

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM CHEROKEE COUNTY  
J. MARK HAYES, CIRCUIT COURT JUDGE

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APPELLATE CASE NO.: 2012-213064

The State of South Carolina.....Respondent,

vs.

Christopher Chad Wessinger,.....Appellant.

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**FINAL BRIEF OF APPELLANT**

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## Statement of Issues on Appeal

- I. **Whether the plea judge should have made a finding under S.C. Code Ann., Section 44-48-30 (2)(0) (Supp. 2011) that the two (2) counts of indecent exposure to which the appellant pled were sexually violent offenses.**

### STATEMENT OF THE CASE

Appellant was indicted for two (2) counts of indecent exposure. (Indictment 12-GS-11-0362 and 12-GS-11-0363, R. pp. 2 - 7). On September 5, 2012 the Appellant pled to two (2) counts of indecent exposure. The Appellant was also charged with lewd act on a minor, however, that charge was dismissed (R. p. 8 ll. 14 - 22). The charge of lewd act was not dismissed as part of a negotiated plea but because of problems with the case. (R. p. 28 l. 19 - p. 29 l. 8). The Appellant in his plea only admitted to the incidents of indecent exposure and nothing more. (R. p. 29 ll. 2 - 22).

The Solicitor at the guilty plea asked the Court to make a determination that the offenses of indecent exposure were sexually violent offenses (p. 26 l. 21 - p. 27 l. 19). The Appellant, through counsel, objected to such a determination without a full evidentiary hearing (R. p. 29 - l. 23 - p. 31 l. 5). Nevertheless, the Court made a finding that the offenses to which Appellant pled were sexually violent offenses. (R. p. 38 l. 25 - p. 39 l. 5).

### ARGUMENT

- I. **The plea judge erred in making a finding, without a full evidentiary hearing, that the offenses to which Appellant pled were sexually violent offenses.**

On September 5, 2012 the Appellant herein pled to two (2) counts of indecent exposure. At the guilty plea the State, through Assistant Solicitor Matthew Kendall, sought a finding by the Court that the Appellant was pleading to sexually violent offenses. The Appellant opposed this determination and sought a full evidentiary hearing if the Court was

going to consider making such a finding.

Indecent exposure is not listed as a sexually violent offense under S.C. Code Ann., Section 44-48-30 (2). However, the State sought a determination under Section 44-48-30 (2) (0) that the offense of indecent exposure under the circumstances of the case would be a sexually violent offense. The Appellant sought a full evidentiary hearing on the issue and objected to the Court making such a determination without an evidentiary hearing. Although the Court seems to agree with the Appellant's position, the Court nevertheless made a finding, without an evidentiary hearing, that the offenses to which Appellant pled would be sexually violent offenses.

Chapter 48 of Title 44 of the S.C. Code contains the Sexually Violent Predator Act (Sections 44-48-10 et. seq.). If an individual is determined to be a sexually violent predator he or she can be committed to the Department of Mental Health for an indefinite period under S.C. Code Ann., Section 44-48-100 (Supp. 2011). If the State seeks to have an individual declared to be a Sexually Violent Predator the State must file a petition for a probable cause determination and if probable cause is found the individual is then entitled to a trial by jury in the Court of Common Pleas. The standard of proof is beyond a reasonable doubt, S.C. Code Ann. Sections 44-48-70 through 44-48-100 (Supp. 2011). However, for Chapter 48 of Title 44 to apply the individual must have been convicted of a sexually violent offense. Section 44-48-30 (2) lists numerous offenses which are defined as sexually violent offenses. The offense of Indecent Exposure is *not* listed as a sexually violent offense. However, Section 44-48-30 (2) (0) provides that a sexually violent offense can include any offense for which the judge makes a specific finding on the record that based on the circumstances of the case, the person's offense should be considered a

sexually violent offense.

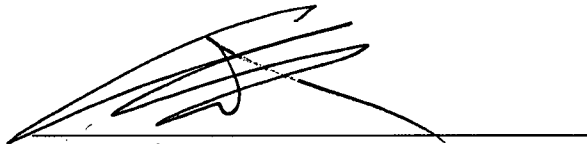
Although Section 44-48-30 (7) defines "Court" as the Court of Common Pleas, the term "judge" as used in Section 44-48-30 (2) (0) is not defined. If the intent under the Sexually Violent Predator Act is for the judge to be the judge of the Court of Common Pleas, then the plea judge in the present case had no jurisdiction to make the findings required under Section 44-48-30 (2) (0) and the court's determination should be disregarded as a nullity. However, assuming *arguendo* that the plea judge in the present case had jurisdiction to make a determination under Section 44-48-30 (2) (0), then due process requires a full evidentiary hearing. In spite of the court's finding, the plea judge appears to agree that an evidentiary hearing, including the right of cross-examination, would be constitutionally required for a finding under Section 44-48-30 (2) (0). (Tr. p. 33 l. 25 - p. 34 l. 22).

Since this is a matter of first impression it appears that guidance from this Honorable Court would be helpful to both the bench and bar. Appellant would argue that, without question, a full evidentiary hearing is constitutionally mandated for a finding to be made under Section 44-48-30 (2) (0). This should be required whether the determination is made by the judge taking the plea in the Court of General Sessions or whether the determination is made by a judge sitting in the Court of Common Pleas per the Sexually Violent Predator Act. However, the Appellant would further argue that since "Court" is defined as the Court of Common Pleas under Section 44-48-30 (7) then it is axiomatic that the term judge as used within the Sexually Violent Predator Act would mean Judge of the Court of Common Pleas. In this event, the Court of General Sessions had no jurisdiction to make a finding in this case.

## CONCLUSION

The Court's finding that the offense of indecent exposure qualifies as a sexually violent offense under S.C. Code Ann. 44-48-30 (2) (0) should be reversed and vacated. In the event this Honorable Court concludes the Sexually Violent Predator Act vests the Court of Common Pleas with exclusive jurisdiction to make findings under the Act, then the issue can be addressed at a later time and no remand is necessary. In the event this Honorable court concludes the Court of General Sessions has jurisdiction under the Act to make findings then this case should be remanded for a full evidentiary hearing on this issue.

Respectfully Submitted,



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**PROOF OF SERVICE**

I, William G. Rhoden, Esquire, Counsel for Appellant in the above referenced matter, certify that I have served the within three (3) copies of the **Final Brief** and three (3) copies of the **Final Reply Brief** by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

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Dated this 3rd day of April, 2013.

  
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