IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 091535

DWIGHT KEITH SMITH,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

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NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal arises from the recommitment of Dwight Keith Smith ("Smith") as a sexually violent predator ("SVP") after his fifth annual review hearing held pursuant to § 37.2-910. This hearing was held on April 30, 2009, and the trial court recommitted him by order entered that same date

QUESTION PRESENTED

I. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ITS EVIDENTIARY RULINGS?

II. WHETHER THE EVIDENCE WAS SUFFICIENT TO RECOMMIT SMITH?

STATEMENT OF FACTS

Prior to the hearing and pursuant to § 37.2-910, the Commonwealth filed the report of Dr. Mario Dennis ("Dr. Dennis"), the Clinical Director of the Virginia Center for Behavioral Rehabilitation ("VCBR"), the mental health facility which houses and treats SVPs. The Commonwealth also submitted the complete file of Smith's treatment for the past year at the VCBR. Smith objected to the introduction of the report and the treatment records. The trial court refused to permit introduction of the report (App. 11), and excluded opinions in the treatment records (App. 13).

Dr. Dennis testified for the Commonwealth. He testified that Smith's behavioral adjustment had been very good for the past year at the VCBR. Smith's attendance had remained largely satisfactory; he was being housed at the highest privilege level. His participation was judged by his therapists to be satisfactory. (App. p. 28).

Dr. Dennis testified that the VCBR keeps documents entitled "Critical Information Reports." These are marked by the therapist to draw attention to them because they contain noteworthy information. They also keep treatment notes, which are required to be completed within 24 hours of the delivery of the service. They are written by the person who provided the therapeutic contact and outline the nature of the contact, any relevant information or their pertinence to treatment. Dr. Dennis testified that in the third quarter of 2008, the notes indicated that Smith participated at a rate of 4.3 out of 6.0. This indicated Smith was contributing brief comments about the topic of discussion in group and/or asked topic related questions. (App. p. 31-33).

Dr. Dennis testified that a note of June 23, 2008, indicated that Smith was refusing to write in his journal, which is an expectation of the treatment process. Smith feared that it would be used against him in court and expressed pessimistic views on treatment helping him to be conditionally

released. Smith objected to this testimony on Fifth Amendment grounds, and the trial court denied his objection. Dr. Dennis further testified that the purpose of journaling was not to elicit criminal information but to help the patients enhance their self-expression, to become more open and discuss what happens in their daily lives as well as throughout the treatment process. However, Smith was refusing to do this. (App. p. 31-36).

Dr. Dennis testified that a note of June 25, 2008, indicated that Smith accused the group leader of making a face when Smith asked to move up in the treatment program after the group leader had expressed his opinion that Smith was not ready to move up. When the group leader reminded Smith that he had refused to journal due to fears it would be used against him in court, Smith denied he had said that. Some group members defended Smith while other group members reminded him of what he had said. Smith offered some feedback to others in the group and acted appropriate even when another member accused Smith of harassing him. Smith referred the group member to the group leader rather than continue the debate. Dr. Dennis testified that this showed fundamental disagreement between Smith and the group leader, but also showed Smith acting appropriately in group. (App. p. 36-37).

Dr. Dennis testified that a group note of May 25, 2008, reflected Smith's statement that he had changed his attitude towards drinking: he acknowledged that he was a problem drinker but denied he was an alcoholic. Dr. Dennis testified that Smith's history is replete with evidence of alcohol abuse and that it had been established that alcohol played a role in his sexual offending and certainly served as a disinhibiting factor in his offending and in his behavior. Dr. Dennis testified that this showed avoidance or minimization by Smith, and that residents should not assume they have completely mastered a drug or alcohol abuse issue just because they have been living in a structured environment for several years. (App. 37-39).

Dr. Dennis testified to a note of May 19, 2008, in which Smith expressed dissatisfaction with the lack of speed at which photocopying was being done for him. (App. 39-40). Dr. Dennis also testified that Smith had not taken a polygraph. Smith objected to this testimony again on Fifth Amendment grounds. The trial court permitted the testimony. Dr. Dennis explained that the focus of treatment is risk management in the community. In order to determine what specific risk issues exist, the VCBR needs to know what the person's sexual interests are and the kind of behaviors they have engaged in previously. It is an expectation, but not a requirement, that

VCBR residents will participate in polygraph examination. Dr. Dennis noted that all residents who have been recommended for conditional release have taken and passed polygraph examinations. Dr. Dennis stated that this provided the staff with some reassurance that the residents were not only being fully disclosive about their histories but also about their current conduct. (App. 41-45).

Dr. Dennis testified that a polygraph is just one component of treatment, which also includes really participating in the classes, journaling, doing the homework and doing whatever is expected. He stated that the VCBR would not make a release recommendation solely on the basis of a polygraph. Dr. Dennis testified that the VCBR was about to begin using the PPG (penile plethysmograph). This would allow the VCBR to establish with each resident their particularly unique arousal pattern which would then permit the VCBR to target any deviant arousal to help the resident dampen or decrease it or help them learn to manage it. This PPG testing would also be requirement of all residents. (App. p. 42-46).

Dr. Dennis testified that Smith had not been promoted from Phase I treatment to Phase II treatment because the treatment team decided Smith had not met the requirements for promotion. Smith had again requested

promotion but the treatment team had not yet made its decision. (App. 46-47).

Dr. Dennis diagnosed Smith with paraphilia not otherwise specified hebephilia: a deviant sexual interest or arousal to adolescents. He also diagnosed Smith with alcohol dependence in a controlled environment; and narcissistic, antisocial and obsessive-compulsive traits. Narcissistic traits refer to traits that reflect grandiosity, egocentricity, self-aggrandizement, and so on. Dr. Dennis thought that Smith was showing less antisocial traits currently; these reflect behaviors that do not comport with society's expectations. Obsessive-compulsive traits were demonstrated by Smith being very focused on details. (App. p. 48-51)

Dr. Dennis testified that Smith's master treatment plan set forth goals they expected Smith to achieve, which is that he needed to be: 1) open to feedback both in and out of group; 2) recognize his self-defense mechanisms; 3) demonstrate a basic understanding of internal and external risk factors for re-offending and strategies for coping with these risk factors; 4) identify his sexual offense behaviors as they related to him and others in the community; and 5) demonstrate motivation to change his arousal and/or thought processes. Dr. Dennis testified that Smith had remained in the first phase of treatment because he has not mastered those issues at

this point. Dr. Dennis also testified that Smith has historically relied on legal solutions to clinical treatment issues, and that while he may be legally entitled to do so it does get in the way of treatment. Dr. Dennis stated that that Smith has tended to be closed off or cautious and reluctant to self disclose; while he has made some progress, this continues to be a treatment area for him. Dr. Dennis testified that Smith needed to use groups appropriately and to explore his specific issues and his reliance on alcohol in the past. This is important because Smith has used his drinking as explaining his offenses rather than simply contributing to them. Further, Smith has not addressed his deviant interests in adolescents, choosing to focus primarily on the drinking component. Further, Smith declines to talk about other reports of problematic or deviant behavior which would permit the treatment staff to understand more fully his risk and treatment needs. (App. p. 50-52).

Dr. Dennis opined that if Smith doesn't open up about these issues, his risk to re-offend is high. Dr. Dennis stated that Smith has not availed himself of all of the tools that the VCBR can help him develop to manage his risk. Dr. Dennis stated that Smith's treatment scores show only a moderate level of engagement in treatment and they could be higher. (App. p. 46-54).

Dr. Dennis testified that Smith had no protective factors: he has not completed treatment and while there is some suggestion that age may reduce risk, Smith was not old enough for this to potentially apply. Smith's dynamic risk factors continue to be his general self-regulation; his reliance upon consulting his attorney rather than fully engaging in the treatment process; his defensiveness; his need to look good and to fend off any indication that he has problems or is not doing well; his historic failure on supervision; and his skill in projecting blame onto others. Dr. Dennis testified that given Smith's talents and abilities, he was disappointed Smith hadn't made more progress. Dr. Dennis testified that Smith remained an SVP. (App. 46-59).

Dr. Dennis further testified that Smith remained in need of continued inpatient involuntary hospitalization and treatment. Dr. Dennis opined that Smith has not made the kind of progress that would justify a conditional release recommendation, which would include his having been promoted to phase three of treatment. For Smith to complete phase three, he would need to expend a great deal of energy, effort and candor in treatment. (App. 59-61).

On cross examination, Dr. Dennis testified that the main bar to Smith being released was that he was not doing the work being expected of him.

The polygraph was only part of the expectation of treatment. (App. p. 61-71).

The defense put on no evidence and made no motion to strike. (App. p. 71). The trial court concluded that the unrebutted evidence established that Smith remained a sexually violent predator and remained in need of recommitment. An order recommitting him was entered at the conclusion of the hearing. (App. p. 80-81).

ARGUMENT

1. THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR IN ITS RULINGS.

The Commonwealth respectfully submits that while certain of the trial court's rulings may have been in error, they did not amount to reversible error.

The trial court did commit error in refusing to admit the report into evidence. Section 37.2-910(D) clearly states that "If the court finds, **based upon the report and other evidence provided at the hearing**…." that the respondent is no longer an SVP, he shall be released; or it may recommit him; or it may order a conditional release plan to be created. Unlike § 37.2-908, which was the subject of the decision in *Commonwealth v. Wynn*, 277

Va. 92, 671 S.E.2d 137 (2009), the annual review hearing provision of the SVP Act clearly requires the report to be admitted into evidence because it requires the trial court to base its decision upon the report as well as the other evidence at the hearing. However, while the trial court did commit error in its ruling, it does not amount to reversible error.

The trial court's rulings on the admissibility of evidence from Smith's treatment records for the past year were also proper. Dr. Dennis testified that all treatment providers were required to write down, within 24 hours, all therapeutic or other contacts they had with each resident. The information contained therein is used by the treatment staff in crafting treatment solutions for the resident. The records are therefore "admissible as circumstantial evidence tending to establish the probability of a fact in issue." *Church v. Commonwealth*, 230 Va. 208, 212, 335 S.E.2d 823 (1985). Smith's statements contained in such records are also admissible under the "state of mind" exeption to the hearsay rule. *Church*, *Id*. Smith's statements can also be seen as declarations against interest, *Hines v. Commonwealth*, 136 Va. 728, 117 S.E.2d 843 (1923)(declarant is unavailable, statement was against his interest when it was made and he was aware of this). They are also party admissions, *Tyree v. Lariew*, 208 Va. 382, 158 S.E.2d 149 (1967) (Smith is a party to the case, declarant is

unavailable, statement was against his interest when it was made and he was aware of this). In addition, these are records kept in the ordinary course or business, *The Law of Evidence in Virginia*, Friend *(6th Ed.)*, § 18-15; *Buchanan v. Higginbotham*, 123 Va. 662 97 S.E.2d 340 (1918), *Ford Motor Co. v. Phelps*, 239 Va. 272, 389 S.E.2d 454 (1990), *McCormick, Evidence*, Section 319(3d. Ed 1984). They are also official records of an agency of the Commonwealth, § 8.01-390; *Ingram v. Commonwealth*, 1 Va. App. 335, 338 S.E.2d 657 (1986). Such records are also admissible as statements of past conditions or feelings made to physicians or other medical personnel, *Cartera v. Commonwealth*, 219 Va. 516, 248 S.E.2d 784 (1978), and present sense impressions, *Clark v. Commonwealth*, 14 Va. App. 1068, 421 S.E.2d 28 (1992). In addition, since Smith had a privilege against testifying, § 37.2-901(3), he was therefore "unavailable" and any statements he made were admissible. *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950). And, if any hearsay exception applies, the statement or document is admissible. The Law of Evidence in Virginia, Friend, 6th Ed., § 18-7.

II. THE EVIDENCE WAS SUFFICIENT TO RECOMMIT SMITH.

Where the sufficiency of the evidence is challenged on appeal, the evidence must be construed in the light most favorable to the

Commonwealth, the prevailing party below. *Higginbotham v. Commonwealth*, 216 Va. 349, 352, 218 S.E.2d 534, 537 (1975). The unrebutted evidence established that Smith continued to make very little progress in the past year at the VCBR. He continues to hide behind his attorney and various legal issues rather than fully participate in treatment. He refuses to participate in journaling or take a polygraph, remains nondisclosive about his behaviors and triggers, and has not even been promoted to the next phase of treatment. He refuses to address his sex offender issues which are clinically significant. There is more to treatment than just showing up for group. As long as Smith refuses to fully participate in treatment, he remains unable to understand himself and his deviant behavior and cannot possibly craft a realistic relapse prevention plan. For this reason, the evidence was sufficient to recommit him and the judgment of the trial court was proper. *See Lotz v. Commonwealth*, 277 Va. 345, 672 S.E.2d 833 (2009); *Shivaee v. Commonwealth*, 270 Va. 112, 613 S.E.2d 570 (2005).

Further, Smith has waived this argument. *United Leasing v. Lehner Family Business Trust*, 2010 Va. LEXIS 34 (2010); *Murillo-Rodriguez v. Commonwealth*, 279 Va. 64, 72-74, 688 S.E.2d 199 (2010). Although he made numerous objections during the trial, he did not make a motion to

strike, which is the only proper way to challenge the sufficiency of the evidence and, more importantly, to preserve the point for appeal. Having failed to do so, his appeal is lost.

CONCLUSION

Wherefore, the Commonwealth respectfully requests this honorable Court to affirm the trial court's rulings and to deny the Appellant's appeal.

RESPECTFULLY SUBMITTED,
COMMONWEALTH OF VIRGINIA

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CERTIFICATE

The undersigned hereby certifies that on the 15th day of March, 2010, pursuant to Rule 5:26(d), the original and 14 copies of the Brief of Appellee were filed in the Office of the Clerk of the Supreme Court of Virginia, three (3) copies of the Brief were mailed to counsel for the Appellant, William A. Crane, P. O. Box 38, Winchester, VA 22604 and that one copy was converted to a PFD file and sent by e-mail to scvbriefs@courts.state.va.us.

_____

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