ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable Carmen T. Mullen, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF GERALD BARRETT,

RESPONDENT

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FEB 13 2018
SC Court of Appeals

APPELLATE CASE NO. 2017-000085

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

The circuit court abused its discretion and erred as a matter of law in dismissing this SVPA action on the ground Respondent's conviction is on appeal, and its finding the State failed to submit sufficient evidence to establish Respondent suffers from a mental abnormality and/or a personality disorder is contrary to the evidence.

RESPONDENT'S COUNTER-STATEMENT OF THE ISSUE ON APPEAL

Whether any evidence reasonably supports the trial court's finding that the State failed to meet its burden of demonstrating probable cause where the Attorney General relied on dismissed charges, admitted it had not obtained information on other alleged charges, and told the trial judge that finding a mental abnormality was "a long shot?"

STATEMENT

The Attorney General instituted a sexually violent predator action seeking the commitment of respondent Gerald Barrett and on October 19, 2016, a probable cause hearing was held in Beaufort County before the Honorable Carmen T. Mullen. R. 111. James G. Bogle, Jr. represented the State. R. 112. James K. Falk represented respondent. R. 112. On January 9, 2017, Judge Mullen dismissed the Attorney General's case with prejudice. R. 3. The Attorney General appealed, filed its initial brief, and respondent now files this brief in response.

ARGUMENT

Evidence supports the trial court's reasonable finding that the State failed to meet its burden of demonstrating probable cause where the Attorney General relied on dismissed charges, admitted it had not obtained information on other alleged charges, and told the trial judge that finding a mental abnormality was "a long shot."

The Standard of Review

The Attorney General misstates the applicable standard of review in its issue statement. The correct standard of review of a trial judge's probable cause determination in an SVP case is well-settled. In the Matter of the Care and Treatment of Chandler, 382 S.C. 250, 256, 676 S.E.2d 676, 679 (2009). "On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding." Id. (internal quotations omitted). This Court "must consider whether any evidence reasonably supports the court's ruling." Id.

The Trial Judge Correctly Found No Probable Cause Existed

The State simply failed in its burden to prove probable cause existed in this case. While the State is not required to prove its case at the probable cause hearing and the inability to present mental health evidence does not prevent a finding of probable cause, this does not mean the trial judge must always allow the State to go forward when its proof is wholly lacking. See In re the Care and Treatment of Beaver, 372 S.C. 272, 278, 642 S.E.2d 578, 581-82 (2007) (discussing effect of State's inability to present mental health testimony at the probable cause hearing). Given the lack of evidence, arguments of counsel, and admissions by the State at the probable cause hearing, Judge Mullen's decision to dismiss this case was reasonable.

The Attorney General admitted it had trouble identifying its alleged victims. R. 114, ll. 2 – 9. The Attorney General told the trial judge his petition had the alleged victims "backwards." R. 114, ll. 2 – 9. He said, "It's hard to tell from the documents." R. 114, ll. 2 – 9. When he described the alleged offenses, he said, "Her grandmother reported that this girl may have—her granddaughter **may have been assaulted** by her daughter's boyfriend, **or something like that.**" R. 114, ll. 19 – 25 (emphasis added).

The Attorney General then asked the court to rely on a charge of contributing to the delinquency of a minor which he stated began as a criminal sexual conduct charge. R. 115, ll. 4 – 11. After admitting that contributing to the delinquency of a minor is not a sexually violent offense, the Attorney General then said "we are starting to see a pattern here." R. 115, ll. 4 – 11. Other than stating that the charge was contested as consensual sex, the Attorney General offered no supporting facts for this offense at the hearing. R. 115, ll. 4 – 11.

The Attorney General then told the court, "We **are looking for** some juvenile records. They throw things away and are hard to find." R. 115, ll. 12 – 19. He told the judge that respondent's "juvenile rap sheet" showed a **nolle prossed** first-degree CSC charge from 2001. R. 115, ll. 12 – 19 (emphasis added). He then said, "All we know right now is that the charge was made and it got nolle prossed the following year. **We don't know why. We are trying to track that down.**" R. 115, ll. 12 – 19 (emphasis added). The Attorney General has the resources of the state at its disposal and can certainly obtain assistance from the solicitor's office. No excuse exists for not being prepared and able to give the trial judge accurate information at the probable cause hearing.

The Attorney General then told the court about respondent's other convictions, none of which were sexual in nature. R. 115, ll. 20 – 23. His prison record had one disciplinary

infraction regarding a cell phone. R. 115, ll. 20 – 25. The prison record also showed no evidence of sex offender treatment and the Attorney General told the judge "we don't know why." R. 115, l. 24 – 116, l. 2.

After then telling the judge, "So, that is what we have," the Attorney General theorized that an expert would rely on respondent not being related to the alleged victim as a factor, respondent's nonsexual convictions, and charges that did not result in a conviction because the fact of an arrest or charge "suggests that something might have happened." R. 116, ll. 3 – 22.

On one of the important elements of the statute—proving a mental abnormality—the Attorney General alleged "the possibility of pedophilic disorder," but then admitted, **"That is a long shot."** R. 116, l. 23 – 117, l. 1. Contrary to the State's argument on appeal which seems to incorrectly imply that pedophilia is simply a matter of a child's age, the Attorney General at the hearing understood the disorder and candidly admitted to the trial judge that "we don't know right now, based on the information that we have seen at this stage, what these two girls look like. You know, whether they are 12 looking like 16 or they are 12 looking like ten, **we just don't know.**"[1] R. 117, ll. 1 – 10. He told the court "that is the kind of thing that we are trying to look for and see what kind of forensic record they have." R. 117, ll. 1 – 10 (emphasis added).

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[1] In its brief, the Attorney General implies respondent's attorney made an improper argument about pedophilic disorder based on the appearance of the alleged victims, calling his argument "boys will be boys." Br. App. at 12, n. 1. As this Court will see from the transcript, at the hearing, the Attorney General was the first to note this important factor for the trial judge. R. 117, ll. 1 – 10. The DSM-V's definition of pedophilic disorder states the children must be "prepubescent" and notes these children will be "generally age 13 years or younger." Diagnostic and Statistical Manual of Mental Disorders, 5th ed. at 697-700 (hereinafter "DSM-V"). The person diagnosed must be over sixteen years of age and "at least 5 years older than the child." Id. Therefore, the analysis by both the Attorney General (at the hearing) and respondent's counsel was not "boys will be boys," but correctly based on the scientific definition of the disorder. The point on appeal is that the Attorney General could have gathered the information necessary to make this distinction clear for the trial judge, but simply failed to adequately prepare.

The Attorney General admitted he could not find the forensic interviews of the alleged victims, but was "looking for" them. R. 117, ll. 11 – 19.

Respondent's counsel explained to the court that it was clear to him that the "12 year old victim is the case that was nolle prossed." R. 117, l. 24 – 118, l. 5. He informed the judge that at the trial for the underlying lewd act conviction, the jury found respondent not guilty of kidnapping.[2] R. 118, ll. 6 – 13. Respondent correctly argued that statutory rape and pedophilia are not the same thing and that for pedophilia, the person must be attracted to children without "any secondary sexual characteristics." R. 118, ll. 14 – 22. Respondent argued there was no evidence of pedophilic conduct and that a person who is "21 or 22" years old having an attraction to a 14 year old was "not a pathology, that is criminal conduct." R. 118, l. 23 – 119, l. 8. Without any evidence of a pathology, respondent argued the State made no showing that probable cause existed that respondent was one of the "worst of the worst" the statute contemplates confining. R. 119, ll. 13 – 21. See In re Thomas S., 402 S.C. 373, 376, 741 S.E.2d 27, 28 (2013) (stating that SVP Act's purpose is not to "broadly subject any dangerous person to what may be an indefinite term of confinement" and was only intended to apply to a "limited subclass of dangerous persons").

After respondent's counsel gave the procedural history of respondent's direct appeal, he argued "there is no probable cause. Because there is just some criminal conduct by a 21 year old." R. 121, ll. 1 – 9. The Attorney General then began to speculate about potential diagnoses, getting one of the definitions wrong. R. 122, ll. 5 – 16. He told the court "there is a recognized paraphilia called biastophilia that involves pedophilia and younger than legal age." R. 122, ll. 5 – 8. Respondent's attorney corrected him, stating that biastophilia applied to coercive conduct

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[2] The jury could not reach a verdict on a CSC charge at this same trial. State v. Barrett, 416 S.C. 124, 127, 785 S.E.2d 387, 388 (Ct. App. 2016).

and hebephilia was attraction to teenagers. R. 122, ll. 9 – 10. The Attorney General then told the court, "Well, we have either one. You have got the Corcephilia (phonetic)."[3] R. 122, ll. 11 – 16. The trial judge took the matter under advisement and requested a proposed order. R. 123, l. 13 – 15, l. 4.

The trial judge then issued a detailed written order finding no probable cause. R. 3. The court found "no evidence" of pedophilic disorder and noted that the State's only alleged potentially prepubescent victim was in a nolle prossed case. R. 4. The court also found "no evidence" of a pattern of paraphilic conduct. R. 5.

These findings by the trial judge were correct. The "any evidence" standard of review here is satisfied by the State's lack of evidence. Put simply, the State had ample opportunity to prepare for the probable cause hearing, but failed to do so. A trial judge cannot find probable cause to confine someone for a civil commitment trial solely based solely on the say-so of the Attorney General. The court has the right to expect the Attorney General to be prepared, not to speculate about a "long shot" diagnosis nor to tell the court it cannot find documents or evidence which are readily available.

On appeal, the Attorney General tries to portray the trial judge's dismissal as based on the lack of mental health evidence, but the court properly based its dismissal on the lack of factual evidence. Unlike mental health evidence, the Attorney General is more than capable of

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[3] "Biastophilia" or coercive disorder is not a specifically listed paraphilic disorder in the DSM-V. See DSM-V, at 685-705. The history of this controversial diagnosis shows that the American Psychiatric Association refused to endorse adding a coercive disorder diagnosis to the DSM. Robert A. Prentky, et al, Sexually Violent Predators in the Courtroom, 12 Psychol. Pub. Pol'y & L. 357, 367-68 (2006). Nor is hebephilia a specified paraphilia in the DSM-V. See DSM-V, at 685-705. Pedophilia is specifically listed, along with voyeurism, frotteuristic disorder, sexual sadism disorder, and others. Id. Under the category, "Other Specified Paraphilic Disorder," the DSM lists, *inter alia*, telephone scatologia, klismaphilia (enemas), and coprophilia (feces), but not coercive disorder. Id. at 705.

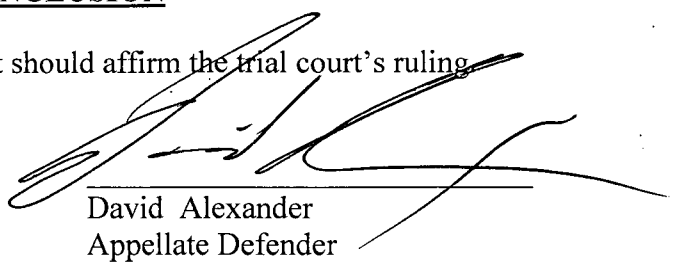
discovering every crime charged, getting the help of the solicitors, reviewing the police reports, forensic interviews, and any other evidence to support its factual contentions at the probable cause hearing. Here, the Attorney General failed to do so. Repeatedly the Attorney General told the court it was **looking for** documents or other evidence to support its contentions. The trial judge properly dismissed the case because the Attorney General asked her to speculate about the existence of evidence. This kind of error is different from the "mental health evidence" error in Beaver relied upon by the Attorney General. In an SVP case, the trial is about the mental health evidence, but the probable cause hearing would be without any meaning if the Attorney General is not required to fully research the underlying factual allegations that support its claim that a defendant must be confined before trial. The trial judge's conclusion was reasonable and based on the State's failure to present evidence to back up its claims. This Court's standard of review controls and the trial judge's finding should be affirmed.

Finally, the State spends the majority of its brief arguing the judge made a legal error in noting that respondent's direct appeal of his criminal conviction was not yet final. The Attorney General told Judge Mullen at the hearing, "Now, the problem with the appeal is, I'm not sure what to do about that, in all candor." R. 122, ll. 19 – 21. He said, "So, I really haven't got an answer there." R. 123, ll. 2 – 3. Respondent's direct appeal is over and it concluded with the Supreme Court dismissing its grant of certiorari as improvident after oral argument. State v. Barrett, Op. No. 27752, 808 S.E.2d 378 (Nov. 22, 2017). Respondent submits that if the Attorney General must bring its SVP action before the conclusion of a direct appeal because the defendant is about to be released, that is a good indication that the defendant's sentence is short and he is not one of the "worst of the worst" the Act contemplates committing. If the Supreme Court had reversed respondent's conviction, he would not have been subject to commitment and

the trial judge was rightly concerned about this fact. Regardless, this Court may affirm for any ground appearing in the record and the trial judge's conclusion that the Attorney General presented no evidence to support a probable cause finding is independent and well-supported. I'ON, LLC v. Town of Mount Pleasant, 338 S.C. 406, 420-21, 526 S.E.2d 716, 723 (2000). This Court should affirm.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's ruling.



David Alexander
Appellate Defender

ATTORNEY FOR RESPONDENT

This 13th day of February, 2018.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Respondent 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 13, 2018.

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