RECEIVED
Aug 31 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Jennifer B McCoy

IN THE MATTER OF THE CARE AND
TREATMENT OF KEVIN LAMAR WRIGHT

APPELLANT

APPELLATE CASE NO. 2020-001551

FINAL BRIEF OF APPELLANT

JAMES FALK

Falk Law Firm
PO Box 1058
CHARLESTON, SC 29402
(843) 606-6007

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

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 Charleston Court of Common Pleas, the Honorable Roger M Young Sr., on June 9, 2013 committed Appellant to the Department of Mental Health as a sexually violent predator. On July 21, 2020 Dr. Christopher Gillen, Ph.D. of the South Carolina Department of Mental Health completed the Annual Review report covering Appellant's March 1, 2019 through June 18, 2020 review period.

On October 2, 2020 an annual review hearing was held via video/WebEx before the Honorable Jennifer B McCoy. Deborah R.J. Shupe, Senior Assistant Deputy General appeared on behalf of the State and James Falk appeared on behalf of Appellant. Dr. Christopher Gillen was the State's only witness and E. Selman Watson, Ph.D. was Appellant's only witness. The court permitted both witnesses to testify as experts in forensic psychiatry. After hearing from both witnesses and arguments of counsel, the Court asked both parties to submit proposed orders. (Transcript p. 135 l. 1-2).

On October 28, 2020 Judge McCoy entered an order finding that Appellant failed to meet his burden and that probable cause did not exist to believe that Appellant's mental abnormality or personality disorder had so changed he is safe to be at large and, if released not likely to commit acts of sexual violence.

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 October 2, 2020 Annual Review hearing Appellant was seeking an order directing the clerk to schedule a release hearing.

Relevant Facts

At the annual hearing Appellant called Dr. E. Selman Watson. Dr Watson received his doctorate in clinical psychology from the University of South Carolina and participated in over 500 hours of training through the American Academy of Forensic Psychology. R. p. 13 lines 12-15. Dr. Watson was the acting director of the SVP treatment program from January 2003 until January 2007. R. p. 13 lines 18-20. As acting director of the SVP treatment program Dr. Watson's responsibilities included both sex offender treatment and conducting the participants' annual

evaluations. R. p. 15 line 23- p. 16 line l7. The Court granted Appellant's motion to admit Dr Watson to testify as an expert in the fields of forensic psychology and in sexually violent predator evaluations. R. p. 14 lines 14 -25. The State did not object to Dr Watson's qualifications nor did it conduct any additional voir dire. R. p. 14 line 21.

Dr Watson opined that Appellant was not likely to reoffend if released from the SVP treatment program. R. p. 16 lines 17-18. Dr Watson reached this conclusion after having seven to eight hours of direct contact with Appellant which included about six hours of interviews. R. p. 15 lines 4- 8. Dr Watson met with Appellant four times between July 2018 and February 2020. R. p. 15 line 23 – p. 16 line 7. These interviews included discussions of Appellant's treatment level, treatment progress, mental health and sexual offender history. R. p. 15 lines 14- 16. Dr Watson also reviewed Appellant's treatment notes and prior evaluations. R. p. 15 l. 16-18; p. 16 lines 19-22.[1]

Dr Watson opined that Appellant did not have a personality defect (R. p. 17 line 12 through p. 18 line 8) but that Appellant did suffer from pedophilia. R. p. 18 lines 15-16. Dr Watson assessed Appellant under the Static 99R criteria and opined that on average Appellant had a 9% chance to reoffend within the next 5 years. R. p. 20 lines 7- 9. Dr Watson noted that his risk assessment of Appellant was consistent with assessments conducted by previous experts who evaluated Appellant. R. p. 19 line 24-25.

In response to the question why, despite a pedophilia diagnosis, Appellant no longer likely to reoffend, Dr Watson testified: *Because he's learning skills to manage that behavior. That's what the program is all about is teaching skills so you can manage that behavior in the community*.

[1] Dr Watson noted that Dr Gehle, the court-appointed expert in Appellant's initial commitment proceeding, opined that Appellant did not meet commitment criteria. R. p. 16 line 24 -26.

Transcript p. 25 lines 18-21. In support of his opinion Dr Watson noted that: Appellant has had seven years of treatment. R. p. 20 line 17. ; 2); Appellant does not have the full slate of dynamic risk factors; R. p. 20 lines 19- 23; and, Appellant harbors no hostility toward women and has reasonable problem solving skills. R. page 20 lines 21-23. Dr Watson noted that while at the SVP treatment program Appellant regularly participated in group sessions and had positive interactions with other participants in these sessions. R. p. 22 line 6- p. 23 line 1. Dr Watson recognized that initially Appellant suffered from a cognitive distortion that his victims enjoyed Appellant's assaults. R. p. 26 lines 6- 16. However Appellant now feels shameful about the assaults, and has shifted his focus to now empathize with his victim's fear. R. p. 26 lines 21 – 25.

The State then offered Dr Christopher Gillen to testify in the field of forensic psychology. R. p. 74 line 22. During voir dire Appellant's counsel challenged Dr Gillen's relative lack of practical experience in the field of forensic psychology. Dr Gillen's evaluation of Appellant was one of Dr Gillen's first evaluations he was permitted to perform without supervision from more senior South Carolina Department of Mental Health (DMH) employees, R. p. 81 line 12 – p.84 line 11. Dr Gillen's primary area of research and his post-doctoral publications and conference publications have focused on adolescent psychopathy and not sexually violent adult offenders. R. p. 79 line 22 – p. 80 line 20. Over Appellant's objection and after conducting its own voir dire, the Court admitted Dr Gillen to testify as an expert in forensic psychology over R. p. 85 line 8 – p. 87 line 11. Dr Gillen testified that Appellant had made some progress in treatment (R. p. 100 line 14), however appellant's mental abnormality has not so changed that he is safe to be at large and if released he is likely to engage in acts of sexual violence. R. p. 107 line 19 – p. 108 line 1.

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

> After weighing the expert testimony offered at the hearing, the Court finds the testimony of the State's expert, Dr. Gillen, to be more credible. In addition, the Court carefully considered the documents received into the record, and the arguments of counsel. Based on this review, the Court finds the Respondent failed to meet his burden, and concludes, at this time, there is no probable cause to believe Respondent's mental abnormality or personality disorder has so changed he is safe to be at large, and, if released, not likely to commit acts of sexual violence.

(Judge Jennifer McCoy's October 28, 2020 order at page 3)

Legal analysis

All expert testimony must satisfy the Rule 702 criteria, and that includes the [circuit] court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold. State v. Cain, 413 S.C. 508, 520, 776 S.E.2d 374, 380 (Ct. App. 2015). 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. In exercising this gatekeeper function the court should have limited its consideration to whether Dr Watson was qualified to testify as an expert in forensic psychology, and whether the underlying science he used was reliable. See State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (discussing the criteria under Rule 702 SCRE for admission of scientific testimony). Once the court admitted Dr Watson to testify as an expert in forensic psychology and SVP evaluations, then the ultimate weight given to his 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). However, the trial court judge based her decision upon her own determination of the relative weight and credibility to be given to Dr Watson'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. § 44-48-80[2]. 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*

[2]S. 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.
(**emphasis added**)

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 statues 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 theses 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. Watson and Dr Gillian 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 August 5, 2021

10