STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Fairfield County

Daniel D. Hall, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF JOHNNY JAMES COOK,

APPELLANT

APPELLATE CASE NO. 2018-001174

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in allowing the defense expert to testify about the details of petitioner's convictions because such testimony was inadmissible hearsay?

STATEMENT OF THE CASE

The Attorney General sought appellant's commitment as a sexually violent predator and on June 18, 2018, appellant was tried before the Honorable Daniel D. Hall and a jury. R. 13. James G. Bogle, Jr. represented the Attorney General and Geoffry Dunn represented appellant. R. 13. The jury found appellant was a sexually violent predator and appellant was indefinitely committed. R. 173. This appeal follows.

STANDARD OF REVIEW

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

ARGUMENT

The trial court erred in allowing the defense expert to testify about the details of petitioner's convictions because such testimony was inadmissible hearsay.

Appellant moved in limine prior to opening statements to prohibit the Attorney General's expert witness from testifying about the contents of documents she reviewed because such documents were hearsay. R. 51. Appellant argued that the police reports, witness statements and "reading between the lines on what happened at the plea hearings" all constituted inadmissible hearsay. R. 51. Defense counsel asked the trial judge to exclude this hearsay when the Attorney General's expert took the stand. R. 51.

The Attorney General argued that this hearsay was admissible under Rule 703, SCRE, because the expert reviewed it and relied on it to reach her opinion. R. 51-52. The Attorney General cited three cases that it believed made it "pretty clear" that the hearsay was allowed. R. 51-52. The Attorney General cited: (1) In the Matter of Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); (2) In the Matter of Corley, 365 S.C. 252, 616 S.E.2d 441 (Ct. App. 2005); and In the Matter of Ettel, 377 S.C. 558, 660 S.E.2d 285 (Ct. App. 2008). Judge Hall denied appellant's motion. R. 52-53.

Dr. Donna Schwartz Maddox ("Maddox") was the Attorney General's only witness. R. 69. She only met with appellant for one-and-a-half hours. R. 75. She diagnosed appellant with Antisocial Personality Disorder. R. 101. She also diagnosed appellant with "Unspecific Paraphilic Disorder." R. 102. She did not diagnose appellant with more specific paraphilias because appellant denied committing the underlying offenses related to these paraphilias and had pled no contest. R. 102-103. Despite not diagnosing appellant with any other specific

paraphilias, Dr. Maddox then told the jury that appellant had pedophilia, exhibitionism, voyeurism, and frotteuristic disorder. R. 102-103.

On cross-examination, Dr. Maddox was forced to admit that the actuarial table used to predict reoffense rates among sex offenders only showed a 27% chance that appellant would commit another sexual offense in the next five years. R. 120-121. Dr. Maddox initially testified that appellant did not complete sex offender treatment in the prison, but was confronted with records showing he did complete treatment. R. 121-122. She also was forced to agree that charges for indecent exposure in prison were not uncommon. R. 125-127.

Appellant testified in his own defense and explained that he only pled guilty to the offenses described by Dr. Maddox so he could get out of jail. R. 138-142. He had a plan to live with a friend if released. R. 144-145. He was subject to GPS monitoring and sex offender registration. R. 143-145. He planned to seek mental health treatment in Winnsboro. R. 143.

When Dr. Maddox began testifying about the details of appellant's convictions based solely on hearsay, appellant renewed his objection, which was overruled. R. 81. The trial court erred in allowing this testimony. While Rule 703, SCRE allows some hearsay to be admitted through an expert, it does not suspend all operation of the hearsay rules and the trial judge must evaluate the proposed evidence for reliability. Watson v. Ford Motor Co., 389 S.C. 434, 449, 699 S.E.2d 169, 177 (2010) ("The trial court must examine the substance of the testimony to determine it if is reliable, regardless of whether the expert evidence is scientific, technical, or other specialized knowledge."). All expert testimony must pass the reliability test when the trial court conducts its initial gatekeeping function. Watson at 449, 699 S.E.2d at 177.

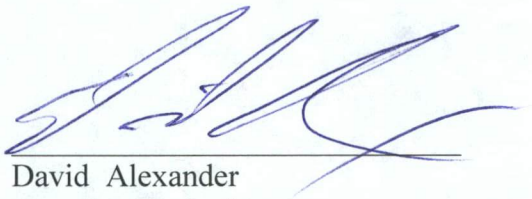
The Attorney General relied on the Ettel line of cases to argue that hearsay is always admissible if the expert states that she relies on them in making their conclusions. See Ettel at

562, 660 S.E.2d at 287 ("These offenses can include both convictions and offenses not resulting in convictions as long as they are relevant to the determination of whether a person is a sexually violent predator."). See also In the Matter of Chandler, 382 S.C. 250, 676 S.E.2d 676 (2009); White v. State, 375 S.C. 1, 649 S.E.2d 172 (Ct. App. 2007). Watson was decided in 2010, after the principal cases discussing this type of evidence in the SVP context were decided. Watson emphasizes the trial court's gatekeeping role and the reliability requirement.

Rule 703 cannot be a limitless exception to the hearsay rule that circumvents the reliability requirement in SVP cases. In Watson, testimony about a known physical phenomenon—electromagnetic interference—was held unreliable from an electrical engineer as it related to cruise control systems. Watson at 449-53, 389 S.E.2d at 177-79. The engineer had no experience with cruise control systems. Id. The Supreme Court reversed, holding that the trial court should have exercised its gatekeeping role to prevent admission of this evidence. Id. Just like in Watson, the expert here's complete lack of independent investigation or verification makes the hearsay evidence unreliable and inadmissible. This Court should reverse.

CONCLUSION

For the foregoing reasons, this Court should reverse appellant's commitment and remand this matter for a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of February, 2019.

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Johnny James Cook 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 Daniel D. Hall, which was held on June 18-19, 2018, 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 Johnny James Cook.

Respectfully Submitted,

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

This 26th day of February, 2019.

STATE OF SOUTH CAROLINA

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APPELLANT

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

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

(1) Preliminary Hearing (August 29, 2017)
(2) Trial Transcript (June 18-19, 2018)

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

February 26, 2019

David Alexander
Appellate Defender

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

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."

February 26, 2019.

David Alexander
Appellate Defender

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APPELLANT

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 Johnny James Cook, at 4546 Broad River Road, Columbia, SC 29210, this 26th day of February, 2019.

David Alexander
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 26th day of February, 2019.

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