In The

Supreme Court of Virginia

RECORD NO. 121562

MICHAEL PAUGH,

Appellant,

v.

HENRICO AREA MENTAL HEALTH AND DEVELOPMENTAL SERVICES,

Appellee.

BRIEF OF APPELLANT

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF VIRGINIA:

NOW COMES the Appellant, Michael Paugh, pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia and Virginia Code § 8.01-670(A)(3) and as his Opening Brief for Appellant herein states as follows:

ASSIGNMENTS OF ERROR

1. The trial court erroneously interpreted Virginia Code § 37.2–821 and Virginia law when considering whether the circuit court hearing was a trial de novo or a review of the special justice's decision. (App. at 9, 19 and 29).

2. The trial court erred in ruling that the entirety of the Pre-Admission Screening Report, hearsay included, should be admitted when Virginia Code § 37.2-816 states that only the facts therein shall be admitted. (App. at 13 and 20).

3. The trial court erred in ruling that the Michael Paugh met the criteria for involuntary commitment at the time the de novo hearing was held. (App. at 14, 17 and 29).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On the evening of March 19, 2012, Michael Paugh was the subject of a temporary detention order (087GM-1200008353). (App. at 1). The next morning, March 20, 2012, the special

justice involuntarily committed Mr. Paugh pursuant to Virginia Code § 37.2-814 et seq. (App. at 2-4). Mr. Paugh, immediately after the hearing, instructed his attorney to appeal this decision. The hospital and Mr. Paugh's treating doctor released Mr. Paugh on March 21, 2012. Mr. Paugh, through his attorney, made timely appeal of the special justice's decision on March 22, 2012 to the Henrico County Circuit Court.

On April 27, 2012, the Circuit Court for Henrico County held a hearing on this matter. The judge at that time ruled that because Mr. Paugh had been released, the court did not have to place this matter ahead of other matters pursuant to Virginia Code § 37.2-821 and continued Mr. Paugh's de novo hearing to May 18, 2012. On May 18, 2012, Mr. Paugh and counsel appeared and argued.

On that same day the trial court, after argument, ruled that by clear and convincing evidence Mr. Paugh was a danger to himself on March 19, 2012, that the original involuntary commitment order was valid and that the appeal was denied.

(App. at 29). The trial court entered its order on June 11, 2012. (App. at 53-54).

Mr. Paugh timely noted his notice of appeal to this Court on June 20, 2012.

STATEMENT OF FACTS

On May 18, 2012, the Assistant Commonwealth Attorney attempted to introduce the Pre-Admission Screening Report dated March 19, 2012. (App. at 7). Mr. Paugh objected to this exhibit for two reasons; the first reason is not being appealed and therefore is not discussed here. The second part of Mr. Paugh's objection to the introduction of the Pre-Admission Screening Report was that Virginia Code § 37.2-816 allows for the Pre-Admission Screening Report to be accepted into evidence only for the facts stated therein, not the entirety of the report. Mr. Paugh argued that a narrative statement based on hearsay upon hearsay was not a fact but instead hearsay and therefore should not be admitted. Instead, Mr. Paugh argued that only facts in the Pre-Admission Screening Report should be admitted. (App. at 10-11).

Both objections were overruled by the trial court. (App. at 13). Later in the hearing, Mr. Paugh also objected to the trial court's ruling that the de novo hearing in circuit court was not a new hearing to determine if Mr. Paugh met the criteria for involuntary hospitalization on the day of the de novo hearing but instead was a review of the special justice's decision from March 20, 2012. (App. at 9 and 14-15). The trial court overruled Mr. Paugh's objection. (App. at 9 and 19-20).

AUTHORITIES, ARGUMENT AND STANDARD OF REVIEW

1. The trial court erroneously interpreted Virginia Code § 37.2–821 and Virginia law when considering whether the circuit court hearing was a trial de novo or a review of the special justice's decision. (App. at 9, 19 and 29).

An issue of statutory interpretation is a pure question of law which an appellate court reviews de novo. Nolte v. MT Technology Enterprises, LLC, 726 S.E.2d 339 (Va. 2012). In construing statutes, the court must apply its plain meaning, and the court is not free to add to language, nor to ignore language, contained in statutes. Pruce v. Patterson, 275 Va. 190, 654 S.E.2d 885 (2008); Logan v. City Council of Roanoke, 275 Va.

483, 659 S.E.2d 296 (2008). At issue in this appeal is the definition of the words "de novo" and the phrase "at the time the appeal is heard" in Virginia Code § 37.2-821(B). Black's Law Dictionary defines trial de novo as a "new trial on the entire case…conducted as if there had been no trial in the first instance." Black's Law Dictionary 1512 (7th ed. 1999). The phrase "at the time the appeal is heard" is referencing the de novo hearing in the circuit court. Courts must assume that the General Assembly chose, with care, the words it used in enacting the statute, and courts are bound by those words when applying the statute. Hollingsworth v. Norfolk S. Ry. Co., 279 Va. 360, 689 S.E.2d 651 (2010); Zinone v. Lee's Crossing Homeowners Ass'n, 282 Va. 330, 714 S.E.2d 922 (2011). The express words contained in the statute make it clear that the trial in the circuit court must be a de novo full trial on all of the evidence to determine whether the Respondent meets the criteria for commitment on the date of this de novo trial.

However, in conflict with this legal standard, the circuit court ruled that it would review the evidence as of March 19th and not

as of the day of the de novo hearing in the circuit court (App. at pg. 9). Reading the statutory scheme as a whole, this determination would yield absurd results. In many of these cases, the courts are not hearing these matters as soon as possible. In the present case, the court, *sua sponte*, ruled that it did not have to hear this matter quickly and continued the matter two months past when Mr. Paugh was discharged from the hospital.

The statute is clear that the hearings must occur as soon as possible, taking precedence over almost every other kind of case and that at that hearing the burden is on the petitioner to prove by clear and convincing evidence that Mr. Paugh currently met the criteria for involuntary hospitalization at the time of the de novo hearing. Va. Code § 37.2-821 (2012). The court is bound by the plain language of the law which states that the criteria must be met at the time of the de novo hearing. Further, Va. Code § 37.2-821 specifically references the procedure to be followed at the de novo hearing. It is that of a full commitment hearing pursuant to Va. Code §§ 37.2-814 through 819.

These statutes require the trial court to consider the certification of an independent evaluator who bases such certification in part on evidence occurring between the time of the filing of the petition and the hearing, including the reports of the staff during hospitalization but prior to the hearing. Va. Code § 37.2-815(B) (2012). The circuit court must also consider all available evidence prior to the de novo trial, including evidence that Respondent was released from the hospital as no longer posing a danger to himself or others or being substantially unable to care for himself.

The General Assembly further allowed the circuit court to rely on the evaluation performed by the independent evaluator at the initial hearing or, in its discretion, to order a new evaluation. Va. Code § 37.2-821 (2012). A new evaluation would have to be based on the Respondent's current mental status because the evaluator would have no way of knowing what Respondent's mental status was several weeks prior. Had the General Assembly so desired, they could have dictated that the circuit court hearing was to determine whether admission was proper at

the initial hearing and it would have required the circuit court to rely on the original evaluation rather than allowing the circuit court to order the completion of a new evaluation.

Mr. Paugh acknowledges there is a concern that, in making the determination at the time of the de novo hearing instead of reviewing the special justice's decision, many people who are decompensating at the time of the initial hearing will have had an opportunity to recover between the initial hearing and the de novo hearing. If this was the case, then a large number of those people could be released from the hospital, resulting in the dismissal of the underlying petition on a regular basis. In continuing with review of the statutory framework to determine whether this consequence was in line with legislative intent, one will find that Virginia Code § 37.2-821 requires that an appeal "shall be given priority over all other pending matters before the court and heard as soon as possible…." Expediting these matters greatly reduces dismissals of petitions based solely on the recovery pending the de novo hearing.

"Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied. There can be no departure from the words used where the intention is clear." Anderson v. Com., 182 Va. 560, 566, 29 S.E.2d 838, 839 (1944). There is simply no exception to this long-standing principle.

In reviewing Virginia Code § 37.2-821 in conjunction with other relevant provisions of the Code and Virginia case law, it is clear that the General Assembly intended for the circuit court to hear appeals from orders of involuntary admission for mental health treatment as of the date of the circuit court de novo hearing.

2. The trial court erred in ruling that the entirety of the Pre-Admission Screening Report, hearsay included, should be admitted when Virginia Code § 37.2-816 states that only the facts therein shall be admitted. (App. at 13 and 20).

An issue of statutory interpretation is a pure question of law which an appellate court reviews de novo. Nolte v. MT Technology Enterprises, LLC, 726 S.E.2d 339 (Va. 2012). This assignment of error is exclusively a question of law – that of statutory

interpretation as to the admission of evidence and therefore this honorable Court applies the de novo standard of review. Walker v. Com., 281 Va. 227, 704 S.E.2d 124 (2011). A hearsay objection lies against the admission of written statements which were made out of court and are offered for the truth of what they say. Va. R. Evid. 2:801, 2:802; Arnold v. Wallace, 725 S.E.2d 539 (Va. 2012). Mr. Paugh relies on the case law cited above regarding the courts giving words their plain meaning. The Pre-Admission Screening Report is a written statement made out of court and was introduced to prove the truth of what it says. While there is a specific code exception to the hearsay rule for those portions of the Pre-Admission Screening Report that are facts, there is no such exception for the remainder of the report.[1]

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[1] Fact is defined as "a thing done; the quality of being actual; something that has actual existence; an actual occurrence." Merriam-Webster's Collegiate Dictionary 416 (10th ed. 1997) or as, "1. Something that actually exists; an aspect of reality. 2. An actual or alleged event or circumstance as distinguished from its legal effect, consequence, or interpretation" Black's Law Dictionary 483 (7th ed. 1999). Although the prescreen narrative could be considered an alleged event (person & "prescreener" met face to face, etc.), but the admission of the hearsay contained therein are not facts as it is impossible to cross-examine a document when the "prescreener" is not present and

It may be argued that it is a business record but this argument fails on two points.

First, business records may be introduced both under the new Virginia Rules of Evidence and case law, but in order for that to occur, certain criteria must be met. For an item to be considered a business record, it must be "created for the administration of affairs generally 'and not for the purpose of establishing or proving some fact at trial.'" Walker v. Com., 281 Va. 227, 704 S.E.2d 124 (2011) citing Melendez–Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527 (2009). Secondly, pursuant to Virginia Rule of Evidence 2:803(6) it still must be authenticated pursuant to Virginia Rules of Evidence 2:901-902. This was not done. There was no custodian of the record to verify this document in violation of Virginia Rules of Evidence 2:1003-1005. It is not strictly a medical record as it was prepared specifically for a legal proceeding so Virginia Rule of Evidence 2:803(4) cannot apply. The declarant was a social worker named Sarah Gray. (App. at 44). Mr. Paugh was not the

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the narrative is created for its legal effect, consequence or interpretation.

declarant and therefore Virginia Rule of Evidence 2:803(3) cannot apply.

Finally, this was not the original document and therefore fails on best evidence grounds. Therefore, those portions of the Pre-Admission Screening Report not specifically allowed by statute are hearsay and may not be introduced.

3. The trial court erred in ruling that Michael Paugh met the criteria for involuntary commitment at the time the de novo hearing was held. (App. at pg. 14, pg. 17 and pg. 29).

Mr. Paugh believes the decision of the court, pursuant to Virginia Code § 8.01-680, is plainly wrong or without evidence to support it to the extent the trial court's decision found Mr. Paugh committable on the date of the de novo hearing in the circuit court. While the trial court did not specifically find Mr. Paugh met the criteria for involuntary commitment on May 18th, it did rule that the appeal was dismissed and therefore the special justice's decision remained valid. By finding for the Commonwealth the trial court, in effect but not intention, ruled Mr. Paugh met the involuntary commitment criteria on May 18th despite the fact that the Commonwealth specifically conceded Mr. Paugh did not meet

the criteria and introduced no evidence to the contrary. (App. at pg.7)

The evidence presented by the Commonwealth Attorney must, by clear and convincing evidence, show the person meets the criteria for involuntary commitment as of the date of the circuit court de novo hearing. Va. Code §§ 37.2-802, 37.2-804, 37.2-804.1, 37.2-804.2, 37.2-805, 37.2-814-819 and 37.2-821; See 1996 Va. Op. Att'y Gen. 158 (1996) ("In addition, … the clear language in § 37.1-67.6 requiring a finding that the commitment criteria be met at the time an appeal is heard, lead me to conclude that a full commitment hearing must be conducted, which requires a renewed finding that the person meets the commitment criteria before the judge may revoke an order of outpatient treatment and impose inpatient hospitalization.")[2] The Supreme Court determines the meaning of certain statutory language from the express words contained in the statute. Young v. Com., 273 Va. 528, 643 S.E.2d 491 (2007) Mr. Paugh had

[2] This opinion of the Attorney General was written before the recodification of this title; however, the language remained verbatim.

been released from the hospital after spending less than two days there. No evidence was present to show that Mr. Paugh, between March 20th and May 18th, met the criteria for involuntary hospitalization. Instead, the Assistant Commonwealth's Attorney specifically stated that Mr. Paugh did not meet the criteria for involuntary commitment at the time of the de novo hearing. (App. at pg. 7 and pg. 18). Therefore, the trial court's ruling that Mr. Paugh's appeal was denied was a ruling that Mr. Paugh's by-right de novo hearing was denied and the underlying petition was upheld without any evidence presented to meet the burden by clear and convincing evidence that Mr. Paugh met the criteria at the time of the de novo hearing. Clearly this is plainly wrong and without evidence to support it.

CONCLUSION

Mr. Paugh respectfully requests that this honorable Court reverse the circuit court order and dismiss the underlying petition as Mr. Paugh did not meet the criteria for involuntary admission for inpatient treatment at the time of the de novo hearing as evidenced by the argument and facts stated above. Mr. Paugh

also respectfully requests that this honorable Court rule that only facts stated in the Pre-Admission Screening Report and not hearsay (not exempt by any hearsay exception) be allowed to be entered as evidence in commitment hearings.

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CERTIFICATE

The undersigned certifies as follows:

(1) The name and address of appellant are: Michael Paugh, 12113 Ridgefield Parkway, Henrico, Virginia 23233.

(2) The name, address, and telephone number of counsel for appellant are: Charles R. Samuels (VSB#65899), 4908 Monument Avenue, Ste. 100, Richmond, Virginia 23230. Telephone number 804-342-1995, Fax number 804-342-1998. E-mail address: cr@samuelslawfirm.com.

(3) The name and address of appellee are: Henrico Area Mental Health and Developmental Services, 10299 Woodman Road, Glen Allen, Virginia 23060. Telephone number 804-727-8484, fax number 804-727-8660.

(4) The name, address, and telephone number of counsel for appellee are: Paul C. Galanides, Esq., (VSB# 45358), Assistant Commonwealth's Attorney, Office of the Commonwealth Attorney for Henrico County, P.O. Box 27032, Richmond, Virginia 23273. Telephone

number 804-501-4218, Fax number 804-501-4110. Email address: gal05@co.henrico.va.us.

(5) Counsel for appellant has been appointed.

(6) This Opening Brief of the Appellant complies with Rules 5:26(h) and 5:27 of the Rules of the Supreme Court of Virginia.

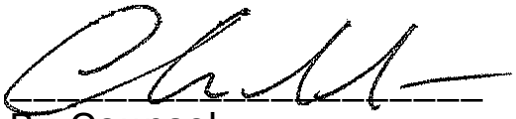
(7) Fifteen bound copies of the Opening Brief of Appellant and ten bound copies of the Appendix, with ten electronic copies on CDs have been hand-filed with the Clerk of the Supreme Court on this 22nd day of January, 2013.

(8) Three bound copies of of the Opening Brief of Appellant and one bound copy of the Appendix, with one electronic copy on CD, have been mailed to opposing counsel this 22nd day of January, 2013.

(9) The total number of words, excluding the cover page, table of contents, table of authorities, and certificate in this brief is 2,759.

(10) Appellant desires to state orally and in person to this honorable Court the reasons why the relief sought in this appeal should be granted.

MICHAEL PAUGH



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