STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County
The Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2018-001442

In the Matter of the Care and Treatment of
Larry James Tyler, Appellant

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

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

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES ON APPEAL

I. The SVPA provides that a qualified expert is "permitted to have reasonable access to the person for the purpose of the examination," which necessarily includes psychological and physiological tests the evaluator determines are required to properly determine if the person meets the statutory requirements for civil commitment under the SVPA

II. Appellant's constitutional rights in connection with the contempt determination were not violated because he was vigorously represented by competent counsel; there were multiple hearings during which Appellant had the opportunity to present evidence and legal arguments; and requiring compliance with tests deemed necessary by the qualified evaluator does not violate either the United States Constitution or the South Carolina Constitution. (Appellant's Issues II and III).

III. The circuit court only compelled Appellant to cooperate with the PPG deemed necessary by the State's mental health expert, and expressly declined to rule on the issue of the admissibility of PPG evidence at trial, and therefore, that issue is not ripe for appellate review.

IV. The circuit court granted a continuance beyond the sixty day statutory requirement for submission of the court-appointed evaluator's report, and the report was ultimately issued within the court ordered deadline.

STATEMENT OF THE CASE

On October 15, 2015, Respondent State of South Carolina initiated civil commitment proceedings against Appellant Larry James Tyler pursuant to the South Carolina Sexually Violent Predator Act (SVPA). On October 26, 2015, the circuit court found probable cause to believe Appellant was a sexual violent predator, and ordered the South Carolina Department of Mental Health (DMH) to conduct an evaluation to determine if Appellant has a mental abnormality or personality disorder that makes him likely to commit acts of sexual violence if not confined for long term, control, care and treatment.

On May 16, 2016, the DMH evaluator issued a report finding Appellant did not meet the criteria for commitment as a sexual predator. As provided by the SVPA, the State retained the Medical University of South Carolina (MUSC) to independently evaluate Appellant. By Order filed October 31, 2016, the Honorable Roger E. Henderson, Circuit Court Judge, held Appellant in contempt for his continuing failure to cooperate with the MUSC evaluation protocol. Appellant moved to alter or amend the Order, which was denied by Order filed July 16, 2018. This appeal followed.

STATEMENT OF FACTS

Appellant Larry James Tyler was arrested on or about September 24, 2011, for Disseminating Obscene Material to a Minor and a non-sexual offense, arising from allegations that sexually explicit photos of the Appellant and sexual text messages to a ten year old girl were on Appellant's cell phone. While in jail, Appellant was charged with thirty-nine counts of Sexual Exploitation of a Minor. On February 27, 2013, the Appellant plead guilty in Darlington County to one count of Sexual Exploitation of a Minor in the Second Degree, one count of Criminal Solicitation of a Minor, and one count of Disseminating Harmful Material to a Minor, and received concurrent sentences of eight years incarceration on each of the first three charges, and three years on the Contributing to the Delinquency of a Minor charge.[1]

Prior to Appellant's release from prison, Respondent State of South Carolina filed a Petition in Darlington County on October 15, 2015, seeking Appellant's civil commitment to the South Carolina Department of Mental Health (DMH) for long term control, care and treatment pursuant to the SVPA.[2] (Petition filed October 15, 2015, with Exhibits; Record on Appeal [R.}, pp. 20-142). By court order dated October 16, 2015, the Chief Administrative Judge in Darlington County court found probable cause to believe Appellant is a sexually violent predator as defined by the SVPA, and by an Order filed October 19, 2015, appointed legal counsel to represent Appellant in the proceeding. (Probable Cause Order dated October 16, 2015; Order filed October 19, 2015; R., pp. 3). After a probable cause hearing on October 26, 2015, the circuit court again found probable cause to believe Appellant is a sexually violent predator, and appointed Dr. Marie

---

[1]Most of the Sexual Exploitation of a Minor charges were *nolle pros'd* pursuant to the plea agreement.

[2]The petition was filed after the Multidisciplinary Team and the Prosecutor's Review Committee found probable cause to believe Appellant is a sexually violent predator as defined by the SVPA.

E. Gehle, Psy.D., of the South Carolina Department of Health (DMH), to evaluate Appellant. (10/26/2015 Hearing Transcript, pp. 267-275; Order for Evaluation filed October 26, 2015; R., pp. 6-7).

Dr. Gehle's evaluation was due on or about December 26, 2105, which was sixty days following the probable cause hearing, as required by S.C. Code Ann. Section 44-48-80 (D). By court order dated December 14, 2015, which was filed on January 15, 2016, the circuit court granted Dr. Gehle an extension of time to complete the evaluation without specifying a due date for the evaluation report.[3] (Order of Continuance; R.p.5).

On or about January 7, 2016, Appellant moved to dismiss the case arguing that Dr. Gehle had not completed her evaluation within the statutorily required sixty days, and the extension was not valid until filed. After a hearing, the circuit court denied Appellant's motion by court order filed February 11, 2016. (Motion to Dismiss; Order filed February 11, 2016; R.pp 143-146; Appendix to ROA, p.2

On or about February 23, 2016, Appellant again moved to dismiss the case, or in the alternate to set a deadline for the completion of Dr. Gehle's evaluation. (Respondent's Second Motion to Dismiss, R., pp. 147-149). After a hearing, the circuit court denied Appellant's motion to dismiss, but ordered Dr. Gehle to complete her evaluation within forty-five days from the date of the Order. (Order dated March 31, 2016; R., pp. 9-10).

In compliance with this order, Dr. Gehle submitted her report on or about May 12, 2016, concluding Appellant met the criteria for Pedophilic Disorder, Nonexclusive Type, Sexually Attracted to Females, but he did not meet the criteria to be confined for treatment as a sexually

[3]DMH sought the continuance and submitted the proposed order. The Attorney General's Office was not involved in the process.

violent predator. (Report dated May 12, 2016; R., pp. 241-264). On May 16, 2016, the State exercised its statutory right to seek an independent evaluation, and retained the Sexual Behavioral Laboratory of the Medical University of South Carolina (MUSC), which assigned Emily Gottfried, Ph.D, to conduct the evaluation.

Subsequently, on or about August 10, 2016, Appellant again moved for dismissal, specifically objecting to the administration of a penile plethysmograph test (PPG) as part of the MUSC evaluation, or in the alternate to set a date certain trial date. The State opposed the motion to dismiss, and moved to compel Appellant to cooperate with the independent evaluation. (Respondent's Motion to Dismiss, Return to Motion to Dismiss and for Trial; Motion to Compel Cooperation with Evaluation; R., pp. 150-167).

After a hearing on September 8, 2016, before the Honorable Roger E. Henderson, Circuit Court Judge, the court denied Appellant's motion to dismiss, and held a ruling on contempt in abeyance to afford Appellant an opportunity to cooperate with the MUSC evaluation. The court further ordered that upon submission of an affidavit of non-compliance, Appellant would be held in contempt until such time as Appellant purged the contempt by cooperating with the evaluation. (9/8/2016 Hearing Transcript, pp. 3-18, Order filed September 23, 2016; R., pp. 278-293, 11-14).

In ordering Appellant's compliance, the court found: 1) Appellant had been transported to MUSC for the evaluation multiple times in an attempt to complete the evaluation; 2) Appellant signed a valid Consent for Evaluation, which included the administration of the PPG and a polygraph; and 3) the PPG and polygraph were part of MUSC's standard protocol to obtain an "evidence base for assessing [Appellant's] likelihood in engaging in future acts of sexual violence." Based on a letter from Dr. Gottfried, the court also found "[Appellant] was deceptive on certain psychological assessment measures and that his self-report was not viewed as being a

valid indicator of his sexual arousal," and because of Appellant's deceptiveness on other measures, "the physiological data from the PPG would be necessary in answering questions regarding [Appellant's] risk of re-offending, and whether Appellant has a mental abnormality that could lead to further acts of sexual violence." (Order filed September 23, 2016; R., pp. 11-14).

Appellant was again scheduled for the evaluation and transported to MUSC on September 29, 2016, with the PPG as one of the assessments to be administered. Even after speaking with his attorney, Appellant again refused to submit to a PPG. Pursuant to the September 23, 2016 Order, the State submitted an affidavit by Dr. Gottfried, indicating Appellant's continued refusal to cooperate with the evaluation. (Affidavit of Emily D. Gottfried, dated October 4, 2016; R., pp. 266). Based on the affidavit provided, by Order filed November 17, 2016, the court held Appellant in contempt, and ordered that Appellant "shall continue to be detained . . . until he purges himself of contempt by cooperating with the State's evaluation." (Order filed November 17, 2016; R., pp. 15-16).

Appellant filed a Motion to Alter or Amend Judgment. (Motion to Alter or Amend Judgment dated November 14, 2017; R., pp. 168-175). The State responded to the Motion on November 28, 2017. (Letter from James G. Bogle, Jr., dated November 28, 2017; R., pp. 176-177). After a hearing on July 13, 2018, the court denied Appellant's motion to amend the November 17, 2016 Order. (Order filed July 23, 2018; R., p. 17). This appeal followed.

STANDARD OF REVIEW

Interpretation of a statute is a question of law for the court, and the appellate court is "free to decide a question of law with no particular deference to the [trial] court." Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 642 S.E.2d 751, 753 (2007). As to constitutional issues, an appellate court in South Carolina is limited to determining if there is any evidence to support the trial court's findings, and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004); *see* State v. Brockman, 339 S.C. 57, 66, 528 S.E.2d 661, 666 (2000) (same). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence, but must affirm the trial court if there is any evidence supporting the ruling. State v. Khingratsaiphon, 352 S.C. 62, 572 S.E.2d 456, 460 (2002). *See also* State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016) (same)); State v. Morris, 411 S.C. 571, 578, 769 S.E.2d 854, 858 (2015) ("'When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm if there is any evidence to support the ruling.'" (citation omitted)). Critically, the appellate court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 682 S.E.2d 307, 310 (Ct. App. 2009); *see* Khingratsaiphon, 572 S.E.2d at 459 ("In State v. Brockman, . . . [w]e concluded the appellate court would not review the trial judge's ultimate determination de novo but, rather, would apply a deferential standard of review.").

ARGUMENT

I. The SVPA provides a qualified expert is "permitted to have reasonable access to the person for the purpose of the examination," which necessarily includes tests the evaluator deems appropriate to properly determine if the person meets the statutory requirements for civil commitment.

Appellant contends the circuit court erred in ordering him to comply with the PPG required by the State's expert because the SVPA does not require a PPG or any other particular test.[4] Considering Appellant's argument in its totality, and taking it to its logical conclusion, a person being evaluated pursuant to the SVPA will be able to refuse compliance with any psychological or physiological test the person believes is degrading, or otherwise makes the person uncomfortable, thus undermining the efficacy of evaluations under the SVPA.

Appellant correctly states the SVPA does not define "reasonable access." The legislature's failure to define a term, however, reveals the obvious intent "to leave to medical professionals" the task of determining what access is necessary to complete an evaluation under the SVPA. *See* Matter of Snow, 425 S.C. 544, 823 S.E.2d 467, 469 (2019) ("The obvious intent in not defining the term was to leave to medical professionals the task of determining. Likewise, the task to determine what testing is necessary for a complete psychosexual evaluation under the SVPA should be left to the experts performing the evaluation. The fact evaluation protocols may differ

[4]Appellant's brief is replete with hyperbole, rhetorical arguments and misleading analogies, but short on facts. Much of Appellant's brief is designed to distract from the relatively simple issue before this Court – whether, after multiple findings of probable cause to believe the person is a sexually violent predator, a person being evaluated by a qualified expert pursuant to the SVPA can be compelled to comply with testing the expert deems necessary to complete a full psychosexual evaluation in order to determine if the person has a mental abnormality or personality disorder that makes him likely to reoffend sexually if not confined for treatment.

as to what psychological and/or physiological tests are necessary does not render any of the protocols unreasonable.[5]

The United States Supreme Court has recognized courts and legislatures are informed by the work of medical experts, and they use those medical sources and authorities to reach independent determinations. Courts rely on professionals to "use their learning and skills to study and consider the consequences of the classification schemes they devise in the diagnosis of persons with mental or psychiatric disorders or disabilities," and "[s]ociety relies upon medical and professional expertise to define and explain how to diagnose the mental condition at issue." Hall v. Fla., 572 U.S. 701, 710 (2014). The medical expert diagnosis informs the legal determination, but the expert views "do not dictate the Court's decision, yet the Court does not disregard these informed assessments." *Id.* at 721–22 (2014). *See also*, Kansas v. Crane, 534 U.S. 407, 413 (2002) ("[T]he science of psychiatry ... informs but does not control ultimate legal determinations ...").

The Supreme Court clarified that even if "the views of medical experts" do not "dictate" a mental condition determination, the determination must be "informed by the medical community's diagnostic framework;" relying "on the most recent (and still current) versions of the leading diagnostic manuals—the DSM–5 and AAIDD–11." Moore v. Texas, ____ U.S. ____, 137 S. Ct. 1039, 1048–49 (2017). In Hall, the Supreme concluded that Florida violated the Eighth Amendment by "disregard[ing] established medical practice," and "indicated that being informed by the medical community does not demand adherence to everything stated in the latest medical

[5]Indeed, given the importance of determining if a person is likely to commit future acts of sexual violence, it can be argued an evaluation based on the results of numerous psychological and/or physiological tests, in addition to a document review and interview, is more reliable than an evaluation based only on a document review, an interview, and one actuarial assessment tool.

guide," but "neither does our precedent license disregard of current medical standards." Moore at at 1048–49.

While Hall deals with the Eight Amendment, the reasoning is instructive. Medical expert opinions particularly significant to the SVPA inquiry of whether a sexual offender is likely to reoffend. The SVPA defines "[l]ikely to engage in acts of sexual violence" to mean "the person's **propensity** to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." S.C. Code Ann. §44-48-30(9) (emphasis added). Therefore, a person's dangerous propensities are the focus of the SVP Act. In re Care & Treatment of Corley, 353 S.C. 202, 577 S.E.2d 451, 453–54 (2003).

The Attorney General has the statutory authority to have Appellant examined by a qualified expert of its choice. *See* S.C. Code Ann. §44-48-90(D). MUSC's Department of Psychiatry and Behavioral Sciences Sexual Behavior Clinic and Lab ("SBCL") employees qualified experts, which provide services to the criminal, civil, and family court systems, other state agencies, and individual or institutional treatment providers. The SBCL standard techniques for treatment and evaluation provides:

> the use of clinical and forensic interviewing techniques with the capacity for digital audio and video recording, psychometric assessment (the use of psychological testing and data collection methods), *physiological assessment (to include penile plethysmography)*, visual reaction time assessment, polygraph examination, and biochemical laboratory studies through affiliated laboratory support.

http://academicdepartments.musc.edu/psychiatry/cpspd/programs/sexual-behaviors-clinic.html. (emphasis added). The SVPA does not enumerate or limit the diagnostic tools that can be used to evaluate a person subject to its terms, only that a qualified expert use them in rendering an opinion.

In order to fulfill the mandate of the SVPA, the State must be able to rely on qualified medical experts to determine if a person suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined for long term control, care and treatment. The legislature purposefully did not define "reasonable access" to give medical professionals the freedom to determine what testing is necessary in order for them to form their expert opinion; not to dictate or limit the parameters to which a medical expert must adhere. If that were the case, the court ordered evaluator's opinion would be dispositive; however, the legislature built in a statutory right for either party to obtain a subsequent independent evaluation. S.C. Code Ann. § 44-48-90(D).

Recidivism is at the heart of the SVPA law, and requires the assistance of the professional medical community in making a legal determination of whether the Appellant is a sexually violent predator. The State has an absolute right under the SVPA to have Appellant evaluated by an independent qualified expert. Dr. Gottfried of the SBCL is qualified and utilizes the PPG as a part of the SBCL's standard techniques for treatment and evaluation of sexual offenders, regardless of who is requesting the evaluation. Under the SVPA, Dr. Gottfried can determine what tests are necessary to complete a thorough psychosexual evaluation of Appellant in order to determine whether he is likely to re-offend sexually. Accordingly, the circuit court did not err in compelling the Appellant to submit to PPG testing.

II. Requiring Appellant's compliance with testing deemed necessary by the qualified evaluator does not violate the Fourth Amendment, the Fifth Amendment or Fourteenth Amendment, and Appellant failed to preserve the issue that his constitutional rights to procedural due process in connection with the contempt determination were violated. (Appellant's issues II and III).

A. Compliance with testing deemed necessary by a qualified expert does not violate the Fourth Amendment because the testing is based on a judicial finding of probable cause, and the expressed interest of the State outweighs Appellant's expectation of privacy.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The South Carolina Constitution is nearly identical to the Fourth Amendment; however, it incorporates a right to be free from **unreasonable** invasions of privacy. S.C. Const. art 1, § 10 (emphasis added). Ultimately, the standard for the Fourth Amendment is reasonableness. State v. Ross, 423 S.C. 504, 508, 815 S.E.2d 754, 756 (2018) (quoting Cady v. Dombrowski, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527 (1973)).

1. The testing deemed necessary by a qualified expert is reasonable because it is based on a judicial finding of probable cause.

The SVPA process begins with a probable cause determination by the Multidisciplinary Team "MDT and the Prosecutor's Review Committee "PRC". S.C. Code Ann. §44-48-50. The State then filse a petition, which "must state sufficient facts that would support a probable cause allegation" that the person is a sexually violent predator. S.C Code Ann. § 44-48-70. The Chief Administrative Judge reviews the petition to make an independent probable cause determination. S.C. Code Ann. § 44-48-80(A). The case then proceeds to an adversarial probable cause hearing, at which the person is present and represented by counsel. S.C. Code Ann. § 44-48-80(B)(C).

"[P]robable cause is the standard by which a particular decision to search is tested against the constitutional mandate of reasonableness." Camara v. Mun. Court of San Francisco, 387 U.S. 523, 534–35 (1967). (building safety regulations allowing inspections of private houses without a warrant were unconstitutional and required adherence to the Fourth Amendment.)

Assuming for purposes of argument only the PPG test is a search, it is a reasonable search because it is based on probable cause. In this case, a circuit court judge reviewed the State's petition; determining probable cause to believe Appellant is a sexually violent predator. (Order dated October 16, 2015; Order filed October 19, 2015; R., pp. 3). After an adversarial hearing on October 26, 2015, a circuit court judge, again, found that probable cause exists to believe Appellant is a risk to reoffend if not confined for long term care, control and treatment, and ordered a mental health evaluation by a court appointed evaluator. (10/26/2015 Hearing Transcript, pp. 1-8; Order for Evaluation filed October 26, 2015; R. pp. 267-274, 6). After receiving the court appointed evaluator's report, which did not recommend commitment, the State exercised its statutory right to seek an independent evaluation, and retained SBCL, which assigned Emily Gottfried, Ph.D, to conduct the evaluation. (Notice Filed May 18, 2016; R. pp. 265).

Further at the adversarial probable cause hearing on October 26, 2015, Appellant was represented by competent counsel, was afforded the opportunity to present witnesses and evidence, to cross-examine witnesses, and to challenge the State's allegation that probable cause exists to believe Appellant is a sexually violent predator. The circuit court found probable cause and ordered Appellant to submit to the mental evaluation to determine if he suffers from a mental abnormality or personality disorder. Therefore, SBCL testing is reasonable because it is based on a judicial finding of probable cause, and compelling Appellant to submit to PPG testing required by the SBCL protocols does not violate his Fourth Amendment rights.

2. The testing deemed necessary by a qualified expert is reasonable because the expressed interest of the State outweighs Appellant's expectation of privacy.

Even if the Court finds a judicial determination of probable cause alone is insufficient to make the PPG testing reasonable, the testing can be justified outside of the warrant requirement. "Whether a particular practice is acceptable requires balancing the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

In Skinner, the Court held that drug and alcohol tests under railroad regulations were reasonable without a warrant requirement or reasonable suspicion that a particular employee was impaired. *Id.* 489 U.S. at 633. The Federal Railroad Administration's testing include collection and analysis of blood, urine and breathe testing. The Supreme Court found that all three were intrusive and trigger the Fourth Amendment. *Id.* 489 U.S. at 618.

The Court reasoned that the "[g]overnment's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, "likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* (*quoting* Griffin v. Wisconsin, 483 U.S. 868, 873 [1987]). Further, the Court concluded the toxicological testing contemplated by the regulations was not an undue infringement on the covered employee's justifiable expectations of privacy because the Government's compelling safety interests outweigh privacy concerns. *Id.* 489 U.S. at 633.

Like the railroad regulations in Skinner, the government interest underlying the SVPA is to protect the public from a dangerous subclass of sexual offenders, which is a compelling interest.

The SVPA expressly states:

> The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators will engage in repeated acts of sexual violence if not treated for their mental conditions is significant.

S.C. Code Ann. § 44-48-20. A person's dangerous propensities to commit future acts of sexual violence are the focus of the SVP Act. Corley, *supra.*

Here, the expressed, compelling interest of the state is protecting its citizens from sexually violent predators. The statute is narrowly tailored to a small subset of dangerous sexual offenders; not all sexual offenders are subjected to the SVPA. Rather, it is limited to those offenders who are likely to reoffend. Whether the offender is likely to reoffend is a significant element in determining whether the person is a sexually violent predator becasue the likelihood to reoffend is at the heart of the statute.

The State's interest must be balanced with the Appellant interests to be free of unreasonable searches. "To claim protection under the Fourth Amendment . . . [Appellant] must show that [he has] a legitimate expectation of privacy in the place searched." State v. Missouri, 361 S.C. 107, 112, 603 S.E.2d 594, 596 (2004) (citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). In Missouri, the South Carolina Supreme Court held that establishing a legitimate expectation of privacy requires a person show: (1) he or she had a subjective expectation of not being discovered, and (2) the expectation is one that society recognizes as reasonable. *Id.* (*citing* Oliver v. United States, 466 U.S. 170, 177 (1984) (*citing* Katz v. United States, 389 U.S. 347, 361 (1967) [Harlan, J., concurring]).

Here, it can be argued Appellant has a subjective expectation his sexual desires will be private. The more important question is whether society is willing to recognize that expectation as

reasonable. Appellant plead guilty to indecency with a child (fondling) in 1993 in Texas, and after a sentence of 10 years, Appellant reoffended in 2013. Appellant plead guilty, in South Carolina, to multiple sexual crimes against minors. (See Petition filed October 15, 2015, with Exhibits; R., pp. 20-142). Appellant has shown a pattern of sexual offenses against children. He was reviewed by the MDT, the PRC, a circuit court judge, and a second judge at an adversarial probable cause hearing, all concluding there is probable cause to believe he is likely to reoffend against children. Under these circumstances, society is unwilling to recognize, as reasonable, Appellant's expectation of privacy to refuse testing to determine if he is likely to re-offend.

Therefore, the State's interest in protecting its citizens, especially children, by determining if a sexual offender is likely to reoffend outweighs the privacy interest the offender has in being subjected to physiological testing. Appellant is a convicted sexual offender who based on a multiple finding of probable cause he is likely to reoffend, has a reduced expectation of privacy, which is outweighed by the significant and clearly expressed State interest in protecting its citizens from an extremely dangerous group of sexual predators. Thus, the testing does not violate Appellant's Fourth Amendment rights, and the circuit court did not err in compelling Appellant to comply with the testing.

B. Compliance with testing deemed necessary by a qualified expert does not violate the Fifth Amendment because the SVPA is a civil, non-punitive scheme.

The Fifth Amendment clause against self-incrimination, which applies to the States through the Fourteenth Amendment, provides that no person "shall be compelled in any criminal case to be a witness against himself." Allen v. Illinois, 478 U.S. 364, 368 (1986). Further, the South Carolina Constitution provides: "[n]o person . . . shall . . . be compelled in any criminal case to be a witness against himself." S.C. Const. art.1 §12.

"The question whether a particular proceeding is criminal for the purposes of the Self-Incrimination Clause is first of all a question of statutory construction." Allen, 478 U.S. at 368.. The South Carolina Supreme Court held the SVPA is a civil, non-punitive scheme, and is modeled after the Kansas SVPA. In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 316 (2001). *See also*, Kansas v. Hendricks, 521 U.S. 346 (1997) (the statutory construction of the Kansas SVP creating a civil commitment scheme was not punitive in nature and did not render the proceeding thereunder criminal).

In Allen, the Petitioner challenged statements he made to psychiatrists during a compelled evaluation, arguing the use of those statements by the doctors during trial violated his Fifth Amendment right. The United States Supreme Court affirmed the Illinois Supreme Court's holding that "the privilege against self-incrimination was not available in sexually-dangerous-person proceedings because they are "essentially civil in nature," and the aim of the statute being to provide "treatment, not punishment." Allen, 478 U.S. at 367–68.

The Illinois Supreme Court reasoned "the State's interest in treating, and protecting the public from, sexually dangerous persons would be "almost totally thwarted" by allowing those persons to refuse to answer questions posed in psychiatric interviews, and that the privilege would be "of minimal value in assuring reliability," concluding "due process does not require the application of the privilege." People v. Allen, 107 Ill. 2d 91, 481 N.E.2d 690, 696 (1985), aff'd sub nom. Allen, 478 U.S. at 367.

Here, allowing Appellant to refuse to cooperate with testing deemed necessary by a qualified expert as a part of a comprehensive evaluation to determine if he meets the statutory definition of a sexually violent predator, "thwarts" the entire purpose and expressed intent on the South Carolina Legislature. The SVPA is civil not criminal; Appellant faces the possibility of

confinement for treatment, not punishment; therefore, he cannot incriminate himself in future criminal proceedings. Further, the information gathered from the PPG is not testimonial, the Appellant is not asked any questions, like in a polygraph, that could incriminate him in future criminal proceedings. The information gathered would simply be used to determine Appellant's sexual arousal to various stimuli for purposes of determining if he has a suffers from a mental abnormality that makes him likely to commit future acts of sexual violence; not for purposes of future criminal proceedings. Thus, the compelled PPG testing does not violate the Appellant's right against self-incrimination, and therefore, the circuit court did not err in ordering Appellant to comply with Dr. Gottfried's evaluation.

C. Compliance with testing deemed necessary by a qualified expert does not violate the Fourteenth Amendment because the testing is rationally related to a compelling State interest.

The South Carolina Constitution incorporates a right to be free from unreasonable invasions of privacy. S.C. Const. art 1, § 10. The Fourteenth Amendment provides that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. Substantive due process protects citizens against arbitrary or capricious action by the government regardless of the procedures used to carry out that action. In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 347 (2002). The Due Process Clause protects only "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition.'" State v. Dykes, 403 S.C. 499, 744 S.E.2d 505, 509 (2013) (*quoting* Washington v. Glucksberg, 521 U.S. 702, 720–21 [1997]). "Thus, courts must 'ensure that legislation which deprives a person of a life, liberty, or property right have, at a minimum, a rational basis, and not be arbitrary . . . .'" *Id.* (*quoting* Luckabaugh, 568 S.E.2d at 346).

In Luckabaugh, the South Carolina Supreme Court held the SVPA complies with the substantive due process requirements of both the United States and South Carolina Constitutions. 568 S.E.2d at 350. The United States Supreme Court's decision in Kansas v Crane held "the substantive due process clause **requires a court to determine an individual suffers from a mental illness** which makes it seriously difficult, though not impossible, for that person to control his dangerous propensities." *Id.* at 348. (emphasis added).

The State's expressed interest in protecting its citizens from a narrow subclass of dangerous sexual offenders is rationally related to compelled physiological testing because the finding of a mental abnormality or personality disorder coupled with an offender's dangerous propensities is key to determining whether Appellant should be released or proceed to trial for involuntary civil commitment. Therefore, the Appellant's right to privacy is not infringed by the State's action in compelling him to undergo PPG testing deemed necessary by a qualified expert as a part of a comprehensive psychosexual evaluation to determine if Appellant suffers from a mental illness he has serious difficultly controlling if left untreated. The circuit court did not err in compelling Appellant to comply with the testing.

D. Appellant failed to preserve the issue that his constitutional rights to procedural due process in connection with the contempt determination were violated.

1. Preservation

The State contends Appellant did not properly preserve this issue for the court. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." Caldwell v. Wiquist, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (*citing* I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Constitutional

arguments are no exception to the preservation rules. *Id.* (*citing* Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 [2012]).

On October 31, 2016, the circuit court ordered Appellant held in contempt for violating a prior Order compelling him to cooperate with Dr. Gottfried's evaluation, including the PPG. The Order was supported by an affidavit from Dr. Gottfried, which documented Appellant's failure to cooperate. (Affidavit, Dr. Emily Gottfried, dated October 4, 2016; R. pp. 266). Subsequently, Appellant filed a Motion to Alter or Amend Judgment. (Motion to Alter or Amend Judgment dated November 14, 2017; R., pp. 168-175). As grounds for his motion to alter or amend judgment, Appellant stated compelling him to submit to PPG testing: 1) violates his substantive due process rights; 2) the PPG is an unreasonable search and seizure; 3) it violates his right to privacy; and 4) it violates his right against self-incrimination. On its face, the motion does not claim the contempt order violated Appellant's procedural due process rights. (Motion to Alter or Amend Judgment dated November 14, 2017; R., pp. 168-175). Thus, Appellant failed to properly preserve this issue for the court's review.

2. Even if the appellate court finds that the issue was properly preserved, the Appellant's procedural due process rights were not violated.

"The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." State v. Binnarr, 400 S.C. 156, 733 S.E.2d 890, 894 (2012) *(quoting* Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 656 S.E.2d 346, 350 [2008]).

Here, Appellant's procedural due process rights were not violated because he had notice that failure to cooperate with Dr. Gottfried's evaluation would constitute contempt of court. After a full hearing on the matter, the circuit court judge held "in abeyance any ruling as to whether [Appellant] should be held in contempt, in order to give him time to cooperate with Dr. Gottfried's

evaluation." (Order filed September 23, 2016; R., pp. 11-14). Appellant also had notice of what would happen if he failed to cooperate. The circuit court ordered "if [Appellant] fails to cooperate with that evaluation, and an affidavit is provided to the court, [Appellant] will then be held in contempt. . . ." (Order filed September 23, 2016; R., pp. 11-14).

Further, when Appellant was transported to SBCL on September 29, 2016 to complete the PPG test, he refused. Significantly, Appellant consulted with counsel via telephone after refusing to cooperate, and after consultation, still refused to cooperate. (Gottfried Affidavit,¶ ¶ 4, 5; R.p. 266).

Appellant had notice and opportunity to be heard in connection with the contempt determination. Appellant's procedural due process rights were not violated because he was vigorously represented by competent counsel, and there were multiple hearings during which Appellant had the opportunity to present evidence and legal arguments; therefore Appellant's procedural due process rights were not violates, and the circuit court did not err in holding Appellant in contempt based on his continued refusal to comply with Dr. Gottfried's evaluation.

III. The circuit court only compelled Appellant to cooperate with the PPG deemed necessary by the State's mental health expert, expressly declining to rule on the issue of the admissibility of PPG evidence at trial, and therefore, that issue is not properly before the appellate court.

The State contends the admissibility of the PPG evidence is not properly before this appellate court because the issue is not ripe. The SVP proceedings have yet to reach the civil commitment trial, where admissibility of evidence would be properly addressed.

A. The issue of admissibility is not ripe because the SVP proceedings have not reached the point of a civil commitment trial.

The admission of evidence is within the sound discretion of the trial judge. Hartfield v. Getaway Lounge & Grill, Inc., 388 S.C. 407, 697 S.E.2d 558, 561 (2010). Further, "[a] justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a **contingent**, hypothetical or abstract character." Holden v. Cribb, 349 S.C. 132, 561 S.E.2d 634, 637 (Ct. App. 2002) (*quoting* Byrd v. Irmo High Sch., 321 S.C. 426, 468 S.E.2d 861, 864 [1996]) (emphasis added).

Here, this matter has yet to reach the civil commitment stage. The circuit court properly noted "much of the attack by [Appellant] on the PPG relates to its admissibility at trial, and the posture of these proceedings is that they are not yet at that point." (Order Filed September 23, 2016; R. pp. 11-14). Currently, neither the State nor Appellant know what Dr. Gottfried's evaluation will conclude or recommend. It is premature to discuss whether the PPG is admissible as evidence in a civil commitment trial, when it is unknown whether there even will be a civil commitment trial. There is no real controversy requiring judicial determination; thus, the issue is not ripe, and the admissibility of the PPG as evidence should be addressed by the trial judge, if and when a civil commitment trial is appropriately scheduled.

B. The circuit court expressly declined to rule on PPG admissibility; however, even if this court determines the issue is properly before the appellate court, the PPG is admissible as evidence in a civil commitment trial.

The PPG's history goes back to 1908, when a type of plethysmograph was used to check the effect of certain drugs on the vasomotor reflexes in dogs. Barker, James, and Howell, Robert, The Plethysmograph: A Review of Recent Literature, Bull Am. Acad. Psychiatry Law, 20(1): 13-25 (1992). In the 1930s, the medical community began using plethysmograph to assess erectile difficulties. *Id.*

Beginning in 1957, the PPG was used in Czechoslovakia as a method to determine the validity of homosexuality claims by soldiers attempting to avoid military service, and now, it "is a widely recognized means of measuring male sexual arousal to given stimuli." Murphy, L., *et. al.*, Standardization of Penile Plethysmography in Assessment of Problematic Sexual Interests, J. Sex. Med. 12(9): 1853-1861 (2015). It "has become a standard objective measure of arousal and is considered by some researchers and clinicians to be essential in the assessment and treatment of male sex offenders and men with paraphilic interests." *Id; see also* Murphy, L., *et. al.*, Assessment of Problematic Sexual Interests with the Penile Plethysmograph: an Overview of Assessment Laboratories, Current Psychiatry Reports 17(5):567 (2015) (PPG "is an objective assessment of sexual arousal based on the change in penis circumference and volume due to increased vasocongestion in the penis"); Howes R. J. & Howes, S. E., Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment, J. Forensic Res. 8(6):398 (2017) (PPG is "[p]erhaps the best means of objectively measuring deviant sexual interest").

The PPG's general purpose is to measure male sexual arousal regardless of how the result is used, including assessing erectile dysfunction, checking function after a prostatectomy, or to determine the efficacy of a sexual behavior treatment. The PPG has undergone Federal Drug

Administration review, and the FDA has approved several PPG systems, including the Limestone system used by the SBCL. *See* 501(k) Summary – Limestone Technologies, Inc. (https://www.accessdata.fda.gov/cdrh_docs/pdf5/K052929.pdf).

In addition, the Medicaid/Medicare regulations provide coverage for PPG tests. *See* Federal Register Volume 72, Number 61, Addendum III and Addendum V (Friday, March 30, 2007) (https://www.gpo.gov/fdsys/pkg/FR-2007-03-30/html/07-1414.htm). Major insurance companies, such as Blue Cross Blue Shield, also recognize the PPG as a medical procedure, and either provide limited coverage, or exclude it from coverage. *See* Blue Cross Blue Shield of Texas, Treatment of Male Sexual Dysfunction, Special Comment on Contract Exclusions (January 7, 2003) (https://www.bcbstx.com/provider/pdf/medicalpolicies/surgery/717-010.pdf). The Federal Government's and insurance companies' recognition of the PPG as a valid medical device and procedure amply demonstrates its general acceptance.

Penile plethysmography is a physiological measure developed as a tool to assess physiological patterns of male sexual arousal.[6] W.T. O'Donohue & D.S. Bromberg (Eds.) *Sexually Violent Predators: A clinical science handbook* pp. 243-254. Cham, Switzerland: Springer, 2019 (Plaud, J.J.The use of penile plethysmography in SVP assessment and treatment decision-making.)

[6] There is a significant misconception regarding the PPG process. While the concept of the PPG is uncomfortable to many, the process is designed to protect personal privacy. The strain gauge (a small, rubber –like ring) is calibrated multiple times using licensed software prior to the examinee placing it on his penis. In fact, many PPG software calibration programs will not initiate a PPG test until the gauge has been properly calibrated. The examinee sits by himself in a private room and is presented with various stimuli. The stimuli are typically audio recordings and slides. In the United States, no child pornography is shown to the examinee via slides or video. The circumference of the flaccid penis at the start of each trial is compared to the maximum circumference for the trial. The PPG measures sexual arousal "by recording changes in the erectile tissue surrounding the penis as it becomes filled with blood" as "this is the most basic overt physiological manifestation of sexual arousal in the human male (Plaud, 2019, p. 244).

As many individuals undergoing sexual behavior evaluations may be motivated to conceal arousal to 'deviant' (i.e., nonconsensual/abusive) stimuli (i.e., sexual arousal to children), having a way to objectively assess this is vital for evaluations of future sexual dangerousness risk. Specifically, having 'deviant' sexual interests, especially sexual arousal to children, is one of the strongest risk factors associated with sexual recidivism. Mann, R.E., Hanson, R.K., & Thornton, D. (2010). Assessing risk for sexual recidivism: Some proposals on the nature of psychologically meaningful risk factors. *Sexual Abuse: A Journal for Research and Treatment, 22*(2), 191-217; Hanson, R.K. & Morton-Bourgon, K.E. (2009), The accuracy of recidivism risk assessments for sexual offenders: A meta-analysis of 118 prediction studies. *Psychological Assessment, 21*(1), 1-21; Hanson, R.K. & Morton-Bourgon, K.E. (2005), The characteristics of persistent sexual offenders: A meta-analysis of recidivism studies. *Journal of Consulting and Clinical Psychology, 73*(6), 1154-1163; Hanson, R.K. & Bussiere, M.T. (1998). Predicting relapse: A meta-analysis of sexual offender recidivism studies. *Journal of Consulting and Clinical Psychology, 66*(2), 348-362.

"Phallometric testing is currently used as a diagnostic, treatment planning, and risk management tool in a variety of jurisdictions" Wilson, RJ. (2016), The use of phallometric testing in the diagnosis, treatment, and risk management of male adults who have sexually offended. In L. Craig & M. Rettenberger (Eds.), *The Wiley Handbook on the Theories, Assessment & Treatment of Sexual Offending: Volume 2.* (p. 823-849). Chichester, UK: Wiley-Blackwell.

The PPG's principal purpose in sexual offending behavior evaluations is determining an individual's level of risk to commit acts of sexual aggression by measuring the extent to which the individual is dominated by sexual arousal to deviant stimuli, and predictions of risk to re-offend "are rendered much more accurate by the inclusion of data from this technique." Howes, R. J., Measurement of Risk of Sexual Violence Through Phallometric Testing, Legal Medicine 11:368-

369 (2009). "Although not universally embraced, there nonetheless remains widespread acceptance and recognition of the value of phallometric assessment," and it "is certainly an assessment procedure which has come a long way since it was first devised." Howes R. J. & Howes, S. E., *Sexual Arousal as a Function of Stimulus Mode: Implications for Phallometric Assessment*. J. Forensic Res. 8(6):398 (2017).[7] *See also* Dean Tong, The Penile Plethysmograph, Abel Assessment for Sexual Interest, and MSI-II: Are They Speaking the Same Language?, 35 Am. J. of Fam. Therapy, 187, 190 (2007) ("The PPG, when administered properly, represents a direct and objective measurement of a man's level of sexual arousal to normal versus sexualized stimuli. Since there is a strong relationship between an individual's pattern of sexual arousal and the probability that he may or will act upon that arousal, an important first step in gauging one's propensity to sexual deviancy is to obtain an accurate assessment of that person's sexual arousal patterns, which is precisely what the PPG does."); James M. Peters, Assessment and Treatment of Sex Offenders: What Attorneys Need to Know, Advocate, 23 (Dec. 1999) (PPG "is invaluable in the evaluation, treatment and management of known sexual offenders.").

Further evidence of the PPG's general acceptance in the mental health community, and perhaps the strongest evidence, is found in the DSM-V, which mental health professionals often refer to as "the bible" for mental health diagnosis purposes. In the section regarding paraphilic disorders, the DSM-V provides:

---

[7]Both the polygraph and the PPG measure physical changes, but the PPG differs significantly in that it measures the size of an erection, which is either there or it is not. Unlike the polygraph, during which the examiner makes subjective interpretations of responses as they occur, the PPG technician makes no such interpretation. The PPG results, i.e., the size of the penis erection during certain stimuli, are recorded by the machine with the technician in a separate room. The evaluator then reviews the results and compares the level of arousal to one stimuli set versus another set, which is done by mathematical formula. Experts can disagree about the significance of one arousal over another, but that is no different than any other issue subject to expert opinion.

> The most widely applicable framework for assessing the strength of a paraphilia itself is one in which examinees' paraphilic sexual fantasies, interest and behaviors are evaluated in relation to their normophilic sexual interests and behaviors. In a clinical interview or on self-administered questionnaires, examinees can be asked whether the paraphilic sexual fantasies, urges or behaviors are weaker than, approximately equal to, or stronger than their normophilic sexual interest sexual interests and behaviors. The same type of **comparison can be, and usually is, employed in psychophysiological measures of sexual interest, such as penile plethymography in males** or viewing time in males and females.

DSM-V 686 (emphasis added). It further provides:

> Psychophysiological measures of sexual interest may sometimes be useful when an individual's history suggest the possible presence of pedophilic disorder but the individual denies strong or preferential attraction to children. **The most thoroughly researched and longest used of such measures is penile plethysomography**, although sensitivity and specificity of diagnosis may vary from one site to another.

DSM-V 699 (emphasis added). Previous DSM versions did not recognize the PPG, however, by the time the DSM-V was published in 2013, there was sufficient research indicating the PPG's validity as a tool to measure an individual's sexual interest.

Courts have also recognized the general acceptance and admissibility of the PPG in sexually violent predator cases. In In re Detention of Halgren, 156 Wash. 2d, 132 P.3d 714 (2006), the Washington Supreme Court found PPG results were admissible as part of the diagnostic process, and the PPG testimony would assist the jury in understanding the expert's sexual deviancy diagnosis. *Id.* at 719. The court further found the issue of the PPG's reliability goes to the weight of the evidence rather than its admissibility *Id.*; *see also* In re Detention of Herrick, 198 Wash. App. 439, 393 P.3d 879, 885 (2017), *aff'd,* 190 Wash. 2d 236, 412 P.3d 293 (2018)(same).

The Illinois appellate court also found PPG evidence was admissible in In re Commitment of Sandry, 367 Ill.App.3d 949, 858 N.E.2d 295 (2006). As to the admissibility of a particular test or methodology, the court stated: "once it is determined that a methodology is generally accepted, it follows that it has achieved a sufficient degree of reliability and validity to cross the threshold

of admissibility." *Id.* at 309. The court then engaged in an exhaustive analysis of case law (use of PPG mentioned in at least 21 states, including South Carolina), statutes [eleven state statutes] and regulations). *Id.* at 310-313.

The court also discussed numerous academic articles, which it determined provided ample support "to conclude that PPG testing is accepted by a substantial number of experts in this field such that it may be used to support a qualitative assessment of the future dangerousness of an individual." *Id.* at 309-316. Acknowledging some experts have criticized and rejected PPG testing, the court noted the existence of contrary authority is not dispositive because many people could disagree on the acceptance of any given methodology, but those who accept it may still constitute a significant subset of experts in any given field. *Id.* at 316; *see also* State v. Graham, 275 Kan. 176, 183, 61 P.3d 662, 667 (2003) (some disagreement in the scientific and medical community as to the reliability of a particular test method is a matter affecting the weight of such evidence and not its admissibility; such evidence is admissible if a qualified expert witness testifies the particular test method is reliable and accurate, and it is generally accepted as such by other experts in the field).

The detailed analysis above demonstrates the PPG is a reliable test, is an accepted practice in the field of psychology, and should be admissible at trial. The admissibility of evidence at trial, however, is a question for the trial court, and this matter has yet to reach that stage. The circuit court only compelled Appellant to cooperate with PPG testing as a part of Dr. Gottfried's comprehensive evaluation. This determination is key to whether this action proceeds to a civil commitment trial, where the trial court can address any questions of admissibility of the PPG test; therefore, the issue is not ripe for appellate review, and the circuit court did not err in compelling Appellant to comply with PPG testing.

IV. Appellant is not entitled to a dismissal because the circuit court granted a continuance beyond the sixty-day statutory requirement for submission of the evaluation report and Dr. Gehle complied with the court's order by completing the evaluation within the deadline.

Upon determination there is probable cause to believe a person is a sexually violent predator, the SVPA requires the person must be transported to the Department of Mental Health for evaluation by the court appointed evaluator to determine whether that person is a sexually violent predator. S.C. Code Ann. § 44-48-80(D). The SVPA mandates the evaluation must be completed within sixty days of the probable cause hearing, and the court may grant one extension for good cause. *Id.* Further, "[t]he grant or denial of a continuance is within the sound discretion of the trial judge and is reviewable on appeal only when an abuse of discretion appears from the record." In re Miller, 393 S.C. 248, 713 S.E.2d 253, 256 (2011) (*citing* Plyler v. Burns, 373 S.C. 637, 650, 647 S.E.2d 188, 195 [2007]).

In this case, after the hearing on October 26, 2015, the circuit court found probable cause to believe Appellant is a sexually violent predator, and issued an order for Appellant to undergo a mental evaluation. By statute, the court ordered evaluation would have been due for completion on December 26, 2015. On or about December 8, 2015, over two weeks prior to the sixty-day time limit, Dr. Gehle timely requested an extension to complete her evaluation. In fact, Appellant's trial counsel acknowledged that Dr. Gehle "made a timely request for an extension in which to complete her evaluation." (Resp't Second Mot. Dismiss ¶ 7, R. pp. 147-149). Moreover, the court, by Order dated December 14, 2015, found Dr. Gehle showed good cause for an extension, and granted a continuance with no specific deadline for completion. Due to unknown circumstances this Order was not filed until January 15, 2016.

When Dr. Gehle's evaluation was not received within the sixty-day time limit, Appellant filed a motion to dismiss. The circuit court held a hearing on February 2, 2016, and based on the

record, the court found it intended to grant a continuance to Dr. Gehle. The court denied the motion to dismiss; reasoning the filing date did not affect the decision of the court to grant the continuance to Dr. Gehle. (Order filed February 11, 2016; Appendix to ROA, p. 2).

Subsequent to the circuit's order granting a continuance and the first motion to dismiss, Appellant's trial counsel again moved to dismiss the case or in the alternative to set a deadline for the completion of the evaluation. (Respondent's Second Motion to Dismiss; R., pp. 147-149. On March 31, 2016, the circuit court denied the motion to dismiss, but ordered Dr. Gehle to complete her evaluation within forty-five days, making the new date for completion May 15, 2016. In full compliance with the circuit court's order, Dr. Gehle's report was completed on May 12, 2016, and subsequently forwarded to the court and counsel.

The Appellant's argument the State and Dr. Gehle failed to comply with statutorily required timelines and the court ordered deadline to complete the evaluation is without merit. The facts conclusively establish the State and Dr. Gehle complied with all statutorily required time limits for the completion of the evaluation by seeking a continuance for good cause, and then complying with the court ordered deadline by completing the evaluation within forty-five days as ordered by the court. Thus, the circuit properly ruled Appellant was not entitled to a dismissal, and the circuit court's ruling should be affirmed.

CONCLUSION

Based on the foregoing, the State respectfully submits the judgment of the circuit court 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
Deborah R.J. Shupe

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 24, 2020

RECEIVED
Jun 24 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County
The Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2018-001442

In the Matter of the Care and Treatment of
Larry James Tyler, Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent 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,"

ALAN WILSON
Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

By: Deborah R.J. Shupe
Deborah R.J. Shupe

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 24, 2020