IN THE

SUPREME COURT OF VIRGINIA

Record No. 092273

HARRY E. WARRINGTON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

WESLEY G. RUSSELL, JR.
Deputy Attorney General

PAMELA A. SARGENT
Senior Assistant Attorney General

SEAN J. MURPHY *
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 371-6017
(804) 786-9136 (fax)
*** Counsel of Record**

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BRIEF OF APPELLEE

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

STATEMENT OF THE CASE

The Commonwealth filed its petition for commitment on February 13, 2009. On August 12, 2009, a bench trial was held before the Honorable Richard D. Taylor, Jr. Ruling from the bench that same day, Judge Taylor

found Warrington to be a sexually violent predator and ordered him committed. The final order of commitment was entered on this date.

ASSIGNMENTS OF ERROR

Warrington had assigned the following errors in his petition for appeal that were granted by the court:

1. The trial court erred in permitting the Commonwealth to substitute Dr. Nelson's Report and opinions for those of Dr. Berman, amen its originally filed petition, and to proceed with an evaluation taken outside the requisite timeframe set forth in Virginia Code Sections 37.2-903 and 904 and by Dr. Nelson without the benefit of a CRC appointment.

2. The trial court erred in continuing to hold Petitioner [Appellant's Counsel must be referring to Respondent/ Appellant] past his release date in order to permit the Commonwealth to conduct a second review over Petitioner's [Appellant's Counsel must be referring to Respondent/ Appellant] objection.

3. The trial court erred in denying Petitioner's [Appellant's Counsel must be referring to Respondent/ Appellant] Motion to Dismiss based on the Petitioner's failure to comply with the SVPA.

ASSIGNMENTS OF ERROR

Warrington has changed the assigned errors in his Brief of Appellant from the originals that were granted by this court:

1. The trial court erred in permitting the Commonwealth to substitute Dr. Nelson's Report and opinions for those of Dr. Berman, to amend its originally filed petition in order to proceed based on Dr. Nelson's opinions, and to proceed on the basis of the evaluation taken outside the requisite timeframe set forth in

Virginia Code Sections 37.2-903 and 904 and by Dr. Nelson without the benefit of a CRC appointment.

2. The trial court erred in continuing to hold Warrington past his release date in order to permit the Commonwealth to conduct a second review over Warrington's objection.

3. The trial court erred in denying Warrington's Motion to Dismiss, Objection to Motion to Amend Petition, and Motion to Release from Department of Corrections based on the Commonwealth's failure to comply with SVPA.

These changes are impermissible and should be disregarded. Hamilton Dev. Co. v. Broad Rock Club, Inc., 248 Va. 40, 445 S.E. 2d 140 (1994).

QUESTION PRESENTED

Warrington's argument on petition for appeal addresses only the procedural matters prior to trial, and does not challenge the sufficiency of the evidence or any other ruling of the trial court. See Weeks v. Commonwealth, 248 Va. 460, 465, 450 S.E.2d 379, 383 (1994). The only issue of law truly presented[1] in his argument is the following:

> Did the trial court err in denying Warrington's Motion to Dismiss based on the trial court's findings of fact that no gross negligence or willful misconduct during the commitment process had been proven by Warrington?

[1] Appellee thus disagrees with Appellant's statement of the questions presented. See Va. S. Ct. R. 5:18(b), 5:28(b).

STATEMENT OF FACTS

Warrington was sentenced in the City of Richmond Circuit Court on December 22, 1986, for the crime of rape and attempted rape. (App. 8-9). He was due to be released on March 16, 2009.

On February 13, 2009, the Commonwealth of Virginia filed a Petition seeking to civilly commit Warrington as a sexually violent predator pursuant to Virginia Code § 37.2-905. (App.1).

Dr. Lisa Berman, who was appointed by the Commissioner of the DMH to evaluate Warrington pursuant to Code § 37.2-904, in the report she issued to the Commitment Review Committee, diagnosed him as displaying Exhibitionism, provisional, and Antisocial Personality Disorder based on his history of sexual assaults and opined that Warrington met the criteria under the Sexually Violent Predator Act (SVPA). (App. 40-47).

Prior to the probable cause hearing, the Commonwealth discovered that Dr. Lisa Berman did not have the "treatment" experience required under Va. Code § 37.2-904. Immediately, the Commonwealth sent a letter to the court and Warrington's counsel informing them of this discovery and requesting a continuance of the probable cause hearing. (App. 48) However, Dr. Berman met all of the other qualifications under Va. Code § 37.2-904 (c) as she is a licensed clinical psychologist skilled in the

diagnosis and risk assessment of sex offenders, and is not a member of the Commitment Review Committee (CRC). (App.50-51)

On April 6, 2009, Dr. Evan Nelson was appointed by the Commissioner of the Department of Mental Health (DMH) to perform an evaluation of Warrington to assist the Commonwealth and testify as an expert. (App.246-247) Dr. Nelson reached the same diagnosis and opinion as to Warrington meeting the criteria under the SVPA. (App.116-145). The Commonwealth withdrew the request to continue, filed an Amended Petition and intended to proceed to the probable cause hearing within the 60-day time period required under § 37.2-906. Warrington had not filed an answer to the Commonwealth's petition prior to the Motion to Amend.

Warrington filed a motion to dismiss the petition, contending that under Code § 37.2-904 he should have been released upon the discovery of Dr. Berman's lack of qualifications. (App.24). He claimed that the Commonwealth's subsequent reliance on the initial petition would subject him to commitment proceedings in violation of Code § 37.2-904 and the holding of Townes v. Commonwealth, 269 Va. 234, 240-41, 609 S.E.2d 1, 4 (2005). (App.85)

However, Warrington did concede that the Commonwealth was permitted to get a second opinion in these cases. Warrington's counsel

stated, "(F)or example, if the first opinion had come back and said that they didn't think he qualified as a sexually violent offender, I think the Attorney General's office ***would be entitled to a second opinion*****,** and I suspect that's the case based on these circumstances." (App.201, emphasis added). Warrington does argue, by alleging "misrepresentations" by the CRC and the Attorney General, a difference in the circumstances in this matter. The court found no misrepresentations or bad faith by the Attorney general's office or the CRC. (App.236-237)

The Court continued the matter, suggesting that DMH and CRC be allowed to take additional steps prior to the probable cause hearing. These suggestions included allowing Dr. Nelson to proceed through the DMH hiring process, an in-person interview of Warrington, and permitting the CRC to reconsider its recommendation to the Commonwealth to the benefit of Dr. Nelson's report.

The Commonwealth then filed an amended petition relying on Dr. Nelson's report at the next hearing on April 13, 2009. (App.246-250) The Court denied the motion to dismiss, allowed the Amended Petition and proceeded to find probable cause at this hearing held within the 60 day requirement under the Code. (App. 248-250)

There was no argument as to whether Warrington met the requirements to be included in the database of prisoner to be considered for SVP matters that had been determined by DOC and CRC, which he scored an 8 on the Static-99[2] and had been convicted of rape and attempted Rape. After the testimony of Dr. Nelson, the court found probable cause and set the trial for August 12, 2009. (App. 280).

At the end of the probable cause hearing, Warrington made a motion for expert assistance. This motion was granted without objection and Dr. Ronald Boggio was appointed. Dr. Boggio met with Warrington and did an evaluation. (App. 160-88). Dr. Boggio scored Warrington as an 8 on the Static-99 and agreed with Dr. Nelson that Warrington met the statutory criteria as an SVP. (App.173-176)

At trial, Cindy Collins, of the Department of Corrections, testified regarding Warrington's ninety-one infractions while in the prison system, including eleven for indecent exposure, two for sexual advances and seven for assault upon a person (App.300-307).

Kay Whitehead, the Institutional Ombudsman for Brunswick Correctional Center, testified as to her request for security when meeting

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[2] The Static-99 is the actuarial screening tool used by DMH required under Va. Code 37.2- 903.

with Warrington because of his behavior toward her. She testified that due to her fear, this was her only time in ten years she requested extra security for a prisoner. (App.311-314)

Lastly, Dr. Nelson testified as to his diagnosis and evaluation. (App.327-373)

Judge Taylor found that the Commonwealth had proven its case by clear and convincing evidence and declared Warrington an SVP. (App.401-405). Further, Judge Taylor ordered immediate inpatient commitment of Warrington, over Warrington's objection and request for a continued disposition, citing the Warrington's lack of credibility on the stand and his history within the prison system. (App.401-408)

ARGUMENT

I. THIS CASE IS GOVERNED BY CODE SECTION 37.2-905.1, A STATUTE WHICH WARRINGTON HAS COMPLETELY OMITTED FROM HIS ANALYSIS.

Warrington's entire argument is based on a claim that no subsequent amendment or additional opinion by a qualified expert could cure an initial defect. He is wrong because of Va. Code § 37.2-905.1.

That section reads:

> 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. VA Code § 37.2-905.1.

Warrington ***fails to mention*** or address any of the provisions of § 37.2-905.1. Further, Warrington does not discuss the issues of the definition of gross negligence or who has the burden of proof under the statute.

Therefore, his entire brief fails to address the governing legal principles in this case.

II. WARRINGTON'S MOTIONS WERE PROPERLY OVERRULED BECAUSE HE FAILED TO BEAR HIS BURDEN OF PROVING GROSS NEGLIGENCE

There is no evidence or even allegation of bad faith in this case. The trial court found no evidence of bad faith. (App.236-237). Warrington argues, however, that the CRC and the Attorney General were guilty of gross negligence in relying on the opinion of Dr. Berman. Although the Commonwealth recognized that since Dr. Berman was unqualified, the reliance upon her opinion in the original petition required amendment of that petition, Warrington has not explained how any of the state actors were guilty of gross negligence. No evidence of gross negligence or willful misconduct was ever presented in the trial court.

Code § 37.1-905.1 affords Commonwealth a presumption of substantial compliance, in the absence of a showing of ***gross*** negligence. Warrington would, therefore, have to bear the burden of proving gross negligence. He produced no evidence to that effect and as a result the Judge properly found gross negligence has not been shown. (App. 236-237).

The finding by the court that there was no evidence of bad faith or gross negligence by the Commonwealth is a ***finding of fact*****.** Warrington does not explain why this ruling was wrong or without evidence in support, which is the standard of review required in this matter. Va. Code § 8.01-680. 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).

Under the statute the CRC uses an expert "designated by the Commissioner." Code § 37.2-904 (B).[3] Thus, it can hardly be gross negligence for the CRC or the Attorney General to rely upon such designation by DMH. There is no reason for either CRC or the Commonwealth to question the determination of qualifications. Neither

[3] "'Commissioner' means the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services." Code § 37.2-100.

CRC nor the Commonwealth routinely reevaluates or investigates the qualifications of the expert. There was no reason to do so in this case.

Gross negligence, if any, would be on the part of DMH for contracting with an evaluator when they knew, or should have known, by reasonable investigation, that the evaluator had no experience in sex offender treatment and thus did not meet the statutory standards.

This is analogous to the tort of negligent hiring. Virginia recognizes such tort; the burden of proof is on the one asserting the wrong. See Majorana v. Crown Central Petroleum Corp., 260 Va. 521, 531, 539 S.E.2d 426, 431-32 (2000), to show (for simple negligence in hiring) that the employer

> plac[ed] a person of known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Southeast Apartments Management, Inc., et al. v. Kimberly M. Jackman, 257 Va. 256, 260, 513 S.E.2d 395, 397 (1999), (quoting Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983)).

Gross negligence in hiring has never been defined by this court. This Court has, however, defined gross negligence in general as:

> that degree of negligence which shows an utter disregard of prudence amounting to complete neglect of the safety of

> another. It is a heedless and palpable violation of legal duty respecting the rights of others.. It is want of even scant care and amounts to the absence of slight diligence.

City of Lynchburg v. Brown, 270 Va. 166, 170, 613 S.E.2d 407, 410 (2005), quoting Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987) (internal quotations and citations omitted).

Alternatively, the Court has intimated that gross negligence can be shown by "a total disregard of all precautions." Brown, 270 Va. at 171, 613 S.E.2d at 410.

Other Virginia cases on gross negligence have characterized it as:

> "that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to complete neglect of the safety of [another]. It must be such a degree of negligence as would shock fair minded [people] although something less than willful recklessness."

Green v. Ingram, 269 Va. 281, 290-91, 608 S.E.2d 917, 922 (2005), (*quoting* Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971)).

Elsewhere, gross negligence has been characterized in this context as "facts that suggest a ***wide*** disparity between the process the [allegedly grossly negligent entity] used… and that which would have been rational." Guttman v. Huang, 823 A.2d 492, 507 n. 39 (Del. Chanc. 2003) (emphasis in original).

In a case against the Connecticut Commissioner of Mental Retardation for negligent hiring of two caretakers at a home for the retarded who had repeatedly abused the plaintiff patient, the evidence showed that in hiring these caretakers, the Department had failed to run criminal records checks on them, and that the caretakers had both lied in denying any criminal records. Had checks been done, their criminal records would have been revealed. In addition, before the two had been assigned to care for the particularly challenging defendant, they had had multiple complaints and investigations in the past concerning patient abuse, but their records were not reviewed prior to the assignment in question.

The Connecticut Superior Court, issuing findings of fact and conclusions of law after a lengthy trial, ruled that this evidence showed negligence in hiring, but "the evidence ***does not provide an adequate foundation*** for the court to conclude that the Commissioner or his representatives, agents, servants or employees were guilty of ***gross*** negligence or recklessness in connection with the allegations therein." Pattavina v. Mills, (unpublished) emphasis added) 2000 Conn. Super. LEXIS 2241 (Conn. Superior Ct., August 23, 2000).

These legal standards make it particularly important for the one claiming gross negligence to prove what the shortcoming or breakdown in

the hiring process was, and, of course, to show that it was bad enough to meet the legal standard. Warrington has not even attempted to describe this shortcoming. Therefore, it has not been shown that there was gross negligence in DMH's selection of the evaluator in question.

At present, and since July 1, 2007, the provisions of Code §§ 37.2-903 and 37.2-904 are no longer considered substantive or jurisdictional, but merely procedural, and unless a respondent proves (1) that the Commonwealth has deviated from the procedures called for in Code §§ 37.2-903 and 37.2-904 in some substantial way; and (2) that the deviation was the result of gross negligence or willful misconduct, "it shall be presumed that there has been substantial compliance with these provisions." § 37.2-905.1.

The evidence showed no more than a simple error on the part of DMH, which the Attorney General promptly corrected as soon as it was discovered.[4] Judge Taylor even found that despite Warrington's

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[4] Having found that no gross negligence or willful misconduct had been shown; the trial court required that additional steps had to be taken by the Commonwealth before he could find substantial compliance. The Commonwealth disagrees with the trial court's analysis that substantial compliance is a separate, free-standing requirement that must be found in addition to the absence of gross negligence or willful misconduct. The statute is clear in the absence of a showing of gross negligence or willful misconduct, substantial compliance must be presumed. Even assuming the trail court's analysis is correct, the CRC had the benefit of the new report,

argument, there was "no bad faith" on behalf of the Attorney General's office.

Warrington argues that Townes v. Commonwealth, 269 Va. 234, 609 S.E.2d 1 (2005), is "nearly identical" and controlling precedent. This case is easily distinguished, since Warrington ignores several pertinent facts. Contrary to his assertions, this Court did not declare that the procedures to be followed in order to civilly commit a prisoner were jurisdictional. Townes involved a challenge to a civil commitment when the prisoner was not currently serving his predicate offense. This Court ruled that because he was not currently serving his predicate offense, he could not be civilly committed. In other past opinions, this Court carefully reviewed the procedures for consideration for civil commitment and held that none was jurisdictional.

Once it has been established that there has been substantial compliance, the court did not err in followed Rule 1: 8 of the Rules of the Supreme Court of Virginia since, "[l]eave to amend shall be liberally granted in furtherance of the ends of justice." Moreover, the Townes case was tried prior to the enactment of § 37.2-905.1.

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the Commonwealth had the benefit of reviewing the Qualified Evaluator's report and there was NO delay in the probable cause hearing and no prejudice to Warrington. Therefore, using either analysis, substantial compliance was found.

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).

Further, Warrington claims that the hold order is invalid as the Commonwealth's subsequent reliance on the initial petition would not suffice to subject him to commitment proceedings in Violation of Code § 37.2-904 and the holding of Townes v. Commonwealth, 269 Va. 234, 240-41, 609 S.E.2d 1, 4 (2005).

Contrary to Warrington's contention that this is a case of first impression, this court's recent decision in Harris v. Commonwealth, 279 Va. 123, 688 S.E. 2d 279 (2010), is on point. The Court citing the above cases and Va. Code § 37.2-905.1, ruled in a similar procedural matter that the circuit court **did not abuse its discretion** by granting the Commonwealth's motion to amend its petition, in a sexually violent predator matter. Harris at 129. (Emphasis added). *See* Adkins v. Dixon, 253 Va. 275, 279, 482 S.E.2d 797, 800 (1997). ("[T]he decision to permit amendments of pleadings rests in the sound discretion of the trial court and will not be disturbed absent a showing of abuse of discretion."). Grattan v.

Commonwealth, 278 Va. 602, 620, 685 S.E.2d 623, 644 (2009) (quoting Beck v. Commonwealth, 253 Va. 373, 385, 484 S.E.2d 898, 906 (1997)).

In Harris, there was an error as to the original predicate offense listed in Commonwealth's petition. This Court upheld an amendment of the petition and there was no finding that a hold order was invalid or that there was any prejudice to Harris. This is in direct conflict with what Warrington contends. Thus, the trial court's action was proper.

CONCLUSION

For these reasons the judgment of the Circuit Court of The City of Richmond should be affirmed.

Respectfully submitted,
COMMONWEALTH OF VIRGINIA
Appellee herein.

By: _____
Counsel

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

WESLEY G. RUSSELL, JR.
Deputy Attorney General

PAMELA A. SARGENT
Senior Assistant Attorney General and Chief,
Sexually Violent Predators Commitment Section

SEAN J. MURPHY
Assistant Attorney General
VSB No. 47216
Counsel of Record

Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
(804) 371-6017
(804) 786-9136 (fax)

CERTIFICATE OF TRANSMISSION AND SERVICE

On April 23, 2010, the required number of copies of this brief were hand-delivered to the Clerk's Office of this Court for filing; and one copy was mailed to Jacqueline M. Ford, Bowen, Champlin, Foreman & Rockecharlie, 1919 Huguenot Road, Richmond, Virginia 23225, counsel for appellant.

_____
SEAN J. MURPHY
Assistant Attorney General