STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

IN THE MATTER OF THE CARE AND TREATMENT OF CARL M. ASQUITH,

APPELLANT.

APPELLATE CASE NO. 2014-001235

Appeal from Lexington County

Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-262

PETITION FOR REHEARING

On June 28, 2017, this Court affirmed Appellant's commitment to the Department of Mental Health for long term control, care, and treatment after a jury found he satisfied the definition of a sexually violent predator (SVP) pursuant to the SVP Act. In the Matter of the Care and Treatment of Carl Matthew Asquith, 2017-UP-262 (S.C. Ct. App. Filed June 28, 2017). Pursuant to Rule 221(a), SCACR, Appellant respectfully petitions this Court for rehearing in light of the significant points overlooked and misapprehended by this Court in rendering its opinion, as detailed below.

At trial, Appellant moved to suppress evidence gathered by Dr. William Mulbry, an expert retained by the state after the court appointed psychologist found Appellant did not meet the criteria to be involuntarily committed as a sexually violent predator, based on multiple violations of Appellant's due process right to an attorney and statutory right to an attorney under the SVP Act.

The state transported Appellant to the Medical University of South Carolina (MUSC) in Charleston on three separate occasions to be evaluated by Dr. Mulbry without notifying his counsel or allowing his counsel to be present during the evaluations.

Appellant's counsel at trial argued, "He [Appellant] went [to MUSC] three separate times. At none of these events was my office told about the review. At none of these events were we allowed to be there. At all of these events, he [Appellant] was asked to sign waivers, and consent forms, and things of that nature. And he was questioned about the case. This evidence that he was questioned about will be used against him in today's trial. We think that's extremely inappropriate because pursuant to the statutory law, he's entitled to an attorney. Pursuant to the . . . tenants of due process, he is entitled to have his attorney at least know about what the other side's doing to him." Counsel also argued, "[W]hen they take your client and do things to him without even bothering to tell you, that's an extreme violation of due process and it's [a] direct violation of what the statute requires. We think that any evidence that was developed as a result of this basic violation of due process . . . should not be allowed before the jury because frankly, he has a right to an attorney." R. 4, l. 16 – 5, l. 17.

Appellant ultimately raised the trial court's denial of Appellant's motion to suppress on appeal asserting individuals subject to commitment under the SVP Act have a statutory right to counsel and a constitutional due process right to counsel at the precommitment evaluation, and that Appellant's statutory right and due process right to counsel were violated when the state transported him to MUSC to be evaluated by Dr. Mulbry without notifying his attorney or allowing his attorney to be present.

It is undisputed that individuals facing commitment under the SVP Act have a statutory right to counsel. S.C. Code Ann. § 44-28-90(B) states in pertinent part, "At all stages of the

proceedings under this chapter, a person subject to this chapter is entitled to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." See In re Care & Treatment of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004) (stating a person committed under the SVP Act has a statutory right to counsel).

Noting the significant due process implications inherent in civil commitments, our Supreme Court in In re Care & Treatment of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) held "section 44-48-90's right to counsel is not merely a statutory right, but also a constitutional one arising under the Fourteenth Amendment and the South Carolina Constitution." The Court further held this right to counsel is necessarily a right to effective counsel. Id. at 180, 796 S.E.2d at 847.

Consequently, this Court correctly held Appellant "enjoys both a statutory right to counsel under the SVP Act, as well as a constitutional due process right to counsel." However, this Court erred by holding Appellant abandoned his argument that he had a statutory right to counsel at the precommitment evaluation and that his statutory right to counsel was violated when the state transported him to MUSC to be evaluated without notifying his counsel or allowing his counsel to be present at the evaluations. This Court's holding is belied by Appellant's brief.

First, it is unnecessary to distinguish between the statutory right to counsel and the constitutional due process right to counsel because an individual subject to commitment under the Act is entitled to both. The statutory right to counsel provided in the SVP Act stems from the constitutional due process right to counsel. In Chapman, our Supreme Court specifically stated "*section 44-48-90's right to counsel is not merely a statutory right, but also a constitutional one* arising under the Fourteenth Amendment and the South Carolina Constitution." 419 S.C. at 179, 796 S.E.2d at 846 (emphasis added). The statute merely effectuates the constitutional due

process right to counsel. This was made clear by the Supreme Court in In re Care & Treatment of Chapman.

Appellant clearly set out the argument in his Statement of Issue on Appeal and cited to the pertinent parts of the SVP Act providing for the right to counsel in his argument. See Brief of Appellant at 10. Appellant also cited to In re Care & Treatment of McCoy, 360 S.C. 425, 427, 602 S.E.2d 58, 59 (2004), which held a person committed under the SVP Act has a statutory right to counsel. Brief of Appellant at 9. Appellant explicitly argued throughout his brief that individuals subject to commitment under the SVP Act have a statutory right to counsel at the precommitment evaluation. Significantly, the state has never asserted the argument was not preserved or was abandoned on appeal.

To the extent this Court held Appellant asserted arguments at oral argument not asserted in his brief, Appellant respectfully disagrees. At oral argument, counsel for Appellant merely honed in on more detailed aspects of the statute which did not take away from the broader argument asserted by Appellant in his brief.

Consequently, this Court erred by holding Appellant abandoned the argument that he had a statutory right to counsel at the precommitment evaluation. Appellant respectfully requests this Court rule on whether individuals subject to commitment under the SVP Act have a statutory right to counsel at the precommitment evaluation and find that his statutory right to counsel was violated when the state transported him to MUSC to be evaluated by Dr. Mulbry without notifying his counsel or allowing his counsel to be present at the evaluations.

Additionally, this Court erred by failing to specifically hold Appellant had a constitutional due process right to counsel at the precommitment evaluation. This Court merely found no reversible error "[a]s to [Appellant's] constitutional right to counsel argument," but failed to

actually rule on whether Appellant had a constitutional due process right to counsel at the precommitment evaluation. In light of our Supreme Court's holding in In re Care & Treatment of Chapman, which concluded an individual facing commitment under the SVP Act has a constitutional due process right to counsel under the Fourteenth Amendment and the South Carolina Constitution, and that this right to counsel is necessarily a right to effective counsel, it is evident that all individuals subject to commitment under the SVP Act have a constitutional right to counsel at the precommitment evaluation. In accord with Chapman, Appellant respectfully requests this Court hold Appellant had a constitutional right to counsel at the precommitment evaluation.

Lastly, this Court erred by holding Appellant failed to show he was prejudiced by counsel's exclusion from his evaluation. First, in light of Chapman, again holding individuals subject to the SVP Act have a statutory and constitutional due process right to counsel, Appellant need not show prejudice because the denial of counsel is a structural error which is not subject to a harmless error analysis and requires reversal without a particularized prejudice inquiry. See generally State v. Rivera, 402 S.C. 225, 247-248, 741 S.E.2d 694, 705-706 (2013); see also Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of counsel is structural error); United States v. Gonzalez-Lopez, 548 U.S. 140, 150 ("We have little trouble concluding that erroneous deprivation of the right to counsel of choice, *with consequences that are necessarily unquantifiable and indeterminate*, unquestionably qualifies as structural error.") (internal quotation marks and citation omitted) (emphasis added).

The state at trial and on appeal compared Dr. Mulbry's evaluation to a competency or other psychiatric evaluation of a criminal defendant and relied in part on our Supreme Court's opinion in State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985). In Hardy, the Court held that a defendant had

no Sixth Amendment right to counsel at a competency evaluation because it was not a critical stage and psychiatric evaluations are not adversarial proceedings. In so holding, the Court noted that during such evaluations "no events take place that are likely to prejudice the defense" and defendants are not asked "to make statements to be used at trial." Id. at 592, 325 S.E.2d at 322.

The state also relied on United States v. Bondurant, 689 F.2d 1246, 1249 (5th Cir. 1982). In Bondurant, the Fifth Circuit held a defendant had no constitutional right to counsel's presence during a competency to stand trial and insanity evaluation. In holding a defendant had no constitutional right to counsel presence's during the evaluation, the court noted that any factual self-incriminating statements made by the defendant would be suppressed. Id. That is not the case with precommitment evaluations. Statements made by the individual the state seeks to commit are used against him at trial. For example, in this case, statements made by Appellant regarding having sex with a fellow male inmate were used against him along with his denial that he committed some of the offenses to which he pled guilty. Dr. Mulbry also testified, based on his evaluation of Appellant, that Appellant's "motivation for treatment was well below average of people who aren't in therapy and significantly lower than people that are in therapy. In other words, therapy in general . . . he doesn't see any need for it at all." R. 54, ll. 2-11. This testimony was obviously prejudicial to Appellant.

Again, unlike competency evaluations in criminal proceedings, evidence collected during precommitment evaluations in SVP proceedings is used against the defendant at trial. This includes statements made by the defendant during the evaluation along with results of any laboratory testing conducted. For example, in this case, evidence collected by Dr. Mulbry during his interview of Appellant and evidence collected by others at MUSC during the laboratory testing was used by Mulbry in reaching his conclusion that Appellant met the criteria of a sexually violent predator

under the SVP Act and bolstered the credibility of his opinion. This evidence was clearly prejudicial to the defense and was used by the state to counter Dr. Gehle's opinion that Appellant did not meet the criteria to be involuntarily committed under the Act.

Moreover, during or before the evaluation, Appellant was asked to sign numerous consent forms and other such waivers without the advice of his counsel. This was clearly a violation of Appellant's due process right and statutory right to counsel.

During the evaluation, counsel can be close to invisible, sitting quietly in the corner of the room. The unlikely possibility that counsel's presence during the evaluation would hinder a psychiatrist from effectively examining the defendant may not be used as a reason to deny a defendant in a SVP case his due process right and statutory right to counsel, especially when, as noted, evidence collected during the evaluation will be used against the defendant at trial where his liberty is at stake. The state even asserted during the oral argument before this Court that if an attorney requests to be present during the precommitment evaluation, the state honors that request, which proves that counsel can be present without interfering with the evaluation.

In light of the significant points that were overlooked and misapprehended by this Court in reaching its opinion, Appellant respectfully requests this Court grant rehearing, hold he has a statutory right to counsel as well as a constitutional due process right to counsel at the precommitment evaluation, that his rights to counsel were violated, and reverse his commitment to the Department of Mental Health pursuant to the SVP Act.

Respectfully Submitted,

Lara M. Caudy

LARA M. CAUDY
Appellate Defender

This 13th day of July, 2017.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing 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 Carl M. Asquith, at Correct Care, 1700 St. Andrews Terrace, Building A, Columbia, SC 29210, this 13th day of July, 2017.

Lara M. Caudy

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 13th day of July, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.