THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

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SC Court of Appeals

Thomas A Russo, Circuit Court Judge

Appellate Case No. 2019-2020

In the Matter of the Care and Treatment of Charles Sullivan, Appellant

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FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I.

Did the trial court err in denying appellant his statutory right to have a jury decide whether he should be released from indefinite confinement as a sexually violent predator because it was undisputed at the release hearing that his alleged mental abnormality was no longer the pedophilia diagnosis used by the State to initially commit him and his recidivism risk was significantly lower, both of which met the low threshold of probable cause to receive a jury trial?

II.

After a significant and material change in appellant's alleged mental abnormality, which is an element the State must prove beyond a reasonable doubt to a jury, did the trial court's refusal to allow a jury decide appellant's continued confinement violate due process?

STATEMENT OF THE CASE

On July 28, 2016 and after a jury trial in Richland Circuit before the Honorable Tanya A. Gee, Appellant Charles Sullivan was committed to the South Carolina Department of Mental Health's (SCDMH) Sexually Violent Predator treatment program (the SVPTP). Dr. Marie Gehle, Psy. D of the South Carolina Department of Mental Health was the court-appointed expert who testified on behalf of the State at Appellant's civil commitment trial. Dr. Gehle's opinions regarding whether Appellant met commitment criteria were set forth in her report dated August 18, 2015. (R. p p. 89-147)

On August 18, 2016 Appellant filed a timely notice of appeal in the South Carolina Supreme Court. In an unpublished opinion on December 31, 2018, the Court affirmed Appellant's commitment. *In the Matter of the Care and Treatment of Charles T Sullivan*, 2015-CP-40-0770 (2018).

On October 4, 2018 and pursuant to SC. Code Ann § 44-48-110, Dr. Rozanna Tross, Psy. D. of SCDMH interviewed Appellant for the purpose assisting the circuit court in determining whether there is probable cause to believe Appellant's mental abnormality or personality disorder had so changed that the person is safe to be at large and, if released, is not likely to commit acts of sexual violence. Dr. Tross' opinion was set forth in her report dated November 7, 2018. (R. pp. 74 -88), in which she stated that Appellant's mental abnormalities have not yet changed and he remains likely to commit acts of sexual violence if released. (R. p. 88). On October 14, 2019 an annual review hearing was conducted in the Richland Circuit Court before the Honorable Thomas A Russo to review Appellant's status. Appellant petitioned for his release from the SVPTP at this annual review hearing. After the hearing Judge Russo held, by order dated November 8, 2019, that

Appellant did not meet his burden of proof and that Appellant must remain in the SVPTP. (R. p. 148)

This appeal follows.

FACTS RELEVANT TO ISSUES ON APPEAL

In her pre-commitment evaluation dated August 18, 2015 Dr. Gehle diagnosed Respondent with two relevant paraphilic disorders and one personality disorder, namely pedophilic disorder, paraphilic disorder (nonconsent) and Narcissistic Personality Disorder. (R. pp. 130-131)

With respect her diagnosis of pedophilic disorder Dr. Gehle stated: *Given that Mr. Sullivan engaged in sexual acts with prepubescent males over the span of many years, he meets criteria for Pedophilic Disorder. Mr. Sullivan reported a history of sexual attraction to pubescent males and to adult females. He also reported a sexual attraction to pubescent females. Therefore, he is diagnosed with Pedophilic Disorder, Non-exclusive Type, Sexually Attracted to Males*. (R. pp. 130).

Regarding the other paraphilic disorder she diagnosed, Dr. Gehle stated: *Mr. Sullivan was convicted of offending several victims while they were asleep and/or intoxicated. He admitted that he offended many victims while they slept. In addition to his criminal convictions, Mr. Sullivan reported that he engaged in this type of conduct 8 to 10 times over the course of a year (in the 1980's). The victims were essentially unconscious, nonresponsive, and unaware of the sexual activity. This suggests a pattern of arousal focused on sexual acts with nonconsenting persons. Mr. Sullivan engaged in these acts over the course of many years. As such, he meets criteria for Other Specified Paraphilic Disorder (nonconsent)*. (R. p. 131)

Dr. Gehle also diagnosed Appellant with a relevant personality disorder. In her report Dr. Gehle stated: *Mr. Sullivan presented with a grandiose and superior view of himself. He believed he would never get caught sexually abusing minor despite numerous allegations against him over the years. He continued to act while under investigation. He presented himself as special and*

unique and deserving of blind trust. He spoke of feeding off the "adrenaline" he experienced from the respect he had from minors and their parents. He repeatedly stated he has a "gift" to reach young people, all the while sexually abusing them and allowing them access to alcohol and pornography. He showed considerable arrogance in writing the letters to others who were investigating him and monitoring his involvement with minor males. He asked these people for special consideration so that he could continue to have access to minor, including the victims, which indicates a strong sense of entitlement. His history suggests he is exploitive in his relationships and that he lacks empathy for others. As a result, Mr. Sullivan meets criteria for Narcissistic Personality Disorder. (R. p. 131).

Dr. Gehle's report also included her assessment of Appellant's likelihood to engage in future acts of sexual violence. In arriving at her risk assessment Dr. Gehle relied upon the Static-99R which she described *as an instrument designed to assist in the estimation of sexual and violent recidivism for sexual offenders. It is the most widely used measure of sexual recidivism.* (R. p. 132). Dr. Gehle scored Appellant with a five (5) on the Static 99R which she then reported placed him in the Moderate-High risk category relative to other male sex offenders. (R. p. 133). Dr. Gehle went on to state that: *[o]n average, 15.2% (range = 13.8-16.6) of non-routine sex offenders with this score sexually recidivated within 5 years. In regard to relative risk ratios (the ratio of two recidivism rates), the expected recidivism rate for individuals who have the same score as Mr. Sullivan is 2.70 times higher than the expected recidivism rate of the average sexual offender in routine samples.*

In her annual review report dated November 7, 2018, Dr. Rozanna Tross stated that Appellant met the diagnostic criteria for Other Specified Paraphilic Disorder and Narcissistic Personality Disorder, but she did not diagnose him as having pedophilic disorder (R. p. 85-86).

Dr. Tross acknowledged that Dr. Gehle originally diagnosed Appellant with having pedophilic disorder. (R. p. 81). Dr. Tross defined a paraphilia as *any sexual interest greater than or equal to normophilic sexual interests*. (R. p. 85). She then defined Other Specified Paraphilic Disorder as *presentations in which symptoms characteristic of a paraphilic disorder (e.g., distress or impairment, or whose satisfaction has entailed personal harm, or risk of harm to others) do not meet full criteria for any of the disorders in the paraphilic diagnostic class.* Dr. Tross then explained that *[g]iven Mr. Sullivan's reported sexual interest in and behavior with adolescent males, along with his extensive detected sexual behavior with pubescent males, he meets criteria for Other Specified Paraphilic Disorder.* (R. p. 86) (omitting internal citations to Diagnostic and Statistical Manual of Mental Disorders Fifth Edition "DSM V")

Dr. Tross's justification for diagnosing Appellant with Narcissistic Personality disorder was similar to that put forth by Dr. Gehle. Dr. Tross stated that: *Narcissistic Personality Disorder (NPD) is a pervasive pattern of grandiosity, need for admiration, and lack of empathy. Mr. Sullivan has exhibited a grandiose sense of self- importance, is preoccupied with fantasies of success, power, or brilliance, believes he is special or unique and can only be understood by other special/unique people, has a sense of entitlement, is interpersonally exploitative, lacks empathy, and shows arrogant, haughty behaviors/attitudes.* (R. p. 86).

Like Dr. Gehle, Dr. Tross used the Static 99R is assessing Appellant's recidivism risk. Dr. Tross reported that Appellant scored a 3 on the Static 99R which placed him in the Average Risk category. (R. p. 87). She reported that this risk level put Appellant "*in the middle of the risk distribution" when* compared to typical adult male sex offenders. *In routine samples* [of offenders] *with the same score as Mr. Sullivan, the five-year sexual recidivism rate was 7.9%. The confidence intervals for this estimate are between 7% and 8.8%. Id.*

ARGUMENT

I.

The trial court erred in denying appellant his statutory right to have a jury decide whether he should be released from indefinite confinement as a sexually violent predator because it was undisputed at the release hearing that his alleged mental abnormality was no longer the pedophilia diagnosis used by the State to initially commit him and his recidivism risk was significantly lower, both of which met the low threshold of probable cause to receive a jury trial.

The Sexually Violent Predator Act[1] (the ACT) defines a sexually violent predator as a person who: (a) has been convicted of a sexually violent offense; and (b) suffers from a mental abnormality or personality disorder that makes the person likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment. S.C. Code Ann. § 44-48-30(1). Recently this Court in *In re Snow*, made clear that the second part of the statutory definition has two separate components, namely that: *(1) the person suffers from a mental abnormality or personality disorder, and (2) the mental abnormality or personality disorder makes the person likely to engage in acts of sexual violence if not confined, such that 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*. *Id.* at 425 S.C. 544, 548, 823 S.E.2d 467, 469 (2019) (internal quotations omitted). This interpretation of the Act's requirement is consistent with the United States Supreme Court's decision in *Kansas v Crane* where the Court noted that state forcible civil commitment statutes require both a finding of dangerousness to self and/or others coupled with proof of an

[1] S.C. Code Ann. § 44-48-10 et. seq.

additional factor such as mental illness or mental abnormality. 534 U.S. 407, 409-10, 122 S.Ct. 867, 869, 151 L.Ed.2d 856, 860 (2002).

In order to be entitled to have a release trial, Appellant at his annual review hearing was only required to provide the trial court with probable cause to believe he was no longer a sexually violent predator. The Act does not provide a specific definition for the term probable cause. The term appears twice in the Act to describe a relevant burden of proof. In the first instance S.C. Code Ann. § 44-48-80 states that once an SVP petition is filed, but before the respondent may be detained for an evaluation, the court must make a determination *whether probable cause exists to believe that the person named in the petition is a sexually violent predator. Id*. The second use of probable cause as the burden of proof appears in S.C. Code Ann. § 44-48-110. In order to be granted a release trial, the committed person at an annual review hearing need only show provide probable cause to believe their 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. If a committed person satisfies this burden of proof then the circuit court must set a trial on the issue. *Id*.

There are several reported cases where the issue was whether the State met its burden of proof under S.C. Code Ann. § 44-48-80 to detain the person named in the petition. In this context South Carolina courts held that probable cause merely requires evidence that would lead a reasonable person to believe and conscientiously entertain suspicion that the person meets the definition of a sexually violent predator. *In re Brown*, 372 S.C. 611, 620, 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. *Id*. at 620, 643 S.E.2d at 123 (quoting *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983)); *In Re Chandler*, 382 S.C. 250, 676 S.E.2d 676 (2009).

Therefore at his annual review hearing Appellant only needed to offer evidence sufficient to lead a reasonable person to believe and conscientiously entertain suspicion that he no longer met the definition of a sexually violent predator.

At his annual review hearing Appellant met his burden of proof. Appellant presented the trial court with evidence of a change in Appellant's mental condition along with evidence of a reduction of his level of dangerousness. Regarding Appellant's mental condition, the trial court had Dr. Gehle's 2015 report in which she diagnosed Appellant as suffering from pedophilic disorder. (R. p. 130). The court was then presented with Dr. Tross' 2018 report in which she diagnosed Appellant as suffering from a different paraphilia. (R. p. 85).

The trial court was also presented with evidence of a decrease in Appellant's level of dangerousness. In 2015 Dr. Gehle opined that Appellant's risk or recidivism was 15.2%. (R. p. 133) Dr. Gehle stated that this level of risk was 2.7 times greater than that routine sex offender. *Id.* However, Dr. Tross opined that Appellant's new recidivism risk was 7.9 % and that his risk to commit another sexually violent offense was in the middle of the risk distribution for routine sex offenders. (R. p. 85).

Evidence of Appellant having a different mental health diagnosis along with evidence of a substantial reduction in his risk to reoffend was sufficient to establish probable cause to believe that Appellant's condition had changed.

II.

<u>After a significant and material change in appellant's alleged mental abnormality, which is an element the State must prove beyond a reasonable doubt to a jury, the trial court's refusal to allow a jury to decide appellant's continued confinement was a due process violation</u>

It is reasonable to conclude that in the minds of a jury a diagnosis of Pedophilic Disorder is significantly different than the more amorphous diagnosis of Other Specified Paraphilic Disorder. The general public has a visceral reaction to the terms pedophile or child predator and this court need look no further than Justice Alito's dissent in *Kennedy v Louisiana*, 544 U.S.407, 128 S.Ct. 2641 (2008). In his defense of the constitutionality of statues allowing for the death penalty for child rapists, Judge Alito wrote*: I have little doubt that, in the eyes of ordinary Americans, the very worst child rapists—predators who seek out and inflict serious physical and emotional injury on defenseless young children—are the epitome of moral depravity*. *Id.* 544 U.S. at 467.

A civil commitment under the Act constitutes a significant deprivation of liberty that requires due process protection. *In re Chapman*, 419 S.C. 172, 796 S.E.2d 843, (2017) *quoting Addington v Texas*, at 441 U.S. 418, 425, 99 S.Ct. 1804 (1979). In *Chapman* this court held that a SVP's right to effective assistance of counsel arises from a constitutional right to due process similar to the rights attendant to a criminal trial. *In re Chapman* 419 S.C. at 185, 796 S.E.2d at 849.

Similar to the right to effective assistance of counsel due process require that in a criminal case the state must prove, beyond a reasonable doubt, each element of the crime for which a criminal defendant is accused. *Apprendi v New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000); *State*

v Brown, 360 S.C. 581, 602 S.E.2d 392 (2004). Although this court has not had the opportunity to consider whether *Apprendi* is applicable in SVP proceedings, *due process is flexible and calls for such procedural protections as the particular situation demands*. *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). To determine whether a particular procedural protection is warranted in a given context, courts apply the test articulated in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct 894, 47 L.Ed. 2d 18 (1976). The *Mathews* test has three elements: (1) the liberty interest at stake; (2) the risk of erroneous deprivation of that liberty interest with the existing procedures and probable value, if any, of additional safeguards; and (3) the government interest, including costs and administrative burdens of additional procedures. *Id.* Mathews, 424 U.S. at 335, 96 S.Ct at 903.

This court has already conclusively addressed the first factor of the *Matthews* test in Appellant's favor. Commitment in the SVPTP deprives Appellant of a significant liberty interest. *In re Chapman*, *Id.* at 419 S.C. 172, 796 S.E.2d 843 (2017); *see also In re Luckabaugh*, 351 S.C. 122, 140, 568 S.E.2d 338, 347 (2002) (recognizing that "[a] person's interest in freedom from bodily restraint is 'at the core of the liberty protected by the Due Process Clause from arbitrary governmental actions.").

Under *Matthews*' second prong, there is no existing procedure to address the constitutionality of Appellant's continued confinement once SCDMH changes the diagnosis upon which his initial commitment was based. S.C. Code Ann § 44-48-110 appears to only address whether the SVP is safe to be at large. Appellant's current status is analogous that of the defendant in *Foucha v. Louisiana*, 504 U.S. 71, 112 S.Ct. 1780, 118 L.Ed 2d 437 (1992). Terry Foucha was charged with aggravated burglary and illegal discharge of a fire arm and was found not guilty by reason of insanity. *Id* 504 U.S. at 74, 112 S.Ct. at 1782. He was then committed to a state forensic

mental health facility. *Id*. At his discharge hearing four years later, there was medical testimony that at the time of the offense that defendant Foucha was suffering with a drug induced psychosis from which he had recovered. *Id.* However the doctors also testified that because he had an antisocial personality they could not certify that if released defendant Foucha would no longer pose a threat to himself or others. *Id*. Because there was proof that Foucha still posed a threat, the trial judge ordered Foucha returned to the state institution. The Louisiana Supreme Court confirmed Foucha's continued commitment. *State v Foucha*, 563 So.2d 1138 (1992). The United States Supreme Court then reversed. The *Foucha Court* held that it was constitutionally impermissible to continue to detain the defendant absent a civil commitment proceeding of his current mental illness. *Id.* 504 U.S. at 78, 112 S.Ct. at 1784. Similarly Appellant should have a new civil commitment proceeding to determine if his current mental health diagnosis requires commitment.

Under Mathews' third factor, the State should have no interest in delegating to one SC DMH employee the authority to make factual determinations regarding the continued existence of an element in the State's burden of proof. At an SVP prep-commitment trial the jury has the final authority to decide if the State met its burden, beyond a reasonable doubt, that the respondent suffers a mental abnormality or personality disorder. Therefore once that diagnosis has changed it must still be the jury's sole authority to determine if the new diagnosis requires continued commitment.

CONCLUSION

Based on the foregoing, the court should reverse Judge Russo's November 8, 2019 order and remand this matter back to the Richland Circuit Court to set a jury trial to determine whether Appellant must remain in the SVPTP.

Respectfully submitted,

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