STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable James R. Barber, Circuit Court Judge

Opinion No. 2017-UP-262 (S.C. Ct. App. Filed June 28, 2017)
2012-CP-32-01783

IN THE MATTER OF THE CARE AND
TREATMENT OF CARL MATTHEW ASQUITH,

PETITIONER

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Carl Matthew Asquith, Appellant.

Appellate Case No. 2014-001235

Appeal From Lexington County
James R. Barber, III, Circuit Court Judge

Unpublished Opinion No. 2017-UP-262
Heard March 8, 2017 – Filed June 28, 2017

AFFIRMED

Appellate Defender Lara Mary Caudy, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Deputy Attorney General Deborah R.J. Shupe, both of Columbia, for Respondent.

PER CURIAM: Carl M. Asquith appeals his order of commitment to the Department of Mental Health for long-term control, care, and treatment following a jury finding he satisfied the definition of a sexually violent predator (SVP) pursuant to the SVP Act. Asquith argues the trial court erred in failing to suppress evidence gathered by an expert retained by the State, in violation of his due process rights and his statutory right to an attorney, based upon the fact he was transported

and evaluated on three occasions for this evaluation without the benefit of notification to or the presence of his attorney. We affirm.

In his brief, Asquith argues he and others facing commitment under the SVP Act have a due process and statutory right to counsel. He maintains his due process and statutory right to counsel were violated when the State transported him across several counties on three separate occasions to be evaluated by the State's psychiatrist without notifying his counsel or allowing his counsel to be present at the evaluations. While acknowledging our courts have held a criminal defendant has no Sixth Amendment right to counsel at a competency evaluation, Asquith argues the evidence collected during the testing and the evaluation by the State's expert in this civil commitment proceedings was used by the expert to determine he met the criteria of an SVP. Additionally, he contends he was asked to sign numerous consent forms and waivers without the advice of counsel before or during the evaluation, which violated his due process and statutory right to counsel.

First, we agree with Asquith that he enjoys both a statutory right to counsel under the SVP Act, as well as a constitutional due process right to counsel. *See* S.C. Code Ann. § 44-48-90(B) (Supp. 2016) ("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."); *In re Care & Treatment of Chapman*, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017) ("[G]iven the significant due process implications inherent in civil commitments, we find 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."). However, the question remains whether such entitle him to the right to counsel at the evaluation performed at the behest of the State.

As to any statutory right to counsel, Asquith does not distinguish between this right and his constitutional right to counsel in his appellate brief, but simply argues he is entitled to both and maintains both were violated by the State's failure to notify counsel or allow counsel's presence during the evaluation. He does not attempt to analyze the statutory scheme or explain why the absence of counsel at the evaluation violated his right to an attorney under the statute as opposed to his constitutional right to an attorney. Asquith points to no provision in the SVP Act, nor have we found one, which specifically requires the presence of counsel at an

evaluation performed pursuant to the Act.[1] He does not specify how his statutory right to counsel was violated, but generally makes this argument in conjunction with his due process right to counsel argument. Accordingly, aside from his argument made in conjunction with his due process right to counsel, any assertion that Asquith had a separate statutory right to counsel at his evaluation that was violated under the terms of the statute is abandoned. *See State v. Addison*, 338 S.C. 277, 285, 525 S.E.2d 901, 906 (Ct. App. 1999) ("Conclusory arguments constitute an abandonment of the issue on appeal."), *aff'd as modified*, 343 S.C. 290, 540 S.E.2d 449 (2000).

As to Asquith's constitutional right to counsel argument, we find no reversible error. "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *In re Care & Treatment of Corley*, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *In re Care & Treatment of Gonzalez*, 409 S.C. 621, 628, 763 S.E.2d 210, 213 (2014) (quoting *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000)). "Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "[T]he phrase [due process] expresses the requirement of 'fundamental fairness,' a requirement whose meaning can be as

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[1] Asquith's appellate counsel argued at oral argument that the SVP Act includes three stages of proceedings—(1) the probable cause hearing; (2) the pre-commitment evaluation; and (3) the trial—and by using the term "all stages of the proceedings" in section 44-48-90(B), implicit in the legislative intent is the right to the presence of an attorney at the pre-commitment evaluation. We decline to rule on this assertion. First, this argument was never made to the trial court. *See S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 301, 641 S.E.2d 903, 907 (2007) (providing an argument cannot be raised for the first time on appeal but must be raised to and ruled upon by the trial court to be preserved). Additionally, Asquith did not argue this in his appellate brief. *See State ex rel. Carter v. State*, 325 S.C. 204, 208 n.1, 481 S.E.2d 429, 430 n.1 (1997) (providing the appellate court would not entertain an argument raised for the first time at oral argument); *State v. Spears*, 393 S.C. 466, 486, 713 S.E.2d 324, 334 (Ct. App. 2011) (declining to address an argument raised for the first time during oral argument and not addressed in the appellate brief); *Bochette v. Bochette*, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989) ("An appellant may not use . . . oral argument . . . as a vehicle to argue issues not argued in the appellant's brief.")

opaque as its importance is lofty." *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N.C.*, 452 U.S. 18, 24 (1981). "Due process is violated when a party is denied fundamental fairness." *Hipp v. S.C. Dep't of Motor Vehicles*, 381 S.C. 323, 325, 673 S.E.2d 416, 417 (2009). "[T]he requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." *S.C. Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

Asquith was being represented by counsel at the time of the evaluation and his counsel was notified the State was exercising its right to an independent evaluation prior to the evaluation. Asquith does not explain why his counsel could not adequately advise him and protect his rights without being physically present during the evaluation or how counsel's absence at that time invalidated the examination or precluded him from challenging the testimony of the State's expert, Dr. Mulbry. Asquith argues evidence collected during his testing and interview at the Medical University of South Carolina was used by Dr. Mulbry in reaching his opinion on his status as an SVP, and that he was asked to sign consent forms and waivers. However, Asquith has not shown how he was harmed by counsel's absence during his evaluation. First, the statute provided the State the right to have an independent evaluation performed on Asquith, which included "reasonable access" to him for purposes of the evaluation. *See* S.C. Code Ann. § 44-48-90(C) (Supp. 2016) ("Upon receipt of the evaluation issued by the court appointed expert as to whether the person is a sexually violent predator pursuant to Section 44-48-80(D), the person or the Attorney General may retain a qualified expert to perform a subsequent examination. All examiners are permitted to have reasonable access to the person for the purpose of the examination . . . .").[2] The mere fact that Dr. Mulbry interviewed Asquith and tests were performed on Asquith incidental to the evaluation without the presence of counsel does not demonstrate that evidence was collected that prejudiced or harmed Asquith in violation of his due process rights. Asquith does not indicate he was deprived of any report from Dr. Mulbry on his evaluation or the ability to depose Dr. Mulbry regarding the evaluation prior to his trial, or was in any other manner hampered by an inability to challenge any of the evidence collected during his evaluation. If Asquith wished to challenge Dr. Mulbry's conclusions or the manner in which the mental examination was conducted, he had the opportunity to do so through cross-examination of Dr. Mulbry and through the testimony of his own witness, Dr. Gehle. Additionally,

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[2] Asquith does not challenge this, or any other provision of the SVP Act, as unconstitutional.

Asquith points to no objectionable testimony from Dr. Mulbry and fails to cite to specific evidence that was obtained by Dr. Mulbry in an improper manner, or that would not have been obtained had counsel been present. Asquith fails to explain how counsel's absence during the independent evaluation invalidated the evaluation or precluded him from challenging Dr. Mulbry's testimony at trial. At any rate, we agree with the State that the record reveals Dr. Mulbry's opinion that Asquith met the criteria of an SVP was premised most heavily on the pattern of deviant sexual behavior documented in the records and reports from his underlying criminal matter and not from the tests[3] or Dr. Mulbry's interview of Asquith. *See id.* (providing examiners retained by the State to perform an independent evaluation are permitted not only reasonable access to the person for the examination, but also "access to all relevant medical, psychological, criminal offense, and disciplinary records and reports"). Notably, the burden is on Asquith to show he was prejudiced by counsel's exclusion from his evaluation. *See Davis v. Parkview Apartments*, 409 S.C. 266, 282, 762 S.E.2d 535, 543 (2014) ("The appealing party bears the burden of demonstrating that the lower court abused its discretion."); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling."); *id.* at 363, 444 S.E.2d at 515 (providing appellant has the burden of showing both error and prejudice). Importantly, our courts have recognized the presence of counsel in a psychiatric examination is "undesirable from a clinical perspective, for it would undoubtedly hinder the psychiatrist from effectively examining the defendant," thereby defeating the purpose of the examination. *State v. Hardy*, 283 S.C. 590, 592, 325 S.E.2d 320, 322 (1985). Under these circumstances, Asquith has not shown he was deprived of fundamental fairness based upon counsel's absence during the independent evaluation. Thus, we find no error in the trial court's denial of Asquith's motion to suppress and the decision of the trial court is

AFFIRMED.

LOCKEMY, C.J., and HUFF and THOMAS, JJ., concur.

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[3] In fact, at least two of the tests performed for Dr. Mulbry's evaluation—the SSI III and the Static 99R tests—were actually favorable to Asquith's position. As to the other test results discussed by Dr. Mulbry in his testimony, they were fairly neutral, insignificant, or he found the test result was not valuable.

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.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable James R. Barber, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO. 2014-001235

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.

The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Carl Matthew Asquith, Appellant.

Appellate Case No. 2014-001235

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James Lockemy C.J.

Thomas E. Huff J.

Paula H. Thomas J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Deborah R.J. Shupe, Esquire
Lara Mary Caudy, Esquire
The Honorable James R. Barber, III

FILED
August 16, 2017