

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Newberry County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case No. 2012-211977

IN THE MATTER OF THE CARE AND TREATMENT OF
RONALD OWEN,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The circuit court properly found there was no probable cause to believe Owen's mental abnormality had so changed he was safe to be at large, because Owen's own expert testified Owen suffered from the mental abnormality of pedophilia, and was not safe to be at large without significant restrictions ensuring compliance with outpatient treatment.

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

Appellant Ronald Owen (Owen) was committed to the Sexually Violent Predator Treatment Program (SVPTP) on February 3, 2010. Pursuant to the Sexually Violent Predator Act (SVP Act), SC Code §44-48-10 (2012), *et seq.*, the SC Department of Mental Health (DMH) reviewed Owen's mental status in March 2011, and submitted a report to the circuit court. DMH determined Owen's mental status had not so changed he was safe to be at large. (State's Exhibit 3; Record on Appeal [R.], pp. ____).

Owen requested a hearing and an independent evaluation by William Burke, Ph.D. The matter was called for a hearing on March 13, 2012, before the Honorable Eugene E. Griffith, Jr., Circuit Court Judge.

Dr. Burke testified as an expert witness for Owen. He stated he previously evaluated Owen during the original commitment proceeding in 2010, but did not do a full evaluation for the annual review hearing. Rather, he just reviewed the DMH treatment records and interviewed Owen for three hours. He opined "nothing had changed with Mr. Owen from the time he had entered the program." He found Owen still met the criteria for pedophilia, and had some personality disorder issues as well. (Hearing Transcript [HT], pp. 8-10; R., pp. ____).

Dr. Burke indicated Owen told him he only received treatment during a ninety minute group session once a week, which Dr. Burke opined was less than the treatment provided in his out-patient treatment program. He stated Owen could be treated on an in-patient basis provided he was "under that strict, the strict protocol" of Dr. Burke's program, "with the addition of any failure to do, to follow treatment recommendations or you know whatever protocol is set into place that he could be to an inpatient facility."

(HT, pp. 17-19; R., pp. ____). Ultimately, Dr. Burke testified he “would like for a mechanism to be in place” under which Owen could be committed pursuant to the S.C. Probate Code. (HT, pp. 25, 30-32; R., pp. ____).

On cross-examination, Dr. Burke conceded Owen would not be under any mandatory supervision if released from the SVPTP. He stated he did not “believe [Owen] is safe to walk out the door unsupervised.” (HT, p. 27; R., p. ____).

Marie Gehle, Ph.D., testified as an expert for the State. She conducted Owen’s annual review, which included a review of all documentation from the original commitment proceeding and the SVPTP treatment records, interviews of SVPTP staff working with Owen, and a two hour interview with Owen. (HT, pp. 34-38; R., pp. ____).

Based on all the information available to her, Dr. Gehle concluded Owen has the mental abnormality of pedophilia. She also concluded he has a personality disorder, not otherwise specified, with “narcissistic traits, lots of entitlement, and very self-focused.” (HT, pp. 39-40; R., pp. ____).

Dr. Gehle testified Owen’s progress in the SVPTP was “minimal.” He was “rather avoidant in group,” “he denies the severity of the offenses” and “the severity of the harm caused to his victims,” and he tends “to blame the victims saying that they initiated the acts.” He also refused to do an assignment, saying “he just had an independent evaluation so he was not going to do this assignment.” (HT, pp. 40-41; R., pp. ____).

As to the treatment program, Dr. Gehle testified “much of the treatment is self-focused.” In addition to group sessions, SVPTP residents do assignments on their own, the therapists talk to them about what they need to work on, and help them gain insight

into what they did and why they did it. (HT, pp. 41-42; R., pp. ____).

When Dr. Gehle interviewed Owen, he told her he “just acts impulsively,” and described it as “an almost irresistible urge,” which she believed made him particularly dangerous because he would act whenever the mood struck him, and against whoever was around at the time. She testified to a reasonable degree of psychological certainty that Owen’s mental abnormality of pedophilia affected his ability to control his behavior, and it had not so changed he was safe to be at large. (HT, pp. 42-44; R., pp. ____).

On cross-examination, Dr. Gehle testified SVPTP residents have about two hours of sex offender specific group work per week. In addition, they have assignments to do on their own, and they get feedback on the assignments. The residents also participate in activity therapy “to help them to have a more full life.” (HT, p. 47; R., p. ____). As to whether Owen would benefit from more therapy, Dr. Gehle stated she did not know if any treatment would help him because he was not doing the very minimum in the SVPTP, or even admitting he had a problem. (HT, pp. 47-48; R., pp. ____).

The circuit court found there was no probable cause to believe Owen’s mental status had so changed he was safe to be at large. The court referenced Dr. Burke’s testimony that Owen could be released with the stipulation he was under court order and recommitted to the SVPTP if he was non-compliant with out-patient treatment, and noted the court did not have the ability to recommit Owen to the SVPTP for failure to attend an out-patient treatment program. The court further found the SVP Act controlled the standard for release from the SVPTP, and the possibility of commitment under the Probate Code did not provide a safeguard for releases under the SVP Act. (Amended

Order Denying Petition for Release/Annual Review Trial, filed April 17, 2012; R., pp. _____). This appeal followed.

ARGUMENT

The circuit court properly found there was no probable cause to believe Owen's mental abnormality had so changed he was safe to be at large, because Owen's own expert testified Owen suffered from the mental abnormality of pedophilia, and was not safe to be at large without significant restrictions ensuring compliance with outpatient treatment.

Owen contends the circuit court erred in finding no probable cause to order a trial in this case, because Dr. Burke's out-patient treatment program was a less restrictive alternative to confinement in the SVPTP, and he could be ordered to in-patient treatment under the SC Probate Code if he failed to comply with the out-patient program. Both assertions are irrelevant to the issue before the circuit court in an annual review hearing under the SVP Act.

In appeals from probable cause findings in cases under the SVP Act, the appellate court will not disturb the circuit court's probable cause determination if the evidence reasonably supports the circuit court's finding. In the Matter of the Care and Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003). In an annual review probable cause hearing, the committed person has the burden to show that probable cause exists to believe his mental condition has so changed he is safe to be released. *Id.* At 722.

The facts of this case are on point with the facts of Tucker. In Tucker, DMH reported Tucker's mental abnormality had not so changed he was safe to be at large, and recommended continued commitment to the SVPTP. 578 S.E.2d at 722.

Tucker asserted he could be treated in an out-patient setting, and presented two expert witnesses on that issue. One witness testified Tucker's "return to the community, if such is achieved, would be favorable with restrictions." The second witness testified Tucker was capable of, and motivated to, continuing sex offender treatment on an out-

patient basis, but did not conclude his mental abnormality had so changed he was safe to be at large. *Id.* at 721.

The circuit court found there was no probable cause to believe Tucker's mental status had so changed he was safe to be at large. The Supreme Court affirmed, holding that even though there was evidence Tucker could be released to long-term out-patient treatment that met on a regular basis, there was no evidence his mental condition had so changed he was safe to be at large, and if released, he was unlikely to commit sexually violent acts. *Id.* at 722.

As in Tucker, Owen presented evidence regarding out-patient treatment available to him if released, but did not establish probable cause to believe his mental condition had so changed he was safe to be at large if released. On the contrary, his own expert witness testified Owen's mental status was essentially the same as it was when he was committed, and the only way he would recommend out-patient treatment was with significant restrictions, including a court order providing Owen would be recommitted if he did not comply with the restrictions. The evidence presented simply did not establish probable cause to believe Owen's mental condition had so changed he was safe to be at large, and if released, he was unlikely to commit sexually violent acts.

Citing McClam v. State, 386 S.C. 49, 686 S.E.2d 203 (2009), Owen asserts he could be court ordered to in-patient treatment pursuant to the Probate Code. Initially, the SVP Act was expressly enacted because the legislature found the existing commitment process through the Probate Code was "inadequate to address the special needs of sexually violent predators, and the risks they present to society." S.C. Code §44-48-20 (Supp. 2012). Therefore, the legislature clearly intended the SVP Act, rather than the

Probate Code, govern civil commitment of persons found to be sexually violent predators.

Further, McClam is distinguishable from this case. McClam was committed to the SVPTP in 2000, and DMH authorized him to petition for release in 2006. Prior to giving such authorization, however, and without notice to the Attorney General's Office, DMH obtained a probate court order committing McClam to a state mental health facility for in-patient care and treatment, on the ground he lacked sufficient insight or capacity to make responsible decisions regarding his treatment, and would inflict serious harm to himself or others. 686 S.E.2d at 205-206.

In this case, DMH did not authorize Owen to petition for release, or initiate a probate court action seeking his commitment to another in-patient facility. On the contrary, DMH specifically recommended that Owen remain in the SVPTP. Accordingly, McClam does not apply.¹

The evidence in the record supports the circuit court's finding of no probable cause to believe Owen's mental abnormality had so changed he was safe to be at large, and if released, not likely to commit future acts of sexual violence. Therefore, the circuit court's Order should be affirmed.

¹ The Court of Appeals dismissed the appeal, finding the primary issue on appeal - whether the circuit court had authority to order DMH to transfer McClam to a private care facility prior to his completion of the SVPTP - was moot. The Court made no finding regarding the efficacy of the probate court order.

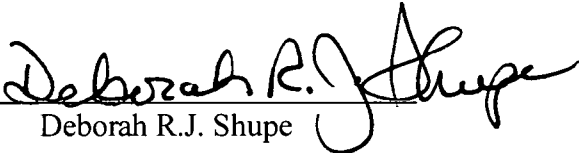
CONCLUSION

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

Respectfully submitted,

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February 27, 2013

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

Respondent proposes the following to be included in the Record on Appeal:

- (1) March 13, 2012 Hearing Transcript, pp. 1-63**
- (2) State's Hearing Exhibits 1, 2 and 3**
- (3) Amended Order Denying Petition for
Release/Annual Review Trial, filed April 17, 2012**

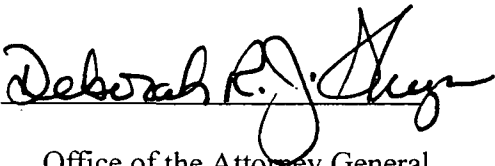
To facilitate preparation of the Final Brief, Respondent requests that counsel for Appellant retain the page numbers of the trial transcript in the Record on Appeal, in addition to the new page numbers.

The undersigned hereby certifies this Designation contains no matter which is irrelevant to this appeal.

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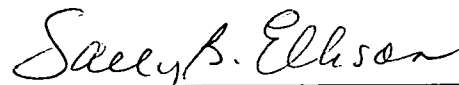
PROOF OF SERVICE

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

Tommy A. Thomas, Esquire
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I further certify all parties required by Rule to be served have been served.

This 27th day of February, 2013.



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