

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Berkeley County
Honorable Roger M Young

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SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF CRAIG A CARROLL,

APPELLANT

APPELLATE CASE NO. 2020-000697

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

At Appellant's Sexually Violent Predator annual review hearing under SC Code § 44-48-110, whether the trial court applied the wrong burden of proof, in violation of due process, when it looked beyond the mere existence or non-existence of evidence and instead considered the weight of the evidence that Appellant presented to determine whether Appellant provided probable cause that his condition had so changed that he was safe to be released from the Sexually Violent Predator Treatment program.

STATEMENT OF THE CASE

After a jury trial in Berkeley Court of Common Pleas, the Honorable Kristi Lea Harrington, on April 12, 2017, committed Appellant to the Department of Mental Health as a sexually violent predator. (Order). On July 29, 2019 Appellant received his Annual Examination and Review Hearing Notice and elected to not waive his annual review hearing. (Document). On January 16, 2020 an annual review hearing was held in the Berkeley County before the Honorable Roger M Young. (Hearing Transcript). James Bogle represented the State and James Falk represented Appellant. On January 22, 2020 Judge Young entered an order denying Appellant a release hearing. (Order). On February 23, 2020 Appellant filed a timely Motion to Reconsider. On March 24, 2020 Judge Young denied Appellant's motion to reconsider.

This appeal follows.

ARGUMENT

At Appellant's Sexually Violent Predator annual review hearing under SC Code § 44-48-110 the trial court applied the wrong burden of proof, in violation of due process, when it looked beyond the mere existence or non-existence of evidence and instead considered the weight of the evidence that Appellant presented to determine whether Appellant provided probable cause that his condition had so changed that he was safe to be released from the Sexually Violent Predator Treatment program.

Individuals committed to the Sexually Violent Predator Treatment Program (SVPTP) must receive an annual evaluation to review whether that person's *mental abnormality or personality disorder has so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence*. S.C. Code Ann. § 44-48-110. At an annual review hearing a person committed under the SVP Act may petition the court for a release hearing. *id.* If at the annual review hearing the individual establishes probable cause that his condition has changed, the court must schedule a release hearing. *id.* At the January 16, 2020 Annual Review hearing Appellant was seeking an order directing the clerk to schedule a release hearing.

At the annual hearing Appellant called Dr. Yadira Baez Lockard to testify. Dr Lockard is a licensed forensic and clinical psychologist with both Masters and Doctoral degrees in Psychology. Dr Lockard is in private practice and had testified in South Carolina courts as an expert in the fields of clinical and forensic psychology at least eighty times. (Hearing Transcript p. 13 line 13 - p. 14 line 8) Dr Lockard has experience in South Carolina, Kentucky and Illinois in both the treatment and evaluation of sex offenders. (Hearing Transcript p. 14 line 16 – p. 15 line 11). The trial court permitted Dr Lockard to testify as an expert in the field of forensic psychology. (Hearing Transcript p. 17, lines 3-4). The State called Dr. Michelle Jones to testify. Prior to

Appellant's hearing, Dr Jones testified for the State in an SVP Annual Review hearing against another client of Appellant's counsel. Based upon the record made at the previous hearing, Dr Jones was permitted to testify as an expert in the field of forensic psychology. (Hearing Transcript p. 32 line 20 – p. 33 line 5).

During her direct testimony Appellant asked Dr Lockard to explain her opinion that Appellant no longer poses a threat if released from the SVPTP. Dr Lockard testified that she based her opinion on: her three interviews with Appellant, (Hearing Transcript p. 17 lines 19 – 21); additional three hours of psychological testing (Hearing Transcript p. 18 lines 8-10); her review of the facilities' treatment records, prior annual evaluations, and documents from the original commitment trial (Hearing Transcript p. 18 lines 14 – 20); and, Appellant's arrest warrants, victim statements, and incident reports (Hearing Transcript p. 18 line 24 – p. 19 line 4). Dr Lockard opined that Appellant suffered from Antisocial Personality Disorder but he no longer would pose a threat if released. (Hearing Transcript p. 19 lines 15-16). In response to counsel's question relating to Appellant's change in condition she replied that she based her opinion on: *the evaluation from even his treatment team as well as information regarding his dynamic factors as well as stability of functioning.* (Hearing Transcript p. 19 line 24 – p. 20 l. 3). Additionally she testified that she disagreed with the other evaluator's scoring of Appellant's Static 99-R.¹ Based on her opinion his Static 99-R score was a 3 which placed him at an average risk level for re-offending and that ninety-two percent of offenders with a similar score **did not** recidivate within five years of release. (Hearing Transcript p. 21 lines 16 – 19).

¹ The Static-99R is an actuarial tool consisting of ten questions that have been proven significantly related to sexual offending. In re Chapman, 419 S.C. 172, 176 n.3, 796 S.E.2d 843, 845 (2017).

With the exception of scoring changes related to age, an offender's score on the Static-99R will not change. However, progress in treatment can be evaluated by reviewing the individual's dynamic risk factors. Dr Lockard testified that since he began treatment there were positive changes in his dynamic risk factors. (Hearing Transcript p 20 line 20 – 23 line 16) For example, prior evaluators opined that one of Appellant's dynamic risk factors was resistance to rules. However, Dr Lockard noted that *Appellant has not had any major infractions for a period of ... two years. So as a result this was not a problematic pattern of behavior for him and meeting a dynamic factor for him.* (Hearing Transcript p. 22 lines 12-16). Another example is that prior evaluators found that Appellant expressed beliefs that justified or excused his sexual offending. Dr Lockard stated *that throughout his records at the Department [SCDMH] it stated that he had not excused his behavior or justified any of his sexual offending behaviors. He did not make any statements to holding any belief that children enjoyed sex or [that] children --- child sex is harmless.* (Hearing Transcript p. 22 lines 1-5)

Dr Lockard conducted various psychological tests or assessments including the Shipley Institute Scale of Intelligence, MMPI, Hare Psychopathy, and the SASSI-3, the results of which supported her opinion. (Transcript p. 23 line 23 – p. 26 line 19). Since there is an overlap between psychopathy and antisocial personality disorder her evaluation of Appellant using HARE assessment tool was particularly relevant and supported her opinion because it indicated Appellant respected the rights of others, was empathetic and was not narcissistic. (Hearing Transcript p. 24 line 10 – p. 25 line 12). Based on her evaluation of Appellant's response on the MMPI-2 she opined that Appellant was being truthful open and forthcoming with her during the interviews; he was receptive to treatment; and that did not show signs that he was struggling with anger or experiencing difficulty controlling his behavior. (Hearing Transcript p 25 line 13 – p. 26 line 19).

Dr Jones opined that Appellant's personality disorder had not so changed that Appellant would be safe to be at large if released. (Hearing Transcript p. 54 lines 7-11). At Appellant's original commitment hearing he was diagnosed with Antisocial Personality Disorder along with a paraphilic disorder namely Other Specified Paraphilic Disorder, Biastophilia. Both the State's expert as well as Appellant's expert testified that they could no longer diagnosis Appellant as suffering from any paraphilic disorder. (Hearing Transcript p. 19 lines 9-10 and p. 36 lines line 17 – p. 37 line 17);

In denying Appellant's request to schedule a review hearing the trial court stated:

Careful consideration was given to the testimony presented, to include the progress Respondent has made in treatment and his diagnosis. The determination by the Court in this matter was made more difficult because Respondent did present testimony from a psychologist recognized as an expert witness by the Court. ***The Court found itself in a position of having to weigh the credibility and the presentation of all witnesses.*** After the testimony, it would reasonably appear that there were distinct differences in the calculation of the Respondent's score on the actuarial assessments, to include the Static 99R. (emphasis added)

(Judge Roger Yong's January 22, 2020 Order, 2015-CP-08-2677).

At an annual review hearing the trial court's role must be limited to the exercise of its gatekeeper function by making a determination of whether either party's evidence is admissible under the South Carolina Rules of Evidence. Once the Court made the determination that Dr Lockard was qualified to testify as an expert in forensic psychology then the weight given to her testimony should be left to the exclusive province of the jury empaneled at a subsequent annual release hearing, *See Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 174-75 (2010). The trial court judge based his decision upon his own determination of the weight and credibility to be given to Dr Lockard's

testimony. The trial court appeared to use a “preponderance of the evidence standard” in determining that Appellant failed to establish probable cause. Therefore the trial court went beyond its gatekeeper role and usurped the authority of a jury to determine whether it was safe to release Appellant.

The SVP Act provides no specific definition of the term probable cause. *When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning. Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law.* S.C. Energy Users Comm. v. S.C. PSC, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) *citing* Branch v City of Myrtle Beach, 340 S.C. 405, 409-10, 532 S.E.2d 289, 292 (2000). This court has looked to criminal case law when considering the State’s burden of proof in establishing probable cause under S.C. Code Ann. § 44-48-80². In Brown v State, the State appealed the trial court’s dismissal of an SVP action for lack of probable cause under § 44-48-80. 372 S.C. 611, 643 S.E.2d 118, (Ct. App. 2007). In reversing the trial court’s decision, the appellate court in Brown cited three South Carolina criminal cases which recognized that probable cause is a flexible, common-sense standard and that very term itself, “probable cause,” does not import absolute certainty. *id.* 372 S.C. at 619, 643 S.E.2d at 122 *citing*, State v. Bowie, 360 S.C. 210, 220, 600 S.E.2d 112, 117 (Ct. App. 2004); State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971); and State v. Arnold, 319 S.C. 256, 460 S.E.2d 403 (Ct. App. 1995). The court in Brown further recognized that *probable cause may be found somewhere between suspicion and sufficient*

²S. C. Code § 44-48-80 (A) Upon filing of a petition, the court must determine whether probable cause exists to believe that the person named in the petition is a sexually violent predator. If the court determines that probable cause exists to believe that the person is a sexually violent predator, the person must be taken into custody if he is not already confined in a secure facility.

evidence to convict. id 372 S.C. at 620, 643 S.E.2d at 122 *citing* State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540-41 (Ct. App. 1999). Under similar circumstances the South Carolina Supreme Court recognized *that probable cause does not demand any showing that such a belief be correct or more likely true than false. In re Care and Treatment of Chandler v. State*, 382 S.C. 250, 257-258, 676 S.E.2d 676, 680 (2009).

Appellant is unaware of any published South Carolina decision addressing the appropriate probable cause standard under S.C. Code Ann. § 44-48-110. Because of the similarity between the South Carolina and Kansas SVP statutes and in the absence of South Carolina precedents this court should consider Kansas state court decisions on this issue as authoritative. *See, In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002) (recognizing that a side by side comparison of our SVP Act and the Kansas Act does not reveal any substantial differences). In Brown, this court looked to case law under the Kansas SVP to support its decision that probable under S.C. Code Ann. § 44-48-80 merely requires *evidence sufficient for a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the person in question is a sexually violent predator. id Brown*, 372 S.C. at 620, 643 S.E.2d at 123 *citing* Matter of Hay, 263 Kan. 822, 953 P.2d 666, 676 (Kan. 1998). On the basis of Dr Lockard's testimony, Appellant established probable cause under the probable cause standard used to evaluate a SVP petition under S.C. Code Ann. § 44-48-80.

Kansas courts hold that the probable cause showing required from an individual seeking a release hearing from SVP confinement is comparable to the probable cause determination made at the preliminary hearing stage of a criminal proceeding. In re Miles, 47 Kan. App. 2d 429, 434-435, 276 P.3d 232, 236, (Kan. Ct. App. 2012). At these probable cause hearing Kansas court's *must consider the evidence in the light most favorable to the committed person and resolve all*

conflicting evidence in that person's favor. In re Sipe, 44 Kan. App. 2d 584, 592, 239 P.3d 871, 877 (Kan. Ct. App. 2010). At an SVP annual review hearing Kansas courts must determine whether *there is sufficient evidence to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the committed person's mental abnormality or personality disorder has so changed. In re Miles, 47 Kan. App. 2d 429, 434, 276 P.3d 232, 236 (Kan. Ct. App. 2012).* Dr Lockard's testimony was sufficient to show probable cause under the standard used to evaluate the State's case in criminal preliminary hearing.

Defendants in SVP trials are entitled to protection under the Due Process Clause. Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). Appellant was denied due process at the January 16, 2020 annual review hearing because the trial court evaluated his proof under a standard more akin to a preponderance of evidence standard as opposed to *the usual and customary meaning* of the probable cause standard. The conflict in the testimony between Dr. Jones and Dr Lockard created a factual issue of whether it was safe to release Appellant from the SVPTP. The Court's resolution of this factual issue constituted a significant deprivation of Appellant's liberty. The trial Court violated Appellant's due process rights when it deprived Appellant of the right to have a jury decide whether he was now safe for release.

CONCLUSION

For the reasons set forth above, Appellant asks that this matter be remanded to the Berkeley Circuit Court to set this matter for an annual release hearing in accordance with S.C. Code Ann. § 44-48-110.

/s/ James Falk

James Falk
Falk Las Firm

ATTORNEY FOR APPELLANT

This October 29, 2020

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APPELLATE CASE NO. 2020-000697

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case was served upon Deborah R.J. Shupe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of same was served on Craig Carroll, SVPTP Well Path Solutions 4546 Broad River Road Columbia, SC 29210 this October 29, 2020

/s/ James Falk

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