In The

Supreme Court of Virginia

RECORD NO. 171224

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

TROY LAMAR GIDDENS, SR.,

Appellee.

BRIEF OF APPELLEE

Joshua A. Goff (VSB No. 80401)
GOFF VOLTIN, PLLC
739 Thimble Shoals Boulevard, Suite 1004
Newport News, Virginia 23606
(757) 369-2415 (Telephone)
(757) 806-6920 (Facsimile)
josh@goffvoltin.com

Counsel for Appellee

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS BELOW

On December 16, 2016, the Commonwealth filed a petition in the Newport News Circuit Court pursuant to the Civil Commitment of Sexually Violent Predators Act. Joint Appendix (hereinafter "J.A.") 1-4. On March 15, 2017, Giddens filed a motion to dismiss. J.A. 5-9. The Commonwealth responded on April 11, 2017. J.A. 10-12. The parties appeared before the Honorable H. Vincent Conway, Jr., Judge Designate, on April 11, 2017 to argue the motion to dismiss. At the conclusion of the hearing, the trial court granted the motion to dismiss. J.A. 64, 119-120.

The Commonwealth later filed a motion to reconsider the ruling granting the motion to dismiss. J.A. 75-81. The trial court held another hearing on June 13, 2017, at which time the trial court denied the motion for reconsideration. J.A. 109. The order denying the reconsideration was entered on June 21, 2017. J.A. 121-122. The Commonwealth thereafter noted an appeal to the Supreme Court of Virginia. J.A. 123-124. J.A. 123-124.

STATEMENT OF FACTS

Giddens filed a Motion to Dismiss pursuant to Va. Code Sec. 37.2-901 and 37.2-903. A hearing on Giddens's motion took place on April 13, 2017. At the hearing, Giddens's brother, Keivin Giddens testified to two separate relationships Gidden's had in the 1990's that lasted longer than two years. J.A. 18-20. Giddens then testified on his own behalf regarding his two relationships in the 1990's that lasted longer than two years. J.A. Tr. 28-31. Giddens further testified he noticed he was scored incorrectly on his Static-99 coding form. J.A. 32. Giddens wrote the SOSA unit to rectify the situation. JA. 36. He received no response. Id. Giddens then filed a formal grievance with the Department of Corrections to address the incorrect scoring. Id. The Department of Corrections declined to act on his grievance, telling Giddens it was a matter for the court to decide. Id. Giddens then wrote the Attorney General's Office asking them to correct his Static-99 score. Id.

The Commonwealth argued at a hearing on its Motion to Reconsider that the case should have been sent back to the Department of Corrections, rather than dismissed, to determine if the Department wished

to proceed under a separate section of Va. Code Sec. 37.2-903. J.A. 91-93. The trial court then noted the initial petition filed by the Commonwealth did not seek relief under an alternative section of Va. Code Sec. 37.2-903. J.A. 93.

APPELLANT'S ASSIGNMENTS OF ERROR

I. The trial court erred in failing to apply Virginia Code Sec. 37.2-905.1 by granting the Respondent's motion to dismiss without first finding that the Commonwealth failed to follow the provisions of Va. Code Secs. 37.2-903, 37.2-904, and 37.2-905.

II. The trial court erred in failing to apply Virginia Code Sec. 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 Sec. 37.2-903 was as a result of gross negligence or willful misconduct by the Commonwealth.

III. The trial court erred in failing to apply Virginia Code Sec. 37.2-905.1 by shifting the burden to the Commonwealth to prove that it complied with the provisions of Virginia Code Sec. 37.2-903 instead of requiring the Respondent to overcome the presumption of substantial compliance.

AUTHORITIES AND ARGUMENT

Standard of Review

"The credibility of a witness, the weight accorded the testimony, and the inferences to be drawn from proven facts are matters to be determined by the factfinder." Welshman v. Commonwealth, 28 Va. App. 20, 502 S.E.2d 122 (1998). "[T]he appellate court should not disturb the factfinder's determination as to credibility unless it finds the testimony supporting the verdict inherently incredible." Robertson v. Commonwealth, 12 Va. App. 874, 406 S.E.2d 417 (1991). An issue of statutory interpretation is a pure question of law, which this Court reviews *de novo*. Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104 (2007). The Court "reviews 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).

Argument

The trial court found 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

The Commonwealth acknowledges Giddens challenged his Static-99 Assessment Score, which in Mr. Giddens's case had to be at least a five to trigger the automatic referral provision of Va. Code Sec. 37.2-903(B)(i).

Giddens presented extensive testimony, found by the trial court to be credible, that his score on the Static-99 should have been a four, not a five. Giddens testified in detail about the steps he took to address his incorrectly scored assessment. He first wrote the SOSA unit of the Department of Corrections asking them to "rectify the situation." J.A. 36. After receiving no response whatsoever, Giddens filed a grievance with the Department of Corrections. Id. The grievance was denied after the Department of Corrections told Giddens it was a "matter for the Court." Id. Giddens then wrote the Attorney General's Office to inform them of the error and received no response. Id.

The testimony and arguments offered at both hearings support the trial court's ruling. Contrary to the Commonwealth's contention, Va. Code Sec. 37.2-905.1 does not give the Commonwealth *carte blanche* to disregard the legislative dictates of Va. Code Secs. 37.2-903; 37.2-904, and 37.2-905. "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 Sec. 37.2-905.1. The statute, by its plain, unambiguous language, creates a presumption that the procedures outlined in the preceding code sections were appropriately followed. The evidence adduced in this case overcame

this presumption, as Giddens outlined, in detail, why the procedures followed by the Commonwealth's agencies in this case were invalid as applied to him. The plain language does not require a showing of gross negligence or willful misconduct to challenge the procedures of the preceding code sections; rather, it simply requires the Court presume those statutes were complied with unless competent evidence is offered to overcome that presumption. The Court's factual determination in this case that the presumption was overcome should not be disturbed on appeal.

Even if this Court were to read the statute to require a showing of gross negligence on the part of the Commonwealth, such a showing is supported by the evidence in this case. This Court has defined gross negligence in other contexts. Gross negligence is "a degree of negligence showing indifference to another and an utter disregard of prudence that amounts to a complete neglect of the safety of such other person." Cowan v. Hospice Support Care, Inc., 268 Va. 482, 487, 603 S.E.2d 916, 918 (2004). '"Ordinary and gross negligence differ in degree of inattention"; while '[g]ross negligence is a manifestly smaller amount of watchfulness and circumspection than the circumstances require of a person of ordinary prudence,' 'it is something less than willful, wanton, and reckless conduct.'" Thomas v. Snow, 162 Va. 654, 661, 174 S.E. 837, 839 (1934).

The Commonwealth's conduct in the instant case was grossly negligent. Giddens was incarcerated when the Commonwealth filed its sexually violent predator petition on December 16, 2016. When he learned that his score was incorrect on the Static-99, he attempted to contact the unit responsible for the incorrect score to no avail. Giddens then filed a grievance with the Department of Corrections, again to no avail. Giddens finally notified the Attorney General of the incorrect score. In short, Giddens alerted the Commonwealth in as many ways as his condition would allow that there was, at the very least, an issue that required further investigation. The Commonwealth did nothing to investigate Giddens's complaints.

The trial court noted the Commonwealth failed to investigate Giddens's complaint even after the motion to dismiss had been filed and initially granted.

> Not to be smart, but Mr. Goff scheduled this hearing on April the 13th, and he said: This is where I'm corning from. I'm going to say it shouldn't have been a five. It should have been a four, or less. If that's the case, this case is over. Why would not the Commonwealth say: Fine. If you are going to do that we are going to bring some other expert that, one, Mr. Goff, you are wrong; two, if you are right, there are aggravating circumstances we'd like to put on via opinion?

J.A. 106. The Commonwealth is asking this Court to conclude that it is entitled to disregard the statutory prescriptions contained in Va. Code Sec.

37.2-903, 37.2-904, and 37.2-905, no matter how many times, or in how many ways, an individual attempts to correct defects in these statutory processes. The Court should decline the Commonwealth's invitation to read such expansive authority into Va. Code Sec. 37.2-905.1 when the General Assembly declined to do so.

> A person subjected to an involuntary civil commitment proceeding 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 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.

Warrington v. Commonwealth, 280 Va. 365, 367, 699 S.E.2d 233, 235 (2010) (citation omitted). Warrington also deals with Va. Code Sec. 37.2-905.1. In that case, the Commonwealth used an improperly credentialed expert to perform its initial evaluation. This Court found such a mistake did not constitute gross negligence, noting, "[i]immediately upon discovering this discrepancy, the Attorney General informed both the trial court and Warrington, and sought to replace Dr. Berman with a qualified expert who satisfied the statutory criteria." Warrington at 236. "As soon as the mistake was discovered, the Attorney General informed both the trial court and Warrington and worked diligently and quickly to resolve the problem." Id.

The trial court, as the finder of fact, found precisely the opposite in this case. The uncontroverted evidence was that Giddens tried through a variety of different means to alert the Commonwealth to the mistake in his Static-99 score. Rather than investigating the complaint, the Commonwealth simply ignored Giddens. Even after credible evidence was presented regarding the mistake in open court, the Commonwealth failed to take action to correct or at least address the issue. Its conduct in this case more than exhibited a "degree of negligence which shows indifference to others as constitutes an utter disregard of prudence…" Warrington at 236 (citations omitted).

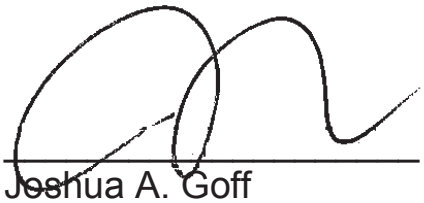
The trial court, as the factfinder, determined Giddens's evidence to be credible. Indeed, none of Giddens's assertions were denied or contradicted by the Commonwealth. The Commonwealth, by its refusal to investigate, or even acknowledge, Giddens's assertion that his Static-99 score was incorrect, was grossly negligent. The trial court properly followed all relevant statutory provisions in reaching the result in this case.

CONCLUSION

Giddens, at two separate hearings on the issue, provided detailed evidence as to how the Department of Corrections scored his Static-99 assessment and why the Department's scoring was incorrect. The trial court found this evidence to be credible. Giddens further provided competent evidence, entirely uncontradicted by the Commonwealth, of the efforts he took to alert the Commonwealth, on at least three separate occasions, of the error. The Commonwealth did nothing to investigate the error, and indeed, admitted to the trial court it did nothing to investigate the error after Giddens's filed his motion to dismiss and before the motion to reconsider hearing. J.A. 106.

Giddens proved by a preponderance of the evidence his Static-99 assessment was scored incorrectly and that the Commonwealth was grossly negligent in ignoring his pleas to correct the score. The trial court correctly dismissed the Commonwealth's petition to declare Giddens a sexually violent predator. The Commonwealth's petition for appeal should therefore be dismissed and the ruling of the trial court affirmed.

Respectfully Submitted,



Joshua A. Goff
GOFF VOLTIN, PLLC
VSB#: 80401
739 Thimble Shoals Blvd.,
Suite 1004
Newport News, Virginia 23606
Telephone: (757) 369-2415
Facsimile: (757) 806-6920
josh@goffvoltin.com

CERTIFICATE

Pursuant to Va. Sup. Ct. R. 5:26(h), I certify on the 25th day of January, 2018, one electronic copy of the Brief of Appellee was filed, via VACES, and three paper copies of the Brief of Appellee have been hand-filed with the Clerk of this Court. I further certify that one electronic copy of the Brief of Appellee was served, via email, upon:

Jill M. Ryan, Esquire
202 North 9th Street
Richmond, Virginia 23219
Telephone: (804) 786-9583
Facsimile: (804) 692-1098
Email: jryan@oag.state.va.us

By:_____

Joshua A. Goff
GOFF VOLTIN, PLLC
VSB#: 80401
739 Thimble Shoals Blvd., Suite 1004
Newport News, Virginia 23606
Telephone: (757) 369-2415
Facsimile: (757) 806-6920
josh@goffvoltin.com