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

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

APPENDIX

SUSAN B. HACKETT
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098
Post Office Box 11549
Columbia, SC 29201
(803) 734-3727

ATTORNEYS FOR RESPONDENT

INDEX

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

In the Matter of the Care and Treatment of Keith Fitzgerald Burris, Appellant.

Appellate Case No. 2015-002122

Appeal From York County
J. Mark Hayes, II, Circuit Court Judge

Unpublished Opinion No. 2017-UP-387
Submitted September 1, 2017 – Filed October 18, 2017

AFFIRMED

Appellate Defender Susan B. Hackett, 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: Keith F. Burris appeals his civil commitment under the South Carolina Sexually Violent Predator (SVP) Act, arguing (1) the trial court erred in allowing the State's expert to testify about a 2012 evaluation of Burris in the civil commitment proceeding, (2) trial counsel was ineffective for failing to introduce evidence of treatment, (3) trial counsel was ineffective for moving to exclude evidence of the results of a previous evaluation of Burris in which the expert found

he was not an SVP, and (4) trial counsel was ineffective for failing to challenge the State's exercise of gender-based peremptory strikes in selecting the jury. We affirm[1] pursuant to Rule 220(b), SCACR, and the following authorities:

As to Issue 1: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *id.* ("An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law."); S.C. Code Ann. § 44-48-30(1) (Supp. 2016) (defining an SVP as a person who (1) "has been convicted of a sexually violent offense" and (2) "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"); *State v. Gaster*, 349 S.C. 545, 551, 564 S.E.2d 87, 90 (2002) ("[The SVP] 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."); *In re Care & Treatment of Taft*, 413 S.C. 16, 23-24, 774 S.E.2d 462, 466 (2015) (holding 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*).

As to Issues 2-4: *In re Care & Treatment of Chapman*, 419 S.C. 172, 175, 179, 186, 796 S.E.2d 843, 844, 846, 850 (2017) (holding persons committed as SVPs under the SVP Act have a statutory and constitutional "right to the effective assistance of counsel, and they may effectuate that right by seeking a writ of habeas corpus," but affirming the appellant's commitment on direct appeal because the ineffective assistance claims were unpreserved); *Buist v. Buist*, 410 S.C. 569, 574, 766 S.E.2d 381, 383 (2014) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved." (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006))).

AFFIRMED.

SHORT, KONDUROS, and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

APPELLANT

APPELLATE CASE NO 2015-002122

Appeal from York County

J. Mark Hayes, Circuit Court Judge

Opinion No. 2017-UP-387

PETITION FOR REHEARING

On October 18, 2017, this Court affirmed the civil commitment of Appellant in an unpublished opinion. State v. Burris, 2017-UP-387 (S.C. Ct. App. filed Oct. 18, 2017). Pursuant to Rule 221(a), Appellant files this petition for rehearing. In his brief, filed on June 28, 2016, Appellant challenged his commitment on four grounds. Three of those grounds involved claims of ineffective assistance of counsel. Concerning those three grounds, this Court affirmed, citing In re Care & Treatment of Chapman, 419 S.C. 172, 175, 179, 186, 796 S.E.2d 843, 844, 846, 850 (2017) for the proposition that persons committed under the SVP Act have a statutory and constitutional right to the effective assistance of counsel, which may be effectuated through the seeking of a writ

of habeas corpus. Burris, supra. Appellant does not seek rehearing as to those three grounds as the appropriate forum for those issues is in state habeas corpus proceedings.

However, Appellant respectfully requests this Court rehear the first issue presented on appeal – whether the trial judge erred in permitting the expert to testify regarding her opinion that Appellant suffered from a 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 because her opinion regarding his personality disorder was based upon her 2012 evaluation of Appellant, which made it unreliable in assessing his present psychology. This Court affirmed the trial court's decision to permit the expert to testify in October 2015, about a personality diagnosis made in 2012. Such an affirmance is contrary to the statutory provision, which requires a *present* personality disorder and *present* likelihood of re-offending and South Carolina Supreme Court case law interpreting the statutory provision. This Court's opinion overlooks and/or misapprehends the plain language of the statute, the Supreme Court's interpretation of that language, and the testimony presented.

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 the Court explained, South Carolina's SVP 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. The South Carolina Supreme Court made this clear in In re Care & Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462 (2015). The 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. The Supreme 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. 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.

The Supreme 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. The Court held that 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 Appellant's commitment, this Court 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*." Burris, supra (emphasis in original). Based upon the words emphasized, it appears this Court sought to distinguish what occurred at Appellant's trial from what occurred during Taft's trial. The distinction this Court appears to rely upon is 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 psychological testing and rendered what she claimed was a current diagnosis. Any such distinction makes no difference.

Dr. Marie Gehle evaluated Appellant in 2012, which was three years prior to Appellant's SVP trial. At that time, she diagnosed Appellant 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. Dr. Gehle evaluated Appellant again in May of 2014. R. 241-284. At that time, she did *not* conduct any psychological testing to determine whether Appellant *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 Appellant had a personality disorder, specifically, antisocial personality disorder. R. 112, l. 16 – R. 113, l. 2; R. 209-238. 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.

She stated that in her opinion, Appellant'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 Appellant's "propensity" was "of such an effect that it[] caused a menace to the health and safety of others." R. 115, ll. 13-17. Further, she stated Appellant had "the propensity to be dangerous and commit future sexually violent offenses." R. 115, ll. 13-17. Appellant's "antisocial personality disorder" and other risk factors cause serious difficulty for him in controlling his behavior according to Dr. Gehle. R. 115, l. 22 – R. 116, l. 2. Finally, she concluded Appellant'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.

Specifically, during the 2012 evaluation, Dr. Gehle tested Appellant 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 conducted in 2012, Dr. Gehle "learned that [Appellant] has very strong antisocial personality attitudes." R. 105, ll. 7-10. She did not "feel it was necessary to redo

8

the MMPI" 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.

In 2012, Dr. Gehle 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 Appellant scored a five out of twelve. R. 108, ll. 4-11. In scoring the Static 99R, Dr. Gehle gave Appellant 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. Appellant 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 – ABHAN – and in 2003, he was convicted of three sexually related offenses. R. 134, l. 14 – R. 135, l. 9. Appellant received another point because he had four or more prior sentencing dates for any offenses. R. 135, ll. 13 – 24. Appellant 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. This score placed Appellant in the "moderate high risk" category. R. 108, ll. 17-19.

Using the recidivism table accompanying the test, Dr. Gehle opined that Appellant 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 Appellant had a 32% chance of re-offending sexually within ten years. R. 109, ll. 3-5. This meant Appellant had a 68% chance of not re-offending. R. 119, ll. 9-12.

Dr. Gehle's testimony, coupled with certified copies of Appellant's prior convictions, was the sum total of the state's case. Appellant 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 - whether Appellant 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, Appellant'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. Gehle's report, which was admitted as an exhibit for identification purposes only, and her testimony made clear that her opinion regarding Appellant's personality disorder and likelihood of re-offending was primarily based upon the 2012 evaluation. R. 209-238. Dr. Gehle's opinion concerning Appellant's personality disorder was based upon her evaluation of Appellant in 2012, *three years prior* to his SVP trial. Although she claimed the MMPI test, which she used to diagnose Appellant 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 the Supreme 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 respondent'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 criminal proceeding "would obviate any possibility of rehabilitee during incarceration" and "would violate the legislature's statutory scheme, which clearly envisions a new civil commit 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.

Appellant respectfully requests this Court rehear the issue – whether the trial judge erred in permitting the expert to testify regarding her opinion that Appellant suffered from a 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 because her opinion regarding his personality disorder was based upon her 2012 evaluation of Appellant, which made it unreliable in assessing his present psychology – based on the significant points misapprehended and/or overlooked by this Court in rendering its opinion.

Respectfully Submitted,

Susan B. Hackett

SUSAN B. HACKETT
Appellate Defender

This 2nd day of November, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

J. Mark Hayes, Circuit Court Judge

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

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon 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 2nd day of November, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 2nd day of November, 2017.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

The South Carolina Court of Appeals

In the Matter of the Care and Treatment of Keith Fitzgerald Burris, Appellant.

Appellate Case No. 2015-002122

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.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Deborah R.J. Shupe, Esquire

FILED
December 14, 2017