

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Saluda County

Honorable William P. Keesley, Circuit Court Judge

RECEIVED

DEC 28 2016

SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF JASON BODIE,

APPELLANT

APPELLATE CASE NO 2016-001043

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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STATEMENT OF ISSUE ON APPEAL

Whether trial counsel provided ineffective assistance in failing to elicit the recidivism rates on the Static-99 test from the expert witness when appellant's score would change from a 5 to a 4 because of his age and the jury specifically asked for this information during its deliberations?

STATEMENT OF THE CASE

On July 8, 2014, the State filed a petition seeking to commit appellant pursuant to the Sexually Violent Predator Act. R. 224. On April 25, appellant was tried before the Honorable William P. Keesley and a jury. R. 1. Aimee J. Zmroczek represented appellant. R. 1. James G. Bogle represented the State. R. 1. The jury convicted appellant. R. 215, ll. 1 – 15.

ARGUMENT

Trial counsel provided ineffective assistance in failing to elicit the recidivism rates on the Static-99 test from the expert witness when appellant's score would change from a 5 to a 4 because of his age and the jury specifically asked for this information during its deliberations.

Only one witness testified at appellant's trial. R. 2. The State called Dr. Marie E. Gehle ("Gehle") who evaluated appellant for commitment in the SVP program. R. 77, ll. 22 – 25. Dr. Gehle interviewed appellant for six hours. R. 78, ll. 19 – 21. She reviewed records provided by the State. R. 79, ll. 14 – 19. Dr. Gehle opined that appellant met the criteria for commitment. R. 137, ll. 7 – 12.

Specifically, Dr. Gehle opined that appellant met the element of having a mental abnormality or personality disorder by diagnosing him with pedophilic disorder. R. 134, l. 23 – 135, l. 1. Dr. Gehle also testified that appellant lacked volitional control. R. 135, l. 12 – 137, l. 6. She told the jury that she believed appellant was likely to engage in acts of sexual violence if not confined. R. 136, l. 25 – 137, l. 6.

To support her conclusion that appellant was likely to reoffend, Dr. Gehle relied primarily on the actuarial tool called the Static-99R. R. 122, l. 11 – 129, l. 1. Dr. Gehle concluded that appellant scored a 5 on the Static-99R. R. 125, ll. 8 – 11. Appellant was in the 18-35 age range and received a point for being in this category. R. 125, ll. 15 – 24. Dr. Gehle noted that appellant would turn 34 the month after the trial. R. 125, ll. 15 – 24.

Dr. Gehle stated that a score of 5 placed appellant in the "moderate-high range." R. 128, ll. 3 – 15. This placed him in the 81st percentile of offenders. R. 128, l. 22 – 129, l. 1. Based on the tables on the Static-99R, Dr. Gehle told the jury that offenders with a score of 5 have a 19.6%

chance of reoffending within five years and a 27.7% chance of reoffending within ten years. R. 128, ll. 16 – 21.

On cross-examination, trial counsel confirmed that appellant’s score would change from a 5 to a 4 within a year “just because of his age.” R. 153, ll. 14 – 18. Dr. Gehle agreed, stating, “When he turns 35, if nothing else has changed, yes, he’ll go down a point.” R. 153, ll. 14 – 18. Trial counsel failed to ask what the recidivism rates were for a score of 4.

During deliberations, the jury sent a note asking for the five-year and ten-year recidivism rates for a score of 4 on the Static-99R. R. 212, ll. 17 – 22. The trial judge correctly told the jury those facts were not in evidence and they must decide the case based “on the record that was presented.” R. 212, l. 23 – 213, l. 4. Seven minutes after excusing the jury, they returned with a verdict convicting appellant. R. 214, l. 1 – 215, l. 19.

The failure to elicit lower recidivism rates for a score of 4 constitutes ineffective assistance of counsel. Traditionally, this Court will not consider a claim based on ineffective assistance of counsel in a direct appeal. Appellant asserts that in an SVP case, such procedural bars are not proper pursuant to the Due Process Clause because, if barred, appellant has no other means to raise the claim. Currently the South Carolina Supreme Court is considering a case that asks it to recognize an SVP defendant’s right to raise ineffective assistance of counsel claims on direct appeal. See In the Matter of the Care and Treatment of Jeffrey Allen Chapman, Appellate Case No. 2014-001181 (argued on May 17, 2016). The right to the effective assistance of counsel in SVP cases flows from the Due Process Clauses of both the United States and South Carolina Constitutions. U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. Addington v. Texas, 441 U.S. 418, 425 (1979). Vitek v. Jones, 445 U.S. 480, 492 (1980). But see In the Matter of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 58 (2004). Appellant urges this Court to adopt the

reasoning of the Kansas Supreme Court in In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012) and consider this claim that would be traditionally considered unpreserved.

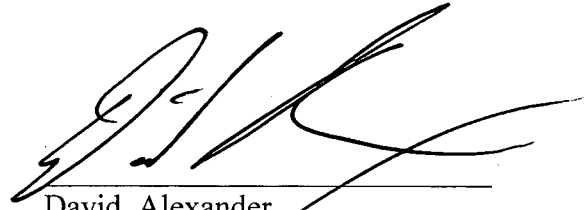
The State bears the burden of proving lack of control and that a defendant is likely to reoffend unless confined. Kansas v. Crane, 534 U.S. 407, 411-13 (2002). “The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement.” In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted).

Trial counsel’s argument was that appellant was not “the worst of the worst” who must be confined. R. 71, ll. 18 – 23. Trial counsel emphasized the recidivism rates on the Static-99R in her closing argument. R. 185, l. 19 – 187, l. 24. Trial counsel argued that “3 out of 10 doesn’t seem that high” and linked this recidivism percentage to the State’s burden of proof beyond a reasonable doubt. R. 186, ll. 2 – 15.

The jury immediately seized on this notion in its deliberations. R. 210, ll. 14 – 17. When the court discussed how to respond to the jury, trial counsel admitted she did not know the difference in recidivism rates between a 4 and a 5. R. 212, ll. 2 – 10. This failure to prepare on a key statistical point, upon which trial counsel specifically cross-examined Dr. Gehle and argued to the jury, cannot be the result of a strategic decision. Trial counsel’s cross-examination was ineffective. The jury’s question and decision seven minutes after not receiving the evidence it needed but for trial counsel’s ineffectiveness demonstrates prejudice. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand this case for a new trial.

A handwritten signature in black ink, appearing to read 'D. Alexander', written over a horizontal line.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of December, 2016.

STATE OF SOUTH CAROLINA

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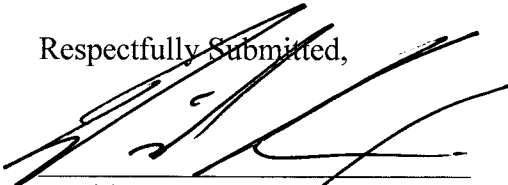
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jason Bodie states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before the Honorable William P. Keesley, which was held on April 25-26, 2016 (SVP Trial), and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Jason Bodie.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of December, 2016.

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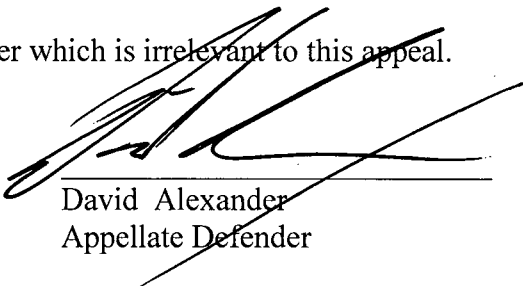
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) Trial Transcript
- (2) SVP Petition
- (3) Court's Ex. 2 (jury note)

I certify that this designation contains no matter which is irrelevant to this appeal.

December 28, 2016



David Alexander
Appellate Defender

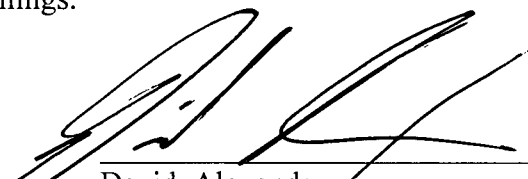
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

December 28, 2016.



David Alexander
Appellate Defender

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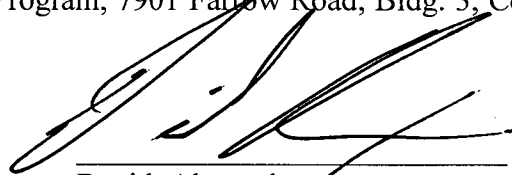
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APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter 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 Anders Brief of Appellant and Designation of Matter have been served on Jason Bodie, at Sexual Violent Predator Program, 7901 Farrow Road, Bldg. 3, Columbia, SC 29203, this 28th day of December, 2016.



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

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

Maui Mendel (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.