In The

Supreme Court of Virginia

RECORD NO. 090655

GORDON HARRIS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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RULE

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ASSIGNMENTS OF ERROR

1. Gordon Harris assigns error to the denial of the Motion to Dismiss. (See Motion to Dismiss (App. 7), see also argument contained in App. 13-19).

2. Gordon Harris assigns error to the trial court permitting the amendment of the Petition to state a predicate offense of abduction with intent to defile. (App. 13-19).

STATEMENT OF QUESTIONS PRESENTED

1. Did the trial court err in denying the Motion to Dismiss filed prior to trial? (Preserved in argument at trial at Tr. 4-10) (Relates to Assignment of Error # 1).

2. Did the trial court err by permitting the amendment of the Petition at trial to state a predicate sexual offense of "Abduction with intent to defile"? (Preserved in argument at Tr. 4-10). (Relates to Assignment of Error # 2).

NATURE OF CASE AND MATERIAL PROCEEDINGS IN TRIAL COURT

The Commonwealth proceeded with a Petition under the Sexually Violent Predator Act. (Va. Code 37.2-900, *et seq.) (*App. 1). A probable cause hearing was conducted on July 30, 2008 in the Henrico Circuit Court, the Honorable Burnett Miller presiding. A trial

was then conducted on December 3, 2008. A final Order in the matter was entered on January 5, 2009. (App. 90). A Notice of Appeal was filed therefrom.

STATEMENT OF FACTS

In 1997, Gordon Harris was convicted and sentenced in the Henrico Circuit Court of one count of attempted forcible sodomy (§ 18.2-67.5), one count of abduction (§ 18.2-48), and five counts of indecent liberties (§ 18.2-370). See, Sentencing Order entered January 24, 1997. (App. 87). In this Order, Mr. Harris was sentenced to ten (10) years with ten (10) years suspended for life on the attempted forcible sodomy charge. He was sentenced to life on the abduction charge with all but eight (8) years suspended. He received suspended sentences on all of the indecent liberties convictions.

As his release approached, the Commonwealth filed a Petition for Civil Commitment as a Sexually Violent Offender (hereinafter "the Petition") against Mr. Harris in the Henrico Circuit Court in 2008. (App. 1). In the Petition, the Commonwealth alleges that Mr. Harris was "incarcerated for a sexually violent offense" (Paragraph 6 of the Petition). (App. 4). Furthermore it is alleged in the Petition that he

was sentenced on convictions for attempted forcible sodomy, abduction, and five counts of indecent liberties. (Paragraph 7 of the Petition.) (App. 4). It is also alleged in the Petition that attempted forcible sodomy is a "sexually violent offense" under § 37.2-900 of the Code of Virginia. (Paragraph 8 of the Petition). (App. 4).

Mr. Harris filed a Motion to Dismiss with the Circuit Court of the County of Henrico prior to trial. See, Motion to Dismiss. (App. 7). Said Motion was argued at the beginning of the hearing on December 3, 2008 and was denied by the Court. The Court furthermore permitted amendment to the Petition over objection from Mr. Harris. The amendment to the Petition changed paragraph 8 of the Petition to read that "abduction with intent to defile" is a "sexually violent offense." (App. 8).

Having dismissed the Motion of Mr. Harris, the trial proceeded with the testimony of Dr. Evan Nelson, a psychologist who performed the evaluation of Mr. Harris on behalf of the Commonwealth. Dr. Nelson's testimony concluded with an opinion that Mr. Harris met the criteria as a sexually violent predator and that he required civil commitment for treatment. (App. 21-56).

The next witness was Dr. Dennis Carpenter, who was appointed at the request of the appellant to perform a second opinion evaluation in this matter. Dr. Carpenter agreed with Dr. Nelson that Mr. Harris met the criteria as a sexually violent predator. (App. 62).

The Court made a finding that Mr. Harris met the statutory criteria as a sexually violent predator and declined to consider a conditional release plan. (App. 80-84).

ARGUMENT

In appellant's Motion to Dismiss, the trial court was presented with an argument as to why Mr. Harris was not subject to the provisions of the Civil Commitment of Sexually Violent Predators Act (hereinafter "the Act") Code of Virginia § 37.2-900, *et seq.* In this Motion, it was argued that Mr. Harris was subject to the provisions of this Act only if he had been "incarcerated for a sexually violent offense." See, Virginia Code § 37.2-903(B). If he had been incarcerated for a sexually violent offense as defined under the Act, he would be included in the "database" of prisoners against whom the Commonwealth may proceed. *Id.* With a score of 5 or greater on the Static-99 test, his name would be forwarded to the Commitment Review Committee. § 37.2-903(E). But if he had not been

incarcerated for a sexually violent offense, it would be error to include him in the aforementioned “database” and proceed against him under the Act.

In their Petition against Mr. Harris, the Commonwealth alleged that Mr. Harris was convicted of a sexually violent offense, namely attempted forcible sodomy. (See Petition, Paragraph 8). (App. 4). The allegation failed to state that Mr. Harris was “incarcerated” for the attempted forcible sodomy conviction. The facts are that Mr. Harris was given a suspended sentence for the attempted forcible sodomy conviction. (See Sentencing Order, January 24, 1997). (App. 87-89). He, therefore, was not incarcerated for the offense of attempted forcible sodomy.

Since he was not incarcerated for the attempted forcible sodomy, Mr. Harris cannot be included in the database of offenders who are subject to the provisions of the Act under Virginia Code § 37.2-903(B). Therefore, it was error for the trial court not to have dismissed the Petition on Mr. Harris’ motion.

To support this argument, the appellant cited in his Motion the fact that this Court has previously held that the statutory scheme of the Act must be strictly construed under the rule of lenity that is

normally applicable to criminal statutes. Townes v. Commonwealth, 269 Va. 234, ____, 609 S.E.2d 1, 4 (2005). Therefore, a trial court must strictly construe the Act in favor of a defendant's liberty. Miles v. Commonwealth, 272 Va. 302, ___, 634 S.E.2d 330, 334 (2006). The clear and unambiguous language of the Act requires that a prisoner must be serving an active sentence for a sexually violent offense at the time he is identified as being subject to the Act. Townes v. Commonwealth, 269 Va. 234, ___, 609 S.E.2d 1, 4 (2005). Under the rule of lenity, it was error not to dismiss the Petition against Mr. Harris when it was clear that he had not been incarcerated for the offense of attempted forcible sodomy.

Furthermore, the trial court erred in its interpretation of § 37.2-903(B) when it concluded that the fact that Mr. Harris had been held on the abduction charge meant that he had been held on "consecutive or concurrent charges" and therefore fell into the "database" under § 37.2-903(B)(ii). See, App. 18 and 19. The section specifically says that the "database" of prisoners who fall under the Act includes those who are "serving or will serve concurrent or consecutive time for another offense in addition to time for a sexually violent offense." § 37.2-903(B)(ii)(emphasis added).

Therefore, this section still clearly requires a finding that he has served time for the sexually violent offense, a fact which is not present with respect to the attempted forcible sodomy. Mr. Harris' exception to this finding by the trial court was noted at App. 19.

Secondly, the trial court erred when, upon the Commonwealth's motion at trial, it permitted the amendment of paragraph 8 of the Petition to include "abduction with intent to defile" under § 18.2-48(ii) under the Code of Virginia. (App. 18). The sentencing order of January 24, 1997 clearly shows that Mr. Harris was convicted of abduction under § 18.2-48. (App. 87-89). There are three subsections of abduction under § 18.2-48, and only § 18.2-48(ii) and § 18.2-48(iii) are considered to be "sexually violent offenses" under the Act. See Code § 37.2-900. The trial court erred by adding language to the conviction order of 1997 and allowing the amendment to abduction with the intent to defile under § 18.2-48(ii) for purposes of the Commonwealth's petition under the Act.

By doing so, the trial court violated the well-settled principle of the finality of judgments. It effectively modified a final judgment after the time in which it would be permissible to do so had elapsed. See Rule 1:1, Supreme Court of Virginia ("All final judgments, orders and

decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated or suspended for twenty-one days after the date of entry, and no longer."). "A final judgment or sentence valid in a court of original entry is final and conclusive upon all courts (except on appeal) after the court pronouncing judgment has lost jurisdiction of the case." Smith v. Commonwealth, 195 Va. 297, ___, 77 S.E.2d 860, 863 (1953). The trial court in this case lacked jurisdiction to, in effect, change the conviction to abduction with intent to defile to suit the purposes of the Petition filed by the Commonwealth herein. The amendment of the Petition, as granted under objection from Mr. Harris, was invalid for the above reasons.

In summation, Mr. Harris should not have been made subject to the Act because he was not incarcerated for a sexually violent offense at the time the Director of the Department of Corrections created the database of prisoners under the Act. See, § 37.2-903(B). If he should not have been included in this database, he should be released. This would be consistent with this Court's holding in Townes v. Commonwealth, 269 Va. 234, 609 S.E.2d 1 (2005).

Pursuant to Townes, the Act should be strictly construed

against the Commonwealth and in favor of Mr. Harris' interest in liberty. The Act does not clearly include abduction under § 18.2-48 as a sexually violent offense. The Act does include attempted forcible sodomy as a sexually violent offense, but the Act also requires one to be incarcerated for such an offense. The evidence is clear that Mr. Harris did not serve a day for the attempted forcible sodomy. For all of these reasons, Mr. Harris should be released from civil commitment.

CONCLUSION

For the foregoing reasons, the appellant respectfully asks that the Order be reversed, and that it be ordered that Mr. Harris be released from civil commitment.

Respectfully submitted,
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CERTIFICATE

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) paper copies and one (1) electronic copy on CD of the Opening Brief of Appellant and Appendix have been hand-filed with the Clerk of the Supreme Court of Virginia and three copies have been mailed, via U.S. Mail, postage prepaid to Pamela Sargent, Senior Assistant Attorney General, 900 East Main St., Richmond VA 23219, on this 26th day of August, 2009.

John W. Parsons