STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Op. No. 2017-UP-262 (S.C. Ct. App. Filed June 28, 2017)
Appeal from Lexington County
The Honorable James R. Barber, III, Circuit Court Judge
Appellate Case No. 2017-001907

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

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding Petitioner's right to assistance of counsel did not require the State to notify Petitioner's attorney when Petitioner was transported to facilitate the State's independent evaluation, or require his attorney's presence during the evaluation?

STATEMENT OF THE CASE

On August 9, 2004, Petitioner Carl Matthew Asquith pled guilty to two counts of criminal sexual conduct in the first degree, and four counts of criminal sexual conduct with a minor in the second degree, all of which are defined as sexually violent offenses under the South Carolina Sexually Violent Predator Act (SVPA), and was sentenced to twelve years incarceration. Prior to Petitioner's release from prison, the State commenced a civil proceeding pursuant to the SVPA, seeking his commitment for long term control, care and treatment as a sexually violent predator. (Record on Appeal [R.], pp. 192-277).

The court appointed evaluator, Marie Gehle, Psy.D, diagnosed Petitioner with "pedophilia, sexually attracted to males, limited to incest, non-exclusive type," but based on his score on an actuarial risk assessment tool (the Static-99R), she concluded he was not a risk to reoffend sexually, and therefore, he did not meet the statutory criteria for commitment. The State then retained the Medical University of South Carolina (MUSC) to conduct an independent evaluation of Petitioner, and notified the court and Petitioner's counsel the State was exercising it right to seek another evaluation. (R., pp. 275).

William Mulbry, M.D., evaluated Petitioner, and concurred with Dr. Gehle's diagnosis, but concluded Petitioner was a high risk to reoffend sexually and met the criteria for commitment as a sexual predator. The case was called for a jury trial on June 2, 2014, before the Honorable James R. Barber, III, Circuit Court Judge.

Prior to trial, Petitioner moved to exclude any evidence related to Dr. Mulbry's testing and interview with Petitioner, arguing his attorney was not informed of the dates Petitioner was transported to Charleston for the evaluation, where he signed waivers and consent forms prior to undergoing the evaluation, and further, he was entitled to have his attorney present during the

evaluation. The State argued Petitioner's statutory right to counsel under the SVPA did not entitle him to counsel's presence during the mental health evaluation. The circuit court denied Petitioner's motion, finding Petitioner did not have a constitutional right to an attorney in a civil matter, the State had a right to get the evaluation, and even if the attorney was present, he could not do anything, or even be in the examining room. (R., pp. 4-7).

The State presented Dr. Mulbry, who was qualified as an expert in psychiatry and forensic psychiatry. He testified MUSC assigned Petitioner's case to him for the evaluation, and he followed the psycho-sexual evaluation protocol mandated by the MUSC sexual behaviors lab, which is designed to collect as much information as possible about how the person being evaluated functions and their criminal offenses. The protocol includes examination of trial records, criminal records, police incident reports, medical records, psychiatric records, and military records, as well as a battery of psychological and physiological tests and a face-to-face interview. Petitioner was transported to MUSC three times, two times for psychological and physiological testing, and the third time for a four hour interview with Dr. Mulbry. (R., pp. 17-29; 162-191).

Dr. Mulbry concurred with Dr. Gehle's diagnosis of "pedophilia, attracted to males, limited to incest, non-exclusive type," and testified to a reasonable degree of medical certainty this mental abnormality causes Petitioner significant difficulty controlling his sexual behavior. He further opined to a reasonable degree of medical certainty Petitioner's propensity to reoffend sexually posed a menace to the health and safety of others, and Petitioner met the criteria for commitment as a sexually violent predator. (R., pp. 29-72).

Dr. Mulbry also reviewed Dr. Gehle's evaluation report regarding Petitioner. He agreed with her diagnosis, but disagreed with her assessment of Petitioner's risk to reoffend using the

Static-99R. He testified the Static-99R does not account for acute criminogenic needs, which are existing factors relevant to the particular individual that might make the person recidivate. While Dr. Mulbry agreed Petitioner's Static-99R score was three, he disagreed with Dr. Gehle's reliance on Petitioner's score to conclude he is not a risk to reoffend sexually in light of Petitioner's repeated demonstration of deviant sexual interests against multiple victims. Dr. Mulbry explained his overall conclusion differed from Dr. Gehle's because:

> I think she used the line that there are no risk factors beyond those accounted for in the Static 99. In other words, she indicated in her report that the risk factors for re-offense were adequately accounted for by the Static 99. But again, the Static 99 does not account for acute criminogenic needs and we know that deviant sexual interest is an acute criminogenic need and we know that it is a lead - - a leading correlate of recidivism rate. Based on that fact, I - - I don't think the Static 99 really did accurately reflect his recidivism. I think that deviant sexual interests raises that risk appreciatively and that's the basis of my opinion.

(R., pp. 72-73).

Petitioner presented Dr. Gehle, who was qualified as an expert in psychology and forensic psychology. She testified her evaluation consisted of reviewing all available documentation, an interview with Petitioner and scoring the Static-99R. Dr. Gehle diagnosed Petitioner with pedophilia, but based in large part on the Static-99R score, she opined his mental abnormality did not cause him difficulty controlling his behavior, he was a low risk to reoffend sexually, and he did not meet the criteria for commitment under the SVPA. She disagreed with Dr. Mulbry's conclusion regarding Petitioner's deviant sexual interests, stating "research" defines the term differently than Dr. Mulbry's definition. (R., pp. 86-115).

On cross-examination, Dr. Gehle testified Petitioner denied committing some of the crimes to which he pled guilty, but she discounted his denial as irrelevant. She also testified about some of the sexual acts recited in police reports and referenced in the victims' forensic

interviews, which included use of a screwdriver, shoving bread up one victim's anus, tying a victim's penis to a rope, and tying the victims' hands, but she discounted those reports because the specific acts were not stated in the indictments, so they were not "proven in Court per se" by Petitioner's guilty pleas. (R., pp. 116-131).

The jury found beyond a reasonable doubt Petitioner is a sexually violent predator. The circuit court denied Petitioner's post-trial motions, and committed him to the South Carolina Department of Mental Health for long term control, care and treatment. (R., pp. 160-161, 277). This appeal followed.

The Court of Appeals affirmed the circuit court's findings and Petitioner's commitment in an unpublished opinion filed June 28, 2017. (Appendix, pp. 1-5). The Court denied Petitioner's Petition for Rehearing by Order filed August 16, 2017. (Appendix pp. 6-14). Petitioner now seeks review of the Court of Appeals' decision.

ARGUMENT

Petitioner's right to assistance of counsel did not require the State to notify Petitioner's attorney when Petitioner was transported to facilitate the State's independent evaluation, or require his attorney's presence during the evaluation.

Petitioner contends the Court of Appeals erred in affirming the denial of his motion to exclude evidence regarding anything related to the testing performed at MUSC and Dr. Mulbury's interview with Petitioner, because the lack of notice to his counsel of when the evaluation occurred and counsel's absence from the evaluation violated his due process and statutory right to counsel. Contrary to this contention, neither the statutory or the constitutional right to counsel requires notice to counsel of the date an evaluation will be conducted, or entitle the person to have counsel present during the evaluation.

A person subject to the SVPA is entitled to the assistance of counsel "at all stages of the proceedings." S.C. Code Ann. §44-48-90(B) (Supp. 2014). It is undisputed Petitioner received the able assistance of a court appointed attorney throughout this case. Therefore, the issue of his **right** to counsel is arguably moot, and the real issue in this case is whether a mental health evaluation is a "stage of the proceeding," which requires notice to counsel of the specific evaluation date, and entitles the person to counsel's presence during the evaluation.[1]

In a criminal case, counsel's presence is required when procedural steps are taken, or events transpire that are likely to prejudice the ensuing trial. State v. Hardy, 283 S.C. 590, 325

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[1]The Court of Appeals found Petitioner abandoned the contention his SVPA right to counsel was violated, and the issue of whether the SVPA right to counsel entitled him to counsel's presence during the pre-commitment evaluation as a "stage of the proceeding" was not preserved for appellate review, and Petitioner asserts this was error. (Petition, Issue I). Petitioner did focus on the due process issue before the Court of Appeals, and did not specifically argue the evaluation is a "stage of the proceeding" in the circuit court. In light of In re: Matter of Chapman, 419 S.C. 172, 796 S.E.2d 842 (2017), however, the State addresses the merits of both contentions in this Return. Even if properly before this Court, these contentions are meritless.

S.E.2d 320, 322 (1985); State v. Williams, 263 S.C. 290, 210 S.E.2d 298, 299 (1974). In Hardy, the trial court ordered a competency/insanity mental health evaluation of the defendant. He was evaluated on three occasions, and the court denied counsel's motion to be present during the third evaluation. Finding the evaluation was not a critical stage of the proceeding, this Court observed: "[t]he presence of counsel is not only unnecessary from a constitutional standpoint, it is also undesirable from a clinical perspective, for it would **undoubtedly** hinder the psychiatrist from effectively examining the defendant." Id. at 322 (emphasis added). *See also* United States v. Bondurant, 689 F.3d 1246, 1249 (1982) (defendant had no constitutional right to counsel's presence during psychiatric examination, and "to do so might well defeat the purpose of the examination"); State v. Schackart, 175 Ariz. 494, 858 P.2d 639, 646 (1993) (majority of courts have determined there is no constitutional right to counsel's presence during mental health examination, and while it may bestow a strategic benefit, counsel's presence is not required to ensure a fair trial).2

While the focus of a mental health evaluation in a sexual predator case is different from the focus of a competency/insanity evaluation, the ultimate purpose is the same - to determine whether the case will proceed to trial and/or the validity of a mental health defense. While the

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[2]Petitioner cites In re: Detention of Kistenmacher, 178 P.3d 949 (Wash. 2008), in support of his contention the pre-commitment evaluation is a stage of the proceedings for purposes of the right to counsel. The Kistenmacher rationale and holding on this issue has not been cited as authority by any other jurisdiction interpreting the same language regarding the right to counsel in sexual predator cases. To date, the only other jurisdiction citing Kistenmacher expressly rejected its analysis, and held neither the sexual predator statute nor the constitution required notice to, or presence of, counsel for the pre-commitment evaluation. *See* In re: Detention of Smith, 422 S.W.3d 802, 804-807 (Tex. App. 2014) ("We conclude that neither the SVP statute nor the Fourteenth Amendment require that counsel be present during a psychiatrist's post-petition examination.").

mental health evaluation in a sexual predator case is a critical component of the case, however, it is **not** a stage of the proceedings, which include the probable cause hearing, guilt or innocence hearing if the person is incompetent to stand trial and not likely to become competent, motion hearings and trial. No procedural matters are discussed or determined during the evaluation, and before the evaluation begins, the person is advised evidence obtained will be disclosed and may be discussed at trial. Thus, the potentially disruptive effect of counsel's presence during an evaluation is even **more** pronounced in sexual predator cases. *See* Allen v. Illinois, 478 U.S. 364, 374-375 (1986) (upholding constitutionality of the Illinois "sexually dangerous person" statute, holding the Fifth Amendment right against self-incrimination does not apply in the civil commitment proceedings thereunder, and acknowledging the possibility that denying the evaluating psychiatrist an opportunity to question people alleged to be sexually dangerous would "decrease the reliability of a finding of sexual dangerousness").

In this case, Petitioner received notice in March 2013 the State was exercising its right to obtain an independent evaluation. (R., pp. 275-276). To effectuate the independent evaluation, Petitioner was transported to MUSC on April 9 and May 3, 2013, for testing, and on June 14, 2013, for the interview. Dr. Mulbry issued a detailed written report in September 2013, which the State immediately forwarded to Petitioner's counsel. Therefore, Petitioner's counsel knew the evaluation was taking place, it would be at MUSC, its purpose, and how the State intended to use the results, and there was ample time to consult with Petitioner before he was transported to MUSC the first time, the second time and the third time. *See* Buchanan v. Kentucky, 483 U.S. 402 (1987) (defendant not entitled to have counsel present during mental health evaluation when his counsel knew about the scope and nature of the examination, as well as its possible uses, and had opportunity to consult with the defendant prior to the examination). Further, there is no

evidence Petitioner asked to consult with counsel before signing any consent forms or waivers, a request MUSC has honored for others undergoing sexual predator evaluations there.

Petitioner did not challenge the validity of Dr. Mulbry's evaluation until the case was called for trial.[3] Significantly, at that time he did not present any evidence, or even allege, anyone at MUSC acted inappropriately, coerced him to sign anything or undergo testing, or denied him basic comforts, such as restroom breaks, and he makes no such allegations in this appeal.

More importantly, Petitioner does not indicate how counsel's presence during the testing and interview could have changed the outcome. If counsel advised him not to sign the consents and waivers, the evaluation would not proceed, and the State would seek an order requiring Petitioner to cooperate, and a contempt citation if he still failed to cooperate with the evaluation. If counsel advised him to sign the consents and waivers, but interfered with the evaluation in any way, such as objecting to certain questions or advising Petitioner not to answer them, contempt for failure to cooperate would still be an issue. Ultimately, if necessary, the State would present evidence at trial regarding Petitioner's failure to cooperate, and its impact on Dr. Mulbry's ability to render an opinion.[4]

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[3]It is interesting to note Petitioner never complained about a lack of notice to counsel or the absence of counsel when he was transported for the interview with Dr. Gehle, during which he had to sign consent and waiver forms, and nothing in the record indicates his counsel received prior notice or was present during the interview.

[4]Given the lack of any indication notification to counsel and counsel's presence during the evaluation would have changed the outcome, the State submits any alleged error in failure to notify counsel and have counsel present during the evaluation was harmless.See State v. Reeves, 301 S.C. 191, 391 S.E.2d 241, 243 (1990) (error is harmless when it could not reasonably have affected the result of the trial).

Petitioner argues "counsel can be close to invisible, sitting quietly in the corner of the room," and labels the possibility counsel would hinder the evaluation as "unlikely." (Petition, p. 19). As discussed herein, however, most courts considering the issue of the right to have counsel present during a mental health examination, including the South Carolina Supreme Court, have found counsel's presence may well hinder the examination, and Petitioner cites no authority to the contrary. At most, counsel's presence might have bestowed some amorphous, unarticulated strategic benefit, but counsel's absence did not deprive Petitioner of a fair trial.[5]

[5]Petitioner asserts the State indicated during oral argument before the Court of Appeals it has honored counsels' requests to be present during the evaluations in previous cases, which distorts the State's argument. The State did advise the Court of Appeals it has honored previous requests for notification regarding evaluation dates, and would have done so in this case; however, the State has no control over, and does not attempt to control, MUSC's (or any other expert's) protocol regarding counsel's presence during the evaluation itself.

Schackart, 858 P.2d at 646.

If the testing and interview revealed any information not already contained in the vast documentation Dr. Mulbry reviewed, it was not the basis for his ultimate opinion. Rather, the psychological tests results were generally favorable to Petitioner, and the physiological test was inconclusive. Dr. Mulbry's opinion was premised most heavily on the pattern of deviant sexual behavior documented by the records (R., pp. 28-73). Since Petitioner denied committing most of the sex acts revealed by the victims in the documentation, even in the face of his guilty pleas, it is safe to assume he did not reveal any new or relevant misconduct to Dr. Mulbry during the interview, and Dr. Mulbry did not testify there were any such revelations.[6]

Therefore, counsel's presence during the testing and interview, and arguably exclusion of any testimony regarding the testing and interview, would not have changed Dr. Mulbry's opinion or the outcome of the trial. If Petitioner had any concerns about Dr. Mulbry's methodology and opinion, he could, and did, challenge them on cross-examination and during Dr. Gehle's testimony. *See* Schackart, 858 P.2d at 647 ("If the defense wishes to challenge the manner in which a mental examination has been conducted, or an expert's conclusions, this can be done on cross-examination or during the testimony of its own witness.") (*citing* United States v. Ash, 413 U.S. 300, 315 [1973] [there are times when a subsequent trial can cure a one-sided confrontation between prosecuting authorities and an uncounseled defendant]).

Petitioner had able assistance of counsel throughout the circuit court proceedings, and now has assistance of counsel on appeal. He does not, and indeed cannot, show how having

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[6]Petitioner also told Dr. Gehle he did not commit those acts. (R., pp. 126-129).

counsel present during the evaluation would, or even could, change the result.[7] Petitioner received the assistance of counsel he was entitled to receive in this case, and the Court of Appeals properly affirmed his commitment as a sexually violent predator.

[7]Even if this Court finds some basis for requiring notice of the evaluation dates and counsel's presence during the evaluation, which the State submits does not exist, any alleged error regarding counsel's notification and presence is harmless in this case. *See* State v. Reeves, 301 S.C. 191, 391 S.E.2d 241, 243 (1990) (error is harmless when it could not reasonably have affected the result of the trial).

CONCLUSION

Based on the foregoing, Respondent submits the Petition for Writ of Certiorari to the Court of Appeals should be denied in its entirety.

Respectfully submitted,

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent by depositing a copy in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 6th day of November, 2017.

Sally B. Ellison

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