IN THE

Supreme Court of Virginia

RECORD NO. 091535

DWIGHT KEITH SMITH,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

William A. Crane (VSB No. 24765)
ATTORNEY AT LAW
Post Office Box 38
Winchester, VA 22604
(540) 667-6145 (Telephone)
(540) 667-6145 (Facsimile)
enarc@visuallink.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

I. TABLE OF CITATIONS.....ii

II. STATEMENT OF THE CASE.....1

III. ASSIGNMENTS OF ERROR.....2

IV. STATEMENT OF THE FACTS RELATING TO ASSIGNMENTS OF ERROR.....3

V. QUESTIONS PRESENTED.....5

VI. ARGUMENT.....6

VII. CONCLUSION.....9

VII. CERTIFICATE.....9

TABLE OF CITATIONS

PAGE NUMBER

CASES:

Green v. Commonwealth, 32 Va. App. 438, 442, 528 S.E. 2d 187, 189 (2000).....8

Higginbotham v. Commonwealth, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975).....8

Neeley v. Johnson, 215 Va. 565, 211 S.E. 2d 100 (1975)..... 7

Ward v. Commonwealth, 216 Va. 177, 217 S.E.2d 810 (1975) 7

Wynn v. Commonwealth, 277 Va. 92, 671 S.E.2d 137 (2009)..... 3

STATUTES:

Virginia Code Section 37.2-910.....2

U.S. CONSTITUTION

Fourteenth Amendment 3, 4, 8

Sixth Amendment 3, 4, 8

STATEMENT OF THE CASE

A. In 1987, the Respondent, Dwight Keith Smith, was convicted of the offense of forcible sodomy and was sentenced to 15 years, with 5 years suspended. After being paroled, the Respondent was convicted in 1993, in Frederick County, of grand larceny and was sentenced to 5 years with 3 years suspended. As a result of this new conviction, a revocation hearing was held, and 2 years of the suspended sentence for the forcible sodomy conviction was imposed. In 1996, the Respondent was convicted of two offenses of consensual sodomy (which convictions were later overturned by a Federal Court). As a result of these consensual sodomy convictions, all remaining suspended time from his original forcible sodomy conviction and his grand larceny convictions were imposed.

B. In September of 2003, while Dwight Smith was serving the remainder of his sentence for a violation of probation in regard to the grand larceny charge, the last sentence imposed, a petition was filed seeking his commitment as a sexually violent predator.

C. In October of 2004, a hearing was held on the petition in the Circuit Court for the City of Winchester. After

hearing evidence, the Court found the Dwight Smith to be a sexually violent predator and he was committed to the Department of Mental Health for treatment and confinement.

D. In October of 2004, in October of 2005, in October of 2006, in October of 2007, and on April 30, 2009, the Circuit Court for the City of Winchester held annual reviews of Dwight Smith's involuntary commitment as a sexually violent predator, pursuant to Virginia Code Section 37.2-910 and, each time, the Court found that he was still a violent sexual predator who was still in need of hospitalization and treatment. He currently is confined, for the purpose of treatment, at the Virginia Center for Behavioral Rehabilitation (VCBR) in Burkeville, Virginia.

E. This appeal relates solely to the hearing held on April 30, 2009, and the Order of the trial Court of that date.

F. References herein will be to the Appendix (App.) or to the Record

ASSIGNMENTS OF ERROR

1. Did the trial Court err in considering evidence containing inadmissible hearsay and opinions? (App. 5-10, 12, 20-21, 28-29).

3. Was the evidence sufficient to support the trial Court's determination that continued civil commitment was necessary? (App. 74-75).

STATEMENT OF THE FACTS RELATING TO ASSIGNMENTS OF ERROR

A. Prior to the hearing in this case, the Appellee filed a CD with the trial Court containing Medical Treatment Plans, Polygraph Information, Quarterly Progress Reports, Quarterly Treatment Notes, Treatment Plan Reviews, an Annual Review Report for 2008, and a Critical Information Report entered on 10/10/07. (R. 1). At the outset of the hearing, Counsel for the Appellant stated that if the Annual Report were to be offered into evidence, there would be an objection on hearsay grounds. (App. 5-6). The Appellee did then move for the admission of the report. (App. 7). The Appellant continued to object to the admission of the report as it was replete with hearsay and hearsay based upon hearsay and arguing that its admission would be in violation of the Appellant's rights under the Confrontation Clause of the Sixth Amendment and in violation of his Due Process rights. Counsel also cited the case of *Wynn v. Commonwealth,* 277 Va. 92, 671 S.E. 2d 137 (2009), decided by the Supreme Court of Virginia on January 16, 2009. (App. 6-10). The Appellant further objected to the introduction of the report on the grounds that the maker of the report was not in Court and that it had not been authenticated. (App. 6, 9). The trial

Court indicated that the objection to the report would be sustained. (App. 11). The Appellee then indicated that the file [the other documents on the CD] should come in as official business records. (App. 11-12). The Appellant objected to all these items coming into evidence as being hearsay and maintained that they could not come in under the Business Records exception. (App. 12). However, the trial Court ruled that, if the Appellee has the records custodian [testify], the items can come in, except for opinions. (App. 13). After some difficulty, the trial Court managed to bring up all the documents in the CD on his computer. The trial Court then asked the Appellee what he should be looking at and she responded, "all of it." Counsel for the Appellant asked the Court if the Court was letting it in or not and the Court responded, "No." (App. 15-16). Thereafter, Dr. Mario Dennis, the Clinical Director at the VCBR began to testify. Seeing where this was heading, Counsel for the Appellant again objected that Dr. Dennis was about to recount hearsay opinions and other inadmissible hearsay, and again cited the Confrontation Clause and the Fourteenth Amendment. The objection was overruled. (App. 20 - 21). Shortly thereafter the Appellee asked Dr. Dennis

about what was said in a Critical Information report [which supposedly was on the CD]. Again, the Appellant objected that this information would be pure hearsay and opinions. The trial Court ruled, however, if it was "official" it would come in. (App. 28-29). Then, Dr. Dennis began to recount information from a Treatment Note of June 23, 2008 and other documents on the CD, all under the guise of being from "official" documents.

B. Concerning the Appellant's behavior, Dr. Dennis, at various points, testified that the Appellant's adjustment and behavior has been very good and his treatment attendance is good (App. 28); that in the context of the treatment program, he has behaved himself satisfactorily (App. 55); and that the he has never engaged in any assaultive or disruptive types of behavior at the facility and is a mild-mannered individual. (App. 71).

QUESTIONS PRESENTED

1. Did the trial Court err in considering documents on a CD filed with the Court and testimony about these documents containing inadmissible hearsay and opinions? (Assignment of Error 1)

    a. Did the documents on the CD contain inadmissible hearsay?

    b. Were the documents on the CD properly considered by the trial Court as admissible under

the Business Records exception to the Hearsay Rule?

c. Did the documents on the CD contain inadmissible opinions?

d. Were the documents on the CD properly authenticated?

e. Was the testimony of Dr. Mario Dennis improperly based on his consideration of inadmissible hearsay and opinions?

f. Was the testimony of Dr. Mario Dennis recounting Information from the documents on the CD properly considered by the trial Court as admissible under the Business Records exception to the Hearsay Rule?

2. Was the evidence sufficient to support the Trial Court's decision that the Respondent remains a violent sexual predator who requires continued secure Commitment? (Assignment of Error 3).

ARGUMENT

A. Objections to Hearsay and Opinion Evidence:

1. All of the documents on the CD contain rank hearsay, hearsay based on hearsay, and opinions. In view of the Appellant's hearsay objection, citing *Commonwealth v. Wynn*, supra, the trial Court initially indicated that the reports would not come in but the expert could recount, i.e., list, what he considered in reaching his opinions, conclusions and recommendations. The Court then got around the hearsay problem by agreeing with the Petitioner that all the materials

on the CD and Dr. Dennis Mario's testimony recounting this information could be considered under the Business Record exception to the Hearsay Rule. This exception is sometimes referred to as the Shopbook Rule and is limited to facts or events within the personal knowledge and observation of the recorder and would not apply to opinions and conclusions or interpretations of events by staff personnel of the institution where the Appellant is housed. See, *Neeley v. Johnson*, 215 Va. 565, 211 S.E. 2d 100 (1975). Also see, *Ward v. Commonwealth*, 216 Va. 177, 217 S.E.2d 810 (1975), wherein it was held that, while an autopsy report was admissible, a statement therein concerning the cause of death was an opinion and, as such, was not covered by the shopbook exception. All of these documents on the CD were replete with hearsay, discussions of events, and opinions of VCBR staff and were not admissible under the Business Record or any other exception to the hearsay rule. There wasn't even any evidence presented that Dr. Dennis was the official custodian of these documents. Just being the Clinical Director does not necessarily make him the official custodian! Further, there was no authentication of the documents. The trial Court's consideration of all of this hearsay and opinion evidence

clearly violated the Respondent's rights under the Confrontation Clause of the Sixth Amendment, and his Due Process rights under the Fourteenth Amendment.

C. Sufficiency of the Evidence:

1. It is recognized that, where the sufficiency of the evidence is challenged on appeal, the evidence must be construed in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deducible therefrom. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975); *Green v. Commonwealth*, 32 Va. App. 438, 442, 528 S.E. 2d 187, 189 (2000).

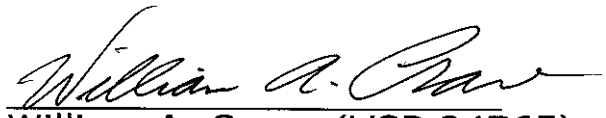
2. The Respondent stands convicted of only one sex offense, an aggravated sexual battery involving a 14 year old boy, and which did not involve actual force and violence. He appears to have largely complied with the requirements of the program. He has not created any problems for the staff or other in the program. There has been no violence, aggression, acting out, or any problems of a sexual nature. The Respondent maintains that, especially if the inadmissible hearsay evidence is disregarded, the record simply does not show, by clear and convincing evidence that he remains, if he ever was, a violent sexual predator.

CONCLUSION

For the reasons stated, Dwight Keith Smith prays the Court to reverse the decision of the trial court and order his release.

Respectfully submitted,

_____
Dwight Keith Smith
by Counsel



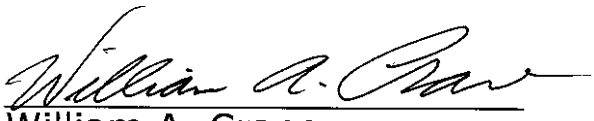
William A. Crane (VSB 24765)
Attorney at Law
P.O. Box 38
Winchester, Virginia 22604
Tel. (540) 667-6145
Fax (540) 667-6145
Email: enarc@visuallink.com

CERTIFICATE

I, William A. Crane, hereby certify that Rule 5:26(d) of the Supreme Court has been complied with; that on the 16th day of February, 2010, twelve copies of this brief were filed with the Clerk of the Supreme Court of Virginia and there was sent by email in PDF format an electronic copy of the brief and appendix to the Clerk's Office; three copies were mailed to Pamela A, Sargent, Senior Assistant Attorney General, Office of the Office of the Attorney General, 900 E. Main St., Richmond, VA 23219; and a copy of this petition has been forwarded to the Respondent, Dwight Keith Smith, at VCBR, P.O. Box 548, Burkeville, VA 23922.

Counsel for the Respondent is a member of the private bar and has been appointed to represent the Respondent.

The Respondent does not waive oral argument.



William A. Crane