

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2020-000353

RECEIVED
Nov 12 2021
SC Court of Appeals

The State of South Carolina, Respondent,
v.

Brian Valbert. Appellant.

INITIAL BRIEF OF APPELLANT

In accordance with *In re McCoy*, 360 S.C. 425, 602 S.E.2d 58 (2004)

s/Michael S. Gambrell
Michael S. Gambrell
104 South Calhoun Street
Greenville, South Carolina 29601
(864) 867-1415
Attorney for Appellant

TABLE OF CONTENTS

Table of Authoritiesii

Statement of Issues on Appeal 1

Statement of the Case2

Standard of Review3

Facts 4

Arguments

1. THERE ARE NO NON-FRIVOLOUS ISSUES REGARDING THE SUFFICIENCY OF THE CIRCUIT COURT’S ORDER6

2. THERE ARE NO NON-FRIVOLOUS ISSUES REGARDING THE CIRCUIT COURT’S FINDING THERE WAS NO PROBABLE CAUSE TO BELIEVE APPELLANT’S MENTAL ABNORMALITY OR PERSONALILTY DISORDER HAD SO CHANGED THAT HE WAS SAFE TO BE RELEASED AND WAS NOT LIKELY TO COMMIT ACTS OF SEXUAL VIOLENCE7

3. OUTLINE OF ALL REMAINING ISSUES OF ARGUABLE MERIT9

Conclusion 10

TABLE OF AUTHORITIES

CASES

In re Care & Treatment of Tucker, 353 S.C. 466, 578 S.E.2d 719 (2003)3,7,8
In re Care and Treatment of Corley, 616 S.E.2d 442, 365 S.C. 252 (S.C. 2005)6

STATUTES

S.C. CODE ANN. § 44-48-1103,6,7

STATEMENT OF ISSUES ON APPEAL

1. ARE THERE ANY NON-FRIVOLOUS ISSUES REGARDING THE CIRCUIT COURT'S FINDING THERE WAS NO PROBABLE CAUSE TO BELIEVE APPELLANT'S MENTAL ABNORMALITY OR PERSONALILTY DISORDER HAD SO CHANGED THAT HE WAS SAFE TO BE RELEASED AND WAS NOT LIKELY TO COMMIT ACTS OF SEXUAL VIOLENT?
2. ARE THERE ANY REMAINING ISSUES OF ARGUABLE MERIT?

STATEMENT OF THE CASE

Brain Valbert was committed to the Sexually Violent Predator Treatment Program on November 6, 2008. Mr. Valbert had an annual review hearing scheduled for September 7, 2016, pursuant to S.C. Code Ann. § 44-48-110. On August 26, 2016, the Circuit Court held a status conference with counsel for Mr. Valbert and the State. Based on the status conference the Circuit Court issued an order continuing the September 7, 2016 annual review hearing.

On January 16, 2020, the Circuit Court conducted an annual review hearing pursuant to S.C. Code Ann. § 44-48-110. On January 22, 2020, the Circuit Court issued an order finding Mr. Valbert had not met the probable cause burden under Section 44-48-110. The Circuit Court accordingly denied Mr. Valbert's annual review and ordered him to remain in the Sexually Violent Predator Program. On February 23, 2020, Mr. Valbert filed a Notice of Appeal with the South Carolina Court of Appeals.

STANDARD OF REVIEW

The appellate court will not disturb the circuit court's finding on probable cause unless found to be without evidence that reasonably supports the circuit courts finding. *In re Care & Treatment of Tucker*, 353 S.C. 466, 470, 578 S.E.2d 719, 722 (2003). In a Section 44-48-110 probable cause hearing, the committed person has the burden of showing the circuit court that probable cause exists to believe that his mental condition has so changed that he is safe to be released. *Id.*

FACTS

On June 10, 2002, Brian Valbert pled guilty to Lewd Act on a Minor for which he was sentenced to twelve years in the S.C. Department of Corrections. In 2007, the S.C. Office of the Attorney General filed a petition under the S.C. Sexually Violent Predator Act (the Act) seeking to commit Mr. Valbert to the S.C. Department of Mental Health (SCDMH) until such time that Mr. Valbert's mental abnormality so changed that he would be safe to be released.

Dr. Peggy Wadman performed a pre-commitment evaluation on Mr. Valbert and diagnosed him with pedophilic disorder, pedophilia—sexually attracted to both, nonexclusive type, and antisocial personality disorder. Mr. Valbert was found to meet the definition of a sexually violent predator and was committed into the Sexually Violent Predator Treatment Program at the SCDMH.

In 2012, Mr. Valbert began to show improvement in the program. In 2016, Mr. Valbert was evaluated by Dr. Amy Swan pursuant to the annual review process under the Act. In her report dated April 16, 2016, Dr. Swan opined that he had continued to make positive progress and had managed his sexual arousal, but that there was insufficient basis to opine that his situation had so changed that he was safe to be at large. During this time, Dr. Thomas Martin also evaluated Mr. Valbert at Mr. Valbert's request and opined that Mr. Valbert's mental abnormality had so changed that he is safe to be at large and be released from the SVP program.

Mr. Valbert's 2016 annual review was scheduled for September 7, 2016 before the Honorable Diane Goodstein. On August 26, 2016, Judge Goodstein held a status conference with counsel for Mr. Valbert and the State. At the status conference, the State informed the Court that Dr. Martin would testify on behalf of Mr. Valbert's release and that Dr. Swan was scheduled to meet with Mr. Valbert on September 21, 2016. The State advised that if Dr. Swan verified Mr. Valbert's progress at that time she would also recommend Mr. Valbert's release from the program. The State stipulated that if the hearing was to go forward on September 7, 2016, the Court would make a finding of

probable cause in favor of Mr Valbert. The result would be an annual review jury trial in the future. If, however, after meeting with Mr. Valbert on September 21, 2016, Dr. Swan found that Mr. Valbert's progress had deteriorated since meeting him in June, a release hearing would be conducted at a future date before a judge. On September 8, 2016, the Court issued an order continuing the September 7, 2016 annual review hearing subject to the State's stipulation and the understanding of all parties that the matter would be resolved in the future by either a contested annual review jury trial or a release hearing.

Subsequent to Dr. Swan's September 2016 evaluation, Dr. Swan recommended that Mr. Valbert be released. As part of the procedure at SCDMH, Mr. Valbert and Dr. Swan appeared before the Discharge Review Board. After hearing from both of them, the Board declined to approve Mr. Valbert's release and Mr. Valbert remained committed. In January 2018, Dr. Swan issued an updated evaluation report and concluded that Mr. Valbert's condition had not so changed to make him safe at large and did not recommend his release from SCDMH.

On January 16, 2020, the Court conducted an Annual Review hearing covering all pending annual reviews through 2019. Mr. Valbert testified on his own behalf and Chief Psychologist Dr. Kelsey Laxton and Dr. Rozanna Tross, both of the SCDMH testified on behalf of the State. The Honorable Roger Young, Sr. found that Mr. Valbert did not meet the probable cause burden under the Act and denied Mr. Valbert's annual review and ordered him to remain at the Sexually Violent Predator Treatment Program.

ARGUMENTS

1. THERE ARE NO NONFRIVOLOUS ISSUES REGARDING THE SUFFICIENCY OF THE CIRCUIT COURT'S ORDER.

Pursuant to Section 44-48-110 of the South Carolina Code the circuit court must conduct an annual review hearing to review a committed person's status. At the hearing, the circuit court uses a probable cause standard to determine whether sufficient evidence exists to go to trial. S.C. Code Ann. § 44-48-110 (2004). If the court determines that probable cause exists to believe 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 shall schedule a trial on the issue. *Id.* The circuit court should substantially comply with SCRCP Rule 52(a) and "find the facts specially and state separately its conclusions of law." *In re Care and Treatment of Corley*, 616 S.E.2d 442, 365 S.C. 252, 253 (S.C. 2005).

In the Amended Order Denying Annual Review, the Court outlined the following procedural history leading up to the hearing:

"In 2016, [Appellant] had a pending annual review where his attorney had obtained the services of Dr. Thomas V. Martin, who was prepared to testify [Appellant] was safe to be released. The Department of Mental Health evaluation at the time, by Dr. Amy C. Swan had found progress, and it was expected that Dr. Swan, upon seeing [Appellant] again and finding the same level of progress, would also recommend release. As a result, a September 7, 2016 hearing was continued by Order filed September 27, 2016, with the expectation that in the future there would be either a release hearing or an annual review trial.

It turned out that Dr. Swan did evaluate [Appellant] again, and recommended he be released. As part of the procedure at the Department, [Appellant] and Dr. Swan (by telephone) appear before the Discharge Review Board. However, after hearing from both of them, the Board declined to approve [Appellant's] release; thereafter, the Board had a follow-up meeting to hear more from Dr. Swan, and again denied [Appellant's] release. Dr. Swan's next annual review evaluation concluded [Appellant's] condition had not so changed to make him safe to be at large. This conclusion was reflected in annual reviews after that, including the most recent by Drs. Laxton and Tross."

The Court then enumerated the following facts discerned from the testimony presented:

"Careful consideration was given to the testimony presented, to include the difficulties and changes in [Appellant] and his progress in treatment over the times indicated above. While

his risk to reoffend on the actuarial risk assessments is only in the average risk category, he has demonstrated a number of static risk factors, including a sexual preference for prepubescent children, lack of emotionally intimate relationships with adults, dysfunctional coping and grievance thinking. His diagnoses are Anti-Social Personality Disorder and Pedophilic Disorder, Sexually Attracted to Females, Non-Exclusive Type.”

Accordingly, the Court found that Appellant had not met the probable cause burden under Section 44-48-110.

Because the Amended Order Denying Annual Review presents a clear presentation of the basis for the circuit court’s findings and the legal conclusion drawn therefore, there are no non-frivolous issues regarding the sufficiency of the Order.

2. THERE ARE NO NONFRIVOLOUS ISSUES REGARDING THE CIRCUIT COURT’S FINDING THERE WAS NO PROBABLE CAUSE TO BELIEVE APPELLANT’S MENTAL ABNORMALITY OR PERSONALILTY DISORDER HAD SO CHANGED THAT HE WAS SAFE TO BE RELEASED AND WAS NOT LIKELY TO COMMIT ACTS OF SEXUAL VIOLENCE.

The appellate court will not disturb the circuit court’s finding on probable cause unless found to be without evidence that reasonably supports the circuit courts finding. *In re Care & Treatment of Tucker*, 353 S.C. 466, 470, 578 S.E.2d 719, 722 (2003).

Here, evidence reasonably supports the circuit court’s probable cause finding. Dr. Kelsey Laxton testified that she reviewed Mr. Valbert’s records, criminal records, prison record, treatment records and prior annual review. Tr. 35, ll. 3-4. Based on her review she opined that in Mr. Vabert’s initial years in the Sexually Violent Predator Treatment Program he was manipulative and very resistant to engaging in treatment. Tr. 25, ll. 12-14. Then, around 2012, Mr. Valbert began to improve and identify and understand what led to his offending pattern and also started to disclose additional victims. Tr. 25, ll. 14-18. Between 2016 to 2018, Mr. Valbert continued to make positive progress and managed his sexual arousal that Dr. Swan, who evaluated him during this time, opined that Mr. Valbert no longer met the criteria as a Sexually Violent Predator. Tr. 26, ll. 13-18. In January 2018, Dr. Sawn issued an updated evaluation and disclosed new things that had come to light about Mr.

Valbert's difficulties with hostility towards woman and grievance thinking and recommended continued confinement. Tr. 26, ll 22-25; Tr. 27, ll. 6-8.

Dr. Laxton testified that since then Mr. Valbert continues to believe that other people are out to get him and is constantly perseverating on grievances with how he feels how he has been treated and that the world has treated him wrong. Tr. 28, ll. 11-15. Mr. Valber also disclosed his belief that he wasn't harming his victims and he had an interest in child pornography and was in denial for a long time about his sexual interest in children. Tr. 28, ll. 19-23. Dr. Laxton testified that Mr. Valbert has diagnoses of pedophilia and anti-social personality disorder. Tr. 30, ll16-17. Dr. Laxton also testified to Mr. Valbert's static and dynamic risk factors effecting his progress in treatment including, sexual preference for prepubescent children and lack of emotionally intimate relationships with adults. Tr. 34, ll. 8-12. Dr. Laxton concluded that Mr. Valbert's mental abnormality and personality disorder have not changed so that he is safe to be at large and if he were released he would be likely to commit crimes of sexual violence. Tr. 35, ll. 12-16.

Additionally, in a Section 44-48-110 probable cause hearing, the committed person has the burden of showing the circuit court that probable cause exists to believe that his mental condition has so changed that he is safe to be released. *In re Care & Treatment of Tucker*, 353 S.C. 466, 470, 578 S.E.2d 719, 722 (2003). In response to the evidence presented by the State, Mr. Valbert testified on his own behalf, but did not present any testimony from an expert witness to rebut the Dr. Laxton's conclusions. Because there was ample un rebutted evidence presented at the January 16, 2020 annual review hearing, there is no non-frivolous issues regarding whether the circuit court's finding of probable cause.

3. OUTLINE OF ALL REMAINING ISSUES OF ARGUABLE MERIT.

The September 8, 2016 Order issued by Judge Goldstein continued that Annual Review Hearing subject to the stipulations made by the State concerning Mr. Valbert's status at that time and with the understanding of all the parties that the matter will be resolved in the future by either a contested Annual Review jury trial or a Release Hearing. It is undisputed that Mr. Valbert did not receive either an Annual Review jury trial or a Release Hearing subsequent to this Order. There is nothing in the record that indicates Mr. Valbert appealed the September 8, 2016 Order.

In the January 16, 2020 Annual Review hearing, counsel for Mr. Valbert argues the following: "I don't really think this is so much a probable cause hearing as this is a hearing to try and get some conclusion as to is [Mr. Valbert] going to have a review hearing or is he going to have a jury trial. But he was promised one or the other by a judge, and it hasn't happened. ... And I think that there have been some procedural problems here that can only be remedied by him getting his jury trial."

In the January 22, 2020 Order, Judge Young references the procedural history leading up to the September 8, 2016 Order and that "[a]s a result, a September 7, 2016 hearing was continued by Order filed September 27, 2016, with the expectation that in the future there would be either a release hearing or an annual review trial." Judge Young goes on to review the procedural history subsequent to the September 8, 2016 Order and then rule that Mr. Valber did not meet his burden of establishing probable cause that his mental abnormality had changed that he is safe to be at large and not likely to commit acts of sexual violence.

There could be an issue that counsel for Mr. Valbert asked the Court to rule on Mr. Valbert's assertion that he was entitled to either an Annual Review jury trial or a Release Hearing and that Judge Young denied this request.

CONCLUSION

After examining the facts of the case in light of the applicable law, counsel on appeal believes there is no basis for presenting any legally non-frivolous issue.

Respectfully submitted,

November 10, 2021

/s/ Michael S. Gambrell
Michael S. Gambrell, SC Bar # 70044

ATTORNEY FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Couch, Sr., Circuit Court Judge

Appellate Case No. 2020-000353

RECEIVED
Nov 12 2021
SC Court of Appeals

The State of South Carolina, Respondent,
v.

Brian Valbert. Appellant.

DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

- (1) Transcript of record January 16, 2020;
- (2) Order Denying Annual Review filed February 3, 2020
- (3) Order Denying Annual Review filed September 27, 2016

I certify that this designation contains no matter which is irrelevant to this appeal.

November 10, 2021

s/Michael S. Gambrell
Michael S. Gambrell
104 South Calhoun Street
Greenville, South Carolina 29601
(864) 867-1415
Attorney for Appellant

RECEIVED

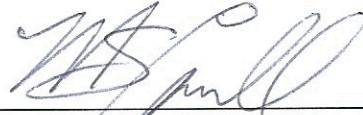
Nov 12 2021

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Initial Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

November 10, 2021



Michael S. Gambrell, SC Bar #70044

104 South Calhoun Street
Greenville, South Carolina 29601
(864) 867-1415

ATTORNEY FOR APPELLANT