IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

RECORD NO. 090655

GORDON HARRIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

William C. Mims
Attorney General of Virginia

Frank S. Ferguson
Deputy Attorney General

Pamela A. Sargent
Senior Assistant Attorney General and Section Chief
Sexually Violent Predators Civil Commitment Section
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-1584
(804) 786-9136 (fax)
psargent@oag.state.va.us (email)
VSB # 16687

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Comes now the Commonwealth of Virginia (hereinafter "Commonwealth"), the Appellee/Petitioner below, and files her brief in opposition to the opening brief filed by Gordon Harris ("Harris"), the Appellant/Respondent below.

STATEMENT OF THE CASE

The Commonwealth agrees with Harris' statement of the case, with the addition that Harris raised none of his current arguments at the probable cause hearing.

QUESTIONS PRESENTED

I. Whether the trial court properly denied Harris' motion to dismiss?

II. Whether the trial court properly permitted the Commonwealth to amend the petition?

STATEMENT OF FACTS

Harris was convicted and sentenced in the Circuit Court of Henrico County ("the trial court") for one count of attempted forcible sodomy; one count of abduction; and five counts of indecent liberties. He received 10

years with 10 years suspended on the attempted forcible sodomy charge; life with all but 8 years suspended on the abduction charge; and suspended sentences on all of the indecent liberties charges.

The Commonwealth filed a petition seeking civil commitment of Harris in the trial court on March 20, 2008. (App. p. 1-6). The probable cause hearing was held July 30, 2008; and the trial was held December 3, 2008. The petition contained a scrivener's error (App. p. 4) in that it alleged the predicate offense was the attempted forcible sodomy charge, rather than the abduction charge. Harris did not file a motion or take any action on this scrivener's error at the probable cause hearing. He did not file his motion to dismiss until November 17, 2008, (App. p. 7) and did not bring the motion on for argument until the day of trial, December 3, 2008.

Harris contended in his written motion that since he did not serve any actual time for the attempted forcible sodomy charge, he could not have been listed in the database required by § 37.2-903 and could not have been referred to the Office of the Attorney General. (App. P. 7-9). However, Harris was serving time for the correct predicate offense, abduction, and was properly within § 37.2-903 as a result.

At oral argument, Harris raised an additional, new argument that the sentencing order recited § 18.2-48, but failed to specify subsection (ii). However, the certified copies of the court's orders which the Commonwealth submitted showed: 1) the arrest warrant did use the specific language of abduction with intent to defile, as did the indictment. 2) the trial court's order of January 8, 1997 continuing the case also specifically referenced § 18.2-48(ii), abducting a minor with intent to defile; 3) the plea agreement of January 15, 1997, specifically stated that the "said defendant agrees to plead guilty to the **indictments as written....;"** 4) the conviction and sentencing order of January 24, 1997, convicted Harris of abduction and sentenced him to life with all but 8 years suspended; life is the sentence set forth in § 18.2-48(ii) for a class 2 felony. (Probable cause and trial exhibits; App. P. 15-16).

The trial court permitted the Commonwealth to amend her petition to cite the proper predicate offense of abduction (App. p. 16-19). Since the Commonwealth and defense experts agreed that Harris met the statutory requirements to be declared a sexually violent predator ("SVP"), Harris then stipulated that he was in fact an SVP. (App. p. 19-21). Harris requested that the trial court order a conditional release plan. The Commonwealth argued that the trial court had to hear some evidence before it ordered a

conditional release plan to be created. (App. p. 20-21). The Commonwealth's expert opined that Harris needed to be committed; the defense expert wanted to see a conditional release plan before he would definitely say whether commitment was the only viable alternative. (App. p. 21-70). The trial court decided that there was no less restrictive alternative and committed Harris. (App. p. 70-84).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED HARRIS' MOTION TO DISMISS.

Harris' argument fails to consider several dispositive points. First, Harris put on no proof that what was referred by the Commitment Review Committee to the Office of the Attorney General was, in fact, the attempted forcible sodomy conviction.[1] Pursuant to § 37.2-905.1, the burden of proof on this issue was squarely upon Harris. He *assumes* that the conviction referred was the one for attempted forcible sodomy, for which he did not serve time, but he adduced no proof of any kind that this was in fact what the Commitment Review Committee sent to the Office of the Attorney General.

[1] In point of fact, the case was referred to the Office of the Attorney General on the abduction charge.

Second, he ignores the fact that he did in fact serve time for a valid predicate conviction, the abduction with intent to defile charge. Because this is a predicate offense under § 37.2-900, and because this validly included him within the § 37.2-903 database, the trial court was eminently correct to deny this motion to dismiss.

Third, he ignores the fact that § 37.2-905.1 was enacted as a direct response by the General Assembly to the initial ruling of this Court in Miles v. Commonwealth, 272 Va. 302, 634 S.E.2d 330 (2006), and to the subsequent ruling on the petition for rehearing. While the normal presumption is that when the General Assembly amends a statute it intends to change existing law, Horner v. Dept. of Mental Health, 268 Va. 187, 193, 597 S.E.2d 202, 206 (2004), there is a specific exception to that rule. When the General Assembly enacts an amendment to a statute soon after a controversy has arisen about it, there is a presumption that the amendment was meant to clarify the meaning of existing law. Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975). As a result, the holding in Miles is no longer controlling precedent.

Section 37.2-905.1 is the substantial compliance provision of the SVP Act and states as follows:

> The provisions of §§ 37.2-903 and 37.2-904 are procedural and not substantive or jurisdictional. Absent a showing of failure to follow these provisions as a result of gross negligence or willful misconduct, it shall be presumed that there has been substantial compliance with these provisions.

Harris, of course, made no showing of either gross negligence or willful misconduct; he did not even prove what charge was referred to the Office of the Attorney General. Therefore the trial court was required as a matter of law to deny his motion to dismiss.

II. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO AMEND THE PETITION.

Harris claims that the trial court violated Rule 1:1 when it granted the Commonwealth's motion to amend the petition. This argument is waived because Harris did not present it to the trial court either in his written motion to dismiss, or in argument the morning of trial. Rule 5:25.

Further, Harris' argument is plainly wrong. The arrest warrant and indictment made it clear that Harris was being charged with abduction with intent to defile, § 18.2-48(ii). There was no amendment to that indictment, which Harris conceded. (App. p. 16). The January 15, 1997, plea agreement specifically recited that Harris "...agrees to plead guilty

to the **indictments as written....,**" and the indictment as written was for a crime against § 18.2-48(ii). Further, the January 14, 1997, conviction and sentencing order sentenced him to life with all but 8 years suspended. This is clearly the sentence contemplated by § 18.2-48(ii). If one accepts Harris' theory, then he should be arguing that he was convicted under § 18.2-47, simple abduction, and that his sentence of life with all but 8 years suspended was excessive.[2] Thus, it is preposterous for Harris to claim that he was not in fact convicted under § 18.2-48(ii), and it is equally preposterous for him to claim that the trial court in the SVP proceeding "amended" his criminal sentencing and conviction order.

In addition, the Code of Virginia expressly permits a trial court in a civil case, which this is, to allow an amendment to a pleading when a variance exists between the evidence and the allegations, § 8.01-377. The evidence demonstrated that Harris was convicted and served time for the predicate offense of abduction with intent to defile. The petition contained a scrivener's error citing attempted forcible sodomy rather than abduction with intent to defile as the predicate offense. Harris was well aware that he was convicted of and served time for abduction for intent to defile; he

[2] Of course, he cannot raise that claim in this proceeding.

cannot, therefore, establish any prejudice.[3] Harris' remedy, if any, would have been to seek a continuance. Not only did he not do so, he immediately thereupon stipulated that he met criteria to be declared an SVP.

Finally, well settled case law permits trial courts to grant amendments to pleadings in appropriate cases where there is no prejudice to the defendant and it would further the ends of justice. See Whitaker v. Heinrich Schepers GMBH & Co., 276 Va. 332, 661 S.E.2d 828 (2008); Peterson v. Castano, 260 Va. 299, 534 S.E.2d 736 (2000). Harris knew since at least 1997 that he was convicted of abduction with intent to defile and permitting this amendment caused him no prejudice and furthered the ends of justice. Thus, the trial court's action was perfectly proper.

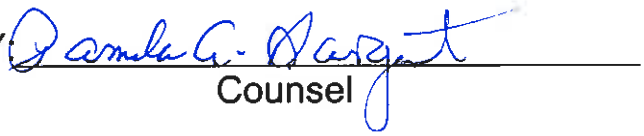
[3] Harris, of course, cannot raise a challenge to his conviction or sentencing in the SVP proceeding, § 37.2-901.

CONCLUSION

Wherefore, the Commonwealth respectfully requests this honorable Court to deny the petition for appeal and to affirm the commitment of the Respondent as a sexually violent predator.

RESPECTFULLY SUBMITTED,

COMMONWEALTH OF VIRGINIA

BY 
Counsel

Pamela A. Sargent
Senior Assistant Attorney General and Section Chief
Sexually Violent Predators Civil Commitment Section
Office of the Attorney General
900 E. Main Street
Richmond, Virginia 23219
(804) 786-1584
(804) 786-9136 (fax)
psargent@oag.state.va.us (email)
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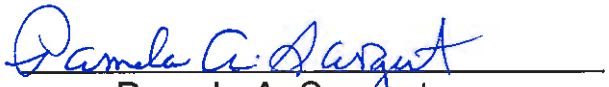
CERTIFICATE

Pursuant to Rule 5:26(d), the undersigned hereby certifies that three true and correct copies of this BRIEF OF APPELLEE were mailed, first class postage prepaid, this 18th day of September, 2009, to counsel for the Appellant, John W. Parsons, Esquire 4122 East Parham Road, Suite C, Richmond, Virginia 23228, and that an electronic copy was filed with the clerk contemporaneously.



Pamela A. Sargent
Senior Assistant Attorney General
and Section Chief