

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H Culbertson, Circuit Judge

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SC Court of Appeals

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN O'NEIL JOHNSON

APPELLANT

APPELLATE CASE NO. 2021-000249

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

On July 15, 2008 Appellant was committed to the South Carolina Sexually Violent Predator Treatment Program (SVPTP) facilitated by Wellpath Recovery Solutions (formerly Correct Care Recovery Solutions). On March 27, 2020 Dr. Rozanna Tross, Psy. D. of the South Carolina Department of Mental Health completed the annual evaluation covering Appellant's 2019-2020 annual review period.

On February 11, 2021 the Honorable Benjamin H Culbertson presided in Horry County Court of Common Pleas via Web/Ex for Appellant's 2019-2020 annual review hearing. Assistant Attorney General Suzanne J. Shaw, Esquire appeared on behalf of Respondent. James K Falk appeared on Appellant's behalf. Dr Rozanna Tross testified for the State and Dr. Yadira Baez-Lockard Psy.D. testified for Appellant. Appellant's counsel offered Dr Lockard to testify in the field of forensic psychology and in the field of sexually violent predator assessment. Trans p. 23. Thereafter Respondent's counsel conducted a lengthy voir dire of Dr Lockard's qualifications. Trans p. 23 – Trans. P. 60. After brief re-direct examination, Judge Culbertson admitted Dr Lockard to testify in the fields of forensic psychology and SVP assessment. Trans p. 65 lines 15-17.

After hearing Dr Tross and Dr Lockard's direct testimony and arguments of counsel, the court asked the parties to submit proposed orders. On February 23, 2021 Judge Culbertson signed an ORDER DENYING ANNUAL REVIEW TRIAL FOR 2019-2020 and remanding Appellate back to the SVPTP for continued long term control, care and treatment.

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 February 11, 2021 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 from the Adler School of Professional Psychology in Chicago Illinois. (Transcript p. 13 lines 4-23) Dr Lockard is in private practice and had testified in South Carolina courts as an expert in the fields of clinical and forensic psychology "over 50-60 times." (Transcript p. 15 lines 9- 16). Dr Lockard estimated that she had been retained as a forensic psychologist by lawyers in over 100 cases to provide either an opinion or an evaluation. (Transcript p. 15 lines 3-8). Dr Lockard testified that she was retained as a consultant in over 200 sexually violent predator cases (Transcript p. 15 lines

17- 24). These consultations included sexual predator evaluations conducted in connection with military court martial cases. (Transcript p. 16 line 25 through p. 17 line 22). Counsel then moved to have Dr Lockard admitted to testify as an expert in the field of forensic psychology and in the field of sexually violent predator assessments (Transcript p 23 lines 15- 17). Thereafter the State conducted a lengthy voir dire of Dr Lockard's qualifications. (Transcript pages 23 -- through 61). After redirected voir dire from Appellant's counsel, the court permitted Dr Lockard to testify as an expert in the field of forensic psychology and SVP assessments. (Transcript p. 65 lines 15- 19).

In preparation for her report and testimony Dr Lockard met with Appellant for 4 hours and then conducted an additional three and one half hours of psychological testing. (Transcript p. 70 lines 9-18). Dr Lockard reviewed documents provided by the SVPTP providers including Appellant's Integrated Care Plan (ICP), Treatment Plan (TP), Case Management Treatment Summary, Psychiatric Referral Summary; Psychiatric Evaluation; Psychiatric Progress Notes, Case Management Progress Notes, Weekly Group notes, and Behavioral Management Committee records. (Transcript p. 70 line 19- p. 71 line 6). Dr Lockard testified that Appellant have been in the SVPTP since July 17, 2008 and she reviewed the reports from previous forensic evaluators including the evaluation prepared as part of the initial commitment proceedings and Appellant's annual review evaluations prepared in 2016, 2017, 2018, 2019 and 2020. (Transcript p 72 lines 6- 21).

AS part of her evaluation process Dr Lockard conducted psychological tests upon appellant including: MMPI (Minnesota Multiphasic Personality Inventory) (Transcript p 86 line 20-23). Dr Lockard testified that the MMPI was a set of True or False questions designed to reveal an individual's *thinking in regards to their overall, psychopathology, typical behaviors, just to be able to clarify and provide additional information regarding that individual's clinical or*

personality disorders. (Transcript p 87 lines 7-10). During the interview Dr Lockard focused on certain topics including victim blaming, sexual entitlement, rape attitudes, and attitudes tolerant of child molestation. (Transcript p 90 lines 17- 20). Dr Lockard focused on these topics in order to determine if Appellant's overall attitudes as well as his thinking reveal he has learned skills that provide him insight to understanding his past behavior. (Transcript p. 90 lines 22-25). Additionally Dr Lockard was looking to see if Appellant was harboring any attitudes or thinking that could increase his likelihood to reoffend. (Transcript p. 91 lines 1-4). Dr Lockard testified that based upon his responses she was unable able to reach any negative conclusions regarding Appellants attitudes toward victim blaming, sexual entitlement, rape attitudes, and attitudes tolerant of child molestation. (Transcript p 91 lines 19-p. 92 line 3).

Dr Lockard testified that she administered the Hare Psychopathy Checklist (PCLR) (Transcript p. 95 lines 7-9) *The Hare PCLR looks into how the individual -- may or may not show or reflect being identified as someone that has the diagnosis of psychopathy or antisocial personality disorders.* (transcript p. 95 lines 17-20.). Dr Lockard testified that Appellants score of a 23 put him below the criteria threshold for identifying Appellant as a psychopath or someone with an antisocial personality. (Transcript p. 97 lines 21-23). Dr Lockard testified that Appellants SVP treatment could have positively affected Appellant low score on the Hare PCLR. Dr Lockard opined that the treatment Appellant received positively effected his low score on the Hare PCLR test. (Transcript p. 102 lines 1- 4). Dr Lockard opined further that as a result of treatment, Appellant *learn[ed] more about himself as well as a better understanding and insight regards to his victim, interpersonal issues, and effective issues things of that sort.* (Transcript p 102 lines 4-8).

After a discussion of the positive changes in Appellant's dynamic risk factors, (Transcript p. 110 line 11 – p. 113 9) Dr Lockard eventually testified that based upon on the clinical intake,

the findings, as well as all of the reviewed documentation, at this time Mr. Johnson's mental abnormality has so changed that he is able to be safe at large out in the society and not likely to be engaged in acts of sexual violence. (Transcript p. 113 lines 16-21.)

After the cross examination and re-direct examination of Dr Lockard, Appellant rested his case, and the State moved for a directed verdict. (Transcript p. 155 line 5- 23). After discussion, the court denied the State's motion for directed verdict. (Transcript p. 159 line 8). The State then called Dr Rozanna Tross to testify as an expert in the field of Forensic psychology and specifically with regard to sex offender evaluations and risk assessments. (Transcript p. 159 Lines 22-24). Counsel for Appellant stipulated to her qualifications in those fields. (Transcript P. 160 line 23).

Dr Tross conducted Appellants annual evaluation on behalf of the South Carolina Department of Mental Health for the period from January 2019 through February 2020. (Transcript p 163 line 18). Dr Tross testified that appellant requires continued inpatient treatment in order to manage his personality disorder. (Transcript p. 196 line 24 – 197 line 2).

Dr Tross opined further, that if released Appellant would continue to present a risk to reoffend. (Transcript 198 line 4 – 7). Specifically Dr Tross testified:

Ultimately, that he has not yet addressed his mental abnormality or personality disorder, which is his antisocial, [trait] He's not yet made progress [in] treatment over the past year, nor made improvements in his ability to effectively problem solve, manage his emotional upsets, demonstrate adequate or prosocial coping skills, challenge his distorted thinking, manage criminal thinking, or manage his cantankerous disposition.

So that seems to be consistent in all the treatment documents available. So he continues to exhibit significant interpersonal difficulties, distorted thinking, affective instability and impulse control which are the foundation of his personality disorder. Therefore, his mental abnormality has not changed. (Transcript p. 198 Lines 9-22).

At the conclusion of Dr Tross's direct, cross examination and redirect testimony the Court ruled it would take the matter under advisement and asked both parties to submit proposed orders. (Transcript p. 219 lines 18-21). On February 23, 2021 the Court entered an order denying respondent an annual review trial for the 2019-2020. In denying Appellant his requested relief the court held: *After weighing the expert testimony offered at the hearing, the Court finds the testimony of the State's expert, Dr Rozanna Tross, to be more credible.* (Order pages 4-5).

S.C. Code Ann. § 44-48-110 requires the court to conduct an annual hearing to review the status of a person previously committed to the SVPTP. *If the court determines that probable cause exists to believe that the 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, the court must schedule a trial on the issue. Id.* Both the State and the committed person have the right to request that the release trial be held before a jury. *id.* At the release trial the State would have to prove beyond a reasonable doubt that the committed person's mental abnormality or personality disorder remains such that the person is not safe to be at large and, if released, is likely to engage in acts of sexual violence. *id.*

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. § 44-48-80¹. 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*

¹S. 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.

As a result of the significant deprivation of ones liberty interest, respondents 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). *citing* Addington v. Texas, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979); *accord* Vitek v. Jones, 445 U.S. 480, 491-92, 100 S. Ct. 1254, 63 L. Ed. 2d 552 (1980). *See also* In re Bilton, 432 S.C. 157, 167, 851 S.E.2d 442, 446 (Ct. App. 2020) (holding that due process does not allow a testifying expert to be a pipeline for someone else's scientific work to be admitted into evidence without a baseline demonstration of reliability). Appellant was denied due process at the February 11, 2021 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. Tross and Dr Lockard created a factual issue of whether it was safe to release Appellant from the SVPTP. The resolution of this factual issue should be resolved by the jury or fact finder at a release trial. The Court's pre-emptory resolution of this factual issue constituted a significant deprivation of Appellant's liberty. The trial Court violated Appellant's due process rights when it required appellant to meet a more stringent burden of proof than the probable cause

standard. Thereby denying Appellant the constitutional and statutory 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 Horry County Circuit Court to set this matter for an annual release hearing in accordance with S.C. Code Ann. § 44-48-110.

/s/ James Falk

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ATTORNEY FOR APPELLANT

This October 24, 2021