STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

James R. Barber, III, Circuit Court Judge

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

APPELLANT

APPELLATE CASE NO. 2014-001235

FINAL BRIEF OF APPELLANT

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

STATEMENT OF ISSUE ON APPEAL

Whether the court erred by failing to suppress the evidence gathered by Dr. William Mulbry in violation of Appellant's due process right and statutory right to an attorney under the Sexually Violent Predator Act when the state transported Appellant from the Lexington County Detention Center to the Medical University of South Carolina (MUSC) in Charleston to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present?

STATEMENT OF THE CASE

On April 25, 2012, James G. Bogle, Jr., an attorney with the South Carolina Office of Attorney General, filed a petition pursuant to the Sexually Violent Predator Act (SVPA) alleging Appellant was a sexually violent predator. R. 192. The trial commenced in Lexington County on June 2, 2014 before the Honorable James R. Barber, III, and a jury. James Bogle represented the state, and M. Brooks Biediger and Amber C. Fulmer represented Appellant. R. 1.

On June 3, 2014, the jury found Appellant was a sexually violent predator under the SVPA. R. 160, ll. 17-23. Judge Barber ordered Appellant be committed to the Department of Mental Health for long-term control, care, and treatment. R. 277.

This appeal follows.

ARGUMENT

The court erred by failing to suppress the evidence gathered by Dr. William Mulbry in violation of Appellant's due process right and statutory right to an attorney under the Sexually Violent Predator Act when the state transported Appellant from the Lexington County Detention Center to the Medical University of South Carolina (MUSC) in Charleston to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present.

Relevant Facts

Appellant, who was thirty years old at the time of trial, was convicted of four counts of second degree criminal sexual conduct with a minor and two counts of first degree criminal sexual conduct with a minor based on events that allegedly occurred when he was sixteen to eighteen years old. Thus, it was undisputed that Appellant had been convicted of a sexually violent offense as defined by the SVPA.[1] After pleading guilty, Appellant was sentenced to twelve years imprisonment on each count to be served concurrently. He was also ordered to register as a sex offender. R. 162-187 (State's Exhibit Nos. 1-6); R. 97, ll. 24-25. The underlying allegations of the convictions were that Appellant had vaginal, anal, and oral sex with his fourteen year old sister and oral sex with his brothers who were ages five, nine, and eleven at the time of the alleged conduct. R. 162-187(State's Exhibit Nos. 1-6); See R. 30, l. 2 – 45, l. 8.

Before his release from the Department of Corrections, the state sought to involuntarily commit Appellant as a sexually violent predator under the SVPA. He was first

[1] See S.C. Code Ann. § 44-48-30(2) (listing offenses defined as sexually violent offenses under the SVPA).

evaluated by Dr. Marie Gehle, the chief psychologist at the South Carolina Department of Mental Health. R. 86, ll. 19-24. Dr. Gehle was court appointed to evaluate Appellant and was qualified as an expert in forensic psychology at trial. R. 92, l. 7 – 93, l. 3. During her evaluation, she and Appellant discussed his background and upbringing. Appellant told her he came from a very religious home and that his parents homeschooled him and his siblings and isolated them from the rest of the community. R. 96, ll. 2-20. He attributed his alleged conduct in part on this isolation and seclusion from others. R. 97, ll. 17-18.

Based on Appellant's prior convictions, Gehle diagnosed him with "pedophilia, sexually attracted to males, limited to incest, non-exclusive type." R. 105, ll. 17-21. She explained that pedophilia is "reoccurring intense sexually arousing fantasies, behaviors, or urges towards children who have not started sexual maturity." She limited her diagnosis to "sexually attracted to males" because Appellant "has only offended pre-pubescent males." She explained that while Appellant was convicted of having sex with his sister, "she was past the point of pubescent" and "had already hit puberty" when the alleged conduct occurred. R. 106, ll. 3-14. Moreover, Gehle testified, "The limited incest again means that he's only been known to have offended family members biologically related [to him] and non-exclusive type means that there's some evidence that he's aroused by more normative groups of people like adult females, adult males, and he's not exclusively attracted to prepubescent children." R. 106, ll. 15-20.

Gehle conducted the Static-99R during her evaluation, which is a risk assessment instrument used to evaluate one's likelihood of reoffending. R. 101, l. 18 – 102, l. 7. She testified that Appellant scored a three, which puts him in the low to moderate risk group for sexually reoffending. R. 102, ll. 18-21. Individuals in this risk group have an 11.9 percent

rate of reoffending in five years and an 18.3 percent rate of reoffending in ten years. R. 103, ll. 3-16.

Gehle opined that Appellant's mental abnormality does not make him likely to engage in acts of sexual violence in the future. She also testified that in her opinion, Appellant **does not meet the criteria** of a sexually violent predator under the SVPA and does not need to be confined for long term care and treatment.[2] R. 107, ll. 3-25. She explained that there are tens of thousands of sex offenders in South Carolina and that, based on one study, only about 13.4 percent of them will reoffend in the future. Gehle testified that the SVPA was "written for an extremely dangerous group of people" and that "[w]e can't recommend that every sex offender go into the treatment program." She concluded that Appellant did not fall into the "extremely dangerous group of sex offenders" the statute was designed to treat. R. 104, l. 3 – 105, l. 16.

After Dr. Gehle determined Appellant did not meet the criteria of a sexually violent predator under the SVPA, the state sought a second opinion from Dr. William Mulbry, a psychiatrist who does contract work for MUSC.[3] Appellant was transported to MUSC on

---

[2] See S.C. Code Ann. § 44-48-30(1) defining a sexually violent predator as a person who "has been convicted of a sexually violent offense" and "suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment."

[3] Dr. Mulbry admitted that the only reason he was hired by the state to evaluate Appellant was because the state was dissatisfied with Dr. Gehle's opinion that Appellant did not meet the criteria to be involuntarily committed as a sexually violent predator. He further admitted that he was paid seven hundred dollars a day to testify at Appellant's trial and ninety dollars an hour to evaluate Appellant. He was further compensated for his travel expenses to and from Charleston to Lexington County for the trial. Mulbry testified that he was paid this fee by MUSC and that the Attorney General's Office compensated MUSC. R. 79, l. 24 – 81, l. 10.

three separate occasions. During the first two visits, Appellant went to the laboratory to undergo various testing and then, on the third visit, Appellant met with Dr. Mulbry to be interviewed. R. 27, l. 19 – 28, l. 1.

During his testimony, Mulbry discussed Appellant's prior convictions and the underlying facts surrounding these convictions, including the specific allegations made by Appellant's siblings. See R. 30, l. 2 – 45, l. 8. He maintained that some of the alleged conduct described by Appellant's siblings, including being made to view child pornography, being made to watch Appellant molest other siblings, being tied up or bound, and Appellant's use of foreign objects, was deviant sexual behavior. See R. 30, l. 2 – 45, l. 8. Mulbry testified that Appellant's deviant sexual interests were concerning to him because deviant sexual thinking is a significant risk factor for recidivism. R. 49, l. 18 – 51, l. 2; R. 62, l. 1 – 64, l. 1.

Like Dr. Gehle, Mulbry conducted the Static-99R and determined Appellant had a score of three, placing him in the low to moderate risk group of reoffending. R. 59, ll. 15-19. He likewise diagnosed Appellant with "pedophilia, attracted to males, limited to incest, non-exclusive type." R. 68, ll. 9-16. Mulbry stated the fact that Appellant's pedophilia was limited to incest was significant because "**the recidivism rate in people who offend only against family members in general is somewhat lower.**" R. 69, ll. 7-17 (emphasis added). However, despite this fact and Appellant's low score on the Static-99R, Mulbry maintained that Appellant's mental abnormality makes him predisposed to commit sexually violent offenses in the future. He testified that Appellant's deviant sexual interests, which he claimed to be an exceptionally high risk factor for recidivism, elevate his risk of reoffending beyond the low rate the Static-99R would suggest. R. 69, l. 25 – 70, l. 13.

Mulbry concluded that Appellant meets the criteria of a sexually violent predator under the SVPA and is likely to engage in future acts of sexual violence unless he is confined in a secure facility for long term control, care, and treatment. R. 72, ll. 3-11

Motion to Suppress

Appellant's counsel moved pretrial to suppress the evidence gathered by Dr. Mulbry based on multiple violations of Appellant's due process right and statutory right to an attorney under the SVPA. Counsel explained that the state transported Appellant to MUSC in Charleston on three separate occasions to be evaluated by Dr. Mulbry without notifying counsel or allowing counsel to be present. He argued, "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.

In response, the assistant attorney general first cited to Michau v. Warden, 2011 WL 4943631 (D.S.C. Oct. 17, 2011), which was a *pro se* action filed by Michau in the South Carolina federal district court pursuant to 42 U.S.C. § 1983. The assistant attorney general explained that Michau, who had been involuntarily committed pursuant to the

SVPA, alleged he had the right to have an attorney present at his pre-commitment evaluation. He indicated that the magistrate judge ruled such an evaluation was not an invasion of privacy and was similar to a competency evaluation ordered for an individual charged with a crime. He also explained that the magistrate judge ruled that because SVP commitment proceedings are not adversarial, there was no requirement Michau be represented by an attorney during a pre-commitment evaluation. The district court affirmed the magistrate's findings.

The assistant attorney general also cited to United States v. Bondurant, 689 F.2d 1246 (5th Cir. 1982) and State v. Hardy, 283 S.C. 590, 325 S.E.2d 320 (1985), which both hold there is no Sixth Amendment right to have counsel present during a competency evaluation since the examination is not a critical stage of the proceeding and is not adversarial in nature. Both cases also hold that the presence of counsel during a psychiatric examination would be undesirable from a clinical perspective for it would hinder the psychiatrist from effectively examining the defendant. Based on these cases, the state argued Appellant had no due process right to counsel and requested Appellant's motion be denied. R. 5, l. 23 – 7, l. 5.

The court denied the motion to suppress and held Appellant had no constitutional or due process right to counsel in a sexually violent predator case because it is a civil proceeding. Judge Barber found the state had the right to have Appellant evaluated without counsel present. He also indicated that he did not believe counsel would have been permitted in the examination room and thus did not think notifying counsel would have made any difference. However, Judge Barber did state that "the appropriate thing" for the state to do would be to notify the individual's counsel that he or she was being transported

for an evaluation and suggested to the assistant attorney general that, in that future, if the state is "going to take somebody [for an evaluation], they at least let the lawyer know they're taking them." R. 7, l. 6 – 8, l. 5.

Discussion

The court erred by failing to suppress the evidence gathered by Dr. Mulbry in violation of Appellant's due process right to counsel and statutory right to an attorney under the SVPA when the state transported Appellant from the Lexington County Detention Center to MUSC to be evaluated on three separate occasions without notifying his attorney or allowing his attorney to be present.

Appellant and others facing commitment under the SVPA have a due process right to counsel as well as a statutory right to counsel. This right flows from the due process clauses of both the United States Constitution and South Carolina Constitution.[4] U.S. Const. amend. V, XIV; S.C. Const. Art. I, § 3. This right is distinct from the Sixth Amendment right to counsel in criminal cases. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (finding no Sixth Amendment right to counsel because SVP cases are not criminal proceedings).

"[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." Addington v. Texas, 441 U.S. 418, 425

---

[4] In In re McCoy, 360 S.C. 425, 602 S.E.2d 58 (2004), our Supreme Court held it would apply the Anders v. California, 386 U.S. 738 (1967) procedure to SVP cases where appellate counsel asserted the appeal was without merit. Id. at 427, 602 S.E.2d at 58. In dicta, the Court stated that persons committed under the SVPA have no Sixth or Fourteenth Amendment rights to counsel, but do have a statutory right to counsel. Id. It does not appear that the Fourteenth Amendment issue was before the Court and the Court gave no citation for this proposition nor engaged in any analysis of this issue. Id. In the event this Court finds McCoy establishes there is no due process right to counsel in SVP cases, McCoy should be modified.

(1979). "The loss of liberty produced by an involuntary commitment is more than a loss of freedom from confinement." Vitek v. Jones, 445 U.S. 480, 492 (1980). "It is indisputable that commitment to a mental hospital can engender adverse social consequences to the individual and that whether we label this phenomena 'stigma' or choose to call it something else . . . we recognize that it can occur and that it can have a very significant impact on the individual." Id. (internal quotations omitted). The discussion of "stigma" in Vitek referred to a person confined because he was mentally ill. Id. at 484. It is hard to imagine anything more stigmatizing than labeling a person a sexually violent predator.

Every justice who considered the merits in Vitek concluded that involuntary commitment implicates a liberty interest protected by the due process clause. Id. at 482, 497-498. The Vitek decision is unusual because four justices believed the case was moot and did not discuss the merits of the due process question in their dissenting opinions. Id. at 500-502 (dissents of Stewart, J. and Blackmun, J.). Four of the five justices who considered the merits concluded that due process required appointed counsel. Id. at 494-497 ("In these circumstances, it is appropriate that counsel be provided to indigent prisoners whom the State seeks to treat as mentally ill.").

South Carolina's SVPA stresses the right to counsel and the need to conform to constitutional requirements. Defendants have the right to counsel at the probable cause hearing. S.C. Code Ann. § 44-48-80(C)(1). If the defendant is going to be tried under the SVPA, he is entitled, "[a]t all stages of the proceedings under this chapter . . . to the assistance of counsel, and if the person is indigent, the court must appoint counsel to assist the person." S.C. Code Ann. § 44-48-90(B). If a defendant is incompetent, they

are entitled to "all constitutional rights available to defendants at criminal trials." S.C. Code Ann. § 44-48-100(B). Finally, the SVPA contains an overarching provision to ensure constitutional protections for accused persons, which states, "The involuntary detention and commitment of a person pursuant to this chapter must conform to constitutional requirements for care and treatment." S.C. Code Ann. § 44-48-170.

"Once a State has granted prisoners a liberty interest . . . due process protections are necessary to insure that the state-created right is not arbitrarily abrogated." Vitek, 445 U.S. at 488-489 (internal quotations omitted). South Carolina grants persons accused under the SVPA a liberty interest in the right to counsel.

In In re Ontiberos, 287 P.3d 855, 865 (Kan. 2012), the Kansas Supreme Court held that there is a constitutional right to assistance of counsel in Kansas Sexually Violent Predator Act (KSVPA) proceedings.[5] The Kansas Supreme Court's decision in Ontiberos is particularly instructive because South Carolina's SVPA is modeled on the Kansas statute. In re Matthews, 345 S.C. 638, 649, 550 S.E.2d 311, 316 (2001) ("South Carolina's Act is modeled on Kansas' Sexually Violent Predator Act."); In re McCracken, 346 S.C. at 97, 551 S.E.2d at 238 ("We hold today in In the Matter of Matthews . . . that a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences."). The Kansas Supreme Court began by analyzing the relevant statute which provided that "at all stages" of SVP proceedings a person "*shall be entitled to the assistance of counsel. . . .*" Ontiberos, 287 P.3d at 862-63 (emphasis in original); Compare S.C. Code Ann. § 44-48-90(B). The court then considered whether

[5] The Kansas Supreme Court further held that the right to counsel under the KSVPA carries with in the right to the effective assistance of counsel. See Ontiberos, 287 P.3d at 865.

an SVP defendant had a constitutional right to counsel. Id. The court examined the relevant United States Supreme Court precedent on the Due Process Clause, including Vitek. Id. at 864-65. The court in Ontiberos stressed that the right to counsel flowed from the defendant's liberty interest "in personal freedom, not just the Sixth and Fourteenth Amendment right to counsel in criminal cases." Id. at 864. The court also stressed that since the state is represented by counsel, "the person the State seeks to commit should also have access to an attorney." Id. at 865. The Kansas Supreme Court ultimately concluded that defendants in SVP cases have a constitutional due process right to the effective assistance of counsel. Id. at 865.

This Court should adopt the reasoning and holding of Ontiberos because the South Carolina and Kansas acts are indistinguishable. Defendants in SVP cases in South Carolina face the possibility of being involuntarily committed for the rest of their lives. Thus, Appellant had a statutory right and a constitutional due process right to counsel at his trial. Consequently, the trial judge erred by finding Appellant had no constitutional or due process right to counsel because a SVP case is a civil proceeding. See R. 7, l. 6 – 8, l. 5.

Moreover, Appellant's due process right and statutory right to counsel were violated when the state transported him across several counties on three separate occasions to be evaluated by a psychiatrist hired by the state because it was dissatisfied with the opinion of the court appointed psychologist without notifying Appellant's counsel or allowing counsel to be present at the evaluations. The state at trial 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 Hardy. 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." Hardy, 283 S.C. at 592, 325 S.E.2d at 322.

Unlike competency evaluations in criminal proceedings, evidence collected at psychiatric evaluations in SVP cases 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 SVPA. 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.

Therefore, the trial judge erred by ruling Appellant had no due process right to counsel and by failing to suppress the evidence collected by Dr. Mulbry and others at the MUSC laboratory during Appellant's evaluation. Respectfully, this Court should find Appellant, and other defendants in SVP cases, have a due process right as well as a statutory right to counsel. Moreover, Appellant respectfully requests this Court find his rights to counsel were violated when the state transported him to MUSC on three occasions to be evaluated by a psychiatrist hired by the state without notifying his counsel or allowing his counsel to be present.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse the order of the trial court committing him to the Department of Mental Health for his long term control, care, and treatment and remand for a new trial.

Respectfully submitted,

Kathryn H. Hudgins for

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Brief 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."

February 23, 2016

Lara M. Caudy
Appellate Defender

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

James R. Barber, III, 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 true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 23rd day of February, 2016.

Kathi H Hutchins for

Lara M. Caudy
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 23rd day of February, 2016.

Lara Caudy (L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.