant to statute, Appellant's mental status was reviewed annually after his commitment. On June 11, 2015, Dr. Amy Swan, Psy.D., issued a report concluding Appellant's mental status had not so changed that he is safe to be a large. Appellant retained Dr. Thomas V. Martin, M.D., to conduct an independent evaluation. Dr. Martin testified Appellant is safe to be at large if released. After a hearing on August 25, 2015, the Honorable Donald B. Hocker, Circuit Court Judge, found no probable cause to believe Appellant's mental status has so changed he is safe to be at large, and ordered Appellant's continued confinement under the statute. This appeal followed.

STATEMENT OF FACTS

Appellant Ronald Owen was charged in 2003 in Newberry County with one count of Lewd Act upon a Minor in Newberry County, and charged in Berkeley County with two counts of Criminal Sexual Conduct with a Minor, First Degree in Berkley County. All the charges arose from Appellant's arising from the sexual molestation of his son. Pursuant to a plea agreement, Appellant entered an Alford[1] plea in Berkley County, and the two Berkeley County criminal sexual conduct charges were reduced to one count of Lewd Act on a Child under 16. On July 21, 2005, Appellant was sentenced to fifteen years incarceration suspended to twelve years. On January 13, 2006, Appellant pled *nolo contendere* to the Newberry County, and was sentenced to twelve years incarceration to run concurrent with the Berkeley County sentence.

Prior to Appellant's release from prison regarding the offenses committed against his minor son, Respondent State of South Carolina commenced an action pursuant to the South Carolina Sexually Violent Predator Act (SVPA), seeking Appellant's civil commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment. On February 3, 2010, Appellant was committed to the custody of SCDMH and the Sexually Violent Predator Treatment Program (SVPTP).

The SVPA requires annual reviews of all committees in the SVPTP. Dr. Amy Swan, Psy.D, performed the required review and issued a report June 11, 2015, which acknowledged Appellant had made progress in treatment, but concluded Appellant's mental status had not so change he was safe to be at large. Appellant requested an annual review hearing and an independent evaluation. (Annual Review Documents dated 6/11/15; Record on Appeal [R.], pp. 86-107).

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[1]Alford v. North Carolina, _____ U.S. _____( ).

On August 25, 2015, the State called the case for an annual review probable cause hearing before the Honorable Donald B. Hocker, Circuit Court Judge. At the beginning of the hearing, the court reviewed the annual review report, and informed Appellant he had the burden to show probable cause to believe his mental status had so changed he is safe to be at large. The Appellant presented testimony from Dr. Thomas V. Martin M.D., who was qualified as an expert in forensic psychiatry. (Trial Transcript [TT], pp. 5-6; R., pp. 9- 10).

Appellant retained Dr. Martin to conduct an independent evaluation of Appellant's mental status, and then render an opinion whether Appellant was now safe to be at large. As part of the evaluation, Dr. Martin reviewed all available records, including previous annual review reports, interviewed the Appellant, conducted collateral interviews, and conducted multiple psychological and physiological assessments. He testified this was the type of information experts rely on in the field of forensic psychiatry. (TT, pp. 7-9; Record on Appeal [R.], pp. 11-13).

Dr. Martin testified about Appellant's problems prior to entering the program. He stated Appellant suffered from serious interpersonal and intimate relationship problems, and had several failed relationships, as well as a distorted impression of sex and its role in a serious relationship. Dr. Martin also testified Appellant previously put very little effort toward sex offender treatment. Based on the available information and testing, Dr. Martin diagnosed Appellant with pedophilic disorder, sexually attracted to both, nonexclusive type, which is typically treated through group therapy. He noted, however, pedophilia is considered chronic, likening it alcoholism, and as with alcoholism, pedophilia can never be fully cured, but pedophiles can learn to manage their disorder. Dr. Martin testified Appellant was receiving the

appropriate group therapy in the SVPTP, and Appellant had been working toward the goal of recovery since he entered the program. (TT, pp. 9-13; R., pp. 13-17).

Dr. Martin testified about Appellant's active participation and steady progress in the treatment program. Appellant was currently at the second highest level in the program, had shown leadership skills, and mentored other members of the treatment group. Appellant also maintained outside relationships with family and friends. While he initially struggled with empathy, he was able to recognize this issue, and had since gained a better ability to interact with others. (TT, pp. 15-19; R., pp. 19-23).

Dr. Martin testified, to a reasonable degree of medical certainty, Appellant's mental condition had so changed he was less likely to sexually reoffend if not confined in a secure treatment environment indefinitely. He then opined Appellant was safe to transition into the community **with the assistance of outpatient treatment**. During Appellant's interview with Dr. Martin, he expressed a willingness to participate in outpatient treatment, and stated he already had a plan set up to receive such treatment in Charleston. (TT, pp. 19-23; R., pp. 23-27)

On cross-examination, Dr. Martin testified Appellant still possessed a general hostility towards women. To illustrate this hostility, he testified about Appellant's attempt to have the mother of his son and his son killed. He also referenced Appellant's past convictions in Delaware relating to the molestation of his daughter. He also reiterated Appellant's need for outpatient treatment if released to keep him from reoffending sexually. (TT, pp. 25-32; R., pp. 29-36).

The State presented Dr. Amy Swan, Psy.D., who was qualified as an expert in forensic psychology. Like Dr. Martin, Dr. Swan reviewed all available records, interviewed the Appellant, conducted collateral interviews, and conducted multiple psychological and

physiological assessments. She testified this was the type of information experts rely on in the field of forensic psychology. (TT, pp. 34-42; R., pp. 38-46).

Dr. Swan diagnosed Appellant with pedophilic disorder, sexually attracted to both, nonexclusive type, a mental abnormality that can be treated, but not cured. Dr. Swan also diagnosed Appellant with narcissistic personality disorder, which involves patterns of grandiosity, a need for admiration, and a lack of emphathy. (TT, pp. 37-40; R., pp. 41-44).

When conducting an annual review evaluation, Dr. Swan testified she looks to see if a person's mental abnormality or personality disorder has so changed he is safe to be at large and, if released, will not likely commit acts of sexual violent. She testified the statute did not mention the phrase "less likely," but rather stated a very clear standard the person must be "not likely" to reoffend. Further, the statute does not include any provision for outpatient treatment or furloughs. (TT, pp. 40-41; R., pp. 44-45).

Dr. Swan testified she also relied on Appellant's criminal history, which included his South Carolina convictions, as well as the Delaware conviction for molesting his daughter between the ages of three and five. The abuse included fondling, forcing her to perform oral sex, performing oral sex on her, digitally penetrating her vagina, simulating sex, and attempting to have penile-vaginal intercourse with her. Appellant was indicted on three counts of Unlawful Sexual Conduct in the First Degree, but as part of a plea deal, Appellant pled guilty to one count of Unlawful Sexual Intercourse in the Third Degree and the State *nolle prossed* the two remaining charges. (TT, pp. 42-44; Annual Review dated 6/11/15, pp.4-5; R., pp. 46-48, 89-90).

Appellant's South Carolina convictions were based on the multiple anal rape of Appellant's eleven years old, beginning when the son was six years old and ended in 2003. These anal rapes took place in the back of Appellant's semi-truck, in several different counties.

Appellant was charged in Newberry and Berkeley Countys, and was convicted in both counties. (TT. pp. 42-44, Annual Review dated 6/11/15, pp.6-8; R., pp. 46-48, 91-93).

Dr. Swan testified Appellant did not initially accept responsibility for his sexual offenses. He originally denied many of the acts alleged by the victim, but ultimately admitted to the reported conduct reluctantly. Dr. Swan stated he only seemed to make these admissions under the belief it would increase his chances of release. (TT, pp. 44-45; R., pp. 48-49).

Dr. Swan described the treatment model used at the SVPTP, and testified Appellant initially did not make much progress, but began to make significant progress between 2013 and 2015. Despite his progress, Appellant still had trouble with certain goals, specifically his difficulty accepting responsibility for his actions, and addressing his attitudes of entitlement, a feature of his personality disorder that was not likely to change. (TT, pp. 46-47; R., pp. 50-51).

Dr. Swan also testified Appellant uses manipulative tactics in the program. Appellant disliked his case manager and blamed health reasons to move out of his therapy group and into a general track program. Later, when the case manager left the program, Appellant attempted to rejoin his original group, but when he was told he must complete the general track program instead, he claimed he was being forced to do the general track program. Dr. Swan testified this incident demonstrated Appellant's refusal to accept responsibility for his manipulative behavior. She stated Appellant has made some progress working on his manipulative behavior, it is a deeply ingrained pattern needing to be addressed further. (TT, pp. 48-49; R., pp. 52-53).

Regarding Appellant's narcissistic personality disorder, Dr. Swan testified it was still an issue for him, even though he claimed he had changed. According to Dr. Swan, Appellant's failure to sufficiently address his personality disorder was an obstacle in learning to manage his

pedophilia. She opined Appellant's sense of entitlement, stemming from his narcissistic personality disorder, motivated him to offend sexually. (TT, pp. 50-51; R., pp. 54-55).

Dr. Swan also conducted physiological testing using the penile-plethysmography (PPG), which Dr. Swan explained was designed to measure a man's sexual arousal by their physiological response to visual and audio stimuli. (TT. p. 61; R., p. 65). Appellant's PPG did not show a sexual interest in children, but she noted this was a common result when testing incest perpetrators. (TT, p. 52; R., p. 56).

Appellant's PPG did, however, show an arousal to sadistic masochistic behavior towards adult women. Dr. Swan testified Appellant's girlfriend previously indicated he anally raped her. Appellant also attempted to have his girlfriend killed. Dr. Swan identified Appellant's hostility towards women to be a dynamic risk factor for reoffending, which Appellant had not addressed and did not fully understand. (TT, pp. 52-53; R., 56-57).

Dr. Swan also used the Static-99R, a risk assessment actuarial based tool comprised of ten risk questions which are based static facts the offender cannot change, including the number and age of victims, the relationship between the offender and the victim, and the offender's age. The possible scores on the Static99-R range from -3 to 12, and Appellant's score was 3, which Dr. Swan testified was in the moderate low risk range, but Dr. Swan testified Appellant's score did not fully address his risk. She identified multiple dynamic risk factors during Appellant's evaluation, including sexual preoccupation, a sexual preference for prepubescent children, lack of emotional intimate relationships with adults, poor problem solving, Machiavellianism, lack of concern for others, dysfunctional coping, sexualized coping, and hostility towards women, all of which increase an offender's risk to reoffend sexually, but can be addressed during treatment. (TT, pp. 55-57; R., pp. 59-61).

On cross-examination, Dr. Swan acknowledged Appellant made progress in his treatment for pedophilia, but testified his failure to address his deviant sexual urges, including his arousal to sadistic-masochism, his lack of understanding and failure to address his risk factors for reoffending, made his a significant risk to reoffend sexually. Although he identified these factors, he had not completed any assignments on them. On redirect, Dr. Swan agreed Appellant's sadomasochistic urges were the biggest issue Appellant faced, Appellant still had to address other issues directly related to his pedophilia, and his personality disorder further increased his risk of reoffending. Dr. Swan testified to a reasonable degree of psychological medical certainty Appellant's mental abnormality and personality disorder had not so changed he is safe to be at large and, if released, is not likely to commit acts of sexual violence. (TT, pp. 57-59, 62, 71; R., pp. 61-63, 66, 75).

After considering all of the testimony and the record, the circuit court found Appellant failed to meet his burden to show probable cause to believe his mental status has so changed he is safe to be at large, and denied Appellant's request for an annual review trial by jury. This appeal followed.

ARGUMENT

The circuit court properly found there was no probable cause to believe Appellant's mental abnormality had so changed he is safe to be released and is not likely to commit future acts of sexual.

Appellant contends the circuit court erred by not finding probable cause and denying his request for an annual review trial by jury pursuant to the South Carolina Sexually Violent Predator Act. This contention ignores significant portions of Dr. Swan's testimony regarding the risk factors Appellant had not fully addressed. Further, Appellant's expert's testimony Appellant is less likely to reoffend did not satisfy the statutory requirment. Therefore, the circuit court properly found Appellant did not meet his burden.

A. Standard of Review

"On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." *See* In re Care and Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003). "Probable cause" in the sexually violent predator context "requires that the evidence presented would lead a reasonable person to believe, and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator... Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.' " In re the Care and Treatment of Brown, 372 S.C. 611, 620, 643 S.E.2d 118, 122-23 (Ct. App. 2007) (*citing* Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)).

A. Statute Provisions

South Carolina Code Ann. §44-48-110 (Supp. 2013) provides for an annual examination of a committed person's mental condition, and unless waived by the person, the circuit court

must conduct an annual review hearing to review the person's status.[2] The person has a right to counsel at the hearing, and the court must determine whether probable cause exists to believe the person's mental abnormality and/or personality disorder has so changed the person's is safe to be at large. The statute requires a showing "probable cause exists to believe the person's mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, he is not likely to commit acts of sexual violence..." S.C. Code Ann. § 44-48-110 (Supp. 2013). The committed person has the burden to show probable cause exists to believe his mental condition has so changed he is safe to be released. To meet this burden, the committed person has the right to have a qualified expert testify on his behalf. *Id.*

C. Application to The Instant Case

In Tucker, the committee presented expert testimony at the annual review probable cause hearing indicating he took responsiblity for his sexual offenses, and was "capable and motivated towards continued sex offender treatment, he should continue his treatment in an outpatient setting." 578 S.E.2d at 721. The State's evidence, however, established he had additional treatment goals he needed to meet before he could be considered safe to be at large if not confined for continued treatment both experts testified he needed. *Id.* at 722. Affirming the circuit court's finding of no probable cause, the Supreme Court held evidence the committee could continue treatment in an outpatient setting does not meet the committee's burden to show probable cause to believe his condition had so changed he is not likely to commit further acts of sexual violence **if not confined**. *Id.*

Similar to Tucker, Appellant's expert testified Appellant he made progress in the SVP program, but he there were other treatment goals he could address in an outpatient setting. there

[2]Under appropriate circumstances, the circuit court may deny the annual review hearing as frivolous under S.C. Code Ann. §44-48-130 (Supp. 2013).

were other treatment goals the appellant needed to address, including his sadistic-masochism. The statute requires a showing of a change in the committee's mental abnormality or personality disorder such that he is safe to be at large, not mere progress in the SVPTP. Both experts agreed Appellant had made progress in the treatment program, which is the purpose of the program. Mere progress does not equate with so changed as to be safe to be at large. Appellant's expert testimony indicating he had progressed, but he needed to continue treatment in an outpatient setting to work on various issues, simply did not meet the statutory requirement of probable cause to believe Appellant is safe to be at large if released.[3] Thus, the evidence failed to establish probable cause to believe Appellant has progressed in the SVP program to the point he is safe to be at large.

There is ample evidence in this case to support the circuit court's determination of no probable cause. Both Dr. Martin and Dr. Swan testified Appellant required further treatment. Dr. Martin merely gave his opinion Appellant progressed to the point where he was less likely to reoffend **if** he participated in outpatient treatment. However, Dr. Martin did not give any testimony Appellant's mental condition had so changed he was safe to be at large without further treatment. Because Appellant did not present evidence he was safe to be at large and there is evidence that reasonably supports the circuit court's finding, the decision should be affirmed.

Furthermore, while there is evidence to suggest Appellant could be released into long term outpatient care, the South Carolina Sexually Violent Predator Act does not allow for the consideration of outpatient treatment when determining the likelihood of reoffense. It is not

[3]The reason the issue of outpatient treatment becomes an issue in annual review cases is the State's inability to force the committee attend such treatment after his release, and then initiate proceedings to get the committee back into the SVPTP if he does not attend the treatment. The absence of a post-commitment process to control a committee being controlled for a period time after release clearly indicates the legislative intent to premise release from the SVPTP on a change in the committee's mental status such that he is safe to be at large, with or without further sex offender treatment.

enough to find a person is safe to be at large with the continuation of treatment. Because there is no way to compel Appellant to attend outpatient treatment, there is no way to assure Appellant will remain at a low risk for reoffense. Therefore, no evidence exists to suggest that Appellant is safe to be at large and, if released, is unlikely to reoffend.

Dr. Martin previously gave similar testimony in Tucker. In that case, the appellant was diagnosed with pedophilia, limited to incest. *See* Tucker, at 721. The State presented expert testimony the appellant required continued confinement. Dr. Martin testified the appellant "was capable of and motivated towards continuing sex offender treatment in the outpatient setting." *Id.* He further testified the appellant would need to take an antidepressant to decrease his sex drive. *Id.* He ultimately concluded "the appellant's mental abnormality or personality disorder had so changed that he was safe to be at large and, if released, was not likely to commit sexually violent acts." *Id.* However, this conclusion was dependent on the appellant's participation in outpatient treatment, and because the State could not compel the appellant to seek treatment upon release, the circuit court's decision was affirmed. *Id.* at 722.

Despite conflicting testimony, the court in Tucker found the appellant did not meet his burden of showing probable cause. While the appellant progressed in his treatment by meeting certain goals, there were still goals the appellant had not met. And although evidence existed to show the appellant could be released into outpatient treatment, there was "no evidence that appellant's mental condition had so changed that he is safe to be at large and, if released, unlikely to commit sexually violent acts." Because evidence existed that reasonably supported the circuit court's finding of no probable cause, the decision was affirmed. *See* Tucker, at 722.

Similar to Tucker, both the State and Appellant presented testimony Appellant suffers from pedophilia, has progressed in treatment, and requires future treatment to reduce his risk of

re-offending. Dr. Martin testified Appellant was capable of continuing treatment in an outpatient setting while Dr. Swan testified he required continued confinement. This conflicting testimony may appear to establish probable cause. However, because Dr. Martin's testimony did not satisfy the statutory requirement the Appellant be safe to be at large without any further treatment, Appellant failed to meet his burden. The circuit court's decision in this case should thus be upheld.

In Corely, evidence reasonably supported the circuit court's finding of no probable cause. In re Care & Treatment of Corley, 365 S.C. 252, 616 S.E.2d 441, 444 (Ct. App. 2005). While the appellant made progress, his behavior and manipulative patterns remained a problem and he had not yet completed treatment. *Id.* Therefore, the circuit court denied probable cause. *Id.* On appeal, expert testimony was presented which stated the appellant would need to continue outpatient treatment if he were released. *Id.* However, the court found the statute contained no provision for outpatient treatment, and accordingly affirmed the circuit court's decision. *Id.*

Similar to Corely, expert testimony was presented to show Appellant would require outpatient treatment if he was released. However, the statute does not provide for outpatient treatment as an option. Appellant had not yet completed treatment, and cannot be compelled to continue it in an outpatient setting. Therefore, there is no evidence to show Appellant is safe to be at large without further treatment and the circuit court's decision of no probable cause should be affirmed.

Because the Appellant did not meet his burden of showing probable cause, the circuit court did not err by finding a lack of probable cause and by denying Appellant's request for an annual review trial by jury. Therefore, its ruling should be affirmed.

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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September 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 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."

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