

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas
Annual Review Hearing

Eugene C. Griffith, Jr., Circuit Court Judge

Case No.: 2009-CP-36-00319
Appellate Case No. 2013-000217

In the Matter of the Care and Treatment of Ronald Owen,..... Appellant,

Initial Brief of Appellant

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SC COURT OF APPEALS

TABLE OF CONTENTS

TABLE OF AUTHORITIES. 1

STATEMENT OF ISSUES ON APPEAL 2

STATEMENT OF THE CASE. 3

STATEMENT OF FACTS. 5

ARGUMENT 7

**Did the trial court err in summarily dismissing the Appellant’s
Petition for Annual Review/Release under South Carolina Code
Annotated Section 44-48-110.**

CONCLUSION. 9

TABLE OF AUTHORITIES

Statutes:

South Carolina Code of Law Ann. §44-48-110

South Carolina Code of Law Ann. §44-48-130

STATEMENT OF ISSUES ON APPEAL

Did the trial court err in summarily dismissing the Appellant's Petition for Annual Review/Release under South Carolina Code Annotated Section 44-48-110.

STATEMENT OF THE CASE

The Appellant was committed to the Department of Mental Health under the Sexually Violent Predator Act, South Carolina Code Annotated, Section 44-48-10 *et seq.* on or about February 3, 2010. Appellant Petitioned for release in 2011 and an Annual Review Hearing was held. Appellant's Annual Review hearing was denied and he was ordered to remain in the custody of the Department of Mental Health by Order filed April 17, 2012. Appellant was given Notice of Right to Petition for release on December 4, 2012, and requested a second Petition for Annual Review. Appellant is seeking release from the sexually violent predator program. This Petition was without the approval of the Director of Mental Health.

Pursuant to South Carolina Code Annotated, Section 44-48-130, the State moved before the Court of Common Pleas, Eighth Judicial Circuit to deny the Appellant's 2012 Petition for Release/Annual Review. The State argued in part that if an individual has previously filed a Petition for release without the approval of the Director of the Department of Mental Health and the Court determined following a previous hearing that the Petitioner's condition had not changed so that he was safe to be at large and, if released, is not likely to commit acts of sexual violence, then the Court must deny any subsequent petition for release as frivolous, without a hearing, unless the subsequent petition contains facts upon which a Court could find the condition has changed so that a hearing was warranted.

A Reply to the Motion to Deny the 2012 Petition for Released/Annual Review was filed with the Court, in part arguing that the Appellant's Motion for Release is not frivolous and that he is entitled to an individual and independent evaluation by a qualified

expert of his own choosing and that he is entitled to present this evidence to the Court prior to a decision to deny the Petition. An Order denying the 2012 Petition for Release/Annual Review was signed by the Honorable Frank R. Addy, Jr. A Motion for Reconsideration was filed with the Court. The Court denied the Appellant's Motion for Reconsideration and a timely Notice of Appeal was filed.

STATEMENT OF FACTS

Appellant voluntarily agreed to be committed to the Sexually Violent Predator Program on February 3, 2010. He was admitted to the program February 17, 2010 from Newberry County. At his sexually violent predator annual review, conducted by the Department of Mental Health, pursuant to Section 44-48-110, a report was prepared by Marie Gehle, Psy.d. The report is dated November 26, 2012 and this report covered a review period of March 31, 2011 to November 26, 2012. It was Ms. Gehle's opinion that Mr. Owen continued to meet the definition of Sexual Violent Predator and that his present mental condition seriously impairs his ability to control his sexually violent behavior. She further found that there is insufficient basis to determine that his mental abnormality or personality disorder has so changed that he is now safe to be at large and no longer likely to engage in acts of sexual violence.

The Appellant, pursuant to his Annual Review and Notice of Right to Petition for Release, Petitioned the Court seeking release and requested a hearing on his Petition. The State filed a Motion for Summary Dismissal. The State's objection is based entirely on Section 44-48-130, that since the Appellant was Petitioning the Court without the approval of the Director of Mental Health and since he had had a previous Annual Review which was denied that any subsequent Petitions for release should be deemed frivolous and should be Summarily Dismissed by the Court.

The Appellant, in his Reply to the State's Motion, argued that even a minimal amount of due process would require that the Appellant be able to avail himself of the provisions provided under Section 44-48-130. That a strict reading of the State's Motion

would imply that no one should ever be granted a review hearing, should the South Carolina Department of Mental Health decide that there has been no change in their condition.

This Appeal follows:

ARGUMENT

Did the trial court err in summarily dismissing the Appellant's Petition for Annual Review/Release under South Carolina Code Annotated Section 44-48-110.

The general process for review from the Sexually Violent Predator Program entails an Annual Review which is performed by the South Carolina Department of Mental Health. At that time, the individual is given Notice that they have the right to Petition the Court for Release and are provided an annual examination and review hearing notice.

Mr. Owen requested to start this process for Release on or about December 4, 2012. This request for release was without the approval of the Department of Mental Health. Dr. Marie E. Gehle, Chief Psychologist for the Program had determined that his mental abnormality or personality disorder had not changed and that he would not be safe to be at large in the community and that he would be likely to engage in acts of sexual violence should he be released.

At this time, Mr. Owen was in the process of seeking an evaluation from an independent expert in preparation of his hearing on his Petition to be Released. The Appellant did not hire or obtain an expert prior to obtaining the results from the South Carolina Department of Mental Health because he did not know if he was going to be recommended for release or not recommended for release. That on December 4, 2012, Appellant requested and Petitioned for Release. (Note the Petition and request for release is contained on a Department of Mental Health form that is transmitted to the Court.)

The State's Motion to Deny the 2012 Petition was dated December 13, 2012. The Order Denying the 2012 Petition for Release/Annual Review, was signed by the Judge on December 21, 2012. The Appellant never had an opportunity to present to the Court his argument for release.

The Appellant would contend that his Petition for Release was not frivolous. That there was evidence that was presented at his prior 2011 Petition for Release/Annual Review that he could be safely treated on an outpatient basis. This testimony was presented by Dr. William Burke.

The Petitioner, at trial on the original Petition for SVP Commitment, agreed to volunteer for the program. This is his second Review hearing since the initial commitment and the Appellant was in the process of obtaining his own expert witness, pursuant to Section 44-48-110. The Appellant would contend that he is entitled to an individual and independent evaluation by a qualified expert of his own choosing and that he is entitled to present this evidence to the Court prior to its decision to deny the Petition. A strict reading of the State's Motion would imply that no one should ever be given a review hearing should the South Carolina Department of Mental Health decide that there has been no change in their condition. Under these circumstances, the Appellant would be without recourse to the Court. This denial being based solely on a decision by an agency with whom he is securely confined.

Second, there is no realistic reason why the Appellant should be required to retain his own expert prior to obtaining the results of the annual examination performed by the Department of Mental Health. Prior to receipt of these results, he does not know if he is going to be recommended for release or not. If the State is entitled to Summary

Dismissal immediately upon the receipt of the Department of Mental Health's recommendation that he not be released, the Appellant is never given an opportunity to challenge this denial. Any such Motion or Petition for release would always be deemed frivolous based on the agency's decision that is charged with his confinement and treatment. It is a situation literally where the fox is guarding the hen house.

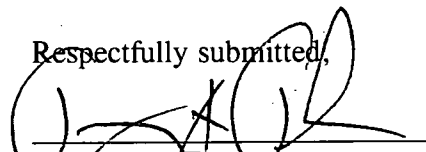
Third, the language of §44-48-130 does say the Court must review and dismiss the Petition without a hearing, if the Petition is based upon frivolous grounds. However, the Statute also says that the court must, **WHENEVER POSSIBLE** (emphasis added) review the Petition and determine if the Petition is based upon frivolous grounds.

The Appellant would argue that the Court assumedly based its dismissal solely on the Report prepared by the Department of Mental Health and the fact that the Appellant had a previously annual review hearing. There are no additional facts in the court's order that establish how a review was conducted. By summarily dismissal the Appellant was never given an opportunity to hire an independent expert or present any evidence that might support his request for release.

CONCLUSION

For the reasons stated above, Appellant respectfully requests that this Court reverse the Lower Court's decision and grant his Petition for Release/Annual Review.

Respectfully submitted,



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May 3, 2013

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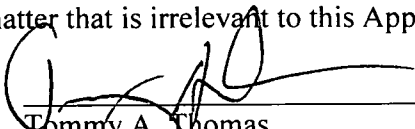
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**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

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

1. Letter dated December 4, 2012 from Holly Scaturro, Director, Sexually Violent Predator Program to The Honorable Frank R. Addy, Jr., Chief Administrative Judge, Eighth Judicial Circuit.
2. South Carolina Department of Mental Health Annual Examination and Review Hearing Notice dated December 4, 2012.
3. Annual Notice of Right to Petition for Release Election to Waive or Exercise Rights dated December 4, 2012
4. Motion to Deny 2012 Petition for Release/Annual Review.
5. Amended Order Denying Petition for Release/Annual Review Trial from previous Annual Review dated April 17, 2012.
6. Annual Review Report dated November 26, 2012.
7. Order Denying 2012 Petition for Release/Annual Review.
8. Reply to Motion to Deny 2012 Petition for Release/Annual Review.
9. Motion for Reconsideration.
10. Order denying Motion for Reconsideration dated January 23, 2013
11. Transcript of Record of Review Hearing dated March 13, 2012.

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


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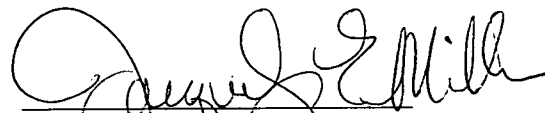
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CERTIFICATE OF SERVICE BY MAIL

I, Jacquelyn E. Miller, secretary to Tommy A. Thomas, Attorney for the Appellant, hereby certify that I placed in the United States Mail, a copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal, with postage prepaid and the return address clearly shown on said envelope to Deborah R. J. Shupe, Esq. with the Attorney General's Office, at:

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