STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

Deadra L. Jefferson, Circuit Court Judge

IN THE MATTER OF THE CARE AND TREATMENT OF GILBERT GONZALEZ,

PETITIONER

APPELLATE CASE NO. 2012-210606

BRIEF OF PETITIONER

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ISSUE PRESENTED

Whether the Court of Appeals erred by affirming the trial court's error which allowed the state to argue in his closing that the jury could draw a negative inference from the fact that Gonzalez's expert did not testify, and that the expert's testimony would be adverse to Gonzalez's case?

STATEMENT OF THE CASE

Gilbert Gonzalez was convicted of three crimes considered to be sexually violent crimes under the Sexually Violent Predator Act. (SVP Act). In June 1985, Gonzalez entered a guilty plea to committing a lewd act on a minor under the age of sixteen. He was sentenced to nine months incarceration. In November 1986, Gonzalez entered a guilty plea to criminal sexual conduct with a minor first degree (CSC) and to committing a lewd act upon a minor. He was sentenced to thirty years on the CSC first degree and ten years on the lewd act charge to run consecutively.

In 2006, prior to his max-out date of January 2007, the Multi-Disciplinary Team and the Prosecutor's Review Committee determined there was probable cause that Gonzalez was a sexually violent predator. Probable cause and was found and he was ordered to under go a psychiatric evaluation by Dr. Pamela Crawford. Dr. Crawford determined that Gonzalez had a mental abnormality and that he met the criteria under S.C. Code § 44-48-30.

Gonzalez proceeded to trial on February 9, 10, and 11, 2009 before the Honorable Deadra L. Jefferson and a jury. The jury found that Gonzalez was a sexually violent predator. Judge Jefferson issued an order committing Gonzalez to the Department of Mental Health for long-term control, care and treatment. Gonzalez' attorney filed a notice of appeal. The Court of Appeals affirmed Gonzalez's commitment on January 4, 2012. In the Matter of the Care and Treatment of Gilbert Gonzalez, 2012-UP-003(Ct. App. filed January 4, 2012). App. 1-2. Gonzalez's appellate attorney filed a petition for rehearing on January 19, 2012. The Court of Appeals issued an order on March 2, 2012 denying the petition for rehearing. App. 15. Gonzalez filed a petition for writ of certiorari which the Supreme Court granted on December 20, 2012 as to Question II.

ARGUMENT

The Court of Appeals erred in affirming the trial court's error which allowed the state to argue in his closing that the jury could draw a negative inference from the fact that Gonzalez's expert did not testify and that the expert's testimony would be adverse to Gonzalez's case.

Gilbert Gonzalez was convicted in 1985 for approaching a four year old girl and an eight year old girl in K-Mart. He pled guilty to pulling up the skirt of the four year old and touching her genitals. ROA. 9, ll. 7 – 25; ROA. 10, ll. 1 – 25; ROA. 22, ll.11 – 25; ROA. 23, ll. 1 – 25; ROA. 24, ll. 1 – 20. Although he pled guilty, Gonzalez denied touching the girl's genitals. ROA. 71, ll. 1 – 15.

In 1986, he pled guilty to two crimes. One was committing a lewd act on a minor where he allegedly had a five year old girl get into his truck at a location where he was installing flooring in a house. He pled guilty to putting his hand in her pants and underwear and rubbing her vaginal area. When this incident occurred, he was on bond for the first incident and was scheduled to go to court the next day. ROA. 27, ll. 19 – 25; ROA. 28, ll. 1 – 24. He denied touching the girl's vagina. ROA. 71, ll. 16 – 19.

The second crime he pled guilty to at the same time in 1986 was CSC with a minor first degree where he admitted that he took a six year old girl into the garage of the house where he was working and performed oral sex on her. She left and he called her into the garage a second time where he performed oral sex again and rubbed her vagina with his penis until he ejaculated. His semen was found in the child's vagina and vulva. ROA. 29, ll. 21 – 25; ROA. 30, ll. 1 – 25; ROA. 31, ll. 1 – 23. He admitted to this incident and expressed remorse about it. ROA. 71, ll. 20 – 25; ROA. 72, ll. 1 – 25; ROA. 73, ll. 1 – 9.

Dr. Crawford's testimony in the instant SVP trial was that Gonzalez had a mental abnormality of pedophilia attracted to females. She also diagnosed him as having an antisocial personality disorder. ROA. 46, ll. 10 – 25; ROA. 47, ll. 1 – 25; ROA. 48, ll. 1 – 25. Her opinion was that Gonzalez met the criteria under the statute to be a sexually violent predator. ROA. 39, ll. 7 – 12. She testified that he had difficulty controlling his sexual behavior and would be at high risk of sexually re-offending against young children. ROA. 50, ll. 2 – 19.

Gonzalez testified that he had been incarcerated twenty years and that he had changed. ROA. 66 – 108. He explained that he had been saved while in jail in 1986 and had repented. ROA. 72, ll. 1 – 25. He said that the spirit of sexual perversion had overtaken him when he committed the crimes, but he had assumed responsibility for them. He said he has learned to control his behavior. ROA. 73, ll. 18 – 24.; ROA. 74, ll. 1 – 25; ROA. 75, ll. 1 – 25; ROA. 76, ll. 1 – 9.

He then gave testimony about the activities he participated in while in prison which included sex offender treatment. ROA. 76, ll. 10 – 25; ROA. 77, ll. 1 – 25; ROA. 78, ll. 1 – 21. He presented thirteen exhibits which included thirty-five certificates of programs he had completed while incarcerated. ROA. 57, ll. 11 – 15 Respondent's Exhibit 10. Among these was an Associate of Arts Degree from the Baptist College of Charleston (Charleston Southern University), and a letter of congratulations from the Senior Deputy Warden for being selected inmate of the month by the Christians in Action. He was bilingual and helped other inmates with learning English and Spanish. ROA. 87, ll. 18 – 25.

His girlfriend of eleven years, Pam Donahue, testified on Gonzalez' behalf. ROA. 137,ll. 15 – 25. Her testimony was that they met when her son was incarcerated under the Youthful Offender Act (YOA). She explained that Gonzalez was working at that prison and that Gonzalez helped her son turn his life around. She said she thought her son was into drugs but that he had stayed out of

trouble and was working successfully. ROA. 138, ll. 1 – 25; ROA. 139, ll. 1 – 25; ROA. 140, ll. 1 – 25. She and Gonzalez had continued their relationship since then and had talked of getting married. ROA. 141, ll. 1 – 25.

At the beginning of the trial in a pretrial motion, Gonzalez's counsel renewed her previous motion for assistance in obtaining a second expert. [1] The attorney told the court that she had made a motion before a circuit court judge in writing but it was denied. Judge Jefferson denied her request but told her the issue was preserved for appeal. ROA. 5, ll. 1 – 25; ROA. 6, ll. 1 – 25; ROA. 7, ll. 1 – 25; ROA. 8, ll. 1 – 18.

Defense counsel then asked the judge regarding jury arguments and questions concerning Gonzalez's failure to call an expert witness but the judge told her she would take argument on it "contemporaneously." ROA7. 19, ll. 18 – 25. During the trial, counsel brought up the issue of the state being allowed to draw a negative inference from Gonzalez not having an expert to testify. The judge ruled that the state could ask Gonzalez if he had been evaluated but said the "rest of it goes to how he argues it to the jury." The judge ruled that "you could always draw a negative inference from a witness not being called." The judge went on to say that the state could "certainly argue lack of a witness." ROA. 59, ll. 19 – 25; ROA. 60, ll. 1 – 22.

The judge said the expert was retained so it did not come within the discovery rules because the discovery rules apply to an expert who is consulted. Counsel argued that this admission was prejudicial to her client and the prejudice outweighed the value of such procedure. Counsel argued that a party could argue the fact that a witness was not called if the witness is equally available to

[1]In the first trial, January 16-17, 2007, which ended in a mistrial, counsel filed a Motion for Assistance in Obtaining Second Expert on Behalf of Respondent filed December 8, 2006 wherein she stated that a second independent psychiatric examination was needed because the first expert, Dr. Tom Martin, would not testify on Respondent's behalf.

both parties or is unavailable. Counsel noted that Dr. Martin was not available to her client. ROA. 60, ll. 23 – 25; ROA. 61, ll. 1 – 25; ROA. 62, ll. 1 – 25; ROA. 63, ll.1 – 25.

The judge said that the state would be very limited in what they could ask Gonzalez which would be limited to asking if he were evaluated. However, she said the state could argue that since the expert was not at trial, the jury "should assume he did not have something favorable to say." She said this was a civil case. ROA. 64, ll. 1 – 22.

During the state's cross examination of Gonzalez, his counsel objected when the state began to question Gonzalez about a second evaluation. The judge did not allow speaking objections but had counsel approach the bench. She then overruled counsel's objection. The state asked Gonzalez if he been evaluated by. Dr. Tom Martin which Gonzalez said yes. ROA. 115, ll. 18 – 25; ROA. 116, ll. 1 – 13.

During his closing argument, the state's attorney told the jury that it was clear from the evidence thatGonzalez was allowed to get an independent evaluation by a psychiatrist of his choice, Dr. Tom Martin. Defense counsel objected which was overruled after a discussion at the bench. ROA. 185, ll. 1 – 19.

The state's attorney then argued to the jury:

> As I was saying, the respondent, after getting the evaluation done by Dr. Crawford, was entitled to get an independent evaluation and he got one by Dr. Tom Martin. Dr. Martin is not here. I would submit to you that you can draw an inference from his not being here that if he was here his testimony would be adverse to the respondent's case.

ROA. 185, ll. 20 – 25; ROA. 186, ll. 1.

The Sexually Violent Predator Act involves involuntary civil commitments to the Department of Mental Health. S.C. Code §. 44-48-20 (1998). However, the Act includes

significant components of the criminal law. These include a probable cause determination and hearing. S.C. Code § 44-48-70 (1998). A person subject to the Act is entitled to the assistance of legal counsel at all stages, and the person is entitled to a jury trial. S.C. Code § 44-48-90 (1998). Although this right to counsel is not constitutional, it is statutory. In re McCoy , 360 S.C. 425, 602 S.E.2d 58 (2004). The burden for a finding by the jury that the person is a sexually violent predator is "beyond a reasonable doubt". S.C. Code § 44-48-100(A) (1998).

The Act involves criminal convictions. A sexually violent predator is defined as a person who has been convicted of a sexually violent offense as listed in the Act and suffers from a mental abnormality or a 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 § 44-48-30(1) (1998). The result is the taking of personal freedom through the involuntary commitment.

Because of these components of criminal law, the Act is a hybrid of civil and criminal law. The evidence and testimony at a trial under the SVP Act is concerned primarily with criminal acts the defendant or respondent has committed and future criminal acts he may commit. If found to be a sexually violent predator by a jury, the person's personal freedom is taken, and he is housed in a prison building at the Department of Corrections, maybe for his life time. This is the same result as a criminal conviction.

Because the same burden applies to these SVP trials as the burden in a criminal trial, and because of the other similarities to the criminal law, the same constitutional rights and rules of evidence should apply as well. The state told the jury in his opening statement that the state had the burden of proof which was beyond a reasonable doubt. SUPP. ROA. 1, ll. 2 – 25; SUPP. ROA. 2, ll. 1 – 3; SUPP. ROA. 3, ll. 1 – 23. Although the judge said the state could argue a negative inference

because Dr. Martin was not present since this was a civil trial, she committed reversible error in allowing the state to shift the burden of proof to Gonzalez.

In Douglas v. State, 332 S.C.67, 504 S.E.2d 307 (1998), the Supreme Court wrote that the jury should ordinarily be instructed not to draw inferences from the neglect of a defendant to call witnesses.

Rule 403, SCRE, provides that any relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The judge's rulings regarding the expert witness were prejudicial. The judge had already denied funding for a second expert because the first expert refused to testify. Then the judge allowed the state to tell the jury they could draw a negative inference because Gonzalez' expert did not testify. This placed Gonzalez in a catch 22 situation where he could not win. This was prejudicial to Gonzalez.

The Court of Appeals held that the trial court did not abuse its discretion because the content of the closing argument should stay within the record and reasonable inferences could be drawn there from. App. 2.

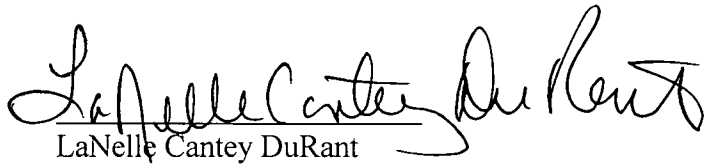
In the case of Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959), the Supreme Court held that the rule that if a party fails to call a witness he knows of on a material issue, and the jury can draw in inference that the witness is adverse, usually applies when the uncalled witness is an agent, employee, relation or associate of the party failing to call him. The Court wrote that in the absence of explanation, the failure or refusal of a party to produce an adverse inference where the party has knowledge of a witness, has the power to produce the witness, and the witness is not equally accessible to his opponent, and is such as he would naturally produce if the witness were favorable to him. The expert was not an associate, employee, or relation of Gonzalez.

The Court of Appeals misapprehended the issue in Gonzalez's case. The trial court abused its discretion by allowing the state to shift the burden of proof to Gonzalez when the state argued in its closing that the jury could draw an inference from Gonzalez's expert not testifying. The inference was that the expert could say only negative things about Gonzalez. The trial court abused its discretion by denying Gonzalez's request for a second expert, and then allowing the state to use that denial against Gonzalez.

CONCLUSION

Based on the above, the order of the trial court committing respondent to the SVP Program should be reversed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 23rd day of April, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Deborah R.J. Shupe, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 23rd day of April, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 23rd day
of April, 2013.

Shawn A. Graham (L.S.)
Notary Public for South Carolina
My Commission Expires: April 27, 2022