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IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 171224

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TROY LAMAR GIDDENS, SR.,

Appellee.

REPLY BRIEF OF APPELLANT

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APPELLANT'S REPLY BRIEF

The Commonwealth of Virginia, by counsel, files this Reply Brief regarding the trial court's dismissal of the Commonwealth's petition for civil commitment of the Appellant, Troy Lamar Giddens, Sr., ("Giddens") as a sexually violent predator, pursuant to the Sexually Violent Predator Act, Virginia Code § 37.2-900, *et seq.* (the "SVP Act"). The Commonwealth alleges that the trial court erred in granting the motion to dismiss, because it failed to apply the substantial compliance provision of the SVP Act, and because Giddens failed to overcome the presumption of substantial compliance. In the Brief of Appellee, Giddens now requests that this Court apply the standard he did not allege or prove, and that the trial court did not rule on, to affirm the trial court's decision. In accordance with Rule 5:29, the Commonwealth relies on the contentions in its Opening Brief and adds the following to address only the matters raised in Giddens's Brief of Appellee.

AUTHORITIES AND ARGUMENT

I. GIDDENS MISINTERPRETS THE PLAIN LANGUAGE OF VIRGINIA CODE § 37.2-905.1 AND PROVIDES NO ARGUMENT OR EVIDENCE TO OVERCOME THE PRESUMPTION OF SUBSTANTIAL COMPLIANCE.

In the Motion to Dismiss Giddens filed in the trial court, he challenged the results of the initial screening conducted by the Director pursuant to

Code § 37.2-903. Such challenges are governed by Code § 37.2-905.1, which presumes that the Commonwealth substantially complied with the initial screening and review procedures of the SVP Act, and that only grossly negligent or willful departures from the procedures undermine the results:

> The provisions of §§ 37.2-903, 37.2-904, and 37.2-905 are procedural and not substantive or jurisdictional. **Absent a showing of failure to follow these provisions <u>as a result of</u> gross negligence or willful misconduct, it shall be presumed that there has been substantial compliance with these provisions**.

Va. Code Ann. § 37.2-905.1 (emphasis added).

For the first time on appeal, Giddens concedes that his challenge to the Director's screening is governed by this substantial compliance provision. But Giddens cannot point to any place in the record where he alleged in the trial court, much less argued or proved, the applicability of that provision or the facts necessary to overcome the presumption of substantial compliance. Instead, to justify the trial court's decision, he disregards the plain language of Code § 37.2-905.1 and suggests that a much lesser showing is required to rebut the presumption. Specifically, Giddens argues that the presumption may be overcome merely by "competent evidence" to the contrary. (Br. of Appellee at 7). But Giddens

provides no authority for this assertion, which flouts the plain statutory language. Giddens's later asserts "even if this Court were to read the statute to require a showing of gross negligence on the part of the Commonwealth. . . ." (*Id.*). Giddens's alternative argument is also meritless; he now asserts that if the statute requires a gross negligence "such a showing is supported by the evidence in this case." (*Id.*).

Giddens's argument fails at all stages of the analysis. In order to overcome the presumption of substantial compliance, Giddens had to prove first that there was, in fact, a failure by the Director to follow the provisions of Code § 37.2-903. *See* Va. Code Ann. § 37.2-905.1 ("Absent a showing of failure to follow these provisions . . . ."). If he is able to prove a failure to follow those statutory provisions, he must next prove that the failure to do so was as a result of gross negligence or willful misconduct in order to overcome the presumption. *See id.* He must prove both an actual failure and the reason therefore.

Giddens relies on his own testimony and that of his brother to argue that he should have received a different, lower score on the Static-99 screening instrument, and that it was gross negligence by certain officials not to respond to his efforts to notify them of his position on the "correct" score. Giddens's argument begins and ends on his assumption that his

score was correct, while the Director's score—which relied on records and documents that contradicted Giddens's testimony—was incorrect. He then characterizes as "gross negligence" the Commonwealth's refusal to adopt his proposed score or to reconsider its score based on his complaint. (Br. of Appellee at 8-10).

The Commonwealth correctly calculated Giddens's Static-99 score as 5, for purposes of the initial screening. As argued by the Commonwealth, Giddens's testimony was contradicted by records that the Director properly considered in calculating his score, including prior evaluations of Giddens that contained relevant statements by him. By contrast, Giddens offers no relevant support for his argument, such as how the Director arrived at his current score of 5, the procedures the Director was required to follow, the procedures he actually followed (if different), or that he was required to give greater weight to Giddens's position than to official records. Despite bearing the burden to overcome the statutory presumption of substantial compliance, Giddens adduced no evidence, argument, or authority for his assertion that a simple difference in score is a per se showing that the Director failed to follow the provisions of Code § 37.2-903, or that such alleged failure was necessarily a result of gross negligence or willful misconduct.

A review of the record makes clear that Giddens did not allege or argue the applicable law before the trial court. In his written motion to dismiss, and in the hearings on the motion to dismiss and motion for reconsideration, Giddens did not address Code § 37.2-905.1, any failure on the part of the Director to comply with Code § 37.2-903, or any allegation of gross negligence or willful misconduct that led to an alleged failure. Instead, Giddens now reads the statute as not imposing those burdens on him. In the alternative, he invites this Court to overlook his omissions, and retroactively apply Code § 37.2-905.1 to the evidence and arguments presented to the trial court. This Court should decline such an invitation.

II. THE TRIAL COURT MADE NO FACTUAL OR LEGAL FINDINGS PURSUANT TO VIRGINIA CODE § 37.2-905.1.

In his Brief of Appellee, Giddens argues that "[t]he trial court found that the Commonwealth failed to comply with Va. Code Sec. 37.2-903, and correctly applied Va. Code Sec. 37.2-905.1 to the facts of this case." (Br. of Appellee at 5). He alleges that "[t]he testimony and arguments offered at both hearings support the trial court's ruling." (*Id.* at 6). Notably, Giddens provides no references in the record to any of the rulings made by the trial court, let alone record citations to support his contentions.

As noted above, Giddens first argues, without support, that a less burdensome requirement applies than what is required by Code § 37.2-

905.1. (Br. of Appellee at 7). Giddens then argues that "[t]he Court's factual determination in this case that the presumption was overcome should not be disturbed on appeal." *Id.* Giddens again provides no citation for this statement. And the record reveals that the trial court made no finding that the Director failed to comply with the provisions of Virginia Code § 37.2-903, or that Giddens overcame the presumption of substantial compliance afforded by Code § 37.2-905.1 in the hearing on the motion to dismiss (J.A. at 62-64), the hearing on the motion for reconsideration (J.A. at 108-09), or in the orders memorializing the trial court's decisions. (J.A. at 119-22). This is the basis for the Commonwealth's appeal—that the trial court erred in neglecting to make the requisite findings under Code § 37.2-905.1 and thereby failed to apply the statute correctly.

A review of the record notes that despite the Commonwealth's written response to the motion to dismiss (J.A. at 10-12), the Commonwealth's argument at the motion-to-dismiss hearing (J.A. at 59-60), the Commonwealth's written motion for reconsideration (J.A. at 78-81), and the Commonwealth's argument at the hearing on the motion for reconsideration (J.A. at 90, 104-05, 106-07), the trial court never made any relevant findings or applied Code § 37.2-905.1. At the conclusion of the hearing on the motion to dismiss, the trial court incorrectly found that the

Commonwealth had not carried its burden to prove Giddens was eligible for the sexually violent predator program. (J.A. at 63). Instead of ruling in accordance with Code § 37.2-905.1, the trial court granted the motion to dismiss based on its misallocation of the burden of proof and sua sponte added "in light of the decision of the jury in 2013" which happened to be favorable to Giddens. (J.A. at 64).

The Commonwealth filed a motion for reconsideration, again reiterating the governing statute for the motion to dismiss, Code § 37.2-905.1, and in answer to the trial court's concerns, noted the Commonwealth's position that the concept of res judicata did not apply. (J.A. at 78-81). At the hearing, the trial court acknowledged it had received the Commonwealth's motion and first clarified its position that it agreed that res judicata did not apply in this case. (J.A. at 85-86). As to the Commonwealth's main point in the motion – the application of Code § 37.2-905.1 – the trial court said, "[y]ou then raise a question about the burden of proof which I found interesting." (J.A. at 86). But the trial court never addressed the Commonwealth's argument that the court had improperly relieved Giddens of his burden under Code § 37.2-905.1, nor did it make any finding that Giddens had overcome the presumption of substantial compliance.

Once again, Giddens invites this Court to retroactively apply the statute to the evidence and arguments presented and find that the trial court implicitly but correctly applied Code § 37.2-905.1, despite the record's silence. This Court should decline such an invitation.

CONCLUSION

The trial court erred in placing the burden on the Commonwealth in considering Giddens's motion to dismiss the Commonwealth's petition for civil commitment. Giddens failed to prove or even allege that the Commonwealth failed to substantially comply with the SVP Act, and that such failure was a result of gross negligence or willful misconduct. Giddens now requests that this Court apply the standard he did not allege or prove, and that the trial court did not rule on, to affirm the trial court's decision.

For the above reasons, the Court should reverse the trial court's dismissal of the Commonwealth's petition to civilly commit Giddens as a sexually violent predator, reverse the trial court's final order entered June 13, 2017 and order entered June 21, 2017, and remand this case for a trial on the merits.

Respectfully Submitted,
COMMONWEALTH OF VIRGINIA

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CERTIFICATE

Pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, counsel for the Appellant certifies as follows:

(a) The requirements of Rule 5:26 and 5:32 have been complied with.

(b) On February 7, 2018, an electronic version of the Reply Brief of Appellant were filed with the Clerk of the Supreme Court of Virginia, and served on counsel for Appellee: Joshua A. Goff, Esq., at josh@goffvoltin.com.

(c) On February 7, 2018, 3 printed copies of this Reply Brief of Appellant were hand delivered to the Clerk of the Supreme Court of Virginia.

(d) This Brief does not exceed the longer of 15 pages or 2625 words.

By:S/_____
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Senior Assistant Attorney General