

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF GARY LEE BURRIS,

APPELLANT

ORIGINAL
RECEIVED
JUL 31 2018
SC Court of Appeals

APPELLATE CASE NO. 2017-002497

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court err in refusing to direct a verdict for appellant where the State's expert witness testified that the most reliable actuarial risk table only predicted appellant, who is over sixty years old and has had a stroke, had only a 3.9% chance to reoffend within five years?

STATEMENT OF THE CASE

The Attorney General sought appellant's commitment as a sexually violent predator and on December 4, 2017, appellant was tried in York County before the Honorable John C. Hayes, III, and a jury. R. 24. James G. Bogle, Jr. represented the Attorney General and Anna Rawl Browder represented appellant. R. 24. The jury found appellant met the statutory definition of a sexually violent predator and Judge Hayes ordered him committed. R. 148, l. 9 – 150, l. 2. This appeal follows.

STANDARD OF REVIEW

“When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law.” McKaughan v. Upstate Lung & Critical Care Specialists, P.C., 421 S.C. 185, 189, 805 S.E.2d 212, 214 (Ct. App. 2017) quoting Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188, 691 S.E.2d 170, 173 (Ct. App. 2010). “When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party.” Id. “The trial court must deny a directed verdict motion where the evidence yields more than one inference or its inference is in doubt.” Id.

ARGUMENT

In this sexually violent predator case, the trial court erred in refusing to direct a verdict for appellant because the State's expert witness testified that the most reliable actuarial risk table only predicted appellant, who is over sixty years old and has had a stroke, had only a 3.9% chance to reoffend within five years.

Only one witness testified at appellant's trial, the forensic psychiatrist, Dr. Donna Schwartz Maddox ("Maddox"). R. 47, ll. 1 – 13. The Department of Mental Health paid Dr. Maddox \$4,000.00 to evaluate appellant. R. 86, ll. 12 – 20. She opined that appellant's mental abnormality is pedophilia based on two offenses against children—one from 2009 and another from 2015. R. 72, l. 11 – 74, l. 25. R. 58, ll. 22 – 24. R. 66, ll. 9 – 13. Her ultimate opinion was that appellant's pedophilia made him sufficiently dangerous that he needed to be committed. R. 83, l. 22 – 86, l. 3.

Dr. Maddox used an actuarial instrument called the Static 99-R to measure appellant's risk to reoffend. R. 75, l. 20 – 79, l. 22. The Static 99-R compared 8,000 men with sexual offenses and attempted to identify common characteristics. R. 75, l. 20 – 79, l. 22. Offenders are given points for negative characteristics and points are subtracted for protective characteristics, meaning the higher the score, the more dangerous the offender. R. 75, l. 20 – 79, l. 22. The range of scores on the Static 99-R is from -3 to 12. R. 75, l. 20 – 79, l. 22.

Appellant only scored a 1. R. 75, l. 20 – 79, l. 22. This score placed appellant in the category of "below average risk to reoffend." R. 79, ll. 4 – 6. Appellant's score of 1, according

to the actuarial table, meant he had only a 3.9% chance of committing another sexual offense within five years.¹ R. 104, l. 22 – 105, l. 16.

Appellant is in his sixties. R. 78, ll. 13 – 23. In 2014, appellant had a stroke. R. 75, ll. 12 – 13. He has high blood pressure and high cholesterol. R. 75, ll. 14 – 19. He is on disability. R. 91, ll. 13 – 14.

Appellant only had two offenses of a sexual nature. R. 56, ll. 9 – 12. R. 62, ll. 7 – 25. The first was a conviction for third-degree criminal sexual conduct which the State pled down from first-degree CSC with a minor on a negotiated sentence for ten years. R. 91, l. 20 – 93, l. 8. On his second charge, the State pled a third-degree CSC case down to a two-year sentence for first-degree assault and battery. R. 93, l. 18 – 94, l. 23. Dr. Maddox agreed with defense counsel that appellant “was a turn around at SCDC.” R. 93, l. 24 – 94, l. 1.

The State rested its case after Dr. Maddox testified. R. 113, ll. 5 – 12. R. 118, ll. 1 – 5. Appellant moved for a directed verdict. R. 113, ll. 13 – 22. Appellant argued that even viewing the evidence in the light most favorable to the State, Dr. Maddox found appellant on the Static 99 to have only a 3.9% chance to reoffend and this did not “rise to the level to get it to the jury” R. 113, ll. 13 – 22.

The Attorney General argued that the Static 99-R score was “one part of a comprehensive evaluation” and cited Dr. Maddox’s testimony discounting the effect of appellant’s age, which lowered his score. R. 113, l. 24 – 114, l. 17. When Dr. Maddox explained appellant’s score to the jury, she testified that his age lowered his score by three points because typically an offender’s risk to reoffend decreases with age. R. 80, l. 11 – 81, l. 16. She claimed appellant

¹ Dr. Maddox testified on direct-examination appellant’s score meant he had a 4.7% chance to reoffend, but admitted on cross-examination this figure was a mistake and she had cited the margin of error. R. 79, ll. 17 – 22. R. 104, l. 22 – 105, l. 16.

was not a typical offender and the low Static 99-R score did not represent his true risk because appellant committed a sexual offense after turning sixty. R. 80, l. 11 – 81, l. 16. Judge Hayes denied the directed verdict motion. R. 114, ll. 12 – 17. The court also denied appellant’s renewal of the motion at the end of the case. R. 149, l. 15 – 150, l. 1.

The trial judge erred in denying appellant’s directed verdict motion. In an SVP case, the Attorney General must prove the person is “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 Attorney General must prove this element beyond a reasonable doubt. S.C. Code Ann. § 44-48-100(A). Here, the Attorney General’s proof failed on appellant’s likelihood to reoffend.

No reasonable juror could conclude that a 3.9% chance to reoffend within five years satisfies the likelihood of reoffending element. See State v. Bennett, 415 S.C. 232, 237, 781 S.E.2d 352, 354 (2016) (“Accordingly, in ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt.”). The five-year recidivism rate for all inmates released by SCDC for 2012, the last year available, was 30.9%, nearly eight times higher than appellant’s risk.² “The purpose of the SVPA is to involuntarily commit only a limited subclass of dangerous persons and not to broadly subject any dangerous person to what may be an indefinite term of confinement.” In re Thomas S., 402 S.C. 373, 741 S.E.2d 27 (2013) (internal quotations omitted) (emphasis added).

² This data is from the Department of Corrections’ website.
<http://www.doc.sc.gov/research/SpecialReports/RecidivismRatesOfInmatesReleasedDuringFY2010-FY2014.pdf>.

As appellant's score on the Static 99-R and low risk to reoffend shows, appellant is not in this "limited subclass of dangerous persons" and his case should never have been submitted to the jury. Appellant is over sixty years old, has had a stroke, is disabled, and poses no significant risk to the community. The trial judge erred in not directing a verdict. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and order him released from confinement.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of July, 2018.

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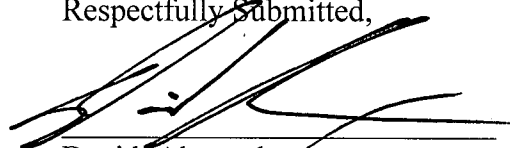
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gary L. Burris states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before the Honorable John C. Hayes, III, which was held on November 4-5, 2017, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Gary L. Burris.

Respectfully Submitted,



David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 31st day of July, 2018.

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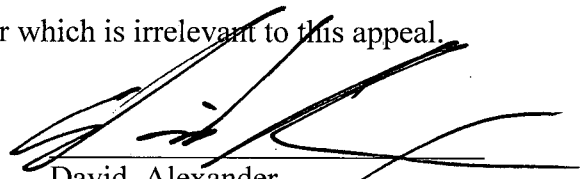
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript (November 4-5, 2017)

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2018



David Alexander
Appellate Defender

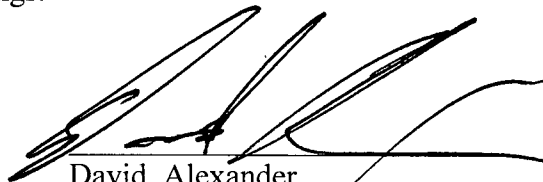
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ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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."

July 31, 2018.

A handwritten signature in black ink, appearing to read 'David Alexander', is written over a horizontal line.

David Alexander
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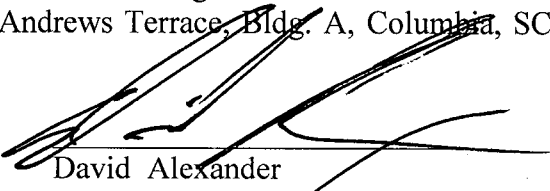
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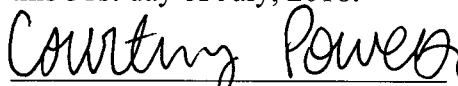
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Gary L. Burris, at Correct Care, 1700 St. Andrews Terrace, Bldg. A, Columbia, SC 29210, this 31st day of July, 2018.


David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of July, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.