

IN THE
MISSOURI SUPREME COURT

IN THE MATTER OF THE)
CARE AND TREATMENT OF) No. SC 88799
RICHARD TYSON ,)
 Appellant.)

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
SIXTEENTH JUDICIAL CIRCUIT, PROBATE DIVISION
THE HONORABLE KATHLEEN A. FORSYTH, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Richard Tyson appealed the judgment and order of the Honorable Kathleen A. Forsyth following a jury trial in Jackson County, Missouri, committing Mr. Tyson to secure confinement in the custody of the Department of Mental Health as a sexually violent predator. This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction originally rested in the Missouri Court of Appeals, Western District, Article V, Section 3, Missouri Constitution (as amended 1982), Section 477.060, RSMO 2000. This Court accepted the case on the State's application for transfer after the Western District reversed Mr. Tyson's commitment because the State and the probate court lacked jurisdiction to commit Mr. Tyson for a condition the probate found no probable cause to believe existed. Article V, Section 10, Missouri Constitution.

STATEMENT OF FACTS

Mr. Tyson incorporates the statement of facts set out in pages 6 through 26 of his initial brief in the Western District Court of Appeals, which was deposited with this Court upon transfer.

POINTS RELIED ON¹

I.

The probate court erred in permitting the State to seek and gain Mr. Tyson's commitment on the "mental abnormality" of pedophilia, in violation of Mr. Tyson's 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 the State and the probate court were deprived of jurisdiction to proceed on that allegation because the State presented that opinion, and evidence supporting it, at the hearing to determine whether there was probable cause to believe that Mr. Tyson is a sexually violent predator, after which the probate court held that the State's evidence failed to establish probable cause to believe that Mr. Tyson suffers the "mental abnormality" of pedophilia.

State ex rel. Buresh v. Adams, 486 S.W.2d 18 (Mo. banc 1971);

State v. Mattic, 84 S.W.3d 161 (Mo. App., W.D. 2002);

State v. Strickland, 609 S.W.2d 392 (Mo. banc 1980);

¹ Mr. Tyson finds it necessary to reply only to the Respondent's argument in Point I of its brief. Mr. Tyson will rely upon the arguments presented in Point II and Point III of his opening brief filed in the Western District Court of Appeals and submitted to this Court upon transfer of this appeal.

In the Matter of the Care and Treatment of Norton, 123 S.W.3d 170 (Mo.

banc 2003);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10; and

Sections 632.483 and 632.489, RSMo 2000.

ARGUMENT

I.

The probate court erred in permitting the State to seek and gain Mr. Tyson's commitment on the "mental abnormality" of pedophilia, in violation of Mr. Tyson's 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 the State and the probate court were deprived of jurisdiction to proceed on that allegation because the State presented that opinion, and evidence supporting it, at the hearing to determine whether there was probable cause to believe that Mr. Tyson is a sexually violent predator, after which the probate court held that the State's evidence failed to establish probable cause to believe that Mr. Tyson suffers the "mental abnormality" of pedophilia.

Mr. Tyson must correct, at the outset, the State's erroneous assertion that this Court is reviewing a question of an abuse of the trial court's discretion to admit expert opinion testimony (Resp. Br. 21). That is not the issue presented in this case. This Court has stated that whether the circuit court has authority to proceed to trial on an allegation rejected in a preliminary determination is a question of jurisdiction. *State ex rel. Buresh v. Adams*, 468 S.W.2d 18, 22 (Mo. banc 1971). Questions of subject matter jurisdiction are reviewed *de novo*. *Mo.*

Soybean Association v. Mo. Clean Water Commission, 102 S.W.3d 10, 22 (Mo. banc 2003).

The State claimed in its brief that when it files its commitment petition, all that the law requires is that “the State plead that the subject has a mental abnormality, not that the State plead or prove any particular diagnosis.” (Resp. Br. 20). The problem with this claim is that only pleading the presence of a mental abnormality is nothing more than expressing a legal conclusion. This would be the same as pleading that a defendant committed a murder or a defendant breached a contract, without pleading how the murder was committed or how the contract was breached. The State is ignoring that Missouri is a fact pleading state, not a notice pleading jurisdiction. *Charron v. Holden*, 111 S.W.3d 553, 555 (Mo. App., W.D. 2003). “Under Missouri pleading rules, to state a claim, a petition must invoke substantive principles of law entitling the plaintiff to relief and *allege ultimate facts informing the defendant of what the plaintiff will attempt to establish at trial.*” *Id.* (emphasis added).

The State simply quotes statutory language to claim that the “sole question before the probate court is ‘whether probable cause exists to the that the person named in the petition is a sexually violent predator,’” in this case, whether Mr. Tyson ‘suffers from a mental abnormality which makes the person more likely that not to engage in predatory acts of sexual violence if not confined in a secure facility.’” (Resp. Br. 22). The State makes this claim apparently as a springboard

to the assertion that “the language of Section 632.489.2 sets out the significance of the probable cause stage of the proceeding: it is a gate to further fact finding.” (Resp. Br. 25). Again the State is attempting to avoid the requirement that it plead and prove facts, not just legal conclusions, in order to continue an individual’s detention.

As with its attempt to change the standard of review in its favor, the State is also attempting to change the significance of a probable cause hearing from that noted by the Western District Court, below, to one more favorable to the State. A preliminary hearing serves as a check on possible abuse of power, to weed out groundless claims, and to narrow the issues set for trial so that the accused may prepare for trial. *State v. Mattic*, 84 S.W.3d 161, 166 (Mo. App., W.D. 2002); *State v. Hill*, 438 S.W.2d 244, 246 (Mo. 1969); *State v. Strickland*, 609 S.W.2d 392, 395 (Mo. banc 1980). The preliminary hearing tests whether the pleading contains all the essential elements of the allegation asserted. *Strickland, supra*. It is a rule of law that every indictment must contain a complete description of the offense; i.e., must set forth facts constituting the crime with such certainty that the accused may have notice of what he is called upon to meet and controvert, and the court, applying the law to the facts charged, may see that an offense has been committed.

The State’s argument that limiting its ability to proceed to trial to the basis of the probate court’s probable cause finding somehow violates the “gate-

keeping” function of the probate court is simply wrong. The probate court did not weigh competing evidence or rule on the credibility of witnesses. It did nothing more than it was obligated to do: to determine, based on the law and the facts, whether the State’s assertion that Mr. Tyson has the mental abnormality premised on the presence of pedophilia was demonstrated by the attachments to the State’s petition and the evidence produced by the State at the hearing.

The State seeks to escape from the essential elements, and significance, of the preliminary proceeding by resorting to its usual defense that these proceedings are civil rather than criminal (Resp. Br. 32). But again, it ignores rules of law that it would prefer to avoid. An alleged sexually violent predator is afforded many of the rights conferred on a defendant in a criminal proceeding. *In the Care and Treatment of Burgess*, 147 S.W.3d 822, 833 (Mo. App.S.D. 2004). These elements are imported into SVP proceedings to protect the individual’s fundamental liberty interest in remaining free from unwarranted restraint. This Court held that the preliminary hearing conducted by the probate court and the finding of probable cause to proceed is one of these imported criminal procedures. *In the Matter of the Care and Treatment of Norton*, 123 S.W.3d 170, 174 (Mo. banc 2003). The State is now simply ignoring this Court’s instruction that “[t]he SVP act erects an elaborate, step-by-step procedure, conferring on the suspected predator a number of rights enjoyed by defendants in criminal prosecutions [including] the right to a preliminary determination by the probate

judge of whether probable cause exists to believe the suspected predator is [an SVP and] the right to contest an adverse probable cause determination.” *Norton, supra*. The State must ignore this Court’s instruction in *Norton* so that it may avoid the adverse consequences of this Court’s opinion in *State ex rel. Buresh v. Adams, supra.*, discussed in Mr. Tyson’s opening brief.

The State’s position in this appeal is that while it may have to suffer the burden of going through the formality of the preliminary hearing, it does not have to accept the burden of the protections provided to the individual by that procedure.

The State’s lament that Mr. Tyson’s argument in this appeal means that it must prove a particular diagnosis before the person is examined and before the State gets all the relevant records that it can acquire (Resp. Br. 20-21) is totally misplaced. Section 632.483.2, RSMo, requires that the End of Confinement report be performed by a licensed psychologist or psychiatrist, and the report was prepared by a psychologist (L.F. 7). The report’s author made several diagnoses (L.F. 6). Mr. Tyson was imprisoned for six years before the State conducted the End of Confinement evaluation (L.F. 5). This procedure can be initiated any time within 360 days prior to the person’s release. Section 632.483.1(1), RSMo. That the State waited until seventeen days prior to Mr. Tyson’s release to prepare the report and initiate this proceeding, and then did only a cursory and superficial job of the evaluation, is in no way an impediment caused by Mr. Tyson.

This lament simply reflects the State's attitude that this entire process is just a formality it must endure before it confines the individual for an indeterminate amount of time, perhaps for life. The State's argument makes the determination of probable cause irrelevant to the ultimate deprivation of liberty. The State's position in this appeal is that no assertion it makes, no condition it proves or cannot prove, no rule, no procedure, no law, and no judge can ever limit its power to ultimately deprive a citizen of this state of his liberty.

Acceptance of the State's position would allow it to begin the deprivation of liberty with only vague assertions and to alter its assertions and come up with the ultimate reason for the deprivation as it goes along. The State's position would allow it to continue to detain an individual while it tries to come up with a reason for doing so. At the very least, this is an abuse of governmental power that the preliminary hearing procedure defends against.

The State can, and certainly did, point to the steps set out in the statutes for prosecution of these cases that permit further, and more comprehensive, evaluations to be performed before trial. But this procedure does not repeal, override, or eliminate the rules of law governing the procedure as it was actually accomplished in this case. The State followed the steps set out up to the probable cause hearing. But then the process took a turn that caught the State by surprise. The probate court found that the State failed to demonstrate probable cause to believe the existence of a mental abnormality premised upon a specific condition.

The State has been trying ever since to make that part of the procedure irrelevant. Rules of law are not irrelevant, and the State must comply with them like anyone else.

Regardless of the general procedures set out for prosecution of a sexually violent predator allegation, the fact remains in this case that the probate court allowed to the State to proceed upon allegations, and committed Mr. Tyson to secure confinement upon allegations that were exactly the opposite and in total contradiction with the findings it made at the probable cause hearing.

Because the State and the probate court lacked jurisdiction to proceed to trial on evidence of the presence of pedophilia, the judgment of the probate court must be reversed and the cause remanded for a new trial. But in this case, remand for a new trial without evidence of pedophilia is inappropriate because the State's expert witness testified that the other existing conditions, exhibitionism and personality disorder NOS, were insufficient to support Mr. Tyson's commitment. Mr. Tyson should be discharged from commitment to the Department of Mental Health.

CONCLUSION

Because the State and probate court lacked jurisdiction to proceed to trial on evidence of the presence of pedophilia, as set out in Point I of Mr. Tyson's opening brief and this reply brief, the judgment of the probate court must be reversed and Mr. Tyson must be discharged. Remand for a new trial without evidence of pedophilia is inappropriate in this case because the State's expert testified that the other existing conditions, exhibitionism and personality disorder NOS, were insufficient to support Mr. Tyson's commitment. Mr. Tyson should be discharged from commitment to the Department of Mental Health. Because the probate court abused its discretion in permitting the State to present prejudicial evidence of danger unrelated to the acquired condition it presented as a mental abnormality, as set out in Point II of Mr. Tyson's opening brief, the judgment of the probate court must be reversed and the cause remanded for a new trial. Because the probate court abused its discretion in permitting evidence regarding the Static-99 and MnSOST-R, as set out in Point III of Mr. Tyson's opening brief, Mr. Tyson's commitment must be reversed and the cause remanded for a new trial.

Respectfully submitted,

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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 2,449 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 ____, 2007. 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 ____ day of _____, 2007, to Charles S. Birmingham, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

Emmett D. Queener