IN THE

Supreme Court of Virginia

RECORD NO. 092273

HARRY E. WARRINGTON,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

OPENING BRIEF OF APPELLANT

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IN THE VIRGINIA SUPREME COURT

COMMONWEALTH OF VIRGINIA,

Commonwealth,

v. **Record No.: 092273**

HARRY WARRINGTON,

Harry Warrington.

OPENING BRIEF OF APPELLANT

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Your appellant, **HARRY WARRINGTON,** Respondent in the Court below and hereinafter referred to as "Harry Warrington," respectfully represents that he is aggrieved by the final decision of the Circuit Court for the City of Richmond, and prays that upon review of the aforesaid final and interlocutory orders that the Final Order be reversed and that the matter at bar be dismissed with prejudice.

STATEMENT OF THE NATURE OF THE CASE THE AND MATERIAL PROCEEDINGS IN THE COURT BELOW

On February 13, 2009 the Office of the Attorney General of the Commonwealth of Virginia ("Commonwealth") filed a Petition for the Civil Commitment of Harry Warrington as a Sexually Violent Predator ("SVP") pursuant to Virginia Code Sections 37.2-900 *et seq.* (the Sexually Violent Predator Act hereinafter referred to as the "SVPA"). The parties argued numerous pretrial motions filed by Harry Warrington seeking his release and to dismiss the Petition. The Court overruled all of Harry Warrington's motions and permitted the matter to proceed to a probable cause hearing then trial on August 12, 2009. At trial the circuit court determined that the Commonwealth proved Harry Warrington met the criteria of a SVP. The circuit court overruled Harry Warrington's motion for the development of a conditional release plan and committed him to the Virginia Center for Behavioral Rehabilitation ("VCBR").

On August 19, 2009, the Court appointed counsel herein to represent Harry Warrington on appeal. On August 27, 2009 Harry Warrington filed his Notice of Appeal pursuant to Rule 5:9 of the Rules of the Virginia Supreme Court. On October 6, 2009 Harry Warrington filed his Notice of the filing of Transcripts pursuant to Rule 5:11(b) of the Rules of the Virginia Supreme Court. On November 10, 2009 Harry Warrington filed his Petition for Appeal. On February 22, 2010 this Honorable Court granted Harry Warrington's Petition for Appeal.

ASSIGNMENTS OF ERROR

I. 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 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.

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

III. The trial court erred in denying Harry 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 the SVPA.

QUESTION PRESENTED

I. (Assignments of Error I, II, and III)

Did the circuit court err in overruling Harry Warrington's motions and permitting his Hold Order to stand and allowing the Commonwealth to obtain a substitute opinion while Harry Warrington was being unlawfully held by DOC in order to permit the Commonwealth to amend its Petition for Civil Commitment and proceed on the same?

(Issues preserved: APP. 85-88; 92-107; 150-151; 156-157, 208-252)

STATEMENT OF FACTS

The material facts of the case as relevant to this appeal are not in dispute.

On February 13, 2009 and on behalf of the Commonwealth of Virginia, the Office of the Attorney General filed its initial Petition seeking to civilly commit Harry Warrington as a Sexually Violent Predator. The Commonwealth made representations based on the reported attached thereto and authored by Dr. Lisa Berman ("Berman Report"). Based on the Berman Report, the Commonwealth petitioned the circuit court issue a Hold Order pursuant to Virginia Code Section 37.2-906(A)(i). Based on the Berman Report and representations set forth in the accompanying Petition, the circuit court complied and issued the requested Hold Order. The Hold Order instructed the Department of

Corrections[1] ("DOC") to continue to hold Harry Warrington past his scheduled release date of March 16, 2009.

Thereafter, the Commonwealth conceded to the circuit court that Dr. Berman lacked the qualifications necessary to opine as she did in her report. On March 31, 2009 the Commonwealth moved to amend its Petition to remove the Berman Report and substitute the report of Dr. Nelson ("Nelson") for the Berman Report. Over Harry Warrington's objection, the circuit court denied Harry Warrington's Motion to Release, Objection to Amend the Petition and Motion to Dismiss the proceedings and permitted the same.

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[1] At all times relevant to these proceedings and prior to his civil commitment Harry Warrington was held in Sussex I State Prison past his release date on the criminal charges for which he was incarcerated and pursuant to the circuit court's Hold Order.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

Upon appellate review, [the appellate court] give[s] deference to the historical facts determined by the trial court, but review[s] de novo whether the legal standard of probable cause was correctly applied to the historical facts. Commonwealth v. Jackson, 276 Va. 184, 192; 661 S.E.2d 810, 813 (2008). The question at bar is one of law; whether the Commonwealth's failure to adhere to procedures set forth in Virginia Code Sections 37.2-903, 904, 905 merits dismissal of the Petition for Commitment at bar. Accordingly, the review at hand is a *de novo* review.

I. The circuit court erred in overruling Harry Warrington's motions and permitting his Hold Order to stand and allowing the Commonwealth to obtain a substitute opinion while Harry Warrington was being unlawfully held by DOC in order to permit the Commonwealth to amend its Petition for Civil Commitment and proceed on the same

Rule 1:8 of the Rules of the Virginia Supreme Court typically governs amending civil pleadings. Rule 1:8 permits leave to be "liberally granted in the furtherance of the ends

of justice." In the case at bar, however, the Commonwealth's proposed motion was neither timely nor sufficient to cure the defects in the original Petition. The circuit court's permission of the proposed amendment frustrated the ends of justice. Furthermore, the Sexually Violent Predator Act ("SVPA") involves substantial liberty interests requiring due process protection. Townes v. Commonwealth, 269 Va. 234, 240-41, 609 S.E.2d 1, 4 (2005). "Liberal leave" must be balanced against the requirement of strictly construing the statutory mandates set forth in the SVPA. The Commonwealth provided its Motion to Amend to Harry Warrington's counsel on March 31, 2009, less than 72 hours before the scheduled Probable Cause Hearing. To permit such a late amendment unduly prejudiced Harry Warrington.

Secondly, permitting the proposed amendment failed to cure the defect of the Petition. Virginia Code Section 37.2-904 sets out the criteria as to how an evaluation is to occur. Section (B) provides that:

> **CRC assessments of eligible prisoners or defendants <u>shall</u> include a mental health examination, including a personal interview, of the prisoner or defendant by a licensed psychiatrist or a licensed clinical psychologist who is designated by the Commissioner, <u>skilled in the diagnosis, treatment, and risk assessment of sex offenders</u>**, and not a member of the CRC. If the prisoner's or defendant's name was forwarded to the CRC based upon an evaluation by a licensed psychiatrist or licensed clinical psychologist, a different licensed psychiatrist or licensed clinical psychologist shall perform the examination for the CRC. The licensed psychiatrist or licensed clinical psychologist shall determine whether the prisoner or defendant is a sexually violent predator, as defined in § 37.2-900, and forward the results of this evaluation and any supporting documents to the CRC for its review.

(emphasis added).

The use of the word "shall" makes the requirements of this Code Section mandatory, not merely directional.

In the case at bar and despite the statutory mandate identified above, in recommending that Harry Warrington be

prosecuted by the Office of the Attorney General, the only psychiatric opinions the CRC considered were those of Dr. Berman, who is not "skilled in the treatment of sex offenders" (which the Commonwealth conceded in both its Amended Petition and oral arguments before the trial court). Subsection (B) dictates that following that review and pursuant to subsection (C), the CRC "shall" make its recommendation to the Office of the Attorney General as to whether to prosecute under the SVPA. The Commonwealth concedes that the CRC made its recommendations in violation of 37.2-904. Accordingly, it follows that the Hold Order issued by the circuit court was obtained in violation of the SVPA as well and upon discovery of the same Harry Warrington should have been immediately released; not continuously held in order to permit/enable the Commonwealth to obtain a second opinion. (APP. 151-52).

Additionally, the Commonwealth presented no evidence to the circuit court that the CRC ever reviewed Dr. Nelson's untimely evaluation and made any recommendations based

on the same. Rather, it appears that the Commonwealth bypassed all the requirements of Virginia Code Section 37.2-903 and 904 and obtained its own opinion and the trial court sanctioned its malfeasance by permitting the Commonwealth to amend the Petition in order to continue to hold and prosecute Harry Warrington based on untimely opinions generated during the course of Harry Warrington's wrongful incarceration.

The CRC's recommendation to the Office of the Attorney General and the Office of the Attorney General's representation to the circuit court to hold Mr. Warrington pursuant to an unqualified opinion constitutes gross negligence. The Commonwealth's misrepresentation in paragraph 6 of its original Petition constitutes gross negligence. Relying on Commonwealth's misrepresentation the circuit court continued to hold Harry Warrington pursuant to 37.2-906(A), thereby denying Harry Warrington his constitutional and due process rights, including but not limited to the right to be free from cruel and unusual

punishment; unlawful detainer; and *ex post facto* punishment. The Supreme Court of Virginia has previously ruled that a respondent in an SVPA action is entitled to constitutional protections such as these in light of the SVPA's substantial impact on his liberty interests. *See* Jim Murrow Jenkins V. Director Of The Virginia Center For Behavioral Rehabilitation, 271 Va., 4, 14; 624 S.E.2d 453, 459 (2006). As SVPA proceedings are a "creature of statute unknown to the common law .... the provisions of the statute must be strictly satisfied." Marcus, Santoro & Kozak, P.C., Et Al. V. Hung-Lin Wu, Et Al., 274 Va. 743, 756; 652 S.E.2d 777, 784 (2007) (referring to the statutory law of garnishments but an applicable standard in the case at bar as well). Accordingly, as the Commonwealth failed to follow the statutory directive and caused the trial court to issue a hold order based on a misrepresentation of an evaluator's qualifications, upon discovery of the same Harry Warrington should have been immediately released from the Department of Corrections (as his prison term had

previously expired). Upon discovery of the misrepresentation in the original Petition, the circuit court had no basis on which to continue to hold Harry Warrington and he should not have been held and made available for Dr. Nelson's second review.

While the specific facts at bar appear to be unprecedented in Virginia, but the Townes case provides the relevant guidance. In Townes, the Office of the Attorney General sought to commit Townes while in custody for a parole violation on a non-sexually violent offense. The Court held that Townes was not subject to the SVPA and dismissed the Petition. That ruling ought to control herein.

In the case at bar, the circuit court held Harry Warrington based on the opinions in the Nelson Report. At the time Dr. Nelson performed his evaluation and developed these opinions, Harry Warrington was no longer being held on a sexually violent offense. *See* Virginia Code Section 37.2-903(B). In fact, he was held under no lawful authority. Rather, the sole basis for Harry Warrington's custody at the

time Dr. Nelson came to his conclusions is Virginia Code Section 37.2-906(A) (and Harry Warrington was only held pursuant to 37.2-906(A) as a result of the circuit court's reliance on the admitted misrepresentations of the Office of the Attorney General). Accordingly, the circuit court erred in continuing to hold Commonwealth and considering Dr. Nelson's opinions developed at a time in which Harry Warrington is no longer subject to the provisions of the SVPA because he is not currently incarcerated for a sexually violent predicate offense. *See* Townes v. Commonwealth, 269 Va. 234, 240-41, 609 S.E.2d 1, 4 (2005).

The Townes Court held the following.

> Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection .... Although civil in nature, a statutory scheme such as the SVPA that permits an involuntary commitment process to be initiated by the Commonwealth is subject to the rule of lenity normally applicable to criminal statutes and must therefore be **strictly construed**.

Id., at 240, 609 S.E.2d at 4 (emphasis added).

When strictly construed, the clear and unambiguous language of 37.2-903 and 904 requires that a prisoner must be serving an active sentence for a sexually violent offense at the time he is evaluated as being subject to the SVPA. 37.2-904(F) does not cure this timing defect, either, as it assumes a Harry Warrington is being lawfully held during the course of his criminal sentence at the time additional evaluations are sought. Accordingly, Dr. Nelson's report dated March 31, 2009 should not have been admitted and used in order to subject Harry Warrington to prosecution under the SVPA.

In the case at bar the evidence adduced indicates that the Commonwealth failed to satisfy this statutory prerequisite to the circuit court's issuing a Hold Order pursuant to Virginia Code Section 37.2-906(A). (APP 156-57). At the time the Commonwealth moved to permit an amendment to its Petition by substituting the Nelson Report for the Berman Report, the circuit court no longer held Harry Warrington in DOC pursuant to any lawful authority. Harry

Warrington was initially referred to the CRC for review under the SVPA on September 3, 3008. 120 days passed since that date of referral. The CRC should not have been allowed to subvert the 120 day statutory prerequisite cited in this statute by continuing to "review" while Harry Warrington is held without lawful authority. Virginia Code Section 37.2-903 and 904 permits the review of lawfully held prisoners only.

The CRC has no authority to "review" Harry Warrington afresh or continue to review him pursuant to the SVPA so long as he is no longer in custody for a sexually violent offense. *See* Virginia Code Section 37.2-903. Once Harry Warrington's release date of March 16, 2009 passed, Harry Warrington was no longer in custody for a sexually violent offense. He could only be held on the Order issued pursuant to 37.2-906(A) and the circuit court erred in not dissolving that Order upon the Commonwealth's concession that the Berman Report was inadequate grounds upon which to base this proceeding. The circuit court erred in permitting the

Commonwealth to amend its Petition by substituting of the Nelson Report which it obtained after the statutory time frames lapsed in order to proceed. Accordingly, the circuit court erred in not dismissing this matter before the probable cause hearing and upon Harry Warrington's Motion to do so.

CONCLUSION

For the foregoing reasons, Harry Warrington, by his counsel, prays that this Honorable Court, upon review, will reverse and dismiss, with prejudice, the Petition seeking the civil commitment of Harry Warrington.

Harry Warrington respectfully requests the opportunity to present oral argument in support of this motion pursuant to Rule 5:35 of the Rules of the Virginia Supreme Court.

Respectfully submitted,
HARRY WARRINGTON

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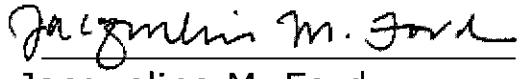
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of March, 2010 Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of the Opening Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia, an electronic copy of the Opening Brief of Appellant was filed by CD in PDF format to the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed postage prepaid to Sean Murphy, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, VA 23219, on this 29th day of March, 2010.



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