STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County
Honorable Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-213697

IN THE MATTER OF THE CARE AND TREATMENT OF
MICHAEL HARGROVE,

Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Hargrove failed to preserve any issue regarding his right to a hearing on the 2012 annual review, or the applicability of S.C. Code §44-48-130. (Appellant's Issues I, II and III).

STATEMENT OF THE CASE

The State concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On November 7, 2006, a jury found Appellant Michael Hargrove ("Hargrove") was a sexual violent predator, and the circuit court committed him to the custody of the South Carolina Department of Mental Health ("DMH") for long term control, care and treatment. As required by the Sexually Violent Predator Act ("SVP Act"), DMH reviewed Hargrove's mental status in 2009, and determined his mental status had not so changed he was safe to be at large. (Annual Treatment Review Summary, dated January 11, 2010 [2010 ATR]; Record on Appeal [R.], pp. 26-29). In connection with that annual review, Hargrove indicated he was aware of his right to petition for release, and he chose "to exercise that right **at this time**." He also requested appointed counsel and a qualified expert to examine him. (Annual Examination, Annual Review Hearing, Annual Notice of Right to Petition for Release, Election to Waive or Exercise Rights, dated June 30, 2009; R., pp. 23-25). The circuit court authorized Hargrove to retain Thomas Martin, M.D., to evaluate him.

While the 2010 matter was pending, Marie E. Gehle, Ph.D., a psychologist with DMH, performed another annual review of Hargrove's mental status, and again concluded Hargrove's status had not so changed he was safe to be at large. (Annual Review Packet, with cover letter dated January 7, 2011; R., pp. 33-45). In connection with that review, Hargrove acknowledged his right to petition for release, but indicated he waived that right. (Annual Examination, Annual Review Hearing, Annual Notice of Right to Petition for Release, Election to Waive or Exercise Rights, dated June 1, 2010; R., pp. 30-32).

Based on Hargrove's waiver, the State submitted a proposed order to the circuit court finding Hargrove waived his annual review hearing. On February 1, 2011, Hargrove's counsel advised the circuit court he spoke with Hargrove "and reviewed **the Petition,**" and Hargrove did not want to waive the annual review hearing. (Letter from Rad S. Deaton, Esquire, dated February 1, 2011; R., p. 45) (emphasis added).

The matter was called for a hearing on December 15, 2011, before the Honorable J. C. Nicholson, Jr., Circuit Court Judge.[1] Dr. Thomas Martin testified for Hargrove, and Dr. Gehle testified for the State. Based on the evidence submitted at the hearing, the circuit court found no probable cause to believe Hargrove's mental status had so changed he was safe to be at large. (Order Denying 2010 Annual Review Trial, filed January 11, 2012; R., pp. 2-3).

In September, 2012, Dr. Gehle again reviewed Hargrove's mental status, and again concluded his mental status had not so changed he was safe to be at large. Hargrove again exercised his right to petition for release and to a hearing. DMH submitted the annual review package to the circuit court. (Annual Review Report, dated September 27, 2012, Annual Notice of Right to Petition for Release, dated October 11, 2012, Annual Examination and Review Hearing Notice, dated October 11, 2012,; R., pp. 49- 59, 60, 61).

On October 26, 2012, the State moved pursuant to S.C. Code §44-48-130 for an order denying Hargrove's 2012 petition for release/annual review hearing as frivolous. (Motion to Deny 2012 Petition for Release/Annual Review, filed October 26, 2012; R., pp. 7-9). Hargrove did not file any response to the motion.

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[1] Based on the timing of the annual reviews, the hearing also encompassed Hargrove's 2011 annual review.

By Order filed November 15, 2012, the circuit court granted the State's motion, finding the matter was before the court pursuant to "an Annual Review/Petition for Release under S.C. Code Ann. Section 44-48-110," and concluding Hargrove's 2012 petition for release was frivolous in light of his previous petitions for release, the December 2011 hearing on his 2010 petition for release, and the lack of any evidence before the court indicating progress in treatment since that hearing. (Order to Deny 2012 Petition for Release/Annual Review, filed November 15, 2012; R., pp. 4-6). Hargrove did not seek reconsideration of the court's decision, but filed this appeal on December 21, 2012.

ARGUMENT

I. Hargrove failed to preserve any issue regarding his right to a hearing on the 2012 annual review, or the applicability of S.C. Code §44-48-130. (Appellant's Issues I, II and III).

Hargrove contends the circuit court erred in failing to hold a hearing on the State's motion to deny his 2012 petition for release without a hearing, and in failing to hold a hearing on the 2012 annual review. He also contends the circuit court erred in finding he previously petitioned for release as contemplated by S.C. Code §44-48-130 (Supp. 2012). None of these issues are preserved for appellate review.

"The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct.App.2010); *see also* Regions Bank v. Owens, 402 S.C. 642, 741 S.C.2d 51, 54 (Ct. App. 2013) (same); State v. Policao, 2013 WL 1138853, 4 (S.C. Ct. App., filed March 20, 2013) (same). When a party raises an issue or argument to the lower court, but the court does not rule on it, the party must file a motion to alter or amend in order to preserve the issue for appellate review. Brown v. Brown, 402 S.C. 202, 740 S.E.2d 507, 510 (Ct. App. 2013) (*citing* Elam v. S .C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 [2004]). *See also* Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013) (same) (*citing* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 [2000]). The rationale underlying error preservation is:

> The losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those arguments. Imposing this preservation

> requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724–25 (2000) (citing Roche v. S.C. Alcoholic Beverage Control Comm'n, 263 S.C. 451, 211 S.E.2d 243 (1975)).

State v. Stanko, 2013 WL 696816, 8 (S.C., filed February 27, 2013).

In the circuit court, Hargrove did not file a response to the State's motion seeking denial of his petition for release without a hearing, or seek reconsideration of the circuit court order granting that motion. For the first time on appeal, Hargrove asserts his request for a hearing on the 2012 Annual Review was **not** a petition for release, and challenges the applicability of §44-48-130 to his request for a hearing. It is clear from the record he never raised those issues before the circuit court.

In addition, the interplay between S.C. Code §44-48-110 (Supp. 2012) (annual review hearings), S.C. Code §44-48-120 (Supp. 2012) (petition for release with DMH authorization), and §44-48-130 (summary denial of petition for release), is a matter of statutory construction, not DMH interpretation. Those statutory construction arguments were not developed in the circuit court because Hargrove failed to raise them. Thus, the circuit court never had an opportunity to rule on those issues, and they are not preserved for appellate review.

Hargrove's contentions on appeal are unavailing on the merits as well. The primary basis for his assertion the 2012 request for an annual review hearing did not constitute a petition for release is language in DMH's form documents indicating the documents do not constitute a petition for release and a separate written release document

must be filed. DMH's documents do not determine the legal effect of a request for an annual review hearing under the SVP Act.[2]

Further, in his February 1, 2011, letter regarding the 2011 annual review, Hargrove's counsel stated he had "**reviewed the Petition.**" At that time, the only documents before the circuit court in connection with the 2011 annual review were the DMH documents Hargrove signed and DMH's Annual Review Report. Clearly, counsel recognized that exercising the right to an annual review hearing is the functional equivalent of petitioning for release without DMH authorization.[3]

Finally, it is clear Hargrove petitioned for release in connection with his 2010 annual review, even though he did not file a separate, written petition for release. At that time, he contended his mental abnormality had so changed he was safe to be at large, and **if released**, he was not likely to commit future acts of sexual violence. He sought, and obtained, an independent evaluation from Dr. Martin, and presented testimony from Dr. Martin at the hearing on December 15, 2011.

Hargrove did not appeal the January 11, 2012, circuit court order finding no probable cause to believe he was safe to be at large, and denying his petition for release in connection with the 2010 annual review. Therefore, the circuit court's treatment of the 2010 annual review hearing request as a petition for release, even without a separate written pleading specifically entitled "petition for release," is the law of the case. The

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[2] By relying on the DMH documents, Hargrove again avoids the statutory construction issues he failed to raise in the circuit court.

[3] At an annual review hearing, the SVP treatment program resident is challenging DMH's recommendation that he remain in the program, and asserting his mental status is so changed he is safe to be at large, and **if released**, not likely to commit acts of sexual violence. This is the statutory standard for release from the SVP treatment program. Consequently, when a resident exercises the right to an annual review hearing, he is necessarily petitioning for release, even without a separate, written petition.

lack of any evidence indicating a change in Hargrove's mental status from January, 2012, to November, 2012, amply supports the circuit court's denial of his 2012 hearing request as a subsequent, frivolous petition for release.

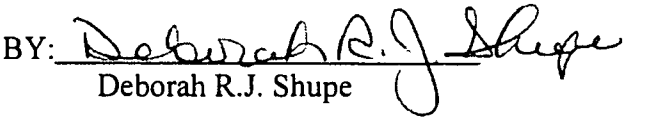
CONCLUSION

Based on the foregoing, the State respectfully submits the circuit court Order Denying 2012 Petition for Release/Annual Review should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098

BY: 
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

July 9, 2013

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b) SCACR.

Respectfully submitted,

ALAN WILSON
Attorney General

DEBORAH R.J.SHUPE
Senior Assistant Deputy Attorney General
S.C. Bar No. 5098
BY: Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3797

ATTORNEYS FOR RESPONDENT

July 9, 2013

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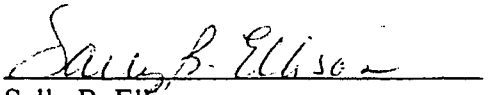
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Final Brief of Respondent on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

Rad S. Deaton, Esquire
Deaton Law Firm
2170 Ashley Phosphate Road, Suite 402
North Charleston, SC 29406

I further certify all parties required by Rule to be served have been served.

This 9 day of July, 2013.



Sally B. Ellison
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4156

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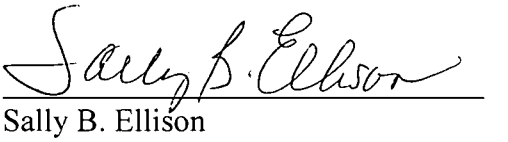
Rad S. Deaton, Esquire
Deaton Law Firm
2170 Ashley Phosphate Road, Suite 402
North Charleston, SC 29406

I further certify all parties required by Rule to be served have been served.

This 26th day of November, 2013.



Sally B. Ellison
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-4156