SCV: Submitted on 01-23-2018 09:44:12 EST for filing on 01-23-2018

IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 171224

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TROY LAMAR GIDDENS, SR.,

Appellee.

OPENING BRIEF OF APPELLANT

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OPENING BRIEF OF APPELLANT

The Commonwealth of Virginia, by counsel, files this Opening Brief appealing the rulings of the Newport News Circuit Court dismissing the Commonwealth's petition for the civil commitment of the Appellee, Troy Lamar Giddens, Sr. ("Giddens"), as a sexually violent predator. The Commonwealth requests that the Court reverse the trial court's ruling dismissing the petition, and remand this matter for a trial on the merits.

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On December 16, 2016, the Commonwealth filed a petition in the trial court to civilly commit Giddens as a sexually violent predator pursuant to the Civil Commitment of Sexually Violent Predators Act, Virginia Code § 37.2-900 *et seq.* (the "SVP Act"). (J.A. at 1-4). On March 20, 2017, the trial court found probable cause to believe Giddens is a sexually violent predator. On or about March 15, 2017, Giddens filed a motion to dismiss. (J.A. at 5-9). The Commonwealth filed a response to the motion to dismiss on April 11, 2017. (J.A. at 10-12). On April 13, 2017, the trial court heard argument on Giddens's motion to dismiss and granted the motion. (J.A. at 64, 119-120).

The Commonwealth filed a motion for stay of execution of the final order and a motion for reconsideration on April 25, 2017.[1] (J.A. at 75-81). The trial court heard the Commonwealth's motion for reconsideration on June 13, 2017, after which the trial court denied the motion for reconsideration. (J.A. at 109). The order denying reconsideration was entered on June 21, 2017. (J.A. at 121-22). The Commonwealth noted its appeal to this Court on July 12, 2017. (J.A. at 123-24).

[1] The trial court granted the stay and entered the order granting the motion to dismiss on June 13, 2017, prior to hearing argument on the motion for reconsideration.

STATEMENT OF FACTS

On October 21, 2000, Giddens was convicted of Attempted Carnal Knowledge and Carnal Knowledge in the Newport News Circuit Court in violation of Virginia Code Sections § 18.2-26 and 18.2-63. *See* J.A. at 2. Said convictions are considered "sexually violent offenses" pursuant to the SVP Act. Virginia Code Ann. § 37.2-900. Pursuant to the SVP Act, as one of the initial steps in screening, the Director of the Department of Corrections scored Giddens as a five on the Static-99 actuarial risk assessment instrument, resulting Giddens's referral to the Commitment Review Committee ("CRC") for further screening.[2] Virginia Code Ann. § 37.2-903. Dr. Glenn Rex Miller, Jr. completed an initial sexually violent predator evaluation on Giddens pursuant to Virginia Code § 37.2-904, and opined that he met the criteria as a sexually violent predator. *See* J.A. at 2. On March 20, 2017, the trial court found probable cause to believe Giddens is a sexually violent predator.

[2] As part of Giddens's Motion to Dismiss, he attached a scoring sheet completed by the Department of Corrections in 2012, which was not the form pertaining to the current referral to the CRC. (J.A. at 9). However, there is no dispute that the Director again scored Giddens as a five on the Static-99 as part of the current referral.

Giddens filed a Motion to Dismiss on March 15, 2017, asserting that he did not meet the statutory criteria to be referred to the CRC for screening as a sexually violent predator. (J.A. at 5-9). One of the scoring items on the Static-99 is whether the subject of assessment has ever lived with a lover for two years; if the person has, they receive zero points zero for that item, and if they have not, they receive one point. *See, e.g.,* J.A. at 9. Giddens contended that because he had lived with a romantic partner for two years or more, the Director of the Department of Corrections (the "Director") incorrectly scored the Static-99 by affording him one point on that scoring item. (J.A. at 6-7). Giddens further argued that without that point, Giddens did not meet the minimum Static-99 score mandating evaluation as a sexually violent predator as prescribed by Virginia Code § 37.2-903 (B).[3] (*Id.*). Giddens relied on this Court's ruling in *Shelton v. Commonwealth*, 274 Va. 121 (2007), in arguing that the case should be dismissed, contending that Giddens's score on the Static-99 is a four rather than a five. (J.A. at 6-7, 54-56).

In its written response to the motion to dismiss and at the hearing on the motion, the Commonwealth argued that it had substantially complied

[3] Based on Giddens's predicate offenses of Attempted Carnal Knowledge and Carnal Knowledge, Giddens would have to have scored a five on the Static-99 to be referred to the CRC, absent the Director making a referral based on aggravating circumstances. Virginia Code Ann. § 37.2-903.

with the screening provisions of the SVP Act – Virginia Code §§ 37.2-903, 37.2-904, and 37.2-905 – which are procedural and not substantive or jurisdictional. Va. Code § 37.2-905.1. (J.A. at 10-12, 59-60). Giddens did not allege that the Commonwealth failed to substantially comply with the provisions of § 37.2-903, in accordance with Virginia Code § 37.2-905.1.

At the hearing on the motion to dismiss, Giddens attempted to prove that he did not meet the requisite Static-99 through his own and his brother's testimony that Giddens had lived with two romantic partners for more than two years each. (J.A. at 16-39). As to the substance of the score, the Commonwealth argued that Giddens had been scored on the Static-99 four times in the last five years and had scored at least a five each time. (J.A. at 57). The Commonwealth also noted that the testimony of Giddens and his brother was not consistent with:

- the records before Dr. Ganderson, who conducted Giddens's 2012 Sexually Violent Predator evaluation;
- Giddens's interview with Dr. Ganderson;
- the records before Dr. Miller, who conducted Giddens's 2016 Sexually Violent Predator evaluation;[4] or
- the records before the Director in 2012 or 2016.

[4] Giddens refused to cooperate with Dr. Miller's 2016 Sexually Violent Predator evaluation, so Dr. Miller was unable to question Giddens about whether he had lived with a romantic partner for more than two years.

(J.A. at 57-59). The Commonwealth argued that even if Giddens's score was a four, the Director would have had the discretion to screen him under Virginia Code § 37.2-903. (J.A. at 59).

Following argument, the trial court granted the motion to dismiss. (J.A. at 63-64). Importantly, in its ruling the trial court did not find that the Commonwealth failed to follow the screening provisions of Virginia Code § 37.2-903, or that any such failure was a result of gross negligence or willful misconduct. Rather, the trial court found that the burden was on the Commonwealth to prove that Giddens is eligible for the sexually violent predator program and that the Commonwealth failed to show that the Static-99 was scored correctly. (*Id.*). The trial court also expressed concerns about the Commonwealth's filing of the petition after a 2013 jury determination that Giddens was not a sexually violent predator.[5] (J.A. at 46-53, 64).

The Commonwealth filed a motion for reconsideration on April 25, 2017, explaining that Giddens bears the burden to prove that the

[5] The issue of the prior jury determination was not one raised by Giddens, but sua sponte by the trial court. (J.A. at 46-53, 64). As the Commonwealth noted in its motion for reconsideration, the issue of res judicata was not applicable in light of this Court's decision in *Rhoten v. Commonwealth*, 286 Va. 282 (2013). Despite the concerns noted initially, the trial court stated in the hearing on the motion to reconsider that it agreed that res judicata did not apply. (J.A. at 85-86).

Commonwealth failed to substantially comply with the provisions of Virginia Code § 37.2-903. (J.A. at 78-79). The trial court held a hearing on the motion for reconsideration on June 13, 2017, at which the Commonwealth argued that it was not the Commonwealth's burden to show that Giddens should have actually scored a five on the Static-99 and that the Commonwealth had relied on the Director's Static-99 score in filing the petition to civilly commit Giddens as a sexually violent predator. (J.A. at 90, 105). The trial court denied the motion for reconsideration, but did not address the application of Virginia Code § 37.2-905.1 or the Commonwealth's substantial compliance argument, and instead it applied a fundamental-fairness standard in making its ruling. (J.A. at 108-09).

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN FAILING TO APPLY VIRGINIA CODE § 37.2-905.1 BY GRANTING THE RESPONDENT'S MOTION TO DISMISS WITHOUT FIRST FINDING THAT THE COMMONWEALTH FAILED TO FOLLOW THE PROVISIONS OF VIRGINIA CODE §§ 37.2-903, 37.2-904, AND 37.2-905. (Preserved at J.A. at 10-12, 59-60, 78-81, 90, 104-05, 106-07, 119-20, and 121-22).

II. THE TRIAL COURT ERRED IN FAILING TO APPLY VIRGINIA CODE § 37.2-905.1 BY GRANTING THE RESPONDENT'S MOTION TO DISMISS WITHOUT A FINDING THAT ANY FAILURE TO FOLLOW THE PROVISIONS OF VIRGINIA CODE § 37.2-903 WAS AS A RESULT OF GROSS NEGLIGENCE OR WILLFUL MISCONDUCT BY THE COMMONWEALTH. (Preserved at J.A. at 10-12, 59-60, 78-81, 90, 104-05, 106-07, 119-20, and 121-22).

III. THE TRIAL COURT ERRED IN FAILING TO APPLY VIRGINIA CODE § 37.2-905.1 BY SHIFTING THE BURDEN TO THE COMMONWEALTH TO PROVE THAT IT COMPLIED WITH THE PROVISIONS OF VIRGINIA CODE § 37.2-903 INSTEAD OF REQUIRING THE RESPONDENT TO OVERCOME THE PRESUMPTION OF SUBSTANTIAL COMPLIANCE. (Preserved at J.A. at 10-12, 59-60, 78-81, 90, 104-105, 106-07, 119-20, and 121-22).

AUTHORITIES AND ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO APPLY VIRGINIA CODE § 37.2-905.1 AND IN GRANTING GIDDENS'S MOTION TO DISMISS WHERE HE DID NOT ALLEGE OR PROVE THAT THE COMMONWEALTH FAILED TO FOLLOW THE SVP ACT'S SCREENING PROVISIONS AS A RESULT OF GROSS NEGLIGENCE OR WILLFUL MISCONDUCT (Assignments of Error I-III).

A. Standard of Review

Under well-established principles, an issue of statutory interpretation is a pure question of law, which this Court reviews de novo. *See Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007) (internal citations omitted). As explained below, this case represents not a strict

statutory interpretation but a failure to apply the correct statute to evaluate and rule on Giddens's motion, and this Court has explained that it "review[s] compliance with statutes and this Court's Rules de novo." *Epps v. Commonwealth*, 293 Va. 403, 407 (2017) (citing *Woodard v. Commonwealth*, 287 Va. 276, 280 (2014)).

B. Because Giddens failed to allege or prove a failure to follow the statutory screening provisions as a result of gross negligence or willful misconduct by the Commonwealth, the trial court erred in failing to apply the presumption of substantial compliance required by Virginia Code § 37.2-905.1.

Sections 37.2-903, 37.2-904, and 37.2-905 of the SVP Act address the various steps that occur before a sexually violent predator is civilly committed: the initial screening of a prisoner by the Director of the Virginia Department of Corrections; referral to and assessment of the prisoners by the Commitment Review Committee; and review by the Attorney General, who decides whether to file a petition to civilly commit the prisoner. Va. Code Ann. §§ 37.2-903, 37.2-904, and 37.2-905. If a petition is filed, the trial court then holds a hearing to determine whether probable cause exists to believe that the prisoner is a sexually violent predator. Va. Code Ann. § 37.2-906(E).

Giddens's motion to dismiss was a direct challenge to the results of the initial screening conducted by the Director pursuant to Virginia Code

§ 37.2-903. Giddens's motion rested entirely on his allegation that his score on the Static-99 should have been lower than that scored by the Director, and thus he fell below the threshold score to be further screened under the SVP Act.

Giddens's challenge was to only one aspect of the initial screening process. Any challenge to the screening procedures of § 37.2-903 is governed by § 37.2-905.1, which expressly provides 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 as a result of 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).

Neither § 37.2-905.1 nor any other provision of the SVP Act requires the Commonwealth to prove that it has complied with the procedural provisions prior to trial. Va. Code Ann. §§ 37.2-905.1, 37.2-908. Rather, the plain and unambiguous language of the SVP Act provides that the Commonwealth is <u>presumed</u> to have substantially complied with these procedural provisions in the absence of a showing of gross negligence or willful misconduct. The burden of proof rested with Giddens, who did not

allege, nor offer any evidence to prove, that the Commonwealth failed to substantially comply with these procedural provisions or that any failure to comply was due to gross negligence or willful misconduct; therefore, the petition should not have been dismissed. *See Harris v. Commonwealth*, 279 Va. 123, 129 (2010) (finding the trial court correctly denied Harris's motion to dismiss the Commonwealth's sexually violent predator petition where he made no showing of gross negligence or willful misconduct); *Warrington v. Commonwealth*, 280 Va. 365 (2010) (finding the trial court correctly denied Warrington's motion to dismiss where he failed to prove the Commonwealth's actions were grossly negligent).

Instead, before the trial court, Giddens relied solely on *Shelton* in arguing that the case should be dismissed if he did not receive a score of five or higher on the Static-99. (J.A. at 7, 101, 102-03). However, this reliance is misplaced. At the time of this Court's ruling in *Shelton*, the requirement that the inmate receive a certain score on the applicable actuarial instrument before being screened was jurisdictional, whereas now the requirement is procedural. *Compare Shelton*, 274 Va. at 129 *with* Va. Code Ann. § 37.2-905.1.

Giddens testified and provided collateral evidence that, if believed, could have resulted in a different score on the Static-99, but did not

demonstrate any actual error by the Director or the reasons for any alleged error. Giddens provided no evidence as to how the Director arrived at a Static-99 score of five for the present referral, let alone how the Director's score amounted to a failure to follow the statutory provisions of § 37.2-903.

That another individual may have access to different information, or score the Static-99 differently for some other reason, is no basis for dismissing the Commonwealth's petition. While the Commonwealth maintains that the Director scored the Static-99 correctly, the fact remains that a simple difference in score is not a per se showing that the Director failed to follow the provisions of Virginia Code § 37.2-903, nor that such failure was a result of gross negligence or willful misconduct.

Even if the trial court believed, based on the evidence adduced at the hearing, that Giddens should have been scored a four on the Static-99, the case still should not have been dismissed. At the initial hearing on the motion to dismiss, neither Giddens nor the trial court addressed the governing provisions of Virginia Code § 37.2-905.1. By filing its Motion for Reconsideration, the Commonwealth provided an opportunity for both Giddens and the trial court to correct the record and follow the statute. Neither did so. Because the sexually violent predator process is entirely

statutory, the trial court erred in failing to follow the requirements of the SVP Act.

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. Under the SVP Act, it was Giddens's burden to prove that the Commonwealth failed to follow the provisions as a result of gross negligence or willful misconduct. 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. Consequently, the trial court erred in dismissing the petition.

Accordingly, the Commonwealth requests that this Court 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 January 23, 2018, electronic versions of the Joint Appendix and this Opening 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 January 23, 2018, 3 printed copies of this Opening Brief of Appellant and 3 printed copies of the Joint Appendix were hand delivered to the Clerk of the Supreme Court of Virginia.

(d) This Brief does not exceed the longer of 50 pages or 8,750 words.

_____

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