STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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

APPELLANT.

APPELLATE CASE NO. 2019-001817

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUE ON APPEAL

In this sexually violent predator case, did the trial court erred in refusing to grant appellant, who was sixty-seven years old at the time of his commitment, a directed verdict because of his low likelihood to reoffend combined with a stroke that left him unable to speak except for the letters “B” and “P”?

STATEMENT OF THE CASE

Near the end of appellant's release, the Attorney General sought his commitment as a sexually violent predator and on October 14, 2019, a trial was held before the Honorable Jocelyn Newman and a jury. R. 1. James G. Bogle, Jr. appeared for the Attorney General. R. 1. Aimee J. Zmroczek represented appellant. R. 1. The jury found appellant was a sexually violent predator and Judge Newman ordered him committed. R. 259, l. 14 – 268, l. 13. This appeal follows.

STANDARD OF REVIEW

"On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light most favorable to the State. The Court's review is limited to considering the existence or nonexistence of evidence, not its weight. When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt based on facts or circumstances which do not amount to proof." State v. Bennett, 415 S.C. 232, 235–36, 781 S.E.2d 352, 353 (2016) (internal quotations and citations omitted). "[I]n ruling on a directed verdict motion where the State relies on circumstantial evidence, the court must determine whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." Id. at 237, 781 S.E.2d at 354.

*

ARGUMENT

In this sexually violent predator case, the trial court erred in refusing to grant appellant, who was sixty-seven years old at the time of his commitment, a directed verdict because of his low likelihood to reoffend combined with a stroke that left him unable to speak except for the letters "B" and "P."

Appellant was sixty-seven years old at the time of this SVP commitment trial. R. 184, l. 16 – 19. His age reduced his score by the maximum amount on the actuarial table used by the State's expert to calculate his risk to reoffend within five years, the Static-99. R. 182, l. 19 – 184, l. 20. The expert, Dr. Gordon Brown, gave appellant a score of "4" on the Static-99, which equated to a 10-12% chance to reoffend within five years. R. 158, l. 12 – 159, l. 22. The average rate of re-offense for all sex offenders is 5%. R. 159, l. 17 – 22. Dr. Brown agreed that drug dealers, robbers, burglars, and murderers all reoffend at a higher rate than sex offenders. R. 184, l. 25 – 185, l. 8.

Dr. Brown testified that appellant had pedophilia. R. 152, l. 13 – 25. The two convictions in his past were a 2002 first-degree criminal sexual conduct with a minor charge involving his daughter and a 2017 offense involving the granddaughter of a woman he lived with. R. 137, l. 3 – 10. R. 140, l. 10 – 16. The 2017 conviction was originally charged as a third degree criminal sexual conduct with a minor, but appellant pled to second-degree assault and battery, which is not a sexually violent crime. R. 138, l. 19 – 139, l. 9. Dr. Brown agreed with defense counsel that appellant's victims were children of people he dated with whom he had developed a relationship. R. 189, l. 8 – 20.

While appellant awaited his SVP trial, he suffered a severe stroke. R. 190, l. 1 – 191, l. 21. The doctors diagnosed appellant with global aphasia, which affected his cognitive abilities

and ability to speak. R. 191, l. 20 – 25. R. 10, l. 2 – 21. Because of the stroke, Dr. Brown met with appellant to see if his evaluation would change. R. 190, l. 1 – 191, l. 1. Appellant could walk and recognized Dr. Brown. R. 190, l. 1 – 191, l. 1. Appellant was "cooperative and pleasant as, as he could be, but he couldn't speak except to make P and B sounds and was clearly frustrated at his inability to speak." R. 190, l. 1 – 191, l. 1.

Appellant could respond to yes or no questions, but Dr. Brown observed, "It's difficult to know how much he's really understanding of, of, of what I'm saying." R. 190, l. 1 – 191, l. 1. Appellant could not write complete sentences. R. 190, l. 1 – 191, l. 1. He identified President Trump as the current president, but could not identify President Obama as the immediate past president even though he was able to do so at his previous meeting with Dr. Brown. R. 190, l. 1 – 191, l. 1. He could write "8+5" on a piece of paper, but could not write the sum. R. 190, l. 1 – 191, l. 1. Dr. Brown summarized, "So, he's having a very difficult time doing anything complex or responding to complex material." R. 190, l. 1 – 191, l. 1.

Appellant also had a pacemaker implanted after his stroke. R. 192, l. 21 – 193, l. 2. He took blood pressure medicine which can affect libido and performance. R. 192, l. 13 – 20. When asked, "Can you say when Mr. Garrard will recidivate," Dr. Brown responded, "No. No." R. 185, l. 19 – 21. When asked, "Can you say he will ever," Dr. Brown responded, "No." R. 185, l. 22 – 23. When asked, "Is it possible he may never," Dr. Brown responded, "It's possible, yes." R. 185, l. 24 – 25. But on direct-examination, when asked whether appellant's health problems changed Dr. Brown's opinion that appellant needed to be committed, he replied, "I don't see anything in the records that would indicate that that would change anything about my opinion." R. 166, l. 19 – 25.

Defense counsel called appellant to the stand for what she told Judge Newman would be "the quickest direct you've ever seen." R. 217, l. 8 – 11. The entire direct examination of appellant was as follows:

> Q. Mr. Garrard, can you state your name for the record?
>
> A. Um, scuse [phonetic]. B, B. B, B.
>
> Q. Mr. Garrard, where are you currently, where were you planning to go if you are released?
>
> A. B, B vere [phonetic].

R. 218, l. 22 – 219, l. 1. The Attorney General asked no questions of appellant. R. 219, l. 4 – 5. Appellant moved for directed verdict at the close of the State's case and renewed the motion after appellant's testimony. R. 212, l. 25 – 217, l. 7. R. 219, l. 17 – 22. Defense counsel argued that because a 2005 SVP evaluation done on appellant by Dr. Pam Crawford found appellant did not have pedophilia, Dr. Brown's new evaluation was stale. R. 212, l. 25 – 217, l. 7. Defense counsel argued appellant's case was a "reverse" of In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015). R. 212, l. 25 – 217, l. 7. Judge Newman denied appellant's motions. R. 212, l. 25 – 217, l. 7.

The trial judge erred in denying appellant's directed verdict motion. The State bears the burden of proving a defendant meets each element of the definition of a sexually violent predator beyond a reasonable doubt. S.C. Code Ann. § 44-48-100(A). "'Likely to engage in acts of sexual violence' means 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). The statute does not further define "likely." When asked by defense counsel what "likely" meant, Dr. Brown stated, "It means that it's more likely than not that he would commit future sexual offenses." R. 178, l. 15 – 24.

Dr. Brown failed to use the beyond a reasonable doubt standard on this all-important element. He instead used the preponderance of the evidence standard. The State in this case failed to prove beyond a reasonable doubt that appellant was likely to reoffend sexually unless confined. In re Taft, 413 S.C. 16, 774 S.E.2d 462 (2015) (reversing denial of directed verdict on appeal). A directed verdict should be granted if the State's evidence only raises a suspicion that a defendant will reoffend. See Id. at 22, 774 S.E.2d at 465.

The beyond a reasonable doubt standard is more rigorous than the preponderance of the evidence standard. Judges in this state frequently define the preponderance standard by asking juries to imagine the scales of justice, even at the beginning of the case, tipping ever so slightly one way or another. This standard implies a numerical value of 51%. Therefore, the beyond a reasonable doubt standard necessarily must be a percentage greater than 51% if assigned a numerical value.

Here, the numerical value given appellant's likelihood to reoffend was only 10-12%. A 10-12% value on this important element of the statute could not even satisfy the preponderance standard, much less the beyond a reasonable doubt standard, which Dr. Brown failed to use. Proof beyond a reasonable doubt means jurors must be "firmly convinced" of the proposition and it must eliminate any "real possibility" of the opposite proposition. See State v. McHoney, 344 S.C. 85, 98-99, 544 S.E.2d 30, 36-37 (2001) citing Victor v. Nebraska, 511 U.S. 1 (1994). An 88% chance that appellant would not reoffend is far more than a real possibility.

Given appellant's age and terrible health, his risk to reoffend is less than the "worst of the worst" for whom the SVP statute was enacted. Appellant could not even speak. Without the ability to speak, appellant's ability to reoffend is almost nonexistent. His further health

limitations, including libido-reducing blood pressure medicine and a pacemaker make reoffending almost an impossibility. This Court should reverse.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed and this Court should order his release.

This 27th day of July, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Jul 27 2020
SC Court of Appeals

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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

APPELLANT.

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Ronald Garrard states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Jocelyn J. Newman, which was held on October 14 - 15, 2019, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Ronald Garrard.

This 27th day of July, 2020.

Respectfully Submitted,

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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

APPELLANT.

DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) Trial Transcript Dated October 14-15, 2019
(2) Pre-Trial Defendant's Exhibit No. 1 (Medical Records)
(3) Pre-Trial Defendant's Exhibit No. 2 (Internet Articles)
(4) State's Exhibit No. 1 (Indictment and Sentence Sheet)
(5) State's Exhibit No. 2 (Indictment and Sentence Sheet)
(6) Defendant's Exhibit No. 1 (Voir Dire Requests)
(7) Court's Exhibit No. 1 (Jury Note)
(8) Court's Exhibit No. 2 (Jury Note)
(9) Court's Exhibit No. 3 (Proposed Jury Charge)
(10) Court's Exhibit No. 4 (Jury Note)
(11) Court's Exhibit No. 5 (Jury Charge)

I certify that this designation contains no matter which is irrelevant to this appeal.

July 27, 2020

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant 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."

July 27, 2020.

s/David Alexander
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

RECEIVED
Jul 27 2020
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

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

APPELLANT.

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Anders Brief of Appellant and Designation of Matter in the above-referenced case have been served upon Deborah R.J. Shupe, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Ronald Garrard, at Well Path, Broad River Correctional Institution, 4546 Broad River Road, Columbia, SC 29210, this 27th day of July, 2020.

s/David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT