STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Edgar W. Dickson, Circuit Court Judge

IN THE MATTER OF THE CARE AND
TREATMENT OF JOHN SHELBY WELLS,

APPELLANT.

APPELLATE CASE NO. 2021-000679

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Attorney General petitioned for appellant John Shelby Wells' commitment as a sexually violent predator and on June 1, 2021, a bench trial was held before the Honorable Edgar W. Dickson in Lexington County. R. 1. Aimee J. Zmroczek represented appellant and Suzanne J. Shaw appeared on behalf of the Attorney General. R. 1. Judge Dickson found appellant was an SVP and ordered him committed. R. 84. This appeal follows.

STANDARD OF REVIEW

"Questions of statutory construction are a matter of law." In the Matter of Chapman, 419 S.C. 172, 178, 796 S.E.2d 843, 846 (2017) (quoting Boiter v. S.C. Dep't of Transp., 393 S.C. 123, 132, 712 S.E.2d 401, 405 (2011)). The appellate courts of South Carolina review questions of law de novo. Id.

ARGUMENT

In this sexually violent predator case, the trial court erred by trying appellant while he was incompetent.

At the time of his SVP bench trial, appellant John Shelby Wells ("Wells") was seventy-three (73) years old, could barely hear, was in a wheelchair after suffering several strokes, and undisputedly incompetent to stand trial. R. 41, l. 11 – 43, l. 12. R. 80. R. 6, l. 1 – 14. R. 9, l. 5 – 9. The Attorney General's expert, Dr. Rozanna Tross ("Tross") opined met the definition of an SVP and was "likely to reoffend if he is released into the community." R. 35, l. 16 – 37, l. 11. When Dr. Tross tried to explain the commitment process to Wells during their interview, he said he would "prefer the lethal injection." R. 19, l. 17 – 22. During Dr. Tross's redirect, the Attorney General clarified that someone does not need to be mobile or move about independently "to sexually recidivate." R. 43, l. 5 – 12. Judge Dickson ordered him indefinitely committed to the SVP facility. R. 84.

Wells' attorney objected to the trial on the grounds that Wells was incompetent. R. 3, l. 21 – 5, l. 19. Judge Dickson accepted trial counsel's statement that she was unable to have any meaningful communication with Wells. R. 4, l. 11. R. 5, l. 20 – 22. Trial counsel attempted to have an independent SVP evaluation performed, but Wells "couldn't even get through" it. R. 4, l. 4 – 11. Trial counsel instead had the evaluator, Dr. William Burke ("Burke") perform a competency evaluation. R. 4, l. 1 – 11. R. 80.

Dr. Burke found that Wells was incompetent to stand trial and "that competency cannot be restored with psychiatric and competency restoration treatment." R. 82 - 83. Nor was Wells likely to be restored to competency "in the foreseeable future." R. 82 - 83. Dr. Burke found

"objective evidence of brain damage" likely due to Wells' strokes and recommended a neuropsychological evaluation for more specific data on the damage to Wells' brain. R. 82 - 83.

The Attorney General did not contest the issue of Wells' competency, but argued it made no difference in whether he could be tried or committed as an SVP. R. 6, l. 1 – 8, l. 10. Both lawyers discussed the import of this Court's opinion in In the Matter of Oxner, 430 S.C. 555, 846 S.E.2d 365 (Ct. App. 2020) cert. granted Aug. 25, 2021, oral argument scheduled for March 15, 2022. Judge Dickson ruled "competency is not an issue in this" and Wells was tried before the court instead of a jury. R. 9, l. 5 – 9.

The trial judge erred in allowing Wells to be tried while incompetent. As argued below, without the ability to communicate with her client, defense counsel could mount no effective defense. SVP defendants have the right to the effective assistance of counsel that flows both from the SVP statute and due process. In the Matter of Chapman, 419 S.C. 172, 179, 796 S.E.2d 843, 846 (2017). Without any ability to assist counsel, it was impossible for counsel to perform effectively. See State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (stating test for competency which includes the ability to consult with counsel); Drope v. Missouri, 420 U.S. 162, 171 (1975) (stating person who cannot assist in preparing his defense may not be subjected to trial).

The SVP Act contains a provision applicable to persons incompetent to stand trial on their underlying criminal charges that would qualify them for confinement under the act. S.C. Code Ann. § 44-48-100(B). This provision dictates that the court should conduct a bench trial on whether the SVP defendant committed the underlying criminal charges. Id. If the court finds the person committed the acts, then the SVP trial proceeds. Id.

The constitutionality of this provision was challenged in Oxner. This Court rejected the argument that procedural due process protects incompetent persons from being tried under the SVP Act for the underlying qualifying criminal charges. Oxner at 566-69, 846 S.E.2d at 371-72. The Court considered the due process protections under Matthews v. Eldridge, 424 U.S. 319 (1976).

At the time of the writing of this brief, Oxner is scheduled for oral argument at the Supreme Court on March 15, 2022. If the Supreme Court reverses and finds that due process prevents a trial on the underlying criminal charges while incompetent, that would strongly indicate that trying Wells while incompetent also violates due process. Wells' liberty interest is the highest possible—his personal freedom, perhaps for the rest of life—is at stake.

Without any ability to participate in his defense, the risk that he has been erroneously deprived of his liberty is high. He could provide no mitigating evidence or even participate in an independent SVP evaluation by Dr. Burke. The SVP Act specifically provides for an independent evaluation. S.C. Code Ann. § 44-48-90(B). This evaluation is a vital part of the procedural protections under the SVP Act so that persons can defend themselves and not be erroneously deprived of their freedom after serving their sentences. Wells had no such ability and his attorney could summon no defense because of the lack of any ability to have him evaluated.

The Attorney General's interest in having an incompetent person confined in the SVP facility is low, especially under the facts of this case. Wells is nearly deaf, is over seventy years old, has organic brain damage, and is in a wheelchair. Certainly Wells is not a member limited class of the "extremely dangerous group of sexually violent predators" envisioned for indefinite incarceration under the SVP Act. S.C. Code Ann, § 44-48-20.

In a recent decision, this Court dealt with an issue nearly identical to Wells' case. See In the Matter of Griffin, 434 S.C. 338, 863 S.E.2d 346 (Ct. App. 2021). In Griffin, the SVP defendant moved for competency hearing which the trial court denied. Id. at 339-40, 863 S.E.2d at 347. This Court held that denying the competency hearing was not error because the right to counsel in an SVP proceeding did not encompass the right to be competent. Id. at 340-42, 863 S.E.2d at 347-48.

Appellate counsel recognizes that Griffin will control the result in this case, but as of the writing of this brief, a petition for writ of certiorari in Griffin is pending at the South Carolina Supreme Court. In the Matter of Griffin, Supreme Court Appellate Case No. 2021-001228, Pet. Cert. filed Nov. 22, 2021, Return filed Dec. 8, 2021. Griffin was erroneously decided. The due process right to counsel has little meaning if an SVP defendant cannot provide any help. In all SVP trials, the Attorney General will present an expert who says the defendant meets the definition for commitment. While not the only defense, counsel's ability to present a counter-expert is the best defense to create a battle of the experts. Wells could not participate in an evaluation nor help his attorney in this regard. Nor could Wells provide any mitigation, which is another potential defense. Finally, Wells could not give his attorney any help to convince the court a plan existed for Wells' release that would prevent him from reoffending. All Wells could say was that he wanted "the lethal injection." Should the Supreme Court reverse Oxner and/or Griffin, Wells will also be entitled to reversal of his commitment.

CONCLUSION

For the foregoing reasons, appellant's commitment should be reversed.

s/David Alexander
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This 8th day of June, 2022.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final 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."

s/David Alexander
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This 8th of June, 2022.