STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
Appellate Case No. 2018-001975
Op. No. 5839

In the Matter of the Care and Treatment of
Thomas Griffin,

Appellant

RETURN TO APPELLANT'S PETITION FOR REHEARING

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By published opinion filed July 21, 2021, the Court affirmed Appellant's commitment as a sexually violent predator pursuant to the Sexually Violent Predator Act (SVPA). Appellant filed a Petition for Rehearing on August 3, 2021, asserting the Court overlooked and/or misapprehended significant points, and the Court requested a Return to the Petition for Rehearing. Reduced to its essence, Appellant's Petition for Rehearing merely regurgitates the issues and arguments set for in the Final Brief of Appellant.[1]

Relying on criminal case law regarding a criminal defendant's right to counsel, and In the Matter of the Care and Treatment of Chapman, 419 S.C. 172, 796 S.E.2d 843 (2017), Appellant contends this Court erred because it overlooked Appellant's inability to consult with his attorney during trial, which violated his right to effective assistance of counsel. He further asserts this Court overlooked Appellant's history of being restored to competency, applied §44-48-100(B) out of context and too broadly, and overlooked the fluidity of competency. These assertions are meritless.

Chapman

As set forth in the Final Brief of Respondent, Appellant seeks to expand Chapman far beyond the scope of the Supreme Court's holding. Chapman held the SVPA's general statutory right to counsel encompassed the constitutional right to effective assistance of counsel, and a person committed pursuant to the SVPA could raise ineffective assistance of counsel claims via a common law petition for habeas relief. *Id.* at 846-847. Chapman also held, however, that allegations of ineffective assistance of counsel could not be raised on direct appeal. *Id.* at 848

[1]Respondent craves reference to the Final Brief of Respondent for a complete statement of relevant facts. (Final Brief of Respondent, pp. 3-9). In addition, the issues Appellant raises on rehearing are addressed in the Final Brief of Respondent, which is incorporated herein as if stated verbatim.

(merits of ineffective assistance of SVPA counsel will not be addressed on direct appeal because such claims may be raised in a habeas proceeding).

Appellant asks this Court to expand Chapman to direct appeals if counsel merely tells the trial court he cannot effectively represent his client for some reason, which conclusively establishes ineffective assistance of counsel and a due process violation. Chapman does not stand for this proposition, and expanding its scope will result in the very thing the Supreme Court sought to avoid – addressing the merits of ineffective assistance of counsel claims in direct appeals from civil commitments pursuant to the SVPA.[2]

As in his Final Brief, Appellant refers to his trial counsel as an "experienced trial lawyer." Proving the accuracy of Appellant's assessment, the record reveals trial counsel vigorously protected Appellant's interests prior to and during trial, including repeatedly raising the competency issue at every opportunity, aggressively cross-examining the court appointed expert, and giving a thorough and impassioned closing argument, which included references to Appellant's mental incapacity and inability to testify at trial. Counsel acted exactly as a seasoned, experienced trial attorney would be expected to act under the circumstances, especially one with extensive experience in SVPA cases, and provided much more than mere "superficial" assistance of counsel. Concluding otherwise requires rank speculation.[3]

Appellant ignores trial counsel's statement to the circuit court that Appellant was able to communicate with him "fine" at the probable cause hearing, but the communication level began to deteriorate after Appellant was transferred from the Department of Corrections to the Horry

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[2]Indeed, trial counsel stated multiple times he could not "effectively" represent Appellant. It can be inferred counsel used the effective representation language precisely to try to expand Chapman and make the ineffective assistance issue reviewable on direct appeal.

[3]The effectiveness of what counsel did, or did not do, prior to and during trial can only be adequately assessed in an appropriately filed habeas proceeding.

County Detention Center. (R., p. 39). Appellant also ignores the court appointed expert's testimony that Appellant was on his antipsychotic medication the day she interviewed him for almost four hours, and while he still had some delusions, he was able to communicate with her, respond to follow-up questions, repeat himself when asked, and spell some words she could not understand because he was mumbling. (R., pp. 68, 84-91).

Significantly, Appellant stopped regularly taking his antipsychotic medication after his transfer to the Detention Center, and he completely stopped taking it in January 2018, **after** this case was originally scheduled for trial in March 2018. (R., pp. 107-108). Given Appellant's mental health history and his statements to the court appointed expert, Appellant was aware taking his antipsychotic medication was crucial to maintaining his ability to understand and communicate, even if still suffering from some delusions, and it is certainly inferable he knowingly stopped taking the medication regularly after he was transferred to the Detention Center rather than released from incarceration, and then stopped it completely after the trial was scheduled.[4]

Due Process

The State does not dispute, and never has disputed, Appellant's right to counsel in this case. Contrary to Appellant's repeated efforts to conflate SVPA cases with criminal cases, however, South Carolina courts have conclusively determined SVPA proceedings are civil, not criminal, and are aimed at treatment rather than punishment. *See, e,g.*, In re Matthews, 345 S.C. 638, 550 S.E.2d 311, 315-317 (2001).

In order to confine a person pursuant to the SVPA, the State must prove beyond a reasonable doubt the person has a diagnosed mental abnormality or personality disorder that makes

[4]Appellant knew from experience that his criminal trials were delayed when he decompensated, so he likely believed the SVPA trial would not proceed either.

him likely to reoffend sexually if not confined for treatment. Given that foundational requirement, it stands to reason the person's mental abnormality or personality disorder may impact his mental capacity, even if the person takes medication as prescribed. In light of that reality, this Court properly considered the legislative intent of the SVPA to determine if there was a statutory requirement of competence in SVPA proceedings.

As this Court found, when the SVPA is construed in its entirety, "it appears the General Assembly contemplated the likelihood of a potential SVP to be incompetent to adequately assist in his or her own defense." Support for that finding begins with the purpose of the statute as expressed in the very first subsection of the SVPA.

The Legislature found "that a mentally abnormal and extremely dangerous group of sexually violent predators exists," "the likelihood these sexually violent predators will engage in repeated acts of sexual offenses if not treated for their mental conditions is significant," and "the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society." S.C. Code Ann. §44-48-20 (2018). The Legislature then defined "mental abnormality" as "a mental condition affecting a person's emotional or volitional capacity that predisposes the person to commit sexually violent offenses." S.C. Code Ann. §44-48-30(3) (2018). The increased danger to society posed by persons with mental abnormalities predisposing them to commit sexually violent offenses clearly encompasses persons whose relevant mental abnormalities render them incompetent to participate in the civil commitment court proceedings.

As part of its legislative intent analysis, this Court appropriately considered the statute in its entirety, including §44-48-100(B), which requires a hearing to determine the likelihood of guilt when the person was not tried on the sexually violent offense due to a finding of incompetence.

In that subsection, the General Assembly afforded the person all the same constitutional rights afforded to criminal defendants, **except** the right to be competent at trial. *See* In re Oxner, 430 S.C. 555, 846 S.E.2d 365, 370-371 (Ct. App. 2020), *cert. granted* (S.Ct. Aug. 25, 2021) (General Assembly contemplated competence issues in cases involving sexually violent offenders, addressed those issues in the plain language of § 44-48-30 and § 44-48-100(B), and made no distinction between pending charges and charges dismissed due to the person's incompetence).

If competency is not required for a hearing to determine if the evidence indicates beyond a reasonable doubt the person actually committed the charged offenses, it is disingenuous to argue the General Assembly intended that competency be required for other SVPA proceedings, including a trial to determine if the person qualifies as a sexually violent predator.[5] According to Appellant's circular reasoning, once a court finds sufficient evidence at a 100(B) charges hearing, no further SVPA proceedings can take place until the person becomes competent. Such a result is ludicrous on its face.

This Court appropriately determined the procedural safeguards included in the SVPA were included to "ensure an individual's constitutional right to procedural due process is not violated," and "sufficiently satisfy the requirements of procedural due process." Every jurisdiction examining this exact issue has concluded likewise. *See* In re Sykes, 303 Kan. 820, 367 P.3d 1244 (2016) (protections provided by the sexual predator statute satisfy procedural due process requirements, there is no statutory requirement of competence in civil proceedings, and the abatement requirements of criminal procedure do not apply); In re Detention of Morgan, 180

[5]Holding otherwise would lead to SVPA proceedings pending indefinitely while the person is detained in a secure facility without "long term control, care and treatment," or the release of potential sexually violent predators with virtually no supervision and no treatment. As other courts have found, either alternative is an absurd result, and undermines the ultimate goals of public safety, and "long term control, care and treatment" of sexually violent predators.

Wash.2d 312, 330 P.3d 774 (2016) (three part test in Mathews v. Eldridge, 424 U.S. 319 [1976] weigh in favor of allowing sexual predator proceedings to move forward if the person is incompetent to assist in his defense)[6]; In re Commitment of Weekly, 956 N.E.2d 634, 647 (2011) (establishing that fitness evaluation does not affect ability to receive a fair commitment trial because of numerous procedural safeguards against erroneous deprivation of liberty); Moore v. Superior Court, 237 P.3d 530, 539-544 (Cal. 2010) (procedural safeguards of sexual predator act ensure the risk of erroneous deprivation of liberty is slight); In re Det. of Cubbage, 671 N.W.2d 442, 448 (Iowa 2003) (lack of pretrial competence evaluation causes no deprivation of due process rights); Commonwealth v. Nieves, 446 Mass. 583, 846 N.E.2d 379 (2006) ("robust, adversary character" of commitment proceeding minimizes risk of erroneous commitment of person who is not sexually dangerous; due process is preserved through adversarial process); State ex rel. Nixon v. Kinder, 129 S.W.3d 5, 10 (Mo. App. 2003) (SVP determination, regardless of competency of respondent, is not unconstitutional deprivation of liberty); In re Commitment of Fisher, 164 S.W.3d 637 (Tex. 2005) (difference between sexual predator commitment proceedings and conventional commitment proceedings does not make predator proceedings punitive; competency requirement for criminal proceedings is inapplicable to civil commitments); In re Commitment of Luttrell, 312 Wis.2d 695, 754 N.W.2d 249 (2008) (no right to competency evaluation before hearing on sexually violent person status; commitment is for treatment, not punishment, and due process concerns are remote).

The Sykes court expressed concerns regarding the alternatives, if competency was required in sexual predator civil commitment proceedings, which are discussed above and equally

[6]The Mathews factors as applied to this case are discussed in depth in the Final Brief of Respondent at pages 17-22.

applicable in South Carolina. The first alternative would be to release the person from the State's control until such time as he may become competent to stand trial, which releases an individual with violent tendencies into society. The second alternative would be to commit him for treatment as a mentally ill person subject to involuntary commitment under regular civil commitment laws, which would provide care and treatment for the mental illness, but the person is still institutionalized without being competent to represent himself at a commitment hearing, even if under a different statutory provision than the sexually violent predator statute. Addressing the contention that sexually violent treatment would not sufficiently address other mental disorders, the court concluded:

> [T]he State is not required to choose between attacking every aspect of a public danger or not attacking any part of the danger at all. The legislature is free to recognize degrees of harm, and it may address restrictions to those cases where it deems the need to be most clear. In this instance, the State has chosen treatment of the sexual predatory mental defect as having a priority over Schizophrenia or other mental disorders.

367 P.3d at 1248 (internal citation omitted).

The facts of this case present a prime example of why competency is not, and should not be, required in SVPA proceedings. Appellant acknowledged to Dr. Gehle he is better <u>when</u> he takes the prescribed medication for his Schizophrenia, which is the primary source of his incompetency. (R., p. 91). While he contended he was not <u>receiving</u> medication after he was transferred from the Department of Corrections, where he was on medication and competent, to the Horry County Detention Center, the records reveal the medication **was** initially prescribed at the Detention Center, but Appellant would not take it consistently, and the prescription was eventually discontinued only after Appellant **refused to take it.** (TT, pp. 102-103; R., 107-108).

As set forth above, given his long history and experience with the effect of not taking the prescribed medication, as well as his statements about his medical history to the court appointed

expert during the interview, Appellant knew his condition would deteriorate if he stopped taking the medication.[7] In short, any issue regarding Appellant's competency at the time of trial was an issue created by Appellant's own conduct in refusing to take prescribed medication he knew made his condition better.

Further, if Appellant received a competency examination and was declared incompetent, he would receive medical treatment designed to address his incompetency, with no sex offender treatment even offered. Once Appellant's competency was "restored," he would return to, and remain in, the Detention Center with no treatment (except prescribed anti-psychotic medication which he could refuse to take) until a new SVPA trial could be scheduled. Assuming Appellant took the prescribed medication, after the case was scheduled for trial, he could stop taking the medication, as he did in January 2018 after the case was first scheduled for trial, and once again decompensate, thus starting the vicious cycle over again. Such a result would be absurd, and completely undermine the purpose of the SVPA.[8]

The SVPA contains **all** the procedural safeguards identified by other jurisdictions as sufficient to afford appropriate due process to a mentally incompetent person subject to the SVPA process. In addition to the numerous levels of review prior to the commitment trial, the person has; 1) the right to counsel; 2) the right to present evidence; 3) the right to cross-examine witnesses;

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[7]The Detention Center could not force medicate Appellant absent a court order to do so, which was never even requested between February 2018 and October 2018.

[8]Even if Appellant's mental status prevented his actual participation in trial preparation and trial, experts and counsel can review Appellant's history, arrest records, previous mental health evaluations and treatment records, and interview him to the extent possible, in order to reach conclusions regarding his mental diagnosis and risk to reoffend sexually, and how to handle such issues at trial. *See* Moore, 237 P.3d at 543 (nature of issues, evidence and findings in sexual predator proceeding prevents person from playing much more than a supporting role; any chance the person's mental incompetence would significantly impair his contribution to his defense is relatively attenuated).

4) the right to retain experts; 5) the right to have the rules of evidence apply; 6) the right to have the civil commitment determination made beyond a reasonable doubt; and 7) the right to appeal the final determination. S.C. Code §§44-48-50, -60, -70, -80, -90, -100(A), and -100(B). Thus, Appellant's procedural due process rights were amply protected by the SVPA.

Section 44-48-100(B)

Appellant's assertion regarding the Court's reliance on §44-48-100(B) as the cornerstone of its statutory interpretation is disingenuous. A cursory review of the Court's opinion makes it clear its statutory interpretation consisted of reviewing the SVPA **in its entirety**, as required by the most basic rules of statutory interpretation, and the Court interpreted the statute to give effect to **all** of its parts. Appellant's argument necessarily ignores the rules of statutory construction, and does the very thing he accuses this Court of doing – considering 100(B) in isolation without regard to the clearly stated legislative intent and other portions of the SVPA.

Overruling Prior Ruling

This Court properly declined to rule on the issue of whether the circuit court erred in denying Appellant's second motion for a competency evaluation because its holding that the SVPA did not afford Appellant the right to be competent for the trial to proceed was dispositive. In any event, the issue fails on the merits.

As set forth in the Final Brief of Respondent, the prior circuit court ruling on Appellant's first motion for a competency evaluation was premised on the question of whether Appellant was entitled to a competency evaluation at all under the SVPA, and that issue did not change between August and October. The fluidity or deterioration of Appellant's mental health and competency was irrelevant in August 2018, and it remained irrelevant in October, 2018. At the August 2018

hearing, the circuit court ruled Appellant was not entitled to a competency evaluation under the SVPA, and the ruling on that issue was binding in subsequent circuit court proceedings.

CONCLUSION

Based on the foregoing and the arguments set forth in the Final Brief of Respondent, the State respectfully submits Appellant's Petition for Rehearing should be denied in its entirety.

Respectfully submitted,

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August 31, 2021

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Appeal from Horry County
The Honorable D. Craig Brown, Circuit Court Judge
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In the Matter of the Care and Treatment of
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PROOF OF SERVICE

I, Caroline Collins, certify I served a copy of the Return to Appellant's Petition for Rehearing on Appellant via email to the address listed in AIS for:

Joanna K. Delany
Assistant Appellate Defender
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This 31st day of August, 2021.

Caroline Collins

From: Caroline Collins
Sent: Tuesday, August 31, 2021 2:04 PM
To: 'jdelany@sccid.sc.gov'
Cc: Deborah Shupe; 'Kasperski, Katriel'
Subject: In the Matter of the Care and Treatment of Thomas Griffin (2018-001975)
Attachments: In the Matter of the Care and Treatment of Thomas Griffin - Return to Appellant's Petition for Rehearing - 2018-001975 (02696430xD2C78).PDF

Good Afternoon Ms. Delany,

Attached please find a Return to Appellant's Petition for Rehearing in In the Matter of the Care and Treatment of Thomas Griffin (2018-001975). This document will be submitted to the South Carolina Court of Appeals today via the AIS One Drive System.

If you will, please reply to this email to confirm receipt.

Thank you!

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