STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF JOHN HENRY DORSEY,

APPELLANT

APPELLATE CASE NO 2016-000816

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN HENRY DORSEY,

APPELLANT

APPELLATE CASE NO 2016-000816

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the court erred in granting the state's motion in limine excluding the defense from offering evidence or discussing the "treatment" appellant would receive if confined in a secure facility, or outside a secure facility, since the need for "treatment in a secure facility" was an element of SVP statute that the jury had to determine, it was therefore relevant, and its erroneous exclusion was highly prejudicial?

STATEMENT OF THE CASE

This was a sexually violent predator trial. It was called on April 4, 2016 before the Honorable William H. Seals, and a jury. James Falk represented appellant. Christopher Andrew Morrow was the assistant attorney general. R. 1.

On April 5, 2016, the jury returned a verdict finding appellant was a "sexually violent predator." R. 144, ll. 17-23. The prosecutor told the judge he had prepared an order of commitment. R. 148, ll. 6-9.

This appeal follows.

ARGUMENT

The court erred in granting the state's motion in limine excluding the defense from offering evidence or discussing the "treatment" appellant would receive if confined in a secure facility, or outside a secure facility, since the need for "treatment in a secure facility" was an element of SVP statute that the jury had to determine, it was therefore relevant, and its erroneous exclusion was highly prejudicial.

There were only two witnesses that testified during this trial. They were Amy Swan, a forensic psychologist from Florida, and appellant John Dorsey. Prior to trial the assistant attorney general made a motion in limine to exclude any references to or evidence pertaining to the details "of future treatment that Mr. Dorsey may receive at the South Carolina Department of Mental Health Sexually Violent Predator program." R. 23, ll. 6-18.

The prosecutor argued that evidence about the "treatment" appellant would receive or cross-examination about treatment was not relevant. He also argued that the only issue in this case was whether appellant had the diagnosis of an abnormality that made it likely for him to reoffend. R. 23, ll. 6-18.

Since that assertion by was not totally accurate, Defense counsel Falk made a strong objection to the state's motion. Counsel Falk noted that whether appellant needed to be confined to a secure facility for treatment was an element of an SVP in the statute, and the jury had to decide that matter as the trier of fact. R. 23, l. 6 – 24, l. 5.

The judge inquired how defense counsel could question Dr. Swan about treatment where he asserted she did not know anything about it, and where she was not going to testify about treatment. Defense counsel Falk said that Dr. Swan might testify about other "treatment" programs during the trial. The judge ruled that if Dr. Swan testified about future treatment the defense could bring the

matter up with the court at that time. However, the judge ruled the matter of treatment *was not relevant* unless Dr. Swan opened the door to it. R. 24, ll. 6-15. As will be seen infra, Dr. Swan claimed the treatment appellant would receive if committed as an SVP was "the most intensive treatment that you can get anywhere in South Carolina." R. 88, ll 3-22.

The assistant attorney general told the jury in his opening statement that he would prove appellant suffered from a mental abnormality or personality disorder that made it likely he would commit acts of sexual violence "*if not confined to a secure facility for long-term control* ***care and treatment***." R. 33, ll. 8-12. (emphasis added).

Dr. Amy Swan testified she was a forensic psychologist licensed in Florida, Missouri, and South Carolina. R. 39, ll. 6-13. Defense counsel would later impeach Dr. Swan with the fact that she had been sanctioned by the Association for the Treatment of Sexual Abusers Ethics Committee because she used an interview guide that had little or no empirical support, and she made conclusions from it that were not supported. The organization included a "cease and assist" order against her using the interview guide for risk assessment purposes, and ordered Dr. Swan to receive ethical training. R. 91, l. 3 – 97, l. 19; R. 150-152. Doctor Swan also admitted she had testified in another case where a witness testified untruthfully. R. 91, l. 12 – 97, l. 16.

Dr. Swan testified early in her direct examination that she opined appellant met the criteria for commitment as a sexually violent predator. R. 45, ll. 2-4. She said that appellant's victims were two boys, one who was twelve, and one who was fourteen-years-old. R. 51, ll. 3-5. Dr. Swan opined that there were three boys in all, and she said that said appellant had raped them, "and it was hard to believe that he [appellant] had not done anything, and he said, I don't remember that." R. 53, ll. 14-19.

Dr. Swan admitted appellant showed only a moderately low risk of offending again on the Static-99R risk assessment instrument. However, she opined the test underestimated appellant's risk "because we know he had victims that he was not arrested or convicted for." Defense counsel Falk asked Dr. Swan at one point why she drew the most "negative inference possible" from each piece of information about appellant. R. 60, l. 15 – 61, l. 22.

Dr. Swan also testified that she believed that a normal person sent to jail for a sex crime would "got to prison, which is not a nice place; you think that they'd say, `I'm not going to do that anymore.'" However, appellant re-offended after being released from prison. Dr. Swan opined appellant fit into a class of people she thought were "callous," "selfish, cynical, and willing to be cruel to another person to get their needs met." She told the jury she did not think appellant cared about the pain he inflicted on his victims for his sexual gratification. R. 64, l. 7 – 65, l. 5.

She also told the jurors that there was no cure for appellant's disorder. R. 65, l. 15 – 67, l. 11. She opined appellant needed to be confined for "long-term control care and treatment." R. 67, ll. 12-17.

On cross-examination, defense counsel sought to have Dr. Swan acknowledge that even if an attraction existed to younger people existed, it was not unusual in the past, and that it could be controlled today. Dr. Swan admitted that the age of consent prior to 1880 in three quarters of the United States was 10 years old. Dr. Swan said: "I think we have come a long way from that and realized that they are still children . . ." Doctor Swan also said the fact that Jewish girls can go through a Bat Mitzvah at age thirteen "[d]oesn't say anything about their sexual development."[1] R. 73, l. 11 – 75, l. 1.

---

[1] The jury in appellant's case was initially deadlocked before the Judge told the jury a verdict had to be unanimous. R. 143, ll. 3-23.

Dr. Swan testified that appellant had an IQ of 71, and she maintained appellant had never had any long relationship with women close to his own age. R. 76, l. 10 – 83, l. 10. She said appellant did not limit his sexual interest to minors only, but she repeatedly said appellant could not be "cured." R. 82, l. 2 – 83, l.10.

Dr. Swan said she asked appellant if he had ever had an "age-appropriate partner for two years." Dr. Swan admitted these were "actual words" she used with appellant even though she said he had an IQ of only 71. R. 87, l. 16 – 88, l. 2.

On cross-examination, Dr. Swan claimed appellant would be treated with "cognitive behavioral treatment" which she said was the "most intensive treatment that you can get anywhere in South Carolina." R. 88, ll. 3-22. Dr. Swan insisted that appellant needed to be treated in a controlled secure facility because "no sex offenders get treatment on their own." R. 88, l. 18 – 89, l. 3.

She further offered that having appellant treated as an outpatient while he did his two years of probation would not work because she did not believe "two years would be sufficient, especially on an out-patient basis where it doesn't have the intimacy, **you're not working on it every day. Out-patient treatment is like once a week for an hour and a half."** Dr. Swan refused to say whether appellant would need three four or more years of "treatment" while confined in South Carolina secure facility. R. 89, ll. 6-23.

Appellant took the stand in his own defense. He told the jurors he had turned his life around and would not re-offend in the future. He had a place to live, work, and go to Church. R. 106, l. 9 – 113, l. 25.

Discussion

South Carolina Code § 44-48-30 (1)(b), provides that a "sexually violent predator" is a person who is likely to engage in acts of sexual violence "if not confined in a secure facility for a long-term controlled, **care, and treatment**." (emphasis added). Thus, as defense counsel Falk argued treatment in a secure facility was an element that the state had to prove in order to commit appellant or another person under the SVP act.

As such, the issue of "treatment" is relevant in an SVP case, particularly where the state's expert, here Dr. Swan, opined that the only effective treatment had to occur where appellant was confined to a secure facility. Dr. Swan said outpatient treatment was not a realistic option, and she opined that appellant would need to be confined for more than two years, and possibly longer than four years for secure treatment. She also opined **no sex offenders** voluntarily showed up for sex offender treatment.

The judge initially reasoned that Dr. Swan did not know anything about the "treatment" in the SVP program in South Carolina, and therefore the matter was not relevant. Yet, Dr. Swan testified that the treatment appellant would receive, as a sexually violent predator, was the finest treatment in South Carolina.

If nothing else at this point, appellant should have been allowed to introduce evidence, and further cross-examine Dr. Swan on the "cognitive treatment" in a secure facility that she maintained was *the only way to protect the public from appellant.* As a practical matter, as defense counsel Falk alluded to, appellant was just going to be placed in "prison" if committed as an SVP to be warehoused with no treatment even though the statute mandated it. R. 23, l. 20 – 24, l. 5.

"Relevant evidence" `means evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence.'" See, Rule 401, SCRE.

The standard of relevance is therefore broad. See, State v. Alexander, 303 S.C. 377, 401 S.E.2d 146 (1991), State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

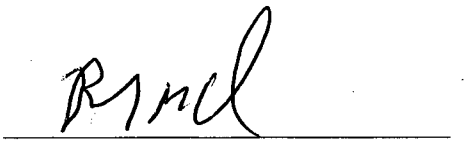
In this case the jury had to determine whether appellant had a prior applicable conviction for a sexual crime, and if he suffered from mental abnormality or personality disorder that made it likely he would engage in future acts of sexual violence "if not confined in a *secure facility* for long-term *control, care and treatment.*" See, S.C. Code § 44-48-30 (1)(b). (emphasis added). If, as defense counsel urged on cross-examination, appellant could receive treatment outside of a secure facility, the jury would have found under the statute that appellant was *not* a sexually violent predator.

When the judge granted the state's motion in limine to exclude evidence of the "treatment issue," he respectfully impermissibly excluded relevant evidence from the jury's determination under the SVP statute. That ruling was highly prejudicial.

Defense counsel urged the jury that the SVP law was meant to only confine the "worst of the worst" who committed sex crimes. South Carolina Code §§44-48-10 – 44-48-170 provide for the involuntary civil commitment of sexually violent predators who are "mentally abnormal *and extremely dangerous.*" See, In the Matter of the Care and Treatment of Renauld L. Brown v. State, 372 S.C. 611, 617, 643 S.E.2d 118, 121 (2007). (emphasis added). The judge's ruling excluding relevant evidence of the statutory element of "treatment in a secure facility" was highly prejudicial, and appellant should be granted a new trial.

CONCLUSION

By reason of the foregoing argument, this case should be remanded to the Georgetown County Court of Common Pleas for another SVP trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 15th day of March, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN HENRY DORSEY,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for John Henry Dorsey states:

1. He is Chief 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 Judge William H. Seals, which was held on April 4, 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 John Henry Dorsey.

Respectfully Submitted,

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 15th day of March, 2017.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Georgetown County
Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF JOHN HENRY DORSEY,

APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Entire hearing transcript
(2) Ethics letter to Dr. Swan.

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

March 15, 2017

Robert M. Dudek
Chief Appellate Defender

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

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."

March 15, 2017.

Robert M. Dudek
Chief Appellate Defender

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

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
MAR 15 2017
SC Court of Appeals

Appeal from Georgetown County

Honorable William H. Seals, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF JOHN HENRY DORSEY,

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 John Henry Dorsey, at Correct Care, 1700 St. Andrews Terrace, Bdlg A, Columbia, SC 29210, this 15th day of March, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 15th day of March, 2017.

Brittany Wilkins (L.S)
Notary Public for South Carolina
My Commission Expires: November 3, 2026.