

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

G. Edward Welmaker, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF CALVIN J. YAWN,

APPELLANT

APPELLATE CASE NO. 2012-210426

FINAL BRIEF OF APPELLANT

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SC COURT OF APPEALS

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Oconee County

R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WALTER GOODINE,

APPELLANT

Appellate Case No. 2012-212261

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Yawn's motion for a directed verdict when the state appointed forensic psychologist who evaluated Yawn said he would not benefit from treatment; this meant that Yawn did not meet the elements of the Sexually Violent Predator Act which requires that the person need long term control, care, and treatment?

STATEMENT OF THE CASE

In September 2002, the Anderson County Grand Jury indicted Calvin John Yawn on the charge of committing a lewd act on a child under sixteen in 1995. In October 2002, the Anderson County Grand Jury indicted Yawn on the charge of committing a lewd act on a child in 2000. On February 14, 2003, Yawn pled guilty to two counts of committing a lewd act on child. He was sentenced to eight years suspended to the service of ninety days and five years probation. (See Plaintiff's Exhibits 1 and 2.) In May 2010, the Greenville County Grand Jury indicted Yawn on the charge of committing a lewd act on a child in March 2009. On October 6, 2010, Yawn pled guilty to the charge, and was sentenced to ten years suspended to time served of 479 days. (See Plaintiff's Exhibit 4). In October 2010, the Greenville County Grand Jury indicted Yawn on the charge of committing a lewd act on a child. On February 2, 2011, Yawn pled guilty to the charge, and was sentenced to three years. (See Plaintiff's Exhibit 3).

Prior to his release, he was referred to the MultiDisciplinary Team for a probable cause determination. Probable cause was found, and Marie Gehle, Ph.D. was appointed to complete an evaluation on Yawn to determine if he met the legal criteria to be a sexually violent predator (SVP) pursuant to the SVP Act. Dr. Gehle determined that he met the legal criteria. On March 19, 2012, Yawn proceeded to trial before the Honorable G. Edward Welmaker and a jury. Yawn was represented by Elizabeth Wiygul, and the state was represented by Lloyd V. Flores, Jr. The jury found that Yawn was a sexually violent predator. Judge Welmaker issued an order committing Yawn to the SVP Program at DMH for long-term control, care and treatment. Yawn's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in denying Yawn's motion for a directed verdict when the state appointed forensic psychologist who evaluated Yawn said he would not benefit from treatment; this meant that Yawn did not meet the elements of the Sexually Violent Predator Act which requires that the person need long term control, care, and treatment.

Calvin Yawn was accused of fondling the penis of a five year old boy in 1995 where Yawn was a friend of the family. Yawn allegedly put his hand in the boy's pants while the boy played computer games. R. 38, ll. 1 – 20. When the boy told his father and grandmother, they brought Yawn over and they all confronted the boy who started crying and recanted his story. No charges were filed at that time. R. 38, ll 21 – R. 39, ll. 8.

When this same boy was nine years old, Yawn was at the lake with the boy and the boy's father. Yawn allegedly started tickling the boy and his friend, and put his hand in the boy's bathing suit and started fondling the boy's penis. R. 39, ll. 9 – 25. Yawn pled guilty to both the lake incident and the 1995 incident on February 14, 2003. He was sentenced to eight years suspended to ninety days and five years probation. Yawn was also ordered to attend sex offender counseling. R. 40, ll. 1 – 25.

In March 2009, Yawn allegedly fondled the penis of an eight year old boy who was visiting Yawn's stepdaughter. Yawn walked the boy home, and reached inside the boy's pants when they arrived at the boy's doorsteps. The boy told his mother immediately, and Yawn was charged. Yawn pled guilty and was sentenced to ten years suspended to time served of 479 days and five years probation. R. 42, ll. 7 – R. 44, ll. 14.

Sometime between January 1, 2009 and April 30, 2009, Yawn fondled the penis of the eight year old nephew of Yawn's wife when Yawn and the boy took showers together. Yawn pled guilty and received a three year sentence. R. 44, ll. 18 – R. 46, ll. 20.

Dr. Marie Gehle testified that she evaluated Yawn for the SVP Program pursuant to a court ordered appointment. R. 32, ll. 1 – R. 33, ll. 23. Her opinion was that Yawn suffered from the mental abnormality of pedophilia, sexually attracted to males, non-exclusive type because he also had a relationship with his wife. R. 53, ll. 7 – R. 54, ll. 6.

Dr. Gehle testified that her opinion was that Yawn had the propensity to commit future sexually violent offenses, and he was likely to do so unless he was confined in a secure facility for long-term control, care, and treatment. R. 55, ll. 1 – R. 57, ll. 14.

However, Dr. Gehle also testified that Yawn told her in his interview that he planned to return to live with his wife and female children, and had a job available to him. He told Dr. Gehle that he did not need sex offender counseling as he was not concerned with sexually re-offending. R. 47, ll. 2 – R. 48, ll. 24.

On cross examination, Yawn's attorney asked Dr. Gehle what treatment she would recommend for Yawn. Dr. Gehle responded:

I don't necessarily make treatment recommendations, but in this case right now, Mr. Yawn is denying that he committed any offenses. So I don't know that he'd benefit from treatment.

R. 61, ll. 23 – R. 62, ll. 5.

The attorney said: "So you don't believe he'd benefit from treatment?" Dr. Gehle replied: "I don't know that he would." R. 62, ll. 6 – 7.

Yawn's counsel then asked Dr. Gehle what was the yearly cost of a resident in the SVP Program. The state objected that the cost was not relevant. Respondent's attorney argued:

Your honor, just she's stating he would not benefit from treatment, yet she wants to commit him to this program for treatment. So I'm trying to figure out what is available that she wants him to get there.

R. 63, ll. 1 – 12.

The judge overruled the state's objection. Respondent's attorney asked the question again to which Dr. Gehle responded that she did not know for sure but she would guess about forty-five thousand dollars a year. Respondent's attorney then began to show her the exhibit marked Respondent's Exhibit 5 (The Nerve Article). R. 63, ll. 5 – 25.

The state asked to take up a matter outside the presence of the jury. The state argued the article marked Respondent's 5 described how sex offender treatment costs had skyrocketed. The state argued that it was from a website. R. 64, ll. 3 – 25. Respondent's attorney then offered an article from the newspaper, The Post and Courier. R. 65, ll. 1 – 25.

The judge asked how these documents related to the issue before the court. The attorney argued that the yearly cost was seventy-one thousand dollars. She argued that it would be a "circular waste of money" to spend seventy-one thousand dollars on someone who would not benefit from treatments Dr. Gehle stated. The state argued that the costs were outside the scope of this trial. R. 66, ll. 1 – R. 69, ll. 12. The judge said the issue was about treatment and how the cost related to treatment. The judge said the pertinent thing was "what do you get for the dollar?" R. 69, ll. 13 – 25.

The judge allowed Yawn's attorney to ask Dr. Gehle one more questions about costs. R. 69, ll. 1 – 21. Yawn's attorney showed Dr. Gehle the executive Summary from a

committee appointed by the General Assembly to study the SVP Act . (Respondent's 8.) Dr. Gehle said the cost in 2005 was forty-six thousand dollars. The attorney asked her about the other recommendations the committee made concerning the SVP Act. One recommendation was for the state to provide treatment for sex offenders while they were in prison. Dr. Gehle confirmed that Yawn was not offered any treatment while he was in prison. R. 72, ll. 13 – R. 73, ll. 21.

In describing the treatment offered in the SVP Program, Dr. Gehle said treatment was cognitive behavioral which meant group therapy for two hours once a week. R. 77, ll. 14 – R. 78, ll. 18.

Yawn's counsel then introduced Respondent's 7 which was a document produced by the Attorney General's Office which stated that sexually violent predators were committed to the SVP Program for **intensive** [emphasis added] treatment. Dr. Gehle admitted that group therapy once a week was not necessarily intensive treatment. R. 79, ll. 18 – R. 80, ll. 22.

At the close of the state's case, Yawn's attorney moved for a directed verdict (DV) on the basis that Dr. Gehle's testimony was that Yawn would not benefit from treatment, and the statute specifically stated that commitment would be for control, care and treatment. The judge denied the DV motion. R. 84, ll. 1 – 3; R. 85, ll. 23 – R. 86, ll. 12.

Yawn testified that when he pled guilty, his attorney did not say anything about the SVP Act or involuntary commitment. R. 93, ll. 10 – 25; R. 97, ll. 1 – 24.

After the jury's verdict, Yawn's attorney moved for a judgment notwithstanding the verdict (JNOV). The judge ruled that this was a factual issue for the jury, and he denied the JNOV. R. 121, ll. 1 - R. 123, ll.24.

A trial judge should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. Id.; State v. Cherry, 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). Unless there is a total failure of competent evidence as to the charges alleged, refusal by the trial judge to direct a verdict of acquittal is not error. State v. Arnold, 361 S.C. 386, 605 S.E.2d 529 (2004). A defendant is entitled to a directed verdict when the state fails to produce evidence of the offense charged. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

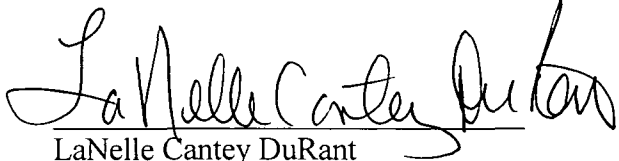
In State v. Gracely, 731 S.E.2d 880 (2012), the Supreme Court wrote that a trial court examines a request for a directed verdict on the existence or non-existence of evidence, and that if there is any direct or substantial circumstantial evidence reasonably tending to prove the defendant's guilt, the case must be submitted to the jury. Citing State v. Weston, 367 S.C. 279, 292-293, 625 S.E.2d 641, 648 (2006).

The state did not prove the second element of the SVP Act that Yawn should be committed for long-term treatment. The state appointed examiner testified that Yawn would not benefit from treatment. The state would be wasting money sending Yawn to the SVP Program. As Yawn's attorney argued in her closing, the state was not trying to commit Yawn for treatment, but only for control. R. 107, ll. 1 – 10. The commitment would have to be for treatment in order to avoid double jeopardy because Yawn had already served his sentence.

CONCLUSION

Based on the above, the order of commitment should be vacated, and Yawn should be released.

Respectfully submitted,

A handwritten signature in cursive script that reads "LaNelle Cantey DuRant". The signature is written in black ink and is positioned above a horizontal line.

LaNelle Cantey DuRant
Appellate Defender

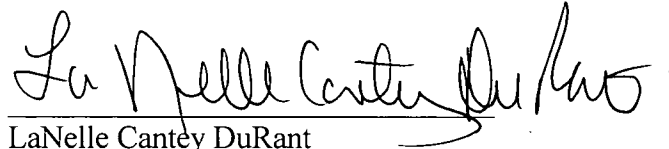
ATTORNEY FOR APPELLANT

This 14th day of March, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

March 14, 2013

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long, sweeping tail on the "t" of "DuRant".

LaNelle Cantey DuRant
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STATE OF SOUTH CAROLINA

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G. Edward Welmaker, Circuit Court Judge

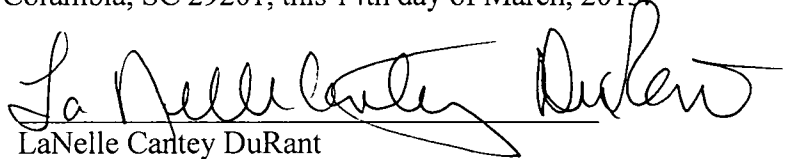
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APPELLANT

APPELLATE CASE NO. 2012-210426

CERTIFICATE OF SERVICE


The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of March, 2013.



LaNelle Cartey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of March, 2013.



(L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2022.