STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from York County
J. Mark Hayes, II, Circuit Court Judge

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S.C. SUPREME COURT

Opinion No. 2017-UP-387 (S.C. Ct. App. filed Oct. 18, 2017)

2015-CP-46-00758

IN THE MATTER OF THE CARE AND
TREATMENT OF KEITH FITZGERALD BURRIS,

PETITIONER

APPELLATE CASE NO 2015-002122

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 14, 2017. App. 12.

QUESTION PRESENTED

Did the Court of Appeals misconstrue this Court's opinion in In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) and the plain language of the Sexually Violent Predator Act, which require evidence of an individual's *present* psychology, by affirming a trial court's ruling that allowed a witness to render an opinion based upon a three-year old evaluation?

STATEMENT OF THE CASE

Petitioner was charged in 1997 with criminal sexual conduct with a minor (CSCM). R. 86, ll. 18-19; R. 241-284.[1] He entered a guilty plea to the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) in June of 1999. R. 86, ll. 20-21; R. 241-284. He was sentenced to five years' imprisonment suspended upon time served and three years' probation. R. 241-284. Subsequently, in 2004, he was charged with three counts of CSCM in the second degree. R. 87, l. 25 – R. 88, l. 9; R. 197-204; R. 241-284. He entered guilty pleas to those charges on January 24, 2005. R. 88, ll. 2-9; R. 94, l. 4; R. 197-204; R. 241-284. The judge sentenced him to a negotiated sentence of ten years' imprisonment on each count to be served concurrently. R. 197-204; R. 241-284. On November 13, 2014, Petitioner entered a guilty plea to the charge of criminal solicitation of a minor in exchange for a negotiated sentence of ten years' imprisonment suspended upon two years' imprisonment and five years' probation. R. 94, l. 17 – R. 95, l. 1; R. 205-208; R. 241-284.

Petitioner was scheduled to be released from prison on April 28, 2015. R. 241-284. As a result, the Department of Corrections referred him to the Multi-Disciplinary Team for assessment under the Sexually Violent Predator Act (the Act). R. 241-284. On January 22, 2015, the Team determined Petitioner satisfied the definition and sent the case to the Prosecutor's Review Committee. R. 241-284. Thereafter, the Committee found probable cause to believe Petitioner was a sexually violent predator (SVP). R. 241-284. On May 4, 2015, the state filed a petition to commit Petitioner as a SVP pursuant to the Act and requested a trial. R. 241-284. On October 7, 2015, the

[1] In various places in the transcript, Petitioner, whose name is Keith Burris, is referred to as Kenneth Burgess and Kenneth Burris. These appear to be typographical errors or the result of participants misspeaking.

SVP case was tried before the Honorable J. Mark Hayes, II, and a jury. R. 1. James G. Bogle represented the state, and Anna R. Good represented Petitioner. R. 1.

The state alleged Petitioner's conviction of criminal solicitation of minor was a qualifying conviction under the Act. R. 99, ll. 6-11; R. 205-208; R. 241-284. Petitioner did not dispute that he had been convicted of a sexually violent offense. R. 72, ll. 16-20; R. 169, ll. 15-20. The only dispute was the second element of the statute – whether Petitioner suffered from a mental abnormality or personality disorder that made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. R. 72, ll. 20-23; R. 169, ll. 20-22. More precisely, Petitioner's focus at trial was whether he had a present personality disorder and whether out-patient treatment would address any problems sufficiently. R. 171, l. 7 – R. 172, l. 12; R. 173, ll. 11-18.

Dr. Marie Gehle evaluated Petitioner in 2012. At that time, she diagnosed Petitioner with "antisocial personality disorder but concluded he was not of such a risk to reoffend in a sexually violent manner as to warrant commitment." R. 209-238; R. 241-284. During the 2012 evaluation, Dr. Gehle tested Petitioner using the MMPI. R. 104, ll. 6-12; R. 105, ll. 13-15. This 500+ question test was designed "to determine whether somebody has problems in certain areas related to mental health problems or personality problems." R. 104, ll. 17-22. From the test, Dr. Gehle "learned that [Petitioner] has very strong antisocial personality attitudes." R. 105, ll. 7-10.

She also performed a Static 99R test, which is an actuarial risk assessment tool. R. 105, ll. 21-25. According to this ten-question test, Dr. Gehle determined Petitioner scored a five out of twelve. R. 108, ll. 4-11. This score placed Petitioner in the "moderate high risk" category. R. 108, ll. 17-19. According to the recidivism table accompanying the test, she opined that Petitioner had a 21.2% chance of re-offending sexually within five years. R. 108, ll. 22-24. In other words, he had a

79% chance of *not* re-offending within five years. R. 119, ll. 4-8. Further, she opined that Petitioner had a 32% chance of re-offending sexually within ten years. R. 109, ll. 3-5. This meant Petitioner had a 68% chance of *not* re-offending. R. 119, ll. 9-12.

In scoring the Static 99R, Dr. Gehle gave Petitioner one point for a CDV conviction from the 1980s because the test assigns one point when a person has a prior conviction for nonsexual violence. R. 132, ll. 5-22; R. 134, ll. 9-13. In other words, one of his five points was from a CDV conviction in the 1980s, over thirty years before the SVP trial. R. 132, ll. 23-24. Petitioner received negative one point because of his age at the time of release. R. 133, ll. 5-15. He got zero points because he lived with a romantic partner for two consecutive years. R. 133, ll. 16-19. He also got zero points because his last conviction was unaccompanied by other offenses. R. 133, l. 20 – R. 134, l. 8. He then got a score of three because in 1998 he was charged with and convicted of a sex offense – the ABHAN – and in 2003, he was convicted of three sexually related offenses. R. 134, l. 14 – R. 135, l. 9. Petitioner received another point because he had four or more prior sentencing dates for any offenses. R. 135, ll. 13-24. Petitioner received zero points because he had no convictions for non-contact sexual offenses, such as peeping tom. He also got one point because his alleged victims were not related to him. R. 137, ll. 3-10. He got zero points because his alleged victims were not strangers and his alleged victims were not males. R. 137, ll. 11-17. Thus, he had a score of five.

Dr. Gehle evaluated Petitioner again in May of 2014. R. 241-284. At that time, she did *not* conduct *any* psychological testing to determine whether Petitioner satisfied the criteria for antisocial personality disorder, or any other mental abnormality or personality disorder. R. 105, ll. 16-17. Instead, she relied upon her evaluation in 2012 to claim Petitioner had a personality disorder, specifically, antisocial personality disorder. R. 112, l. 16 – R. 113, l. 2; R. 209-238. She stated that

in her opinion, Petitioner's "personality predisposes him to commit a wide variety of criminal offenses that also includes sexual offenses." R. 115, ll. 4-12. She opined that Petitioner's "propensity" was "of such an effect that it's caused a menace to the health and safety of others." R. 115, ll. 13-17. Further, she stated Petitioner had "the propensity to be dangerous and commit future sexually violent offenses." R. 115, ll. 13-17. Dr. Gehle claimed Petitioner's "antisocial personality disorder" and other risk factors cause serious difficulty for him in controlling his behavior. R. 115, l. 22 – R. 116, l. 2. Finally, she concluded Petitioner's personality disorder made him likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. R. 116, ll. 3-7; R. 209-238.

Dr. Gehle's testimony, coupled with certified copies of Petitioner's prior convictions, was the sum total of the state's case. After hearing the testimony of the state's only witness presented and two defense witnesses – an officer from the detention center and Petitioner – the jury found Petitioner was a sexually violent predator. R. 191, ll. 3-12. After the verdict, Judge Hayes ordered Petitioner be "committed to the Department of Mental Health for his long-term control, care, and treatment." R. 292.

Petitioner served his notice of appeal on October 14, 2015. The appeal was perfected by undersigned counsel. Without the benefit of oral argument, the Court of Appeals affirmed Petitioner's commitment on October 18, 2017, by an unpublished opinion. App. 1-2; In the Matter of the Care and Treatment of Keith Fitzgerald Burris, 2017-UP-387 (S.C. Ct. App. filed Oct. 18, 2017). On November 2, 2017, Petitioner requested the Court of Appeals rehear the matter based upon significant points overlooked and/or misapprehended by the Court in rendering its opinion. App. 3-11. On December 14, 2017, the Court of Appeals denied the request. App. 12.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals misconstrued this Court's opinion in *In re Taft*, 413 S.C. 16, 774 S.E.2d 462 (2015) and the plain language of the Sexually Violent Predator Act, which require evidence of an individual's *present* psychology, by affirming a trial court's ruling that allowed a witness to render an opinion based upon a three-year old evaluation.

Relevant facts

On October 7, 2015, during pre-trial hearings, trial counsel moved to prohibit the state's expert, Dr. Marie Gehle, from testifying regarding her diagnosis of Petitioner with antisocial personality disorder because the testing to arrive at that diagnosis was conducted in 2012 and the statute requires a finding by the jury that the person has a *present* personality disorder. R. 40, ll. 2-18; R. 40, l. 21 – R. 41, l. 21. Trial counsel explained the 2012 testing occurred three years prior to the current proceeding, and as a result, the test could not indicate that Petitioner had a *present* personality disorder. R. 41, ll. 12-21. The state admitted that Dr. Gehle evaluated Petitioner in 2012 pursuant to a petition filed by the state. R. 42, ll. 7-8. At that time, Dr. Gehle determined Petitioner did not meet the criteria for SVP although he had a personality disorder. R. 42, ll. 8-9. Following Petitioner's subsequent conviction, Dr. Gehle evaluated Petitioner again but she did not conduct any testing to determine his present psychology. R. 42, ll. 9-11. In 2015, Dr. Gehle changed her opinion – she opined Petitioner was a SVP. R. 42, ll. 11-13. The state argued "[a]nything going about the prior evaluation really goes to the weight of her testimony as opposed to it's [*sic*] admissibility." R. 42, ll. 14-16. The judge concluded the expert could "testify as to her prior evaluation" and that trial counsel's objection went "to the weight of her testimony not to the admissibility of it." R. 44, ll. 6-8; R. 45, ll. 8-12.

Dr. Gehle's report, which was admitted as an exhibit for identification purposes only, made clear that her opinion was primarily based upon the 2012 evaluation. R. 209-238. During the 2012 evaluation, Dr. Gehle tested Petitioner using the MMPI. R. 104, ll. 6-12; R. 105, ll. 13-15; R. 126, ll. 22-25; R. 209-238. This test was designed "to determine whether somebody has problems in certain areas related to mental health problems or personality problems." R. 104, ll. 17-22; R. 127, ll. 3-12. From the test, Dr. Gehle "learned that [Petitioner] has very strong antisocial personality attitudes." R. 105, ll. 7-10. She did not "feel it was necessary to redo the MMPI" when she evaluated Petitioner in 2014 because it is "something that's stable over time." R. 105, ll. 16-17. However, she was forced to admit that a person's personality problems, including disorders, could change over time. R. 127, ll. 13-18. She also explained that the test "can take somebody a couple of hours" to complete because it is "very long" and she "didn't want to give him that long test again." R. 105, ll. 18-19; R. 127, ll. 19-22.

Dr. Gehle testified that in her opinion, Petitioner suffered from antisocial personality disorder. R. 113, ll. 1-2. She told the jurors that antisocial personality disorder is a pervasive pattern of disregard for and violations of the rights of others. R. 114, ll. 19-20. According to Dr. Gehle, "the primary personality disorder related to sexually violent offender and sexually violent civil commitment is antisocial personality disorder." R. 82, ll. 20-23. Based upon this 2012 diagnosis, Dr. Gehle concluded Petitioner had a predisposition to commit a "wide variety of criminal offenses," including sexual offenses, had a "propensity to be dangerous and commit future sexually violent offenses," had difficulty controlling his behavior, and was likely to engage in acts of sexual violence unless confined for long term control, care, and treatment. R. 115, l. 4 – R. 116, l. 7.

Discussion

According to the statute, a sexually violent predator is a person who "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." S.C. Code Ann. § 44-48-30(1)(b). The statute was written in the present tense because the legislature sought to commit only individuals with a *present* mental abnormality or personality disorder and a *present* likelihood of re-offending. In fact, this is one feature of the statute that saves it from an *ex post facto* challenge. See State v. Gaster, 349 S.C. 545, 550-551, 564 S.E.2d 87, 90 (2002)(citing Kansas v. Hendricks, 521 U.S. 346, 370-371 (1997)). As this Court explained, the Act "permits involuntary confinement based upon the determination the person *currently* suffers from both a mental abnormality or personality disorder and is likely to engage in acts of sexual violence." Id. at 551, 564 S.E.2d at 90 (emphasis added).

The Act provides that a person is considered "likely to engage in acts of sexual violence" if "the person's propensity to commit acts of sexual violence is such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. § 44-48-30(9). Again, the present tense in the statute indicates the legislature's desire to commit only those who *presently* pose a danger. This Court made clear in In re Care & Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462 (2015), that the danger had to be present at the time of the trial – not at some time in the past. This Court explained the state "must prove, beyond a reasonable doubt that the individual is *presently* a sex offender." Id. at 23, 774 S.E.2d at 466 (emphasis in original).

In Taft, the state's expert examined the Taft "nearly two years earlier in June 2009" and that based on that previous evaluation, the expert opined Taft suffered from pedophilia and met the statutory definition of a SVP. Taft, 413 S.C. at 20, 774 S.E.2d at 464-465. Specifically, the expert

"discussed Taft's ability to accept and utilize the treatment he had received, and testified about the previous abuse Taft had himself endured beginning at age five." Id. at 20, 774 S.E.2d at 464. Further, the expert "opined that based upon his previous evaluation" "Taft suffered from pedophilia, sexually attracted to females and nonexclusive type." Id. Additionally, the expert "opined ... Taft met the statutory definition of a sexually violent predator" based upon "several risk assessment tests" he conducted "to measure Taft's likelihood of reoffending," which led to his determination that Taft "had a moderate to high risk of sexual recidivism." Id. at 20, 774 S.E.2d at 464-465.

The "sole question" on appeal in Taft's case was "whether the state produced evidence that his mental abnormality is such that he is *presently* likely to reoffend if not confined." Id. at 22, 774 S.E.2d at 466 (emphasis in original). Taft argued "the state's expert testimony established only that he had a risk of reoffending in 2009 when he was evaluated in conjunction with the underlying criminal charges, and not that he had a risk of reoffending in 2011 in the context of his civil commitment proceeding." Id. This Court found "the state's evidence devoid of proof Taft has a *present* risk to reoffend." Id. at 23, 774 S.E.2d at 466 (emphasis added). The state's expert "consistently refused to render a current diagnosis," two years after his evaluation, because he did not have the personal contact and personal interview necessary to form a current opinion. Id.

This Court explained the state's expert's opinion was that Taft met the statutory definition of SVP in 2009 and was *not* a *current* opinion. Id. at 23, 774 S.E.2d at 466. Permitting the state to offer evidence of an expert's evaluation that was not current "would violate the legislature's statutory scheme, which clearly envisions a new civil commitment proceeding based upon *current* evidence that the individual 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." Id. (emphasis added).

In affirming Petitioner's commitment, the Court of Appeals misconstrued this Court's holding in Taft. The Court of Appeals cited Taft for the proposition that the state "failed to prove Taft was an SVP when the state's expert rendered his decision *solely* on a two-year-old evaluation and *refused to render a current diagnosis*." App. 2; Burris, supra (emphasis in original). Based upon the words emphasized, it appeared the Court of Appeals sought to distinguish what occurred at Petitioner's trial from what occurred during Taft's trial. More specifically, the distinction the Court of Appeals appeared to rely upon was that the Taft expert relied on a two-year old evaluation and refused to render a current diagnosis, but the Burris expert relied on two-year old testing and rendered what she claimed was a current diagnosis. Any such distinction makes no difference as explained below.

The expert's testimony revealed she had tested Petitioner using the MMPI in 2012, and had *not* repeated the test in 2014. R. 104, ll. 6-12; R. 105, ll. 7-10; R. 105, ll. 13-15; R. 105, ll. 18-19; R. 126, ll. 22-25; R. 127, ll. 19-22; R. 209-238. Her conclusion regarding Petitioner's personality disorder was based upon the MMPI conducted in 2012. R. 105, ll. 7-10. Certainly, the expert stated that "to a reasonable degree of psychological certainty" she believed Petitioner suffered from antisocial personality disorder. R. 112, l. 16 – R. 113, l. 2. However, the basis for her opinion included the MMPI conducted in 2012 and her interactions with Petitioner in 2012:

> Q. And in fact didn't you take a lot of the information regarding what he told you about the offenses from a 2012 evaluation that you did?
>
> A. Yes.
>
> Q. So you didn't re-ask those questions to see if his attitude changed to see if anything was different about what he would have said or taken more responsibility or less responsibility?
>
> A. Well I reviewed that information with him and ask him, you know, is that your take on it still and that's how we approached it.

R. 121, ll. 12-22.

At that time, she did *not* conduct any psychological testing to determine whether Petitioner *currently* satisfied the criteria for antisocial personality disorder, or any other mental abnormality or personality disorder. R. 105, ll. 16-17. Instead, she relied *solely* upon her evaluation in 2012 to maintain Petitioner had a personality disorder, specifically, antisocial personality disorder. R. 112, l. 16 – R. 113, l. 2; R. 209-238.

Not only was the expert's testimony and opinion based on a test performed three years earlier and not re-administered, but her testimony was based upon interviews conducted with Petitioner three years' earlier that were not re-assessed. Permitting the expert to use the prior evaluation violated the statutory scheme in that it was not based upon *current* evidence. See Taft, 413 S.C. at 23, 774 S.E.2d at 466.

Dr. Gehle's opinion concerning Petitioner's personality disorder was based upon her evaluation of Petitioner in 2012, three years prior to his SVP trial. Although she claimed the MMPI test, which she used to diagnose Petitioner with a personality disorder, was stable over time, she admitted that a person's psychology changes over time. Her testimony revealed her reluctance to administer the MMPI again was due to the length of the examination, and not due to confidence of the results. As explained by this Court, "[a] civil proceeding to commit an individual, perhaps for life, following service of his criminal sentence, is an extraordinary remedy," therefore, the state must prove the individual's *present* mental status, not a past mental status, and should not be permitted to use test results for the sake of expediency over accuracy. See Taft, 413 S.C. at 23, 774 S.E.2d at 466. Permitting the state to use an expert's evaluation from a prior proceeding "would obviate any possibility of rehabilitation during incarceration" and "would violate the legislature's

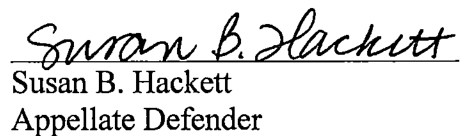
statutory scheme," which requires a new civil commitment proceeding based on current evidence. Id.

Petitioner respectfully requests this Court grant the petition for writ of certiorari to review the Court of Appeals' decision in this case. In affirming the trial court's decision to permit the state's expert to render an opinion regarding Petitioner's current psychology based upon testing conducted three years prior to the trial, the Court of Appeals disregarded this Court's decision in Taft, supra, and the plain language of the statute. Thus, the Court of Appeals' decision is in conflict with a prior decision of this Court and requires correction. See Rule 242(b)(3), SCACR.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issue presented. In the event this Court grants the petition and dispenses with further briefing, Petitioner respectfully requests this Court vacate the order of commitment and remand for a new trial.

Respectfully Submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 4th day of January, 2018.

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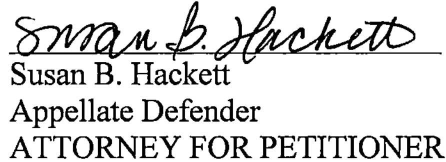
IN THE MATTER OF THE CARE AND
TREATMENT OF KEITH FITZGERALD BURRIS,

PETITIONER

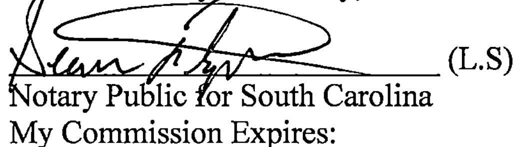
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Keith Fitzgerald Burris at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 4th day of January, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 4th day of January, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: