

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

Appeal from Charleston County

APR 23 2013

Deadra L. Jefferson, Circuit Court Judge **S.C. Supreme Court**

IN THE MATTER OF THE CARE AND TREATMENT OF
VINCE NEAL WAY,

PETITIONER/RESPONDENT

V

THE STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2011-199686

BRIEF OF RESPONDENT

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER/RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUES ON APPEAL.....3

STATEMENT OF THE CASE4

ARGUMENT I.....5

ARGUMENT II10

CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959)..... 10

Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998)..... 11

State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009)..... 8, 11

State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011) 10

State v. Charping, 333 S.C. 124, 508 S.E.2d 851 (1998)..... 10

State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978)..... 10

State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990) 10

Statutes

S.C. Code Ann. § 44-48-90..... 7, 8

Sexual Violent Predator Act (SVP Act) 11

Rules

Rule 201 (b), SCACR 5

Rule 220(c), SCACR 5

Rule 403, SCRE..... 9

Rule 26(b)(4)(B), SCRCP 7

STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals correctly affirmed the trial court in allowing the state to cross examine Way regarding his retained expert when Dr. Martin did not testify and did not present a report.
2. Whether the Court of Appeals correctly ruled that the state was not entitled to inform the jury during closing argument that it could infer the absence of Way's expert would have been adverse to Way, but the Court of Appeals erred in ruling that it was not reversible error.

STATEMENT OF THE CASE

Petitioner/Respondent agrees with the Respondent/Petitioner's statement of the case.

ARGUMENT

I

The Court of Appeals erred in affirming the trial court in allowing the state to cross examine Way regarding his retained expert when Dr. Martin did not testify and did not present a report.

Rule 220(c) SCACR, provides that the appellate court may affirm any ruling upon any grounds appearing in the Record on Appeal. Rule 201 (b) provides that only a party aggrieved by an order or decision may appeal. The state did not have grounds to file a petition for writ of certiorari because the trial court was affirmed, and the state was not an aggrieved party.

The Court of Appeals erred in affirming the trial court when it allowed the state to cross examine Way regarding his expert, Dr. Martin. In a pretrial motion, defense counsel asked the court to prohibit the state from mentioning at any point during the trial any second mental evaluation that Way may or may not have had. He argued that the state has the burden of proof and not the defendant. The state should not be able to mention any expert the defense may have had. ROA.6, ll. 4 – 25; ROA.7, ll. 1 – 2.

The state argued that they knew there was a court order providing that an independent expert evaluate Way. State's attorney said he should be able to ask Way when he testified if he had seen an expert and if the expert was at the trial. He argued that there was case law providing that there was a "presumption" the absent witness would have testified adverse to the party who retained him. The judge said that in a civil case, an attorney was not allowed to talk about experts that have been consulted that were not being

called as a witness. ROA.7, ll. 2 – 25. The judge declined to rule until she heard the case.

ROA.8, ll. 1 – 7.

Just before Way testified, defense counsel renewed his motion to exclude any testimony about a second doctor that may have been consulted by the defense; who wrote no report; and who was not testifying. ROA.62, ll. 16 – 25; ROA.63, ll.1.

The state argued that defense received an order from the court to pay for Way to see Dr. Martin. Defense counsel said Way was sent to see Dr. Martin, but Dr. Martin did not provide any results of that visit. ROA.63, ll. 2 – 25.

The judge said that obtaining an independent expert as provided by the statute paid for by the state was different from retaining an expert under the civil rules which was more like an attorney/client privilege and more protected. Defense counsel argued that it was still attorney work product where he spoke to the doctor and decided his input was not necessary. ROA.64, ll. 2 – 25.

The judge said that the rules concern experts who are consulted but not called as witnesses. The statute provided for the independent evaluation of a defendant as a matter of right which was paid for by the state. The judge stated: “These cases are a kind of hybrid..... Our Supreme Court has been very clear that when a rule and statute conflict, the statute has supremacy, or it supersedes the rule.” ROA.65, ll. 1 – 25.

Defense counsel argued that it was prejudicial to let the jury know about Dr. Martin because he had no idea what Dr. Martin’s determination was, because Dr. Martin did not produce a report. The judge then said that “you can always comment about a witness that’s not called.” She continued to explain that it was done everyday in civil and criminal

contexts because the presumption was that the witness had something to say that was not beneficial to the party. ROA.65, ll. 19 – 25; ROA.66, ll. 1 – 25.

The state argued that Section 44-48-90 of the SVP statute provided that if an indigent person wanted an expert of his own choosing, then the court determined if it were necessary. If so, then the court must assist the person in obtaining the expert, and the court must approve the payment for services. ROA.68, ll. 4 – 24.

Defense counsel said he was relying on Rule 26(b)(4)(B), of the South Carolina Rules of Civil procedure which provided that a party was not required to disclose nor produce an expert who was only consulted informally or consulted and not retained. ROA.69, ll. 4 – 25; ROA.70, ll. 1 – 25.

The judge said the rule did not apply because the expert was retained as provided by the statute. The expert was not simply consulted informally, for the statute did not provide for an informal consultation. She said that the statute clearly provided for the retention of an expert. She said she was bound by the language of the statute, and this statute was silent as to whether it was admissible or not. Her opinion was that if the legislature wanted a prohibition, they would have added it. ROA.71, ll. 1 – 25; ROA.72, ll. 1 – 25; ROA.73, ll. 1 – 25; ROA.74, ll. 1 – 25.

She ruled that the state could ask Way if he was evaluated by a second doctor according to the statute and whether a report was generated. That was all the state could ask because any conversations defense counsel may have had with the doctor and Way's conversation with the doctor were privileged. ROA.75, ll. 1 – 25.

During his cross examination of Way, the state asked if Way had been transported to see Dr. Martin to be evaluated for this proceeding. Defense counsel objected and the judge overruled the objection. ROA.78, ll. 21 – 25; ROA.79, ll. 1 – 25.

S.C. Code Section 44-48-90 provides in part:

In the case of an indigent person who would like an expert of his own choosing, the court must determine whether the services are necessary. If the court determines that the services are necessary and the expert's requested compensation for the services is reasonable, the court must assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf.

The language of the statute was that the court would “assist the person in obtaining the expert to perform an examination or participate in the trial on the person's behalf.” In reviewing the strict language of the statute, the Legislature wrote that the court would “**assist**” the person meaning the expert belongs to the person, and the court was only helping the person to obtain the expert. Then the Legislature wrote that the expert would participate in the trial on the person's behalf. If the expert was not going to participate “on the person's behalf,” then the person did not have to call the expert as a witness. Furthermore, the statute provides that the expert can perform an examination. This is separate from testimony.

The state paying for an indigent defendant to retain an independent expert is the same premise as the state paying for an attorney to be appointed to represent an indigent defendant. In that case, the state is not allowed access to the attorney/client information or to the attorney work product.

The state in Way's case could have called Dr. Martin as a witness as well. In State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009), the Supreme Court held that the state's

subpoenaing the defendant's non-testifying consultative expert to testify on its behalf did not violate work product doctrine and did not violate attorney/client privilege, as state did not attempt to elicit any confidential communications between expert and defendant. Dr. Martin was just as available to the state to call as a witness as he was to Way.

The Court of Appeals held that the trial court did not err in allowing the state to question Way regarding his retained expert since the trial court limited the state to questions relevant to the rules of evidence. App. 4. The Court of Appeals misapprehended this issue because Way was prejudiced when the judge allowed the state to question Way about his expert, Dr. Tom Martin. Way was prejudiced for following the language of the statute when the judge allowed the state to question Way about Dr. Martin.

The state argues that the Court of Appeals erred in addressing this issue based on the Rules of Evidence. Even under the Rules of Evidence, the mention of Way having retained an independent expert was more prejudicial than probative pursuant to Rule 403, SCRE. The state had sufficient evidence to determine whether Way met the legal criteria to be a sexually violent predator without any mention of his seeing an independent expert.

The Court of Appeals also contradicted its own rulings. The Court held that the trial court erred in allowing the state to argue that Dr. Martin's testimony would have been adverse to Way. The Court should have also held that the state could not question Way about his expert.

ARGUMENT

II

The Court of Appeals correctly ruled that the state was not entitled to inform the jury during closing argument that it could infer the absence of Way's expert would have been adverse to Way, but the Court of Appeals erred in ruling that it was not reversible error.

The Court of Appeals correctly held that it was improper for the state to imply a negative inference regarding the absence of Way's expert witness, but incorrectly held that the error did not rise to the level of reversible error. App. 5. However, the Court erred in holding that this did not rise to the level of reversible error because this was prejudicial to Way, and the state could have called Dr. Martin to testify as a witness.

The Supreme Court held in State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011), a harmless error analysis is contextual and specific to the circumstances of the case. In citing State v. Reeves, 301 S.C. 191, 193-194, 391 S.E.2d 241, 243 (1990), the Court wrote that "no definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case; error is harmless when it could not have reasonably affected the result of the trial.

In State v. Chapping, 333 S.C. 124, 508 S.E.2d 851 (1998), the Supreme Court ruled that it was not error and not an abuse of discretion when the trial court refused to allow the defendant to comment, at sentencing, on the state's failure to call the co-defendant as a witness in this capital case. The Court wrote that it had previously stated in State v. Hammond, 270 S.C. 347, 356, 242 S.E.2d 411, 415 (1978), that it was always proper for an attorney in argument to the jury to point out the failure of a party to call a witness. However, the Court stated that Davis v. Sparks, 235 S.C. 326, 333, 111 S.E.2d 545, 549

(1959), recognized the general rule that a party was not to be prejudiced by his failure to call a witness who was equally available to the other party. The Court wrote that Charping could have called the co-defendant as a witness as well as the state.

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

The state in Way's case could have called Dr. Martin as a witness as well. In State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009), the Supreme Court held that the state's subpoenaing the defendant's non-testifying consultative expert to testify on its behalf did not violate work product doctrine and did not violate attorney/client privilege, as state did not attempt to elicit any confidential communications between expert and defendant. Dr. Martin was just as available to the state to call as a witness as he was to Way.

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.

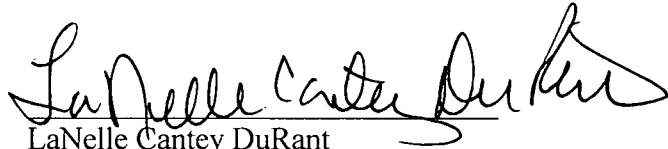
Because the same burden applies to these SVP trial as the burden in a criminal trial, and because of the other similarities to the criminal law, the same constitutional rights and rules of evidence should apply as well. Although the judge said the state could argue a negative inference because Dr. Martin was not present, she committed reversible error in allowing the state to shift the burden of proof to the respondent.

The error was not harmless because there is a reasonable probability that the jury may not have found Way to be a sexually violent predator if they had not known that Way's own expert would not testify in his behalf. This was prejudicial to Way because it invited a decision on inadmissible evidence.

CONCLUSION

Based on the above, the order of commitment of the trial court should be reversed.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large, sweeping initial "L".

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER/RESPONDENT

This 23rd day of April, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Deadra L. Jefferson, Judge

IN THE MATTER OF THE CARE AND TREATMENT OF
VINCE NEAL WAY,

PETITIONER/RESPONDENT

V.

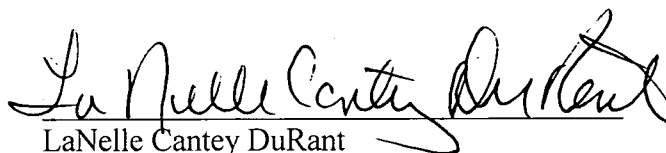
THE STATE OF SOUTH CAROLINA,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2011-199686

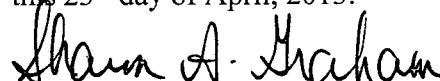
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon William M. Blicht, Jr., Esquire, at 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/RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 23rd day of April, 2013.

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