

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2006-CP-10-322

IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL HARGROVE

Michael A. Hargrove, Appellant,

v.

State of South Carolina, Respondent.

BRIEF OF APPELLANT

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JUL 11 2013

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN FAILING TO HOLD A HEARING ON THE STATE'S MOTION TO DENY 2012 PETITION FOR RELEASE/ANNUAL REVIEW?
2. DID THE COURT ERR IN DENYING THE APPELLANT THE RIGHT TO AN ANNUAL REVIEW HEARING?
3. DID THE COURT ERR IN FINDING THAT THE APPELLANT PREVIOUSLY FILED A PETITION FOR RELEASE WITHOUT THE APPROVAL OF THE DIRECTOR OF THE DEPARTMENT OF MENTAL HEALTH, THE DETERMINATION OF WHICH RESULTED IN THE COURT'S FINDING THAT THE APPELLANT'S REQUEST FOR AN ANNUAL REVIEW HEARING SHOULD BE DENIED AS FRIVOLOUS UNDER S.C. CODE SECTION 44-48-130?

STATEMENT OF THE CASE

Appellant Michael Hargrove was committed to the Department of Mental Health under the Sexually Violent Predator Act, S.C. Code Sections 44-48-10, *et seq.*, on or about November 7, 2006, following a jury trial. Appellant was represented by appointed counsel Alex Apostolou, Esquire. The State was represented by Assistant Attorney General Brandy Duncan.

An Annual Review Hearing was held on December 15, 2011, before the Honorable J.C. Nicholson, Jr. Appellant was represented by appointed counsel Rad S. Deaton, Esquire. The State was represented by James G. Bogle, Jr., Senior Assistant Attorney General. In an Order filed January 11, 2012, the Court found that probable cause did not exist such that the Appellant's mental abnormality had so changed that he was safe to be at large and no longer likely to engage in acts of sexual violence and that the Appellant should remain in the custody of the Department of Mental Health.

On or about October 24, 2012, the State filed a Motion to Deny 2012 Petition for Release/Annual Review. On or about November 1, 2012, the State submitted a proposed Order

Denying 2012 Petition for Release/Annual Review to the Honorable Deadra L. Jefferson. On November 8, 2012, Judge Jefferson signed the proposed Order Denying 2012 Petition for Release/Annual Review, the Order being filed on November 15, 2012.

FACTS

Appellant Michael Hargrove was committed to the Department of Mental Health under the Sexually Violent Predator Act, S.C. Code Sections 44-48-10, *et seq.*, on or about November 7, 2006, following a jury trial.

On June 30, 2009, the Appellant signed a document entitled “Annual Examination Annual Review Hearing Annual Notice of Right to Petition For Release Election to Waive or Exercise Rights.” (R. pp. 23-25). On September 26, 2011, the Appellant signed a document entitled “Annual Examination Annual Review Hearing Annual Notice of Right to Petition For Release Election to Waive or Exercise Rights.” (R. pp. 46-48). An Annual Review Hearing was held on December 15, 2011, before the Honorable J.C. Nicholson, Jr., and testimony was received from Dr. Marie E. Gehle of the Department of Mental Health on behalf of the State and from Dr. Thomas V. Martin for the Appellant. (R. p. 2, lines 15-19). The Court, in an Order filed January 11, 2012, concluded that probable cause did not exist such that the Appellant’s mental abnormality had so changed that he was safe to be at large and no longer likely to engage in acts of sexual violence. (R. p. 2, lines 19-22). As such, the Appellant was ordered to remain in the custody of the Department of Mental Health. (R. p. 2, line 22-p. 3, line 1).

On October 11, 2012, the Appellant signed a document entitled “Annual Notice of Right to Petition for Release Elections to Waive or Exercise Rights” (R. p. 60) and a separate document entitled “Annual Examination and Review Hearing Notice.” (R. pp. 61-62).

On or about October 24, 2012, the State filed a Motion to Deny 2012 Petition for Release/Annual Review. (R. pp. 7-22). On or about November 1, 2012, the State submitted a proposed Order Denying 2012 Petition for Release/Annual Review to the Honorable Deadra L. Jefferson. (R. pp. 63-66). On November 8, 2012, Judge Jefferson signed the proposed Order Denying 2012 Petition for Release/Annual Review without a hearing on the State's Motion, said Order being filed on November 15, 2012. (R. pp. 4-6).

This appeal follows.

ARGUMENT

1. **The trial court reversibly erred by failing to hold a hearing on the State's Motion to Deny 2012 Petition for Release/Annual Review.**

The trial court reversibly erred by failing to hold a hearing on the State's Motion to Deny 2012 Petition for Release/Annual Review.

Procedural due process requires notice, the opportunity to be heard in a meaningful way, and judicial review. Blanton v. Stathos, 351 S.C. 534, 570 S.E.2d 565 (Ct. App. 2002). Procedural due process contemplates notice, a reasonable opportunity to be heard, and a fair hearing before a legally constituted impartial tribunal. Id. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Id.

The State filed a motion to deny the Appellant's 2012 request for an annual review hearing, asserting as its basis for the motion that the Appellant previously filed a petition for release without the approval of the director of the Department of Mental Health. The Court issued an Order granting the State's Motion without a hearing on the matter, depriving the Appellant the opportunity to be heard on whether he in fact previously filed a petition for release and whether the Appellant's 2012 request for an annual review hearing was in fact frivolous under S.C. Code Section 44-48-130.

S.C. Code Section 44-48-110 provides that a person committed pursuant to the Sexually Violent Predator Act must have an examination of his mental condition performed once every year and an annual report provided to the court that committed the person, the multidisciplinary team established in S.C. Code Section 44-48-50, and various prosecuting agencies. Section 44-48-110 further provides that the court "**must conduct an annual hearing to review the status of the committed person.**" S.C. Code Section 44-48-110 [emphasis added]. The Director of

the Department of Mental Health must provide the committed person with an annual written notice of the person's right to petition the court for release at the annual review hearing and the notice must contain a waiver of rights, all of which must be forwarded to the court with the annual report. S.C. Code Section 44-48-110. The committed person is not prohibited from petitioning the court for release at the annual review hearing. Id.

S.C. Code Section 44-48-130 provides that if a person has previously **filed a petition for release** without the approval of the Director of the Department of Mental Health, and the court determined either upon review of the petition or following a hearing that the petitioner's petition was frivolous or that the petitioner's condition had not changed so that the petitioner continued to be a threat and, if released, would commit acts of sexual violence, the court must deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. S.C. Code Section 44-48-130 [emphasis added]. Upon receipt of a first or subsequent petition from a committed person without the director's approval, the court must, whenever possible, review the petition and determine if the petition is based upon frivolous grounds and, if so, must deny the petition without a hearing. Id.

S.C. Code Section 44-48-10, *et seq.*, the South Carolina Sexually Violent Predator Act (hereinafter referred to as "the Act") requires that the Court conduct a hearing annually to review the status of a committed person. Nothing in the Act absolves the Court from conducting the annual review hearing, including the filing of a frivolous Petition for Release. The Act, on the contrary, requires the Court to deny any subsequent "**Petitions for Release**" if filed without the approval of the Director of the Department of Mental Health and the Court determines either upon review of the petition or following a hearing that the petitioner's petition was frivolous or

that the petitioner's condition has not changed so that the petitioner continues to be a threat and, if released, would commit acts of sexual violence.

In the instant case, the Appellant signed a document on June 30, 2009, entitled "Annual Examination Annual Review Hearing Annual Notice of Right to Petition For Release Election to Waive or Exercise Rights." (R. pp. 23-25). This document, hereinafter referred to as "2009 Notice," is unequivocally the annual written notice of the person's right to petition the court for release at the annual review hearing as required by S.C. Code Section 44-48-110, but is not a "Petition for Release." The 2009 Notice contains an "Acknowledgement and Election" section whereby the Appellant was required to acknowledge receipt of the Notice and check certain boxes pertaining to the annual review hearing, including whether he is aware of the fact that he has the right to petition the Court for release at the annual review hearing and whether he chooses to exercise that right at this time. (R. p. 24, line 11-p. 25). Most conspicuously at the bottom of the 2009 Notice is the following paragraph:

*****PLEASE NOTE: Please be advised that this document does not constitute a "PETITION FOR RELEASE." If you choose to petition the Court for release at your annual review hearing, a separate *written* "Petition for Release" must be submitted to the Court, regardless of whether the Director of the Department of Mental Health is recommending release or further treatment, along with any supporting documentation, by you or your legal counsel.*****

(R. p. 25, lines 14-20).¹ The 2009 Notice, provided to the Appellant by the Director of the Department of Mental Health, explicitly makes clear that the Notice in and of itself, including the "Acknowledgement and Election" section, does not constitute a "Petition for Release" within the contemplation of Section 44-48-110, and a separate document is required.

¹ The 2011 Notice signed by the Appellant on September 26, 2011, contains the exact paragraph as the 2009 Notice, once again advising the Appellant that the Notice "does not constitute a PETITION FOR RELEASE." (R. p. 48, lines 15-19).

The Court conducted its annual review hearing as mandated by Section 44-48-110 and after hearing testimony from medical professionals, determined that probable cause did not exist such that the Appellant's mental abnormality had so changed that he was safe to be at large and no longer likely to engage in acts of sexual violence. (R. p. 3, lines 1-4). The Appellant never submitted any separate written "Petition for Release" as required by the 2009 Notice.

On October 11, 2012, the Appellant signed a document entitled "Annual Notice of Right to Petition for Release Elections to Waive or Exercise Rights." (R. p. 60). Conspicuously therein, and requiring that the Appellant initial and check a separate box adjacent thereto, is the following paragraph:

"I am aware of the fact that I have the right to petition the Court for release at any time and I am aware that this document does **not** constitute a "Petition for Release."

(R. p. 60, lines 17-18). The Appellant signed an additional document on October 11, 2012, entitled "Annual Examination and Review Hearing Notice." (R. pp. 61-62). Contrary to the form provided to the Appellant in 2009, the 2012 Annual Examination and Review Hearing Notice did not set forth a box to check pertaining to whether he was aware of the fact that he has the right to petition the Court for release at the annual review hearing and whether he chooses to exercise that right at this time. (R. pp. 61-62). Just as the 2009 Notice provided, however, the 2012 Notice explicitly indicates that the document **does not constitute a "Petition for Release."**

In the State's Motion to Deny 2012 Petition for Release, the State requested that the Court deny the Appellant's "Petition for Release" without a hearing on the matter. (R. p. 8, line 19-p. 9, line 2). The State averred that in an "Annual Review and Notice of Right to Petition for Release, Election to Waive or Exercise Rights, dated on or about October 11, 2012, Petitioner again seeks release without the approval of the Director of the Department of Mental Health."

(R. p. 60, lines 17-18). The State's Motion was granted without the Appellant having the opportunity to demonstrate to the Court that the Appellant had never filed an initial "Petition for Release" within the meaning of the statute and thus certainly never filed a subsequent "Petition for Release" that could be summarily denied.

Procedural due process requires that the Appellant receive not only notice of the State's Motion but also a reasonable opportunity to be heard at a fair hearing before the Court. Without giving the Appellant the opportunity to be heard as to whether any Petition for Release, first or subsequent, was filed, the Court issued its Order denying a "Petition for Release" that was never filed and effectively denied the Appellant the opportunity for his statutorily mandated Annual Review Hearing. Accordingly, the trial court's issuance of its Order without a hearing on the Motion was error.

2. The trial court reversibly erred in denying the Appellant the right to an Annual Review Hearing.

As set forth previously herein, S.C. Code Section 44-48-110 provides that a person committed pursuant to the Sexually Violent Predator Act must have an examination of his mental condition performed once every year and an annual report provided to the court that committed the person, the multidisciplinary team established in S.C. Code Section 44-48-50, and various prosecuting agencies. Section 44-48-110 further provides that the court "**must conduct an annual hearing to review the status of the committed person.**" S.C. Code Section 44-48-110 [emphasis added]. The Director of the Department of Mental Health must provide the committed person with an annual written notice of the person's right to petition the court for release at the annual review hearing and the notice must contain a waiver of rights, all of which must be forwarded to the court with the annual report. S.C. Code Section 44-48-110. The committed

person is not prohibited from petitioning the court for release at the annual review hearing. *Id.*

S.C. Code Section 44-48-130 provides that if a person has previously **filed a petition for release** without the approval of the Director of the Department of Mental Health, and the court determined either upon review of the petition or following a hearing that the petitioner's petition was frivolous or that the petitioner's condition had not changed so that the petitioner continued to be a threat and, if released, would commit acts of sexual violence, the court must deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. S.C. Code Section 44-48-130 [emphasis added]. Upon receipt of a first or subsequent petition from a committed person without the director's approval, the court must, whenever possible, review the petition and determine if the petition is based upon frivolous grounds and, if so, must deny the petition without a hearing. *Id.* S.C. Code Sections 44-48-10, *et seq.*, the South Carolina Sexually Violent Predator Act (hereinafter referred to as "the Act") requires that the Court conduct a hearing annually to review the status of a committed person. Nothing in the Act absolves the Court from conducting the annual review hearing, including the filing of a frivolous Petition for Release. The Act, on the contrary, requires the Court to deny any subsequent "**Petitions for Release**" if filed without the approval of the Director of the Department of Mental Health and the Court determines either upon review of the petition or following a hearing that the petitioner's petition was frivolous or that the petitioner's condition had not changed so that the petitioner continued to be a threat and, if released, would commit acts of sexual violence.

According to the plain language of the Act, the Court is required to conduct the annual review hearing every year, regardless if the committed person files even a frivolous "Petition for Release." In the instant case, the Court failed to conduct the statutorily mandated Annual Review

Hearing. Accordingly, the trial court's issuance of its Order denying the Appellant his statutory right to an Annual Review Hearing was error.

3. The trial court reversibly erred in finding that the Appellant previously filed a Petition for Release without the approval of the Director of the Department of Mental Health.

The State filed a motion to deny the Appellant's 2012 request for an annual review hearing, asserting as its basis for the motion that the Appellant previously filed a petition for release without the approval of the director of the Department of Mental Health.

S.C. Code Section 44-48-130 provides that if a person has previously filed a petition for release without the approval of the Director of the Department of Mental Health, and the court determined either upon review of the petition or following a hearing that the petitioner's petition was frivolous or that the petitioner's condition had not changed so that the petitioner continued to be a threat and, if released, would commit acts of sexual violence, the court must deny the subsequent petition unless the petition contains facts upon which a court could find the condition of the petitioner had so changed that a hearing was warranted. S.C. Code Section 44-48-130 [emphasis added]. Upon receipt of a first or subsequent petition from a committed person without the director's approval, the court must, whenever possible, review the petition and determine if the petition is based upon frivolous grounds and, if so, must deny the petition without a hearing. Id.

In the instant case, the Appellant signed a document on June 30, 2009, entitled "Annual Examination Annual Review Hearing Annual Notice of Right to Petition For Release Election to Waive or Exercise Rights." (R. pp. 23-25). This document, hereinafter referred to as "2009 Notice," is unequivocally the annual written notice of the person's right to petition the court for release at the annual review hearing as required by S.C. Code Section 44-48-110, but is not a

“Petition for Release.” The 2009 Notice contains an “Acknowledgement and Election” section whereby the Appellant was required to acknowledge receipt of the Notice and check certain boxes pertaining to the annual review hearing, including whether he is aware of the fact that he has the right to petition the Court for release at the annual review hearing and whether he chooses to exercise that right at this time. (R. p. 24, line 12-p. 25, line 20). Most conspicuously at the bottom of the 2009 Notice is the following paragraph:

*****PLEASE NOTE: Please be advised that this document does not constitute a “PETITION FOR RELEASE.” If you choose to petition the Court for release at your annual review hearing, a separate *written* “Petition for Release” must be submitted to the Court, regardless of whether the Director of the Department of Mental Health is recommending release or further treatment, along with any supporting documentation, by you or your legal counsel.*****

(R. p. 25, lines 16-20).² The 2009 Notice, provided to the Appellant by the Director of the Department of Mental Health, explicitly makes clear that the Notice in and of itself, including the “Acknowledgement and Election” section, does not constitute a “Petition for Release” within the contemplation of Section 44-48-110, and a separate document is required.

The Court conducted its annual review hearing as mandated by Section 44-48-110 and after hearing testimony from medical professionals, determined that probable cause did not exist such that the Appellant’s mental abnormality had so changed that he was safe to be at large and no longer likely to engage in acts of sexual violence. (R. p. 3, lines 1-4). The Appellant never submitted any separate written “Petition for Release” as required by the 2009 Notice.

On October 11, 2012, the Appellant signed a document entitled “Annual Notice of Right to Petition for Release Elections to Waive or Exercise Rights.” (R. p. 60). Conspicuously therein,

² The 2011 Notice signed by the Appellant on September 26, 2011, contains the exact paragraph as the 2009 Notice, once again advising the Appellant that the Notice “does not constitute a PETITION FOR RELEASE.” (R. p. 48, lines 16-17).

and requiring that the Appellant initial and check a separate box adjacent thereto, is the following paragraph:

I am aware of the fact that I have the right to petition the Court for release at any time and I am aware that this document does **not** constitute a “Petition for Release.”

(R. p. 60, lines 17-18). The Appellant signed an additional document on October 11, 2012, entitled “Annual Examination and Review Hearing Notice.” (R. pp. 61-62). Contrary to the form provided to the Appellant in both 2009 and 2011, the 2012 Annual Examination and Review Hearing Notice did not set forth a box to check pertaining to whether he was aware of the fact that he has the right to petition the Court for release at the annual review hearing and whether he chooses to exercise that right at this time. (R. pp. 61-62). Just as both the 2009 and 2011 Notices provided, however, the 2012 Notice explicitly indicates that the document **does not constitute a “Petition for Release.”**

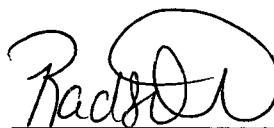
In its Order of November 8, 2012, the Court made findings of fact that were predicated upon the Court’s determination that the Appellant “petitioned for release in his 2010 Annual Review” (R. p. 4, lines 19-20) and that in the 2012 Notice the Appellant “again sought release without the approval of the Director of the Department of Mental Health.” (R. p. 5, lines 3-6). However, even the 2009, 2011, and 2012 Notices explicitly state that the Notices themselves do not constitute “Petitions for Release.” Thus, the Court reversibly erred in concluding that the Appellant previously filed a Petition for Release without the approval of the Director of the Department of Mental Health.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Charleston County Court of Common Pleas and remand the matter for a hearing on the State's Motion and, separately, Appellant's statutorily mandated Annual Review Hearing.

Respectfully submitted,

July 10, 2013



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2006-CP-10-322

IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL HARGROVE

Michael A. Hargrove, Appellant,

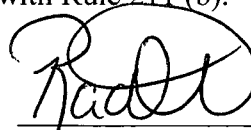
v.

State of South Carolina, Respondent.

CERTIFICATE OF COUNSEL

I certify that this final Brief of Appellant complies with Rule 211 (b).

July 10, 2013



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SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2006-CP-10-322

IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL HARGROVE

Michael A. Hargrove, Appellant,

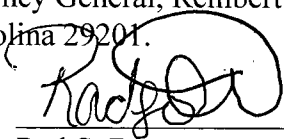
v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the final Brief of Appellant on the State of South Carolina by depositing three (3) copies of same via Federal Express, on July 10, 2013, addressed to its attorney of record, Deborah R.J. Shupe, Senior Assistant Deputy Attorney General, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, South Carolina 29201.

July 10, 2013



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SC Court of Appeals

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July 10, 2013

VIA FEDERAL EXPRESS

The Honorable Jenny Abbott Kitchings
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SC Court of Appeals

Re: In the Matter of the Care and Treatment of Michael Hargrove, 06-CP-10-322
Appellate Case No. 2012-213697

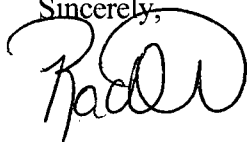
Dear Ms. Kitchings:

Enclosed please find one (1) original, unbound and fourteen (14) copies, bound of the final Brief of Appellant for filing with regard to the above-referenced case.

In addition, I have enclosed the original and one (1) copy of the Certificate of Counsel and the original and one (1) copy of the proof of service for filing with regard to the above-referenced matter. Please file said originals and return the clocked copies of same in the self-addressed stamped envelope provided.

I thank you in advance for your assistance in this matter. If you have any questions or comments concerning this matter, please do not hesitate to contact me.

Sincerely,



Rad S. Deaton
RSD/mcl

Enclosures as stated

Cc: Mr. Michael Hargrove

Deborah R.J. Shupe, Senior Asst. Deputy Attorney General (Via Federal Express)