THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY

Roger E. Henderson, Circuit Judge

Case No. 2015CP1600788

Appellate Case No. 2018-001442

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

RETURN TO MOTION
TO PROCEED PRO SE

ISSUE

By Request for Another Counsel dated August 18, 2020(Request), and Motion to Proceed Pro Se dated September 16, 2020 (Motion), the appellant Larry James Tyler seeks to dismiss his attorney and proceed *pro se* in his appeal from a Contempt Order (Record, pp. 15-16) finding him in contempt of court for his refusal to submit to a penile plethysmograph test.

PROBABLE CAUSE

Appellant asserts, "The State never had probable cause to make the appellant a S.V.P. and put him under the act." (Request, ¶¶ 2-3). The Honorable Paul M. Burch held the probable cause hearing on October 26, 2015, and issued his Order for Evaluation Pursuant to the Sexually Violent Predator Act the same day.

At the probable cause hearing, The State asserted,

> The sexually qualifying sexually violent crime is sexual exploitation of a minor in the second degree, criminal solicitation of a minor and disseminating harmful material to a minor which

> these are all sexually violent crimes under the law." (Record, p. 271, lines 10-14).

Appellant's lawyer responded,

> It would be our opinion that, certainly, although it is under the statute certainly not the type of sexual crime of violence like what his prior convictions were. And we think that has been, certainly, a long period of time since he did have some problems back in the 90s. And we don't think that there is sufficient evidence today to say that he is a sexually violent predator; that he suffers from a mental disease or defect or personality disorder. And there is no reason to think that he would commit a crime if he was released. (Record, p. 273, line 18, to p. 274 line 2).

When Judge Burch asked, "Anything else?," counsel responded, "I'm just concerned that is a pretty thin index charge." The court agreed, "[T]his is indeed not one of the strongest cases I have reviewed over the year," but found probable cause. (Record, p. 274, lines 3-12)

The Brief of Appellant and Reply Brief of Appellant addressed this question. See the section titled *Conviction of a Violent Crime* below.

PROBABLE CAUSE EVIDENCE

Appellant asserts, "Counsel refuse to ... get the probable cause evidence from the state to prove [probable cause]. (Request, ¶ 3).

If the evidence is not in the Record, then it is like a tree falling in the forest with no one to hear it; it does not make a sound. If neither party makes it part of the record, an appellate court could not properly consider it. "Generally, 'the appellate court will not consider any fact which does not appear in the Record on Appeal.'," *State v. Gordon*, 408 S.C. 536, 541, 759 S.E.2d 755, 757 (Ct. App. 2014), *aff'd in part, amended in part, vacated in part,* 414 S.C. 94, 777 S.E.2d 376 (2015)

The probable cause issue revolved around whether the prior convictions qualified under the Sexually Violent Predator Act. The Briefs of Appellant address that issue.

DUE PROCESS

Appellant wants an attorney to assert the denial of due process. (Request, ¶ 4). Counsel did this. (Brief of Appellant,, p. 19, Issue II, p. 23, Issue II, and p. 32, Conclusion.)

GUILTY PLEA VERSUS FOUND GUILTY

Appellant asserts a jury convicted him; that he did not plead guilty. (Motion to Proceed Pro Se, ¶¶ 1-4) The Record does not suggest there was an issue whether the appellant pled guilty or was found guilty. The Sentence Sheets (Record pp. 37-38) show a conviction rather than a guilty plea. The Sentence Sheets (Record pp. 32-35) have neither "convicted of" nor "pleads" checked. The Petition Pursuant to the Sexually Violent Predator Act (Record p. 21, ¶ C) reflects "Trial or Plea: guilty pleas in Darlington County." The Sexual Predator Referral Form (Record, p. 28) checks neither "guilty plea" nor "trial." On September 26, 2015, Mr. Bogle advised the trial court, "The guilty pleas happened here in Darlington County on February 27th, 2013...." (Record, p. 271, lines 15-16). He also referred to "the time he pled guilty." (Record, p. 272, line 13). "The defense neither contested, refuted nor discussed this. " [W]hatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987).

CONVICTION OF A VIOLENT CRIME

Appellant asserts, "App has never been convicted of a violent sex crime." Motion, ¶ 5) I agree. "The trial court did not address Mr. Tyler's assertion these were not sexually violent crimes." (Brief of Appellant, p. 30). "The State did not address this argument in its brief." (Reply Brief of Appellant, p. 36). A violent crime involves "the use, attempted use, threatened use, or substantial risk of physical violence...." *Black's Law Dictionary* (11th ed. 2019).

- Criminal solicitation of a minor (S. C. Code Ann. § 16-15-342) is not mentioned in S. C. Code Ann. § 16-1-60, *Violent Crimes Defined.* The trial judge checked "non-violent" on the Sentence Sheets (Record p. 32 and 35.)
- Disseminating harmful material to minors or exhibiting harmful performance to minor (S. C. Code Ann. § 16-15-385) is not mentioned in S. C. Code Ann. § 16-1-60, *Violent Crimes Defined.* The trial judge checked "non-violent" on the Sentence Sheet (Record p. 37). Also, § 16-15-385 was found unconstitutional as applied to 'digital electronic files." (*Booksellers Ass'n v. McMaster*, 371 F. Supp. 2d 773, 788 (D.S.C. 2005)
- Contributing to the delinquency of a minor (S. C. Code Ann. § 16-17-490) is not mentioned in S. C. Code Ann. § 16-1-60, *Violent Crimes Defined.* The trial judge checked "non-violent" on the Sentence Sheet (Record p. 38.

PRO SE REPRESENTATION

("[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*" (Emphasis in original). *Turner v. Rogers*, 564 U.S. 431, 449, 131 S. Ct. 2507, 2520, 180 L. Ed. 2d 452 (2011) That a trial or appellate court would ever find a nonlawyer qualified by education, life experience, or any other reason to represent himself or herself is a self-inflicted insult on that court and to the legal profession.

Neither the South Carolina nor United States Constitution provides a right to proceed *pro se* in an appeal. A defendant seeking self-representation must request to proceed *pro se* promptly. Though not on "all fours," this appeal is similar to *State v. Roberts*, 364 S.C. 583, 614 S.E.2d 626 (2005)

The appellant is an intelligent, sometimes charming, sometimes grateful, and always focused person. He is also the product of systemic racial, economic, and social discrimination. Deborah R. J. Shupe, an excellent appellate lawyer who probably has more experience with penile plethysmograph cases than any lawyer or judge in South Carolina, represents The State (This concession of her intelligence, education, and experience does not concede she is correct on this appeal.) Shupe versus McDow may be a mismatch but Shupe v. Tyler would make the Lions versus the Christians look like a fair fight.

The appellant is not qualified to represent himself. His Motion to Proceed Pro Se corroborates this conclusion.

Dismissal of Thomas F. McDow

I do not want to work for a client who does not want my representation. It is always a relief, to finish a case and to have no further responsibility. Still, no lawyer wants to be discharged, even by a *pro bono* client with a difficult case.

The parties filed final briefs and record by approximately August 24, 2020. Nothing remains but oral arguments. It is inconceivable the Court might relieve one attorney, appoint a new attorney, and permit the appellant to file a new Brief of Appellant, which would require a new Brief of Respondent, especially where the appellant filed the Notice of Appeal over two years ago. Compare *State v. Roberts*, *supra.,* in which the Court wrote, "Finally, 'the State is also correct that any mistake appellate counsel make in determining viable issues for briefing can be resolved on post-conviction relief."

The great American Lawyer Abraham Lincoln, in arguing his case for a second term to the American people, counseled in 1864, "It is not best to swap horses while crossing the river." Oral argument before a panel of the Court of Appeals is limited to the issues briefed. For better or worse, I am the author of the Brief of Appellant and Reply Brief of Appellant. The Court will most probably have questions that the authors of the Briefs can best answer. Another lawyer might have difficulty arguing my Briefs and responding to questions from the panel on those Briefs. Lincoln's 1864 advice to the American people is valid here.

In 52 years and probably 167 appellate cases, this is the most difficult appeal on which I worked. I recorded over 152 hours of work and have spent countless other hours discussing it with other lawyers and thinking about the issues and injustice "off the clock." I now identify with Lieutenant Colonel Nicholson in 1957's best motion picture, *Bridge over the River Kwai,* who after having built the bridge, did not want to destroy it. While I am convinced of the injustice of the trial court's ruling and the justice of Larry Tyler's position, I am less confident the Court of

Appeals will reverse the denial of due process under South Carolina and United States Constitutions. Cases such as this are the reason I went to law school.

Conclusion

Whether Larry Tyler pled guilty or a jury found him guilty is irrelevant. The Court should not allow Larry Tyler to proceed *pro se*, both for his protection and the protection of future litigants affected by the *stare decisis* effect of the Court's Opinion. The Court appointed me to represent the appellant and I prefer to finish what I inherited.

Ultimately, the Court must review this matter and decide consistent with established law what serves Tyler's best interest and the interest of justice. Whatever the ruling, I will accept the Court's decision.

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October 6, 2020

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CERTIFICATE OF SERVICE

I certify that I have served the Return to Motion on the respondent by depositing copies in the United States Mail, postage prepaid, on October 6, 2020, addressed to respondent's attorneys of record:

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I also served a copy on the appellant addressed as follows:

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