

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC 87569
TIMOTHY S. DONALDSON,)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF VERNON COUNTY, MISSOURI
TWENTY-EIGHTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE GERALD D. McBRIDE, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
Telephone (573) 882-9855
FAX (573) 875-2594
emmett.queener@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Mr. Donaldson incorporates the jurisdictional statement set out on page 6 of his initial substitute brief.

STATEMENT OF FACTS

Mr. Donaldson incorporates the facts set out in the Statement of Facts on pages 7 through 38 of his initial substitute brief.

POINTS RELIED ON

I.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss Petition Because Of Violation Of The Respondent's Procedural Due Process Rights, because the referral of Mr. Donaldson to the Attorney General's Office for SVP commitment arbitrarily abrogated a state-created procedure in violation of Mr. Donaldson's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that at the time Mr. Donaldson entered MOSOP in 1999 it was the established procedure of DOC not to begin the process of referring an inmate to the Attorney General's Office for civil commitment as a sexually violent predator unless the inmate had failed, withdrawn, or was terminated from MOSOP, or unless the inmate was no longer eligible for MOSOP, and Mr. Donaldson was enrolled in MOSOP when he was referred to the Attorney General's Office and the civil commitment petition was filed against him.

II.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss For Failure To Try The Case Within Ninety Days Of The Declaration Of A Mistrial, because retrial within ninety days was required by Section 632.495, RSMo 2000, which denied Mr. Donaldson his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that a mistrial was declared on January 27, 2004, and the case was not tried until September 29, 2004, nor was it continued within the ninety-day period of time according to the provisions of Section 632.492, RSMo 2000.

State v. Hoover, 719 S.W.2d 812 (Mo. App., W.D. 1988);

State v. Will, 753 S.W.2d 333 (Mo. App., S.D. 1998); and

Section 552.030, 552.040, RSMo 2000.

III.

The probate court abused its discretion in admitting evidence that Mr. Donaldson suffers antisocial personality disorder (APD), because APD cannot satisfy the statutory requirement of a “mental abnormality,” in violation of his rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the jury may have used APD as a basis for its finding of a mental abnormality, but APD fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal conduct in general.

ARGUMENT

I.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss Petition Because Of Violation Of The Respondent's Procedural Due Process Rights, because the referral of Mr. Donaldson to the Attorney General's Office for SVP commitment arbitrarily abrogated a state-created procedure in violation of Mr. Donaldson's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that at the time Mr. Donaldson entered MOSOP in 1999 it was the established procedure of DOC not to begin the process of referring an inmate to the Attorney General's Office for civil commitment as a sexually violent predator unless the inmate had failed, withdrawn, or was terminated from MOSOP, or unless the inmate was no longer eligible for MOSOP, and Mr. Donaldson was enrolled in MOSOP when he was referred to the Attorney General's Office and the civil commitment petition was filed against him.

Mr. Donaldson will rely on the argument presented in Point I of his initial substitute brief on this point.

II.

The probate court erred in denying Mr. Donaldson's Motion to Dismiss For Failure To Try The Case Within Ninety Days Of The Declaration Of A Mistrial, because retrial within ninety days was required by Section 632.495, RSMo 2000, which denied Mr. Donaldson his right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that a mistrial was declared on January 27, 2004, and the case was not tried until September 29, 2004, nor was it continued within the ninety-day period of time according to the provisions of Section 632.492, RSMo 2000.

The State suggests that this Court should review the probate court's denial of Mr. Donaldson's motion to dismiss for an abuse of discretion (Resp. Br. 19-20). Mr. Donaldson disagrees. There is no dispute over facts relevant to the determination of the issue presented in this appeal. The relevant facts are contained in the record on appeal; the date of the mistrial, the date of the motion to dismiss, the dates of the probate court's rulings on that motion, and the date of the retrial. The State attempts to inject into the appeal a dispute over the reason for the delay of Mr. Donaldson's retrial, and suggests that this dispute presents a question of judicial discretion by the trial court. This dispute is irrelevant to the questions presented in this appeal; whether the statutorily imposed time limit for

retrial is mandatory and whether the trial can be continued after that time limit has expired. These are legal questions this Court reviews *de novo*. *Harmon v. Headley*, 95 S.W.2d 154, 156 (Mo. App., W.D. 2003); *Weems v. Montgomery*, 126 S.W.3d 479, 484 (Mo. App., W.D. 2004).

The State argues that Mr. Donaldson's position was rejected by the "analogous" claim rejected in *State v. Hoover*, 719 S.W.2d 812 (Mo. App., W.D. 1988) and *State v. Will*, 753 S.W.2d 333 (Mo. App., S.D. 1998) (Resp. Br. 26). The situation in those cases is not analogous with Mr. Donaldson's. In fact, they are quite distinct in the most significant manner, and that distinction defeats the State's argument.

The appellants in *Hoover* and *Will* had each been found not guilty by reason of a mental disease or defect excluding responsibility and committed thereafter to the custody of DMH pursuant to Section 552.040.2 RSMo. 719 S.W.2d at 813; 753 S.W.2d at 333. Each filed an application for *release* from that custody. 719 S.W.2d at 815; 753 S.W.2d at 333. Neither was brought to trial within sixty days of objections to the release as required by Section 552.040.4, and both argued on appeal that that failure required their release. 719 S.W.2d at 813; 753 S.W.2d at 334. The *Hoover* Court held that the sixty day time limit was directory only, and the application for *release* did not have to be automatically granted. 719 S.W.2d at 817-818. The Southern District Court of Appeals simply

followed in *Will* the reasoning of the Western District Court of Appeals in *Hoover*. 753 S.W.2d at 334.

The distinction the State fails to acknowledge, and which defeats its argument, is that Hoover and Wills had lost their liberty *after an adjudication* of the presence of a mental disease or defect excluding responsibility for the crimes. After the defendant in a criminal case pleads not guilty by reason of a mental disease or defect excluding responsibility, the presence of such mental disease or defect can either be accepted by the State, as it was in *Will*, 753 S.W.2d at 333, or presented to the trier of fact who can acquit on that basis, as it was in *Hoover*. 719 S.W.2d at 813. *See also*, Section 552.030, subs 2, 6 and 7. After acceptance of the not guilty plea by the State, or acquittal by the jury, the trial court must commit the person to the custody of DMH. Sections 552.030.2 and 552.040.1. Thus, by the time the issue presented in *Hoover* and *Will* was raised, the presence of the mental disease or defect had been adjudicated and the appellants were already committed to the custody of DMH.

Mr. Donaldson's case presents a distinctly different situation. At the time the motion to dismiss for failure to comply with the time limit for retrial required by Section 632.495, Mr. Donaldson's case had not been adjudicated, and the presence of the alleged mental abnormality had not been judicially accepted or proved, nor had he yet been committed to the custody of DMH on the basis of

that mental condition. For these reasons, the basis underlying the *Hoover* and *Will* opinions does not apply.

The purpose of Chapter 552 is to exclude from punishment those persons who are dangerous, but due to a want of mental soundness are not accountable for their actions. *Hoover*, 719 S.W.2d at 816. It is the further purpose of Chapter 552 “to keep in confinement an accused *exonerated* of crime by reason of mental disease or defect until the danger of such want of responsibility poses to the public *no longer* exists.” *Id.* (emphasis added). The past-tense of the emphasized language speaks to the fact that the presence of the mental disease or defect had already been adjudicated and the accused had already been committed to the custody of DMH on the basis of that mental condition. It was this purpose that the Western District relied upon to conclude that the sixty-day time limit for a hearing on an application for release from custody was directory only. *Id.* at 817. According to the Court: “The purpose of chapter 552, *once a person accused of a crime is acquitted* by reason of mental disease or defect excluding responsibility, is *to retain* that person in custody until” it is determined that the person does not have a mental disease or defect rendering him dangerous. *Id.* (emphasis added). The Court is again speaking of the procedure *after* the presence of the mental disease or defect has been adjudicated and the accused has been committed to the custody of DMH. Because Hoover’s mental disease or defect had been previously adjudicated, and he had lost his liberty on account of it when he was

previously committed to the custody of DMH, the Court could hold: “It is sufficient if compliance with procedure, albeit tardy, substantially subserves the statutory purpose without jeopardy to any substantial right.” *Id.* at 818.

The same does not hold true in Mr. Donaldson’s situation before this Court. At the time the State violated the statutory requirement by not re-trying Mr. Donaldson within ninety days of the mistrial he had not yet lost his liberty as the result of an adjudication that he is a sexually violent predator. The presence of a mental abnormality had not been adjudicated, nor had he been committed to the custody of DMH. He was being detained pending that adjudication and that commitment. It is this detention that the legislature has expressly limited at every step of the process in the SVP statutes. The State’s position in this appeal contradicts this legislative intention to protect Mr. Donaldson’s “substantial right” of liberty by limiting the pre-adjudication detention. The State wants this Court to ignore this distinction when it suggests that *Hoover* is applicable here because the purpose of the SVP law “is to provide control, care, and treatment of persons found to be sexually violent predators....” (Resp. Br. 29). *Found* to be sexually violent predators not *alleged* to be, which is all that exists prior to trial.

The probate court erred in denying Mr. Donaldson’s motion to dismiss the petition. The judgment and commitment order of the probate court must be reversed, and Mr. Donaldson must be discharged.

III.

The probate court abused its discretion in admitting evidence that Mr. Donaldson suffers antisocial personality disorder (APD), because APD cannot satisfy the statutory requirement of a “mental abnormality,” in violation of his rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the jury may have used APD as a basis for its finding of a mental abnormality, but APD fails to distinguish a condition specifically predisposing a person to commit a sexually violent offense from a personality disposed to criminal conduct in general.

Mr. Donaldson will rely on the argument presented in Point III of his initial substitute brief on this point.

CONCLUSION

Because the probate court erred in denying Mr. Donaldson's motion to dismiss the petition for a violation of his rights to due process of law, as set out in Point I, Mr. Donaldson's commitment to DMH should be reversed, and he should be discharged from custody. The probate court's *post facto* attempt to rescue the State's petition from the application of the time limit mandated by the legislature in Section 632.495 was unavailing. Because the probate court erred in denying Mr. Donaldson's motion to dismiss the petition because he was not brought to trial within ninety days of the declaration of a mistrial, as set out in Point II, the judgment and commitment order of the probate court must be reversed, and Mr. Donaldson must be discharged. Because the probate court abused its discretion in overruling Mr. Donaldson's motions to exclude evidence of a personality disorder, and in admitting the evidence at trial, as set out in Point III, the judgment and commitment order must be reversed and Mr. Donaldson must be discharged.

Respectfully submitted,

Emmett D. Queener, MOBar #30603
Attorney for Appellant
3402 Buttonwood
Columbia, Missouri 65201-3724
(573) 882-9855
emmett.queener@mspd.mo.gov

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,201 words, which does not exceed the 7,750 words allowed for an appellant's reply brief.

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in May, 2006. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 1st day of June, 2006, to Alana M. Barragan-Scott, Deputy State Solicitor, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener