

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Mark Hayes, II, Circuit Court Judge

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DEC 28 2016

SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF KEITH FITZGERALD BURRIS,

APPELLANT

APPELLATE CASE NO 2015-002122

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ARGUMENT IN REPLY1

CONCLUSION.....5

TABLE OF AUTHORITIES

Cases

In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) 4

ARGUMENT IN REPLY

Reply to Respondent's Recitation of Facts

As an initial matter, Appellant must correct several misstatements of fact contained within Respondent's Statement of Facts. Respondent claimed as follows: "In 2014, Appellant was charged with one count of criminal solicitation of a minor, arising from the inappropriate fondling of a ten year old female." IBOR at 3. Respondent provided no citation to support this assertion. Respondent further claimed that "[o]n November 13, 2014, [Appellant] pled guilty as charged in exchange for a negotiated sentence of ten years' incarceration, suspended upon two years' incarceration and five years' probation." IBOR at 3. There was also no citation provided to support this assertion. However, this sentence makes clear that Respondent's initial sentence was referring to the charge for which Appellant entered a guilty plea on November 13, 2014. Thus, correction of two misstatements of fact contained within the first sentence must be made – the age of the minor and the type of conduct alleged to have occurred. In short, the minor was *not* ten-years old and the conduct alleged was *not* fondling.

On April 17, 2014, a York County grand jury indicated Appellant for criminal solicitation of a minor (2014-GS-46-1188). Nowhere in the indictment was it alleged that Appellant engaged in "inappropriate fondling of a ten year old female" as claimed by Respondent. Cf. R. *(Petition Pursuant to SVP Act) with IBOR at 3. According to the indictment, the minor was born in 1997; thus, the minor was between *fifteen* and *sixteen* years of age in 2013 when the alleged crime occurred, *not* ten years of age as claimed by Respondent. R. *(Petition Pursuant to SVP Act). Further, according to the indictment, the alleged crime involved communication for the purpose of persuading, inducing, enticing, or coercing the person to engage or participate in a sexual activity, or violent crime, or with the intent to perform a sexual activity in the presence of

the person reasonably believed to be under the age of eighteen. R. *(Petition Pursuant to SVP Act). There was *no* allegation of “fondling” as claimed by Respondent. See IBOR at 3. Finally, *even* in the Petition Pursuant to SVP Act prepared by Respondent, the “brief facts” of the criminal solicitation of a minor charge involved a *fifteen-year old female* and the exchange of “inappropriate text messages and nude pictures,” *not* fondling. R. *(Petition Pursuant to SVP Act). The very documents prepared by Respondent contradict the assertions made by Respondent in its brief. In fairness, Appellant notes that much later in the brief, Respondent stated as follows: “In 2014, Appellant was convicted of criminal solicitation of a minor in connection with sexually explicit text messages and photographs exchanged with a fifteen year old female.” IBOR at 6. This appears to be a correct statement of fact, and in contradiction with Respondent’s initial assertions. Nevertheless, Respondent’s first sentence in its “Statement of Facts” was not accurate.

Reply to Respondent’s Argument I

Appellant argued the trial judge erred in permitting an expert to testify regarding her opinion that Appellant suffered from a personality disorder that made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment because her opinion regarding his personality disorder was based upon her 2012 evaluation, which made it unreliable in assessing his present psychology. Respondent argued the trial judge properly allowed the testimony because it was the result of the expert’s May 2015 evaluation of Appellant. To support this contention, Respondent stated the expert “had the personal contact and personal interview necessary to render an opinion as to Appellant’s ‘present’ mental status.” IBOR at 10. Further, Respondent asserted the expert “testified to a reasonable degree of psychological certainty Appellant had ASPD and was a significant risk to

reoffend sexually **as of the date of trial** in 2015.” IBOR at 10 (emphasis in original). Respondent provided no citations to the trial transcript to support these assertions.

At the time of the SVP trial, the state acknowledged that the expert “ran some testing like the Static 99 or the MMPI” in 2012 and the testing “relates to his diagnoses right now.” Tr. 48, ll. 21-23. According to the state at the trial, “the way the timing of that diagnoses just relates to her opinion right now and goes to the weight of her testimony.” Tr. 48, l. 24 – Tr. 49, l. 1. The state further explained the “time of the actual test she ran the Static 99R for him in the current evaluation and my understanding is she also ran an MMPI for him or look at that same MMPI in this evaluation.” Tr. 49, ll. 1-5.

The expert’s testimony revealed she had tested Appellant using the MMPI in 2012, and had *not* repeated the test in 2015. Tr. 111, ll. 6-12; Tr. 112, ll. 7-10; Tr. 112, ll. 13-15; Tr. 112, ll. 18-19; Tr. 133, ll. 22-25; Tr. 134, ll. 19-22; R. *(Defendant’s Exhibit #1). Her conclusions regarding Appellant’s personality disorder was based upon the MMPI conducted in 2012. Tr. 112, ll. 7-10. Certainly, the expert stated that “to a reasonable degree of psychological certainty” she believed Appellant suffered from antisocial personality disorder. Tr. 119, l. 16 – Tr. 120, l. 2. However, the basis for her opinion included the MMPI conducted in 2012 and her interactions with Appellant in 2012:

Q. And in fact didn’t you take a lot of the information regarding what he told you about the offenses from a 2012 evaluation that you did?

A. Yes.

Q. So you didn’t re-ask those questions to see if his attitude changed to see if anything was different about what he would have said or taken more responsibility or less responsibility?

A. Well I reviewed that information with him and ask him, you know, is that your take on it still and that’s how we approached it.

Tr. 128, ll. 12-22.

Not only was the expert's testimony and opinion based on a test performed three years earlier and not re-administered, but her testimony was based upon interviews conducted with Appellant three years' earlier that were not re-assessed. Permitting the expert to use the prior evaluation violated the statutory scheme in that it was not based upon current evidence. See In re Taft, 413 S.C. 16, 23, 774 S.E.2d 462, 466 (2015).

Appellant respectfully requests this Court reverse the decision of the lower court and find the expert should not have been permitted to testify regarding the testing she performed three years' prior to the trial, which by statute was to focus on Appellant's present state of mind.

CONCLUSION

As to Issue I, Appellant respectfully requests this Court reverse the decision by the lower court. As to Issues II, III, and IV contained in the brief, Appellant respectfully requests this Court hold that individuals in SVP trials have the right, statutorily and constitutionally, to the effective assistance of counsel. Furthermore, as to Issues II, III, and IV contained in the brief, Appellant respectfully requests this Court remand for a hearing to determine whether trial counsel provided ineffective assistance.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of December, 2016.

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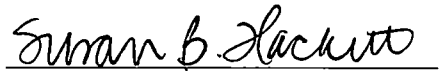
SC Court of Appeals

IN THE MATTER OF THE CARE AND
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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Reply Brief of Appellant have been served on Keith Fitzgerald Burris at Correct Care, 177 St. Andrews Terrace, Building A, Columbia, SC 29210, this 28th day of December, 2016.


Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of December, 2016.

 (L.S)

Notary Public for South Carolina

My Commission Expires: October 30, 2022.