STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2017-000085

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

Respondent,

THE STATE OF SOUTH CAROLINA,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF 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.

STATEMENT OF THE CASE

By Petition filed September 29, 2016, Appellant State of South Carolina commenced an action pursuant to the South Carolina Sexually Violent Predator Act, S.C. Code §44-48-10 (Supp. 2005), *et seq.*, alleging Respondent meets the statutory criteria for confinement as a sexually violent predator, and seeking his commitment in a secure facility for long term control, care and treatment. The matter was called for a probable cause hearing on October 19, 2016, before the Honorable Carmen T. Mullen, Circuit Court Judge.

By Order dated January 4, 2017, which was received by Appellant on January 11, 2017, the circuit court found no probable cause to believe Respondent is a sexually violent predator and dismissed the action with prejudice. Appellant timely filed this appeal on January 13, 2017.

STATEMENT OF FACTS

On or about July 24, 2012, Respondent Gerald Barrett, Jr., was arrested and charged with two counts of second degree criminal sexual conduct with a minor, one count of lewd act on a child, and one count kidnapping, arising out of the sexual assaults of two minor females in Beautfort County, South Carolina. According to the incident reports and victim statements, Respondent forced the two minor victims to have sexual intercourse with him. He also fondled one victim's genitalia before raping her. On May 22, 2013, Respondent was convicted by a jury of lewd act on a child. (Petition filed September 29, 2016 [Petition], Exhibit C; Record on Appeal (R.), pp. 20-72).

Prior to Respondent's release from incarceration, the Multidisciplinary Team reviewed Respondent pursuant to the Sexually Violent Predator Act (SVPA), and found there was probable cause to believe Respondent is a sexually violent predator. Thereafter, the Prosecutor's Review Committee reviewed the records and also found probable cause to believe Respondent was a sexually violent predator. The Appellant State of South Carolina (the "State") then filed a Petition pursuant to the SVPA in the Beaufort County Court of Common Pleas, seeking Respondent's civil commitment to the South Carolina Department of Mental Health for long term control, care and treatment as a sexually violent predator. (Petition; R., pp. 8-110).

The Petition alleged Respondent's lewd act conviction constituted a sexually violent conviction under the SVPA, and set forth the underlying facts of the charges against Respondent. According to the records, Respondent had forced intercourse with a twelve year old female on or about April 14, 2012, and forced intercourse with fourteen year old female on or about July 3, 2012. In addition, on or about November 16, 2011, Respondent was convicted of contributing to the delinquency of a minor, arising from a six week sexual relationship with a fourteen year old

female. Further, Department of Juvenile Justice arrest records revealed Respondent was charged on or about October 1, 2001, with criminal sexual conduct with a minor, but the charge was *nolle prossed* on September 20, 2002. The Petition also set forth multiple known risk factors for sexual reoffending applicable to Respondent based on the documentation, and alleged Respondent may have the mental abnormality of pedophilia (sexual interest in prepubescent children) and/or a paraphilic disorder involving sexual coercion. The Petition sought an order finding probable cause to believe Respondent is a sexually violent predator, and appointing a qualified expert to evaluate Respondent. (Petition, pp. 1-7; R., pp. 9-15).

By Order dated October 17, 2016, the circuit court found the State's Petition set forth sufficient facts to establish probable cause to believe Respondent met the statutory criteria for commitment. (Probable Cause Order filed 10/18/2016; R., pp. 1-2). The matter was called for a probable cause hearing on October 19, 2016, before the Honorable Carmen T. Mullen, Circuit Court Judge.

At the hearing, the State reiterated the allegations set forth in the Petition, including the underlying facts of Respondent's offenses. The State also went over the list of known risk factors the State alleged applied to Respondent based on the documentation, and the mental abnormalities the State alleged might apply to Respondent based on the facts presented. (Hearing Transcript [HT], pp. 1-7, 12; R., pp. 111-117, 122).

Respondent argued "there is nothing biologically wrong with a man being attracted to a fourteen year old girl," and "statutory rape is not evidence of a paraphilia." As to the twelve year old victim, Respondent noted "she was drunk at the time," and "was maybe acting as though she was older." Respondent then stated there was "another complication" in the case because his lewd act conviction was still on appeal, and according to counsel's conversation with the

appellate counsel, "there is a real possibility that this underlying conviction gets bounced by the State Supreme Court." Finally, counsel stated he was "really pretty sure [the court appointed evaluator] is going to say there's no problem." (HT, pp. 8-10; R., pp. 118-120).

The circuit court inquired if there was an independent evaluator Respondent could use to get the evaluation done quickly. Respondent replied the statute did not provide for him getting an independent evaluation before the court appointed evaluator submitted a report, and the usual court appointed evaluator was more likely to say Respondent was not a predator than anyone else the court could appoint. (HT, pp. 11-12; R., pp. 121-122).

As to the pending appeal, the State argued the SVPA set specific time lines governing when the process started and how it was to proceed, and it did not "carve out a 'what if' as an appeal matter." The State then noted Respondent would complete his prison sentence in April 2017, and the matter could continue proceeding as required under the SVPA unless Respondent's conviction was overturned. (HT, pp. 12-13; R., pp. 122-123).

The court stated it was "concerned" about the possibility of the qualifying conviction being overturned. The court further stated "if we do find probable cause based on what I have got here, because it hasn't been overturned yet, I am concerned." (HT, p. 13; R., p. 123)

By Order dated January 4, 2017, the circuit court dismissed the State's petition with prejudice, finding Respondent's qualifying conviction was before the South Carolina Supreme Court, and because "there is possibility (sic) that the underlying criminal conviction may be remanded for further proceedings, it is not ripe for a determination of whether Respondent has been convicted of a sexually violent offense. The court further found the State failed to present evidence to establish probable cause to believe Respondent suffers from a pedophilic or paraphilic disorder. (Order of Dismissal filed January 9, 2017; R., pp. 3-5).

On January 13, 2017, the State received written notice of the Order of Dismissal filed January 9, 2017. The State timely filed this appeal on January 13, 2017.

ARGUMENT

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.

The circuit court dismissed this SVPA action on two grounds: 1) Respondent's underlying conviction might be overturned on appeal, and therefore, "it is not ripe for a determination of whether Respondent has been convicted of a sexually violent offense; and 2) the State presented no evidence Respondent has a mental abnormality. (Order of Dismissal, ¶¶4-8; R., pp. 4-5) The circuit court erred as a matter of law by ignoring the effect of appeals on convictions, and then essentially requiring the State to present evidence establishing Respondent **in fact** has a mental abnormality beyond a reasonable doubt, rather than applying the appropriate probable cause analysis. The court's analysis was fundamentally flawed, and its decision should be reversed.

The SVPA defines "sexually violent predator" as a person who has 1) been convicted of a qualifying sexual offense, and 2) suffers from a mental abnormality or personality disorder which makes him likely to commit further acts of sexual violence if not confined for treatment. S.C. Code §44-48-30(1) (Supp. 2016). At a probable cause hearing, the court must "determine whether probable cause exists to believe that the person is a sexually violent predator." S.C. Code §44-48-80(B)(3) (Supp. 2016). At the probable cause hearing, the State may rely upon the petition, or supplement it with additional documentary evidence or live testimony. S.C. Code §44-48-80(B) (Supp. 2016).

"'In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe

and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator.'" In the Matter of the Care & Treatment of Chandler, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (*quoting* In re the Care and Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 122–23 [Ct.App.2007]). "'Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" *Id.* at 123 (*quoting* Texas v. Brown, 460 U.S. 730, 742 [1983]). "The very term itself, 'probable cause,' does not import absolute certainty." *Id.* at 122. If the circuit court finds probable cause, a full psychiatric examination is required to determine whether the person **in fact** suffers from a mental abnormality or personality disorder meeting the statutory criteria for commitment under the SVPA. S.C. Code §44-48-80(D) (Supp. 2016).

A. Effect of Pending Appeal on Conviction

Prior to conviction and sentence, a defendant is cloaked with a presumption of innocence, but after conviction, the presumption of innocence yields to the verdict and judgment of guilt, and there is a legal presumption the conviction is just, which is **not destroyed or abrogated by appeal**. State v. Whitener, 225 S.C. 244, 81 S.E.2d 784, 786 (1954) (Stukes, J. dissenting) (*citing* Parker v. State Highway Department, 224 S.C. 263, 78 S.E.2d 382 [1953]); *see also* Berman v. United States, 302 U.S. 211, 212 (1937) ("Final judgment in a criminal case means sentence."); State v. Prater, 27 S.C. 599, 4 S.E. 562, 563 (1888) (appeal in a criminal case has no effect on the judgment, which stands unaffected by the appeal until judgment is reversed); Rule 246(a), SCACR (service of notice of appeal by criminal defendant operates as stay of execution of sentence, however, sentence of confinement is not stayed until the defendant posts appeal bond); Rule 246(b), SCACR (no stay of sentence in a criminal case may be granted after conviction has been affirmed by an appellate court, except by order of appellate court or judge or justice thereof).

In this case, the South Carolina Court of Appeals affirmed Respondent's lewd act conviction in a published opinion filed March 23, 2016. State v. Barrett, 416 S.C. 124, 785 S.E.2d 387 (Ct. App. 2016). After the Court of Appeals denied his Petition for Rehearing by Order filed May 20, 2016, Respondent petitioned for a writ of certiorari to the Court of Appeals, which was granted by the Supreme Court on May 24, 2017. Thus, Respondent's conviction is final unless the Supreme Court reverses the Court of Appeals, and his pending appeal does not preclude the State from moving forward in accordance with the SVPA.

If a pending appeal that **may** overturn a conviction supersedes the specific time lines set forth in the SVPA, then a pending post-conviction relief case or federal habeas action attacking the conviction would also arguably supersede the SVPA. In short, the matter will never be "ripe" for SVPA proceedings until the defendant exhausts every possible avenue for attacking the conviction, which may continue years after the defendant is released from custody and is free to sexually offend again. Such a result is absurd, and would serve to drastically undermine the legislative intent of the SVPA to protect the public from individuals who have a mental abnormality that makes them likely to reoffend sexually. *See* In the Matter of the Care and Treatment of Chapman, 419 S.C. 172, 796 S.E.2d 843, 849 (2017) (court will not construe a statute in a way which leads to an absurd result or renders it meaningless) (*citing* Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578, 581 (2000) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature."); In the Matter of the Care and Treatment of Valentine, 377 S.C. 244, 659 S.E.2d, 229-230 (Ct. App. 2008) (SVPA provides for involuntary civil commitment of sexual violent predators who are mentally abnormal and extremely dangerous); S.C. Code § 44-48-20 (Supp. 2016) (legislative findings).

Nothing in the SVPA provides for delay if an appeal is pending. The circuit court erred as a matter of law in finding the matter was not "ripe" for a determination of whether Respondent had been convicted of a sexually violent offense in light of the pending appeal. As of the date of the probable cause hearing, and as of the date of this brief, Respondent stands convicted of a sexually violent offense, and the ruling on that ground should be reversed.

B. State's Evidence

The circuit court also found the State failed to present any evidence Respondent suffers from a pedophilic or paraphilic disorder, and therefore, there was insufficient evidence for a reasonable person to believe and conscientiously entertain suspicion Respondent suffers from any mental abnormality or personality disorder. While acknowledging the probable cause standard, the court applied a much higher, and inaccurate, standard in reaching this conclusion.

> Pursuant to the SVP Act, and particularly S.C.Code Ann. §44-48-80(D) (Supp.2006), the State is not able to require a mental examination of the offender until a judge, after a hearing, has found that there is probable cause to believe the offender is a sexually violent predator. Therefore, **the State is generally unable to produce any mental health information at the probable cause hearing because probable cause must first be found by a judge at the hearing before such evidence can be obtained. The State's inability to provide mental health evidence does not prevent a finding of probable cause.**

In the Matter of the Care & Treatment of Beaver, 372 S.C. 272, 642 S.E.2d 578, 582 (2007) (emphasis added). Thus, at probable cause hearings under the SVPA, the State must establish there is a reason to believe the person named in the petition suffers from a mental abnormality or personality disorder that causes him serious difficulty controlling his behavior, and makes him likely to commit future acts of sexual violence. The State must generally establish this fact without the benefit of an evaluation by a mental health expert, so by necessity, the State is left to present possible mental diagnoses based on a lay person's view of the evidence and the diagnoses that may fit the evidence.

At the probable cause hearing in this case, the State went over the details of Respondent's lewd act conviction, as well as the *nolle prossed* criminal sexual conduct with a minor charge. Contrary to the court's finding the *nolle prossed* offense was not evidence of a pedophilic disorder, under the express terms of the SVPA, **any** relevant "offenses" can be considered for probable cause purposes. *See* In the Matter of the Care and Treatment of White, 375 S.C. 1, 649 S.E.2d 172, 175 (Ct. App. 2007) (SVPA does not limit consideration of criminal offenses to convictions, and the circuit court can consider any prior relevant offenses which may be contained in the State's petition). Clearly, Respondent's criminal sexual conduct with a prepubescent minor was a "relevant" offense for purposes of a probable cause determination.

The State also informed the court Respondent had a prior conviction for contributing to the delinquency of a minor, and a possible juvenile charge of first degree criminal sexual conduct with a minor. The State advised the court Respondent had some nonsexual offenses, he had one disciplinary infraction while incarcerated, and he had received no sex offender treatment. (Hearing Transcript [HT], pp. 3-6; R., pp. 113-116).

In addition to Respondent's established pattern of sexual misconduct with minors, the Petition, and the State at the hearing, listed known risk factors for sexual reoffending applicable to Respondent based on the evidence. Those factors included multiple victims, non-family victims, prior sexual and nonsexual convictions, length of sexual offending of one to six years, force or threat of force used, and victims between the ages of thirteen and fifteen. (Petition, p. 4, HT, p. 6; R., pp. 12, 116).

The Petition alleged the possibility of a pedophilia diagnosis, which involves a sexual interest in prepubescent children, and a paraphilic disorder diagnosis, which involves recurrent and intense sexual urges over a period of at least six months, and the person has acted on those

urges with a nonconsenting person. (Petition, Exhibit H and Exhibit I; R., pp. 104-110). At the hearing, the State suggested possible diagnoses of pedophilia, biastophilia (sexual interest in coercive acts), and hebephilia (sexual interest in adolescents). (HT, pp. 6-7, 12; R., pp. 116-117, 122).

Significantly, the same circuit court judge (Mullen) signed the Probable Cause Order on October 17, 2016, specifically finding the Petition set forth "probable cause to believe the Respondent meets the criterial to be a sexually violent predator pursuant to the statute, and the State of South Carolina has established sufficient evidence to require that the Respondent be taken into custody and confined in a secure facility, and a hearing be held to allow Respondent to contest probable cause as to whether Respondent is a sexually violent predator." (Probable Cause Order dated 10/17/2016, p. 1; R., p. 1). Given the fact the same judge presided over the probable cause hearing two days later, and the State primarily relied on the Petition in arguing for probable cause, Respondent's evidence to "contest" probable cause bears particular scrutiny.

In essence, Respondent argued: 1) the *nolle prossed* charge should not be considered because the prosecutor declined to proceed to trial; 2) the twelve year old victim was drunk and "maybe acting as though she was older;" 3) there is nothing "biologically wrong with a man being attracted to a fourteen year old girl;[1] and 4) his qualifying conviction was on appeal, the appellate lawyer said there was a "real possibility" the conviction would be overturned by the Supreme Court,[2] and it was "really going to be a problem if he got caught up in the SVPA system and his conviction was reversed." (HT, pp. 7-10; R., pp. 117-120). Other than consideration of the *nolle prossed* criminal sexual conduct with a minor charge (discussed above), Respondent's contestation consisted of blaming the twelve year old victim, contending it

[1] In other words, boys will be boys.

[2] It goes without saying the State's appellate counsel has a very different opinion regarding the merits of Respondent's appeal.

was normal to be attracted to a fourteen year old girl, and depending on the "possibility" his conviction might be overturned on appeal. None of those arguments countered the State's evidence of his pattern of behavior toward minor females.

The only real change between October 17, 2016, and October 19, 2016, was Respondent advising the circuit court about the pending appeal, and the court's comments at the hearing indicate the appeal was the deciding factor. After inquiring about the possibility of getting an evaluation done quickly, the court stated: "I'm concerned if I say that is the basis for - - or one of the strongest basis for the underlying probable cause, and if that's taken away, I would agree that there still has to be some kind of - - if we do find probable cause based on what I have got here, because it hasn't been overturned yet, I am concerned." (HT, pp. 11-13; R., pp. 121-123).

The evidence presented in the Petition and at the hearing indicated Respondent engaged in forced sexual intercourse with two minor females on separate occasions in 2012, he engaged in sexual intercourse with another minor female over a period of six weeks in 2011, and he was charged with first degree criminal sexual conduct with a minor in 2001. In addition, in spite of his history and incarceration, Respondent never had any sex offender treatment. Contrary to the circuit court's findings, there was sufficient evidence of a pattern of sexual misconduct toward minors to give a reasonable person a reason to believe Respondent suffers from a mental abnormality or personality disorder that causes him serious difficulty controlling his behavior, and makes him likely to commit future acts of sexual violence. There is no evidence supporting the circuit court's finding the State presented no evidence indicating Respondent has a mental abnormality or personality disorder, and therefore, the circuit court abused its discretion and should be reversed.

CONCLUSION

Based on the foregoing, Appellant State of South Carolina respectfully submits the Order of Dismissal finding no probable cause and dismissing the Petition should be reversed, and the matter remanded to the circuit court for further proceedings under the Sexually Violent Predator Act.

Respectfully submitted,

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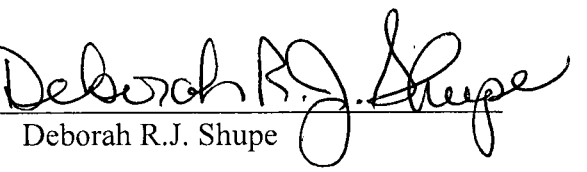
BY: 
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February 15, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

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

Respondent,

THE STATE OF SOUTH CAROLINA,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant 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."

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February 15, 2018