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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal From Greenville County
The Honorable R. Lawton McIntosh, Circuit Court Judge
On Petition for Writ of Certiorari to the Court of Appeals
Appellate Case No. 2018-000012

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

Petitioner.

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

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals properly find the circuit court did not abuse its discretion by allowing the State's expert to testify about her consideration of psychological tests results from a 2012 evaluation as part of Petitioner's 2015 sexual predator evaluation?

STATEMENT OF THE CASE

In 2014, Petitioner was charged with one count of criminal solicitation of a minor, arising from the inappropriate fondling of a ten year old female. On November 13, 2014, he pled guilty as charged in exchange for a negotiated sentence of ten years' incarceration, suspended upon two years' incarceration and five years' probation.

Respondent State of South Carolina ("the State") filed a Petition Pursuant to the Sexually Violent Predator Act (the "SVPA"), seeking Petitioner's civil commitment for long term control, care and treatment as a sexually violent predator. (Record on Appeal [R.], pp. 241-284). The circuit court found probable cause to believe Petitioner is a sexually violent predator, and appointed Marie E. Gehle, Psy.D., to evaluate Petitioner and render an opinion regarding whether he has a mental abnormality or personality disorder that makes him a risk to re-offend sexually if not confined for treatment.

The case was called for a jury trial on October 7, 2015, before the Honorable J. Mark Hayes, II, Circuit Court Judge. Prior to trial, Petitioner moved to exclude any testimony from the State's expert regarding Petitioner's previous two SVP commitment evaluations and her conclusions Petitioner was not a sexually violent predator. The circuit court denied the motion, but the State agreed not to illicit testimony relating to previous evaluations. (R., pp. 43-44).

Without objection, Dr. Gehle was qualified as an expert in psychology and forensic psychology. She testified she was appointed by the court to evaluate Petitioner under the SVPA, and outlined the protocol she follows in pre-commitment evaluations, which includes reviewing all available documents, an interview with the person, some psychological testing, and scoring of an actuarial risk assessment. (R., pp. 74-81).

Dr. Gehle testified she had extensive documentation regarding Petitioner's background, including police reports, witness statements, booking reports, warrants, indictments, narratives, and incident summaries. She also looked for any psychological or psychiatric records, and interviewed Petitioner for four and a half hours. She testified this was the type of information typically and reasonably relied on by experts in her field, and stated a person's past behavior, sexual or nonsexual, is the best predictor for future behavior because if the person has already engaged in the behavior, it is more likely he will do it again. (R., pp.80-82).

Dr. Gehle diagnosed Petitioner with Antisocial Personality Disorder (ASPD), and stated it was important to look at his criminal offenses other than his sexual crimes when she diagnosed him with that disorder. She also considered the criteria for conduct disorder, which is a prerequisite for a ASPD diagnosis and includes cruelty to animals. During a four and a half hour interview with Petitioner, Dr. Gehle asked him if he had ever harmed animals, and he said he used to tie cats up in sacks and throw them in a creek, which did not bother him. Based on his responses during the interview, Dr. Gehle found Petitioner met the criteria for conduct disorder. (R., pp. 82-83).

Dr. Gehle testified she considered substance abuse and history of drinking alcohol as part of her evaluation because it relates to the risk factor of impulsivity. She also considered Petitioner's attitude toward women, stating Petitioner referred to women as "females," which he keew was demeaning, and he told Dr. Gehle he had never been faithful to a woman, often sleeping with four or five women a day on a rotation. Dr. Gehle testified Petitioner's attitude and behavior indicated a general disrespect for women. (R., pp. 84-85).

Dr. Gehle then testified about Petitioner's criminal history and the details of his sexual offenses. She testified the documents she relied on in forming her opinion were the type of

documents typically and reasonably relied upon by experts in her field, and it was necessary to examine the underlying details of a sexual crime because they are relevant to forming a diagnosis. (R., pp. 85-86).

In 1997, Petitioner was charged with criminal sexual conduct with a minor, which arose from Petitioner's sexual assault of a thirteen year old female, and he ultimately pled guilty to a lesser charge of assault and battery of a high and aggravated nature (ABHAN). In 2005, Petitioner was convicted of three second degree criminal sexual conduct with a minor charges, arising from sexual assaults of a minor female between the ages of twelve and fifteen. In 2014, Petitioner was convicted of criminal solicitation of a minor in connection with sexually explicit text messages and photographs he exchanged with a fifteen year old female. While out on bond for that charge, Petitioner was charged with criminal domestic violence. (R., pp. 86-100).

Dr. Gehle also considered Petitioner's prison disciplinary history. While incarcerated, Petitioner was convicted of possession or attempt to possess a cellphone, possession of contraband, and abuse of privileges. Dr. Gehle testified these offenses were significant to her diagnosis because they occurred while Petitioner was under strict supervision. (R., pp. 100-101).

Dr. Gehle stated Petitioner completed sex offender treatment while incarcerated on the 2005 convictions, and the fact he reoffended sexually after receiving treatment was an indication the treatment did not work. Dr. Gehle also testified Petitioner showed no remorse for his actions. (R., pp., 101-104).

As part of the evaluation, Dr. Gehle considered the results of a personality assessment Petitioner completed during a 2012 evaluation. The assessment indicated Petitioner has "very strong antisocial personality attitudes so the way he looks at the world is very much with an antisocial personality disorder." (R., pp. 104-105).

Dr. Gehle also completed the Static99-R, which is a well-recognized actuarial recidivism assessment tool. Petitioner scored a five on the tool, which put him in the moderate-high risk to reoffend sexually. In addition to the risk factors factored into the Static99-R, Dr. Gehle determined Petitioner had several “psychologically meaningful risk factors” relating to sexual reoffending, including: a history of sexual preoccupation; a sexual preference for pubescent females; emotional congruence with minors; a history of sexualized violence; offense supported attitudes; lack of emotionally intimate relationships with adults; lifestyle impulsiveness; poor problem solving abilities; resistance to rules and supervision; grievance and hostility; negative social influences; hostile beliefs about women; Machiavellianism; and a lack of concern for others. (R., pp. 105-112).

Dr. Gehle considered various paraphilias and personality disorders in reaching her conclusions. She did not find Petitioner had a paraphilia, but did conclude he had ASPD, and testified to a reasonable degree of psychological certainty his ASPD made Petitioner likely to engage in future sexually violent offenses. She further testified his ASPD caused Petitioner to be a menace to the health and safety of others, caused him serious difficulty controlling his behavior, and made him likely to engage in acts of sexual violence if not confined for long term control, care and treatment. She stated outpatient treatment was not sufficient in light of Petitioner’s difficulty controlling his behavior even if he was subject to probation and required sex offender treatment as part of his probation. (R., pp. 112-117).

The jury found beyond a reasonable doubt Petitioner is a sexually violent predator, and the court committed him to the custody of the SC Department of Mental Health for long term control, care and treatment. (R., pp. 199, 292). This appeal followed.

By unpublished opinion filed October 18, 2017, the Court of Appeals affirmed Petitioner's commitment, finding the circuit court did not abuse its discretion in admitting Dr. Gehle's testimony regarding the psychological test results from Petitioner's previous evaluation. (Appendix, pp. 1-2). Petitioner sought rehearing, which the Court of Appeals denied by Order filed December 14, 2017. (Appendix, pp. 3-12). Petitioner now seeks review of the Court of Appeals decision.

ARGUMENT

Petitioner contends the circuit court erred in allowing Dr. Gehle to testify regarding her opinion of Petitioner's ASPD because it was premised on testing she conducted during a 2012 sexual predator evaluation of Petitioner. While Dr. Gehle did review documentation from the 2012 evaluation, including the personality assessment, the opinion she testified to at trial was premised on the full evaluation she conducted in 2015.

A cursory comparison of Dr. Gehle's 2012 evaluation report and her 2015 trial testimony reveals significant differences. (R., pp. 75-117, 209-238). As a threshold matter, the 2012 evaluation did not consider any information regarding Petitioner's 2014 criminal solicitation of a minor conviction for the obvious reason it did not exist in 2012. Further, all the documentation from Petitioner's offenses prior to 2012 did not change from 2012 to 2015, and Dr. Gehle properly reviewed all that documentation as part of the 2015 evaluation.

Petitioner's reliance on In the Matter of the Care and Treatment of Taft, 413 S.C. 16, 774 S.E.2d 462 (2015), is misplaced. The expert in Taft "expressly testified that he '[did not] have the personal contact and the personal interview that [he] would need to do to form a current and active opinion' because 'to be able to say whether [Taft] is a sexually violent predator now, [he] would have to be able to evaluate [him],'" and "admitted on cross-examination that 'as of [that day] he could not give an opinion as to whether or not [Taft] is a sexually violent predator.'" *Id.* at 466 (alterations in original).

Unlike the expert in Taft, Dr. Gehle had the personal contact and personal interview necessary to render an opinion as to Petitioner's "present" mental status. Also contrary to Taft, Dr. Gehle testified to a reasonable degree of psychological certainty Petitioner had ASPD and

was a significant risk to reoffend sexually **as of the date of trial** in 2015.¹ Simply stated, the Taft analysis does not apply to this case.

In the face of obvious factual and legal distinctions between Taft and the instant case, Petitioner argues the Court of Appeals misconstrued the Taft holding by focusing on the Taft expert's "two-year old evaluation and [refusal] to render a current diagnosis," rather than Dr. Gehle's reliance on "two-year old testing and [rendering] what she claimed was a current diagnosis." In essence, Petitioner asserts this was a distinction without a difference. To the contrary, however, this distinction makes all the difference.

Initially, Petitioner's statement Dr. Gehle merely "claimed" her diagnosis was "current" blatantly misrepresents the testimony. Dr. Gehle did not "claim" her diagnosis was current; rather, on the date of trial, she testified Petitioner: "**suffers** from antisocial personality disorder;" she looked at "**current** behavior and **current** attitudes and see how he **views** the world;" "his personality disorder **predisposes** him to commit a wide variety of criminal offenses that also includes sexually violent offenses;" his propensity to commit these offenses "**is**" such that it "**is**" a menace to the health and safety of others; he "**does**" have the propensity to be dangerous and commit future sexually violent offenses; his ASPD **causes** him serious difficulty controlling his behavior; and "**he's likely**" to engage in acts of sexual violence if not confined for treatment. She further testified Petitioner "**does**" meet the legal criteria for commitment "at this time." (R., pp. 114-117). Each statement is in "present" tense, and considering Dr. Gehle's testimony in full and in context, unlike the Taft expert who would not even give an opinion, Dr. Gehle made it

¹In Taft, the State had an expert who evaluated Taft two months prior to trial, and as in this case, was prepared to testify at trial Taft currently met the criteria for civil, but the trial judge excluded his testimony.

clear that while she considered the test results for a 2012 psychological as one part of an extensive 2015 evaluation, her opinion regarding Petitioner's mental status was current as of the date of trial, which is what Taft requires.

Petitioner also claims Dr. Gehle's 2015 opinion was based on statements Petitioner made to her during the 2012 evaluation, statements "that were not re-assessed." The very testimony Petitioner quotes in the Petition as support for this claim completely belies it.

When asked if she used information Petitioner provided in 2012, Dr. Gehle testified she did. Petitioner then asked her if she re-asked the questions during the 2015 evaluation "to see if anything was different about what her would have said or taken more responsibility or less responsibility," and she responded that she "reviewed that information with him," and asked if the information was his "take on it still." (R., p. 121). Thus, rather than simply rely on Petitioner's 2012 statements as Petitioner claims, Dr. Gehle's testimony clearly establishes she did ask Petitioner about the 2012 statements during the 2015 evaluation to determine if he adhered to their content for purposes of the 2015 evaluation. Therefore, the Court of Appeals properly affirmed the circuit court on this issue.

CONCLUSION

Based on the foregoing and the Final Brief of Respondent, Respondent submits the Court of Appeals properly affirmed the circuit court's ruling, and the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
SC Bar No. 5098

BY: 
for DEBORAH R.J. SHUPE

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-0087

ATTORNEYS FOR RESPONDENT

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals by depositing a copy in the United States mail, postage prepaid, addressed to:

Susan B. Hackett
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

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

This 5th day of February, 2018.


SALLY B. ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727