

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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MAY 31 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

Honorable R. Markley Dennis, Jr., Circuit Judge

Appellate Case No.: 2014-002351

In the Matter of the Care and Treatment of Alton Chisolm

ANDERS BRIEF OF APPELLANT

James K. Falk

Falk Law Firm
PO Box 1058
Charleston, SC 29402

(843) 606-6007

ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in finding no probable cause existed as to whether Appellant's mental abnormality or personality disorder had so changed that Appellant was no longer a sexually violent predator because the Appellant's mental health diagnosis stated in Appellant's 2013 Annual Evaluation was no longer a generally accepted diagnosis?

STATEMENT OF THE CASE

Following a jury trial in Charleston County Court of Common Pleas, Appellant was committed to the care and custody of the Department of Mental Health as a sexually violent predator as defined in SC Code Ann. § 44-48-30(1). On November 12, 2013, Appellant received his annual notice of petition for release pursuant to SC Code Ann. §§ 44-48-110 and 130. Appellant exercised his right to petition for a release hearing. On October 21, 2014, a probable cause hearing was held in Charleston County Court of Common Pleas, where Judge Dennis found no probable cause. This appeal follows.

ARGUMENT

The trial judge erred in finding no probable cause existed as to whether Appellant's mental abnormality or personality disorder had so changed that Appellant was no longer a sexually violent predator because Dr. Domino's was no longer a generally accepted diagnosis.

Pursuant to § 44-48-110, Dr. Marla L. Domino prepared a report of her October 9, 2013 evaluation of the appellant. Dr. Domino's report, dated November 7, 2013, covered the review period of October 23, 2012 through October 09, 2013. The State submitted Dr. Domino's report as part of the file for the hearing. (R. p. 19, ll. 12- 24). The State's only witness was Dr. Domino who was qualified and testified as an expert in the fields of psychology, forensic psychology with regard to sexually-violent predators. (R. p. 23, l. 7 – p. 24, l. 2).

Dr. Domino testified that Appellant's mental abnormality had not so changed as to render him safe to be at-large in the community. (R. p. 24, ll.21-24.). Dr. Domino testified further that Appellant suffered from Paraphilia Not Otherwise Specified (NOS), and that it was this mental abnormality that justified his further confinement in the Sexually Violent Predator Treatment Program. (R. p. 24, l. 25- p. 25, l. 3). In her report Dr. Domino states that Paraphilic Disorder NOS diagnosis is supported by data indicating a history of longer than six months in which Mr. Chisolm has experienced sexual arousal involving non consenting individuals. (R. p. 14).

The Diagnostic and Statistical Manual (5th ed.) (hereafter DSM-V) classifies eight named paraphilic disorders (not including the disorder at issue here). It defines the word "paraphilia" as "any intense and persistent sexual interest other than sexual interest in

genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners" Id. at 685. One may have a paraphilia, however, without having a paraphilic disorder. A paraphilia describes a sexual interest and is a "necessary but not . . . sufficient" predicate for a paraphilic disorder. Id. at 686. A paraphilic disorder "is a paraphilia that is currently causing distress or impairment to the individual or a paraphilia whose satisfaction has entailed personal harm, or risk of harm, to others" Id. at 685-686. The eight listed paraphilic disorders are: Voyeuristic Disorder, Exhibitionistic Disorder, Frotteuristic Disorder, Sexual Masochism Disorder, Sexual Sadism Disorder, Pedophilic Disorder, Fetishistic Disorder and Transvestic Disorder.

The DSM-5 also includes the diagnosis "Other Specified Paraphilic Disorder" ("OSPD"), which, with the specifier "Non-Consent" is at issue here. When publishing the DSM –V, the APA change the description of this disorder from Paraphilia NOS to OSPD. State v Jason C., 51 Misc.3d 553, 554, 26 N.Y.S. 3d 423, 423 (Supreme Court, Kings County 2016). Unlike the other eight named paraphilic disorders, the DSM-V contains no specific diagnostic criteria for OSPD. Instead the DSM-V describes OSPD as follows:

This category [Other Specified Paraphilic Disorder] applies to presentations in which symptoms characteristic of a paraphilic disorder that cause clinically significant distress or impairment in social, occupational or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the paraphilic disorders diagnostic class. The other specified paraphilic disorder category is used in situations in which the clinician chooses to communicate the specific reason that the presentation does not meet the criteria for any specific paraphilic disorder. This is done by recording "other specified paraphilic disorder" followed by the specific reason (e.g., "zoophilia").

This passage goes on to provide six non-exclusive examples of OSPD diagnoses: the sexual attraction to obscene phone calls, corpses, animals, feces, enemas and urine. Id. at 705.

According to the manual, the eight listed disorders were chosen because "they are relatively common, in relation to other paraphilic disorders" and because some are classified as crimes. The manual notes that this list is not exhaustive and that "[m]any dozens" of paraphilias have been identified and named". The OSPD diagnosis is therefore "indispensable and will be required in many cases" Id. at 685. The DSM-5 also includes a section entitled "Conditions for Further Study" described as "conditions on which future research is encouraged" Id. at 783. OSPD Non-Consent is not listed as one of these conditions.

Non-consent as a specifier for an OSPD diagnosis would appear to describe an *intense and persistent sexual interest*, in non-consensual sex. Participation in non-consensual sex represents criminal conduct. The desire to participate therein is the *mens rea* required for a conviction of a sexually violent crime and not a mental disease or defect listed in the DSM-V. The fact that "non consent" is not one of the eight listed specifiers for OSPD nor is it included in the list for further study, strongly questions the current acceptance of the diagnosis as a basis justifying continued civil commitment.

In State v Jason C., 51 Misc.3d 553, 26 N.Y.S. 3d 423 (Supreme Court, Kings County 2016) the New York trial court held a Frye hearing which resulted in the exclusion of the State's experts' testimony that regarding concerning a diagnosis of paraphilia NOS. In its ruling The New York Court Noted:

Other than giving the general definition of what this proposed disorder is, namely arousal to non-consent, the State has not provided this court with a clear understanding of what the agreed upon criteria is for the diagnosis. Each of the State's experts proffered his own understanding of how it would be diagnosed. Further, it was also very clear from the literature that there is no agreed upon criteria for this condition even among SVP practitioners. As a starting point then, the court cannot find a diagnosis "generally accepted" when there is not, at the very least, a generally accepted criteria that defines the condition. In this context, a judicial finding that this diagnosis is generally accepted would provide no clarity as to what "this diagnosis" actually is—other than in name and general definition. *Id.* 51 Misc.3d 553, 554, 26 N.Y.S. 3d 423, 423

Similarly in McGee v Bartow, 593 F.3d 556 (7th Cir 2010) the court noted that even the most ardent advocates of the diagnosis of paraphilia NOS as a mental health disease recognize that the diagnosis is "probably ... the most controversial among the commonly diagnosed conditions within the sex offender civil commitment realm." citing Dennis M. Doren, *Evaluating Sex Offenders: A Manual for Civil Commitments and Beyond* 63 (2002). 593 F.3d 556, 579 (7th Cir 2010)

Justice Anthony Kennedy provided the fifth vote in the 5-4 decision of the United States Supreme Court upholding the constitutionality of Kansas' SVP statute against a challenge that it was punitive and therefore violated the ex post facto and double jeopardy clauses. Kansas v. Hendricks, 521 U.S. 346, 371-72 (1997). Justice Kennedy wrote separately "to caution against dangers inherent when a civil confinement law is used in conjunction with the criminal process, whether or not the law is given retroactive application." *Id.* He concluded his concurrence by stating that if "it were shown that mental abnormality is too imprecise a category to offer a solid basis for concluding that civil detention is justified, our precedents would not suffice to validate it." *Id.* at 372. Judge Kennedy went on to state:

If the civil system is used simply to impose punishment after the State makes an improvident plea bargain on the criminal side, then it is not performing its proper function. These concerns persist whether the civil confinement statute is put on the books before or after the offense. We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone. Id. at 373

The use of OSPD non-consent as diagnosis to support Appellant's continued civil commitment amounts to nothing more than an increase in punishment for Appellant's past crimes as is not a reflection of a current mental disease or personality defect justifying continued confinement.

CONCLUSION

Because of the questionable validity for the rationale in Dr. Domino's report, the trial court should have found probable cause existed for a jury to determine whether appellant would continue to be a threat if released.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Falk', is written over a horizontal line.

James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402
(843) 606 6007
jfalklaw@gmail.com
SC Bar 80125

ATTORNEY FOR APPELLANT

This May 27, 2016

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Alton Chisolm states:

1. He has a contract with the South Carolina Commission for Indigent Defense and authorized by that office to file on Appellant's behalf.
2. He has reviewed the record of appellant's probable cause hearing before R. Markley Dennis, Jr., which was held on October 21, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a 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 probable cause hearing.

WHEREFORE, she asks the Court to relieve her as counsel for Alton Chisolm.

Respectfully submitted,



James Falk

ATTORNEY FOR APPELLANT

This 27th day of May, 2016.

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DESIGNATION OF MATTER

TO BE INCLUDED ON APPEAL

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

- (1) Appellant's Annual Notice of Right to Petition for Release and Election to Waive or Exercise Rights, date November 12, 2013.
- (2) Appellant's Annual Examination and Review Hearing Notice, dated November 12, 2013.
- (3) Annual Review by evaluator Marla L. Domino, PhD, dated November 11, 2013.
- (4) Complete Transcript of October 21, 2014 Probable Cause hearing before the Honorable R. Markley Dennis.

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

May 27, 2016



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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 of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

May 27, 2016

A handwritten signature in black ink, appearing to read "J. Falk", is written over a horizontal line.

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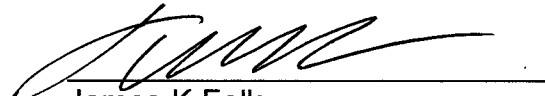
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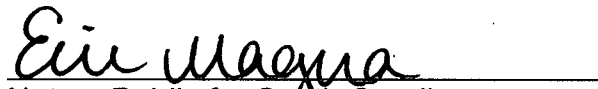
CERTIFICATE OF SERVICE

The undersigned certifies that on May 27, 2016 he deposited a true and accurate copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case with the United States Post Office, sufficient first class postage affixed, and addressed to Deborah R.J. Shupe, Esq. Office of the South Carolina Attorney General PO Box 11549 Columbia SC 29211-1549; and, copy of the same was also deposited with the United States Post Office, sufficient first class postage affixed, and addressed to Alton Chisolm, SVPTP, 7901 Farrow Road, Columbia, SC 29203; and, I further certify that all parties required by Rule to be served have been served this May 27, 2016.


James K Falk

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
This May 27, 2016.


Notary Public for South Carolina

My Commission Expires: 06-30-2020