In The

Supreme Court of Virginia

RECORD NO. 161489

JOSEPH BOYD RICKMAN,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The Office of the Attorney General filed a Petition for Civil Commitment against the Petitioner- Appellant, Mr. Joseph Boyd Rickman (Mr. Rickman) in the Chesterfield County Circuit Court on August 28, 2015 (Ap. Vol. I, 104). On September 16, 2016, the original court-appointed counsel for Mr. Rickman, Ms. Miriam Airington, Esq. Contacted the Court and the Office of the Attorney General by email requesting to set a probable cause hearing (Ap. Vol. I, 104-107; 127).

Ms. Airington provided available dates for this hearing and the Court provided several suggested dates within the required time frame to both Ms. Airington and the Office of the Attorney General (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). On September 22, 2015, Ms. Airington explained by email that she would not waive the statutory 90-day rule and noted an objection (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). Ms. Airington further explained that should a date be set outside of the 90-day statutory limit, a Motion to Dismiss would be filed (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

At the request of the Office of the Attorney General and over Ms. Airington's objection, a probable cause hearing date of January 8, 2016 was set, well beyond the 90-day statutory limit (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

On October 6, 2016, Mr. Rickman retained Mr. Stephen K. Armstrong, Esq. as Counsel. On December 8, 2016, Mr. Armstrong filed a Motion to Dismiss, citing the non-compliance of the Office of the Attorney General (Ap. Vol. I, 100, 101).

On January 8, 2016, a hearing was conducted in the Chesterfield Circuit Court. The Court granted Mr. Rickman's Motion to Dismiss, citing the non-compliance of the Office of the Attorney General (Ap. Vol. I, 100-135).

On January 12, 2016, a Motion for Stay of Execution of Final Order was filed by the Office of the Attorney General as well as their intention to file a Motion to Reconsider. On January 14, 2016, a hearing was conducted to address this Motion (Ap. Vol. I, 202-221). After hearing the arguments before it, the Court granted the Motion to Stay the Execution of the Final Order (Ap. Vol. I, 3-8).

On January 21, 2016, a hearing was conducted to address the Motion to Reconsider filed by the Office of the Attorney General. After hearing the arguments before it, the Court announced that it would render its decision in writing at a later date (Ap. Vol. I, 202-221).

On January 27, 2016, through written opinion, the Court reversed its initial decision and ordered that a probable cause hearing be set (Ap. Vol. I, 277-286).

On February 5, 2016, a probable cause hearing was conducted over the repeated objections of Mr. Armstrong (Ap. Vol. II, 293-294). After hearing the arguments before it, the Court determined that there was probable cause and set the matter for trial (Ap. Vol. II, 293-321).

On May 27, 2016, a trial was conducted over Mr. Armstrong's objections (Ap. Vol. II, 391) and Mr. Rickman was found to meet the criteria of being a sexually violent predator (Ap. Vol. II, 390-398). The Court ordered that a Conditional Release plan be prepared (Ap. Vol. II, 397) and the matter was set for a hearing on final disposition (Ap. Vol. II, 397-398).

On July 29, 2016, and over Counsel's objections (Ap. Vol. II, 548), a hearing was conducted to determine whether Mr. Rickman was to be considered for Conditional Release or Committal (Ap. Vol. II, 502-549). At the end of the hearing, and over counsel's objections, the Court determined that Mr. Rickman was not a suitable candidate for Conditional Release and committed him to the Department of behavioral health and Developmental Services for confinement and treatment (Ap. Vol. II, 547-549). Counsel for Mr. Rickman noted his objection to each proceeding after the trial court

reversed itself dismissing the Petition (Ap. Vol. II, 293; Ap. Vol. II, 391; Ap. Vol. II, 548).

All references in the Petition to the trial transcripts, the Chesterfield Circuit Court's written opinion, and the Interlocutory Appeal found in the Appendix will be labeled "Ap." followed by the volume number ("Vol. I or Vol. II) and page number(s).

It is from the reversal of the trial court's original ruling, and all adverse rulings and decisions in this matter, that Mr. Rickman now appeals to this honorable Court.

STATEMENT OF THE FACTS

The Office of the Attorney General filed a Petition for Civil Commitment against Petitioner-Appellant, Joseph Boyd Rickman (Mr. Rickman) in the Chesterfield Circuit Court on August 28, 2015 (Ap. Vol. I, 104). On September 16, 2016, the original court-appointed counsel for Mr. Rickman, Ms. Miriam Airington, Esq. Contacted the Court and the Office of the Attorney General by email requesting to set a probable cause hearing (Ap. Vol. I, 104, 127). Ms. Airington specifically noted the statutory deadline of 90 days (Ap. Vol. I, 104; Ap. Vol. I, 215-218).

Ms. Airington provided available dates for Mr. Rickman and the Attorney General to the Court, but none were available to the Court (Ap.

Vol. I, 104-107; Ap. Vol. I, 215-218). The Court provided several suggested dates within the required time frame to counsel. Defense counsel was available on several of the proposed dates (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

The Office of the Attorney General advised the Court that the Commonwealth's expert was available on none of the suggested dates within the time frame (Ap. Vol. I, 104-107; Ap. Vol I, 215-218). Ms. Miriam Airington explained through email on September 22, 2015 that she would not waive the 90-day rule and noted an objection (Ap. Vol. I, 104-107; Ap. Vol I, 215-218).

Ms. Miriam Airington again explained through email on September 28, 2015 that she would not waive the statutory time limit and even noted that a Motion to Dismiss would be filed due to the Office of the Attorney General's non-compliance with the statute (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

Over defense objection, the probable cause hearing was scheduled for January 8, 2016, well beyond the 90-day timeframe (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). On October 6, 2015, Mr. Rickman retained Mr. Stephen K. Armstrong, as counsel.

Although the statute provides a mechanism for a continuance (Ap. Vol. I, 104-107; Ap. Vol I, 215-218), the Office of the Attorney General did not file a motion for a continuance in this case, and there was no agreement between the parties to extend the deadline (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). To the contrary, the defense specifically and repeatedly requested a hearing within 90 days and objected to the case being set beyond 90 days (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

On December 8, Mr. Armstrong filed a Motion to Dismiss the Petition filed by the Office of the Attorney General (11 days after the 90 day period had expired). Mr. Rickman asserts that if the Office of the Attorney General files a petition seeking civil commitment, the Office of the Attorney General has the obligation to make all reasonable efforts to comply with the statutory requirements.

In this case, the defense initiated the scheduling of a probable cause hearing. The defense provided several dates available to the Court within the 90 day time frame. The defense repeatedly objected to any waiver of the 90 day time frame. The defense stated it would file a Motion to Dismiss. The Defense filed a Motion to Dismiss.

On January 8, 2016, a hearing was conducted in the Chesterfield Circuit Court to address the Motion to Dismiss filed by Mr. Armstrong. After

hearing the arguments before it, the Court dismissed the Petition (Ap. Vol. I, 130-135).

On January 12, 2016, a Motion for Stay of Execution of Final Order was filed by the Office of the Attorney General as well as their intention to file a Motion to Reconsider. On January 14, 2016, a hearing was conducted to address this Motion. After hearing the arguments before it, the Court granted the Motion to Stay the Execution of the Final Order (Ap. Vol. I, 7).

On January 21, 2016, a hearing was conducted to address the Motion to Reconsider filed by the Office of the Attorney General. After hearing the arguments before it, the Court announced that it would render its decision in writing at a later date (Ap. Vol. I, 221).

On January 27, 2016, through written opinion, the Court reversed its initial decision and ordered that a probable cause hearing be set (Ap. Vol. I, 277-286). On February 5, 2016, a probable cause hearing was conducted over the repeated objections of Mr. Armstrong (Ap. Vol. II, 293). After hearing the arguments before it, the Court determined that there was probable cause and set the matter for trial (Ap. Vol. II, 318).

On February 10, 2016, a Motion for an Interlocutory Appeal was filed by the Mr. Rickman and on February 25, 2016 that Motion was denied.

On May 27, 2016, a trial was conducted over Mr. Armstrong's objections (Ap. Vol. II, 391) and Mr. Rickman was found to meet the criteria of being a sexually violent predator (Ap. Vol. II, 397). The Court ordered that a Conditional Release plan be prepared and the matter was set for a hearing on final disposition (Ap. Vol. II, 397-398).

On July 29, 2016, and over Counsel's objections, a hearing was conducted to determine whether Mr. Rickman was to be considered for Conditional Release or Committal. At the end of the hearing, and over counsel's objections, the Court determined that Mr. Rickman was not a suitable candidate for Conditional Release and committed him to the Department of Behavioral Health and Developmental Services for confinement and treatment (Ap. Vol. II, 548). Counsel for Mr. Rickman noted his objection to each proceeding after the trial court reversed itself dismissing the Petition (Ap. Vol. II, 293; Ap. Vol. II, 391; Ap. Vol. II, 548).

On August 23, 2016, Mr. Rickman, through counsel, filed his Notice of Appeal to the Supreme Court of Virginia with the clerk of the trial court and the clerk of the Supreme Court of Virginia. On September 28, 2016, Counsel for Mr. Rickman received the transcripts of the proceedings. It is from the reversal of the trial court's original ruling, and all adverse rulings

and decisions in this matter, that Mr. Rickman now appeals to this honorable Court.

ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED WHEN IT REVERSED ITSELF IN DISMISSING THE PETITION OF PROBABLE CAUSE HEARING ON A MOTION TO RE-HEAR (Ap. Vol. I, 100-135; Ap. Vol. I, 202-221; Ap. Vol. I, 277-286).

STANDARD OF REVIEW

Virginia Code Section 37.2-906 provides as follows:

> Upon the filing of a petition alleging that the respondent is a sexually violent predator, the circuit court shall (i) forthwith order
> That until a final order is entered in the proceeding, in the case of a prisoner, he remain in the secure custody of the Department of Corrections, or in the case of a defendant, he remain in the secure custody of the Department and (ii) schedule a hearing within 90 days (emphasis added) to determine whether probable cause exists to believe that the respondent is a sexually violent predator. Va. Code § 37.2-906

LAW AND ARGUMENT

I. THE OFFICE OF THE ATTORNEY GENERAL DID NOT COMPLY WITH THE STATUTORY LANGUAGE OR THE SUBSTANTIVE OR PROCEDURAL REQUIREMENTS OF THE APPLICABLE VIRGINIA CODE.

Virginia Code Section 37.2-906 provides as follows:

> Upon the filing of a petition alleging that the respondent is a sexually violent predator, the circuit court shall (i) forthwith order
> That until a final order is entered in the proceeding, in the case of a prisoner, he remain in the secure custody of the

> Department of Corrections, or in the case of a defendant, he remain in the secure custody of the Department and (ii) schedule a hearing within 90 days (emphasis added) to determine whether probable cause exists to believe that the respondent is a sexually violent predator. Va. Code § 37.2-906

The Office of the Attorney General filed a Petition for Civil Commitment against Mr. Rickman in the Chesterfield Circuit Court on August 28, 2015. Once this petition was filed, the Office of the Attorney General had the burden of scheduling a probable cause hearing before November 26, 2015.

The statute further provides a mechanism for which a continuance or an extension may be requested:

> A continuance extending the case beyond the 90 days may be granted to either the Attorney General or the respondent upon good cause shown or by agreement of the parties. Va. Code § 37.2-906

The Office of the Attorney General did not file a motion for a continuance in this case (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218), and there was no agreement between the parties to extend the deadline (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). To the contrary, the defense specifically and repeatedly requested a hearing within 90 days and objected to the case being set beyond 90 days (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). The defense also advised both the Court and the Office of the Attorney General that a Motion to Dismiss would be filed if the Office of

the Attorney General does not comply with the statutory language of the applicable Virginia Code (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

The Office of the Attorney General of Virginia's assertion that Mr. Rickman has somehow waived or "sat on" his rights is preposterous and wholly unsupported by the facts.

The timeline is clear:

1) The Office of the Attorney General of Virginia filed paperwork that gave them a 90 day deadline to establish probable cause.
2) The Office of the Attorney General of Virginia set a hearing well outside of that 90 day window.

3) Mr. Rickman, by counsel, objected in writing, informing the Office of the Attorney General of Virginia of the statutory deadline, Mr. Rickman's unwillingness to waive this deadline, and the fact that he planned to file a Motion to Dismiss should this statutory deadline pass.

4) The Office of the Attorney General of Virginia did not seek a continuance or extension (which required a showing of good cause) and allowed the statutory deadline to pass.

5) Mr. Rickman, as promised, filed a Motion to Dismiss.

In its written opinion reversing its earlier dismissal of the Petition, the trial court stated that the Motion to Dismiss was filed "eleven days beyond the 90 day time frame" (Ap. Vol. I, 285). But, in fact, the issue was not yet ripe for litigation. Mr. Rickman could not file a Motion to Dismiss based on the statutory deadline passing - until the statutory deadline had passed.

The requirements of Va. Code § 37.2-906 are to be strictly construed and not subject to the lenity granted by Va. Code § 37.2-905.1

The Supreme Court of Virginia has noted the substantial liberty interest at stake for the Respondent in these proceedings:

> [A] person subjected to involuntary civil commitment proceedings has a substantial liberty interest in avoiding confinement in a mental hospital. Civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Accordingly, we are of the opinion that, 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. Townes v. Comm., 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005).

The SVPA statutory scheme permits "substantial compliance" for some of the statutory requirements in the SVPA process. However, the requirements of Va Code § 37.2-906 are not among those where substantial compliance is explicitly tolerated (Va Code § 37.2-905.1).

If the Attorney General files a petition seeking civil commitment, the government has the obligation to make all reasonable efforts to comply with the statutory requirements.

In this case, the defense initiated the scheduling of a probable cause hearing. The defense provided several dates available to the Court within the 90 day time frame (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218). Having

this information, the Office of the Attorney General continued to set the date for the probable cause hearing well outside the statutory limits. The Office of the Attorney General made no motion for a continuance and was on notice that defense counsel would file a Motion to Dismiss (Ap. Vol. I, 104-107; Ap. Vol. I, 215-218).

As such, a Motion to Dismiss was filed and a hearing was held to address this issue. After hearing all of the arguments, the Court dismissed the Petition.

As the Court itself stated in its written opinion of January 27:

> "This Court's analysis of §37.2-906(A) is conducted under the overarching consideration of the liberty interests at stake in an SVPA proceeding. 'The SVPA involves the potential involuntary loss of a prisoner's liberty ... A prisoner subject to the SVPA is afforded certain rights generally applicable to criminal proceedings.' McCloud v. Commonwealth, 269 Va. at 253. The Virginia Supreme Court has repeated stated 'with specific application to the SVPA... That 'involuntary civil commitment is a significant deprivation of liberty to which federal and state procedural due process protections apply.'" Hood v. Commonwealth, 280 Va at 536 (internal citations omitted) (WO. 7).

Mr. Rickman agrees. As stated in the Court's initial Opinion, the very concept of Due Process has been violated by these proceedings. The United States Supreme Court has stated that Due Process "'is the embodiment of the concept that the government is required to do, or refrain from doing, certain things if it is to exercise that authority that it derives

from the consent of the governed justly and without prejudice or excess.' Id." Due process is at the very core of this issue. As the trial court explained, the authority granted to the Commonwealth pursuant to the SVPA is strictly statutory (Ap. Vol. I, 283). When the Office of the Attorney General does not follow the plain language of the statute - for whatever reason - the action filed should be dismissed.

The legal analysis in this case is simple. Mr. Rickman is incarcerated pursuant to a Government proceeding and faces the equivalent of incarceration in the future. See Townes v. Comm., 269 Va. 234, 240, 609 S.E.2d 1, 4 (2005).

The Office of the Attorney General of Virginia has 90 days in which to establish probable cause or request a continuance or extension for good cause shown. 90 days had elapsed and Office of the Attorney General of Virginia did neither.

The Office of the Attorney General's inaction, leaving Mr. Rickman incarcerated as statutory deadlines expired, violated Mr. Rickman's Due Process Rights, both those explicitly established in law and those granted in the Constitutions of Virginia and the United States.

CONCLUSION

The Commonwealth had 90 days by which to schedule a probable cause hearing. They did not. The Office of the Attorney General of Virginia did not request a continuance or extension of the statutory 90 day deadline. As such, the petition against the Petitioner-Appellant, Mr. Joseph Boyd Rickman - that was originally dismissed - should have been dismissed as a matter of law.

Respectfully submitted,
JOSEPH BOYD RICKMAN

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CERTIFICATE OF SERVICE

In accordance with Rule 5:26(h), I hereby certify the following:

1. The name and address of Appellant are:
   Joseph Boyd Rickman
   Virginia Center for Behavioral Rehabilitation
   4901 East Patrick Henry Highway
   Burkeville Virginia, 23922

2. Counsel for the Appellant is Stephen K. Armstrong, REED|ARMSTRONG LLP (VSB No. 78249), 10301 Memory Lane, Suite 201, Chesterfield, Virginia 23832; Telephone: (804) 748-8080; Facsimile: (804) 748-8066; Email: Steve@ReedArmstrongLaw.com

3. Counsel for the Appellant is court-appointed.

4. An electronic copy of the Brief of Appellant and Appendix were filed, via VACES, and ten paper copies of the Brief of Appellant and three paper copies of the Appendix were hand-filed with the Clerk of this Court. On this same day, an electronic copy of the Brief of Appellant was served, via email, and an electronic copy on CD of the Brief of Appellant and Appendix was served, via UPS Ground Transportation, upon Counsel for Appellee, Sara Robb, Esq., Office of the Attorney General of Virginia, 202 North 9th Street, Richmond, Virginia 23219, oagcriminalitigation@oag.state.va.us, this 14th Day of April, 2017.

5. Counsel for Appellant requests oral argument of this Brief.

Stephen K. Armstrong, Esq.