

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Richland County
The Honorable Thomas A. Russo, Circuit Court Judge
Appellate Case No. 2019-2020

In the Matter of the Care and
Treatment of Charles T. Sullivan,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large, and therefore, Appellant was not entitled to a jury trial on the issue. (Appellant's Issues I and II)

STATEMENT OF THE CASE

After a jury trial in July 2015, Appellant Charles Sullivan was civilly committed pursuant to the South Carolina Sexually Violent Predator Act (SVPA). As required by the SVPA, the Department of Mental Health (DMH) reviewed Appellant's mental status annually, and in November 2018, a DMH psychologist issued an annual review report concluding Appellant's mental status had not so changed he was safe to be at large.

After a hearing, at which Appellant appeared and was represented by counsel, the Honorable Thomas A. Russo, Circuit Court Judge, found there was no probable cause to believe Appellant's mental status had so changed he was safe to be at large, and continued Appellant's civil commitment for long term, control, care and treatment. This appeal followed.

STATEMENT OF FACTS

In July 2015, a jury found beyond a reasonable doubt Appellant met the criteria for civil commitment pursuant to the SVPA. Thereafter, his mental status was reviewed annually, and each review found Appellant's mental status had not so changed he was safe to be at large.

In November 2018, Rozanna Tross, Psy.D., issued an annual review report concluding Appellant's mental status had not so changed he was safe to be at large, and he should remain in the Sexually Violent Predator Treatment Program (SVPTP) for long term control, care and treatment. Appellant requested an annual review probable cause hearing, asserting there was probable cause to believe he was safe to be at large, and filed a petition for release on the ground the review evaluator had removed the Pedophilia diagnosis on which he was originally committed.¹ The matter was called for a hearing on October 14, 2019, before the Honorable Thomas A. Russo, Circuit Court Judge.

Appellant argued he was entitled to a new commitment trial because Dr. Tross' report did not diagnose Pedophilia, and without the Pedophilia diagnosis the commitment trial jury would not have found he was a sexually violent predator. He also argued the report showed a significant drop in his static risk number, and that drop indicated he should get a new commitment trial. (Hearing Transcript [HT], pp. 5-10, Annual Examination and Review Hearing Notice dated November 8, 2018, Petition for Release dated May 27, 2019; Record on Appeal [ROA], pp. _____).

The State argued Dr. Tross' report did not exclude the Pedophilia diagnosis, but based on many factors, including the wide age range (prepubescent to post pubescent) of Appellant's

¹The DMH Director did not authorize Appellant to file a release petition. *See* S.C. Code Ann. §44-48-120(A) (2018) (Director certifies in writing the resident is safe to be at large and authorizes resident to petition the court for release).

victims, she concluded the more expansive Other Specified Paraphilic Disorder was appropriate for clinical and treatment purposes. While Pedophilia was one diagnosis at Appellant's commitment trial, the pre-commitment evaluator also diagnosed Unspecified Paraphilic Disorder (non-consent) and Narcissism, which the commitment trial jury had before it. The State further argued Appellant's claim the verdict would have been different if the Pedophilia diagnosis was excluded required pure speculation. (HT, pp. 10-19, Respondent's Reply to Petitioner's Petition for Release, filed August 22, 2019; R., _____).

Dr. Tross was qualified as an expert in forensic psychology without objection, and testified her duties as a chief psychologist for DMH included conducting annual reviews of the residents in the SVPTP. She started the 2017-2018 annual review process regarding Appellant in October 2018, and as part of that process, Dr. Tross interviewed Appellant for approximately two hours, and reviewed documentation regarding his criminal history, the original pre-commitment evaluation, and an annual review report for 2016-2017 prepared by Donna Maddox, M.D. (HT, pp. 10-23; R., pp. _____).

When Dr. Tross began the review process (October 2018), Appellant was in Phase 2.1 of the SVPTP, and had not progressed further at the time of the hearing (October 2019). Dr. Tross testified Appellant continued to minimize his role in his offenses, and did not acknowledge his sexually deviant attraction to minors, which he had acted on for over twenty years. He also minimized his role by asserting the minors he molested "liked to be abused." According to the treatment records, Appellant was "still in the early stages of acknowledging and understanding his own interactions." (HT, pp. 23-27; R., pp. _____).

Based on his offending history and Appellant's accounts of his offenses, Dr. Tross determined Appellant's victims ranged in age between 11 and 16 years old, which lead her to

diagnose Other Specified Paraphilic Disorder and Narcissistic Personality Disorder, and the combination of those disorders constituted Appellant's "mental abnormality." She testified Appellant "needs to address both of those equally to be able to mitigate his risk to not reoffend, given that they both play a strong role in why he offended." (HT, pp. 26-27; R., pp. ____).

She further testified Appellant's sexual attraction included a couple of age groups, and Other Specified Paraphilic Disorder encompasses those age groups, including prepubescent children. She stated Appellant's "predominant sexual behavior throughout his life has been with [children]," which "puts him at risk for all male children" rather than a specific age group. (HT, pp. 28-30; R., pp. ____). Appellant's Narcissistic Personality Disorder caused him to display a sense of grandiosity and entitlement, and led him to seek positions of power, which he exploited to sexually assault his victims, even after he was under active investigation for assaulting young victims. (HT, pp. 30-32; R., pp. ____).

As for Appellant's progress in treatment since he was committed in July 2016, Dr. Tross testified he has "very limited understanding," and "tends to externalize and minimize things." During her interview of Appellant, he was unable to state how he was working to address his narcissistic traits, and he had "a hard time recognizing how any of the traits manifested themselves in him." She stated the only factor reducing his static risk score was his age, which had "no bearing on his ability to internalize treatment," or "on determining his diagnosis." (HT, pp. 32-38; R., pp. ____).

On cross-examination, Dr. Tross explained "somebody can be a pedophile and prefer young children, and budding puberty children and adolescents," and can still be a pedophile who prefers a wide range of childhood development. Given Appellant's sustained interest in a wide age range of minor children, and the lengths he went to defend the abuse and support his interest

in children, Dr. Tross stated putting him in a category of only pedophilic attraction was not accurate. (HT, pp. 38-47; R., pp. ____). On re-direct, Dr. Tross stated she did not “undiagnose” the original Pedophilia diagnosis. (HT, p. 47, Respondent’s Reply to Petitioner’s Petition for Release, Exhibit; R., pp. ____).

Appellant did not offer any testimony or evidence, but argued the Pedophilic Disorder diagnosis was gone, and his risk assessment was lower than it was at the original commitment trial, which sufficiently established probable cause to require another trial. The circuit court found there was sufficient evidence presented to support the State’s contention Appellant still met the criteria for confinement and continued treatment. The court further found releasing Appellant would create a risk of him reoffending, and he should remain in treatment. (HT, pp. 47-49, Order Denying Trial After Annual Review Hearing Pursuant to the Sexually Violent Predator Act, filed November 25, 2019; R., pp. ____).

STANDARD OF REVIEW

“On review, the appellate court will not disturb the hearing court's finding on probable cause unless found to be without evidence that reasonably supports the hearing court's finding.” In re Care and Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 721 (2003); *see also* In re Treatment and Care of Luckabaugh, 351 S.C. 122, 568 S.E.2d 338, 342 (2002) (on appeal of a non-jury law case, the findings of fact will not be disturbed unless found to be without evidentiary support); In re Care & Treatment of Corley, 365 S.C. 252, 616 S.E.2d 441, 444 (Ct. App. 2005) (trial court's probable cause ruling in SVPA annual review hearing will not be disturbed unless there is no evidence reasonably supporting it). When reviewing a trial court's rulings in a SVPA case, the appellate court will only reverse the trial court if there is no evidence to support the trial judge's ruling. In re Care and Treatment of Harvey, 355 S.C. 53, 584 S.E.2d 893, 896 (2003) (*citing* In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 315 [2001]); Care & Treatment of Brown, 372 S.C. 611, 643 S.E.2d 118, 120–21 (Ct. App. 2007) (same). The appellate court is concerned with the existence of evidence, not its weight. Brown, 643 S.E.2d at 121.

ARGUMENT

The record amply supports the circuit court's finding of no probable cause to believe Appellant's mental status had so changed he is safe to be at large, and therefore, Appellant was not entitled to a jury trial on the issue. (Appellant's Issues I and II)

Appellant contends the circuit court erred in denying his request for a new commitment trial and finding no probable cause to believe his mental status has so changed he is safe to be at large. As he did in the circuit court, Appellant maintains that since his July 2016 commitment trial, his diagnosed mental abnormality changed from Pedophilia to Other Specified Paraphilic Disorder, and his risk assessment score dropped dramatically. He contends these "changes" warranted releasing him, or alternatively, established probable cause to believe his mental status had so changed he is safe to be at large, which warranted a new trial. Appellant's bases his arguments on a limited view of the evidence, and totally ignores substantial parts of Dr. Tross' trial testimony.

In a SVPA annual review probable cause hearing, the committed person has the burden to show and that there is probable cause that his mental condition has so changed he can safely be released from civil commitment. In re Care & Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719, 722 (2003); S.C. Code. Ann. §44-48-110 (2018). "In the context of probable cause to believe someone to be a sexually violent predator, probable cause requires that the evidence presented would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator." Care & Treatment of Chandler v. State, 382 S.C. 250, 676 S.E.2d 676, 680 (2009) (*quoting In re the Care and Treatment of Brown*, 372 S.C. 611, 643 S.E.2d 118, 122-23 [Ct.App.2007]). "Probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" Brown, 643 S.E.2d at 123 (*quoting Texas*

v. Brown, 460 U.S. 730, 742 [1983]). “The very term itself, ‘probable cause,’ does not import absolute certainty.” *Id.* at 118, 122.

Appellant’s asserts the “change” in his diagnosis from Pedophilia to Other Specified Paraphilic Disorder warranted a finding of probable cause to believe his mental abnormality had so changed he is safe to be at large, and that mandated a new trial. As a threshold matter, Dr. Tross specifically testified she did not remove the Pedophilia diagnosis, but she used the broader diagnosis of Other Specified Paraphilic Disorder because Appellant’s victims ranged from prepubescent children (Pedophilia) to pubescent children (nonconsent), and using only the Pedophilia diagnosis was inaccurate. In essence, her diagnosis reflected Appellant’s sexual deviancy was **more** extensive than Pedophilia.

Appellant also contends the commitment trial jury committed him because of the Pedophilia diagnosis, and excluding that diagnosis would have led to a different verdict. As a threshold matter, Appellant’s argument is nothing more than rank speculation. In addition, Appellant essentially ignores the pre-commitment expert’s other diagnoses of Unspecified Paraphilic Disorder (non-consent) and Narcissism, which were more than sufficient to support the jury’s verdict.

Washington state courts have addressed the issue of “changing” diagnoses in the sexual predator context. In In re Meirhofer, 182 Wash. 2d 632, 644, 343 P.3d 731, 736 (2015), the Washington Supreme Court affirmed a lower court’s finding that Meirhofer failed to present sufficient evidence to warrant an evidentiary hearing on the issue of his release from civil commitment as a sexual predator. *Id.* at 736.

At the original commitment trial, the state’s expert diagnosed Meirhofer with Pedophilia,

Paraphilia Not Otherwise Specified (NOS) (nonconsent),² a personality disorder with antisocial features, and alcohol and amphetamine dependence, and testified he had a high risk of reoffending. *Id.* at 733. In a 2010 annual review, the state’s expert gave Meirhofer the provisional diagnosis of “Rule Out Pedophilia,”³ but definitively diagnosed Meirhofer with Paraphilia, NOS (hebephilia), Paraphilia NOS (nonconsent), and Personality Disorder NOS with antisocial and borderline traits. The expert testified Meirhofer had “a 5–year sexual recidivism estimate of about 20% and a 10–year sexual recidivism estimate of about 30%” based on an actuarial risk assessment tool.⁴ *Id.* at 734.

As Appellant argues in this case, Meirhofer argued the expert’s change in diagnosis from Pedophilia to Rule Out Pedophilia constituted sufficient probable cause to require a full evidentiary hearing. The court found Meirhofer’s remaining diagnoses of Paraphilia NOS (nonconsent) and Antisocial Personality Disorder substantially supported continued confinement for treatment. *Id.* at 736. The court noted it had rejected a similar challenge to continued civil commitment after an insanity acquittal when the detainee’s diagnosis changed in State v. Klein, 156 Wash.2d 103, 124 P.3d 644 (2005). *Id.* In Klein, the court “observed that ‘the subjective and evolving nature of psychology may lead to different diagnoses that are based on the very same symptoms, yet differ only in the name attached to it.’” *Id.* (quoting Klein, 24 P.3d 653). Applying the principles set

²Paraphilia Not Otherwise Specified (NOS) is the predecessor of Other Non-specified Paraphilic Disorder in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). The DSM-5 also includes Other Specified Paraphilic Disorder, which is the diagnosis at issue in this case.

³A provisional “rule out” diagnosis indicates the evaluator found some indication of the diagnosis, but further information is needed to definitively determine whether the disorder is present or not.

⁴The risk assessment tool was the Static-99, which virtually every South Carolina SVPA evaluator uses in psychosexual evaluations.

forth in Klein, the court held “the change from a diagnosis of Pedophilia to a “Rule Out Pedophilia” and hebephilia diagnosis is not sufficient to require a new evidentiary proceeding.” *Id.*

Again, as Appellant argues in this case, Meirhofer argued the actuarial instruments used by the State's expert suggested his risk of reoffending was 30% in the next ten years. In rejecting this argument, the court noted the Washington sexual predator statute “does not limit experts to the results of actuarial tests and there is no requirement that ‘the SVP will reoffend in the **foreseeable** future.’” *Id.* at 737 (quoting In re Det. of Moore, 167 Wash.2d 113, 125, 216 P.3d 1015 [2009]) (emphasis added). In formulating his opinion Meirhofer was still a high risk to reoffend, the state’s expert used static and dynamic risk factors, as well as his own clinical judgment, to opine “there has been no apparent change in [Meirhofer's] mental condition that would indicate a lowered risk for sexual re-offense.” *Id.*

In this case, Dr. Tross testified her diagnosis of Other Specified Paraphilic Disorder did **not** replace Appellant’s prior Pedophilia diagnosis, but was a more expansive diagnosis encompassing Appellant’s sexual proclivities toward **both** pre-pubescent and pubescent male children. The bases for her diagnosis included all the information from the original commitment proceeding, as well as information revealed during Appellant’s treatment and her interview with him. In other words, Appellant is still a pedophile, but his sexual deviance is not limited to pre-pubescent children. Thus, Dr. Tross’ diagnosis did not substantially alter or change the diagnosis presented at Appellant’s original commitment trial (other than making it even broader), and it did not establish probable cause to believe Appellant’s mental status had so changed he is safe to be at large.

Appellant’s lower static risk assessment also did not establish probable cause. The static score was lower solely because of Appellant’s age, rather than any change in Appellant’s deviance.

Dr. Tross testified the lower static score had “no bearing on his ability to internalize treatment,” “his ability to work on his risk factors,” or “determining his diagnosis.” (HT, p. 35; R., p. ____).

There is ample evidence in the record supporting the circuit court’s finding of no probable cause to believe Appellant’s mental status had so changed he is safe to be at large. Conversely, there is no evidence indicating his mental status and sexual deviancy had changed in any way since his commitment as a sexual predator in July 2015. Accordingly, the Court should affirm the circuit court finding of no probable cause to believe Appellant’s sexual deviance has changed such that he is safe to be at large, and ordering the continuation of Appellant’s confinement for long term control, care and treatment.

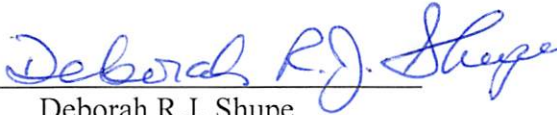
CONCLUSION

Based on the foregoing reasons, the State respectfully submits the Court should affirm the circuit court ruling.

Respectfully submitted,

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In the Matter of the Care and
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Appellant.

PROOF OF SERVICE

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

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The Initial Brief and Designation of Matter has also been filed with the Court of Appeals through the AIS system.

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

This 14th day of September, 2020.



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From: Sally Ellison
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Attachments: Sullivan Charles #2 IBOR and DOM Appellate Case No. 2019-2020 (02378496xD2C78).pdf; Sullivan, Charles IBOR (AR) (02326636xD2C78).docx

Dear Mr. Falk:

Attached is the Initial Brief of Respondent and Designation of Matter in the above appeal. Two copies of the Brief will be placed in the US Mail as designated on the Proof of Service. The Brief and Designation of Matter are also be filed with the Court of Appeals through the AIS System.

Please confirm receipt of the IBOR and DOM.

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