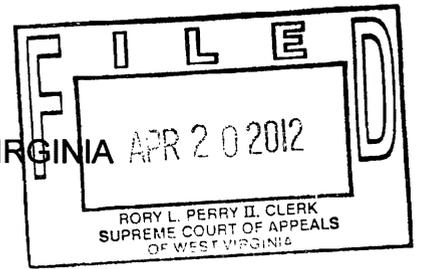


SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Plaintiff below/Respondent,

v.

APPEAL NO.: 11-1618

JAMES ROBERTSON,

Defendant below/Petitioner.

ON APPEAL FROM THE CIRCUIT COURT OF
RALEIGH COUNTY, WEST VIRGINIA

Respondent
BRIEF OF APPELLANT

Submitted by:

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Dated April 20, 2012

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I.

ASSIGNMENTS OF ERROR

RESPONSE TO ASSIGNMENT OF ERROR #1: The Final Order Transferring Appellant to Columbia Regional Care Center (“Geo-Care”), a Private Treatment Facility in South Carolina Does Not Violate the Transportation Clause As Appellant Was Transferred so as To Obtain Appropriate Treatment.

RESPONSE TO ASSIGNMENT OF ERROR #2: The Circuit Court’s Order Transferring Appellant to GEO-CARE is Consistent with the Statutory Requirement That Appellant Be Placed in the Least Restrictive Environment.

RESPONSE TO ASSIGNMENT OF ERROR #3: The Interstate Compact does not Preclude Transfers from the State of West Virginia to a Privately Owned Facility in Another State.

II.

STATEMENT OF CASE

Appellant was indicted on the charge of first degree arson, and on February 22, 2002, he entered a plea of not guilty by reason of mental illness in the Circuit Court of Raleigh County.¹ Pursuant to West Virginia Code § 27-6A-4, Appellant was ordered into the custody of the Department of Health and Human Resources (“Department”) for appropriate placement.² At that time the Department placed Appellant at William R. Sharpe, Jr. (“Sharpe”) Hospital. Appellant had a number of difficulties while at Sharpe. Consequently, the Circuit Court transferred Appellant to the Forensic Evaluation Unit

¹ Appendix, pp. 1-2.

² Appendix, p. 2.

maintained by the Department at South Central Regional Jail.³ A federal lawsuit was filed on Appellant's behalf alleging the amount of time Appellant remained at the Forensic Evaluation Unit was inappropriate and that Appellant was not receiving treatment.⁴ As a result of this lawsuit, a community treatment plan was designed and presented to the Circuit Court for approval to place Appellant in an apartment in the community.⁵

By Order entered April 29, 2010, the Circuit Court approved Appellant's placement in the community with specific requirements, including having Clayman and Associates assist Appellant with community integration, provide psychotherapy, and monitor Appellant's psychiatric stability. If at any time Appellant began to decompensate, Dr. Clayman was to notify the Court.⁶

After approximately four months in the community and three psychotic episodes, Appellant was ordered to Mildred Mitchell-Bateman ("Bateman") Hospital. A multidisciplinary team was organized to determine placement options for Appellant.⁷

While Appellant resided at Bateman Hospital, Dr. Clayman gained access to Appellant's apartment to ensure all of Appellant's belongings were secure. Upon entering the apartment, Dr. Clayman found Appellant's apartment to be in a state of chaos.⁸ Appellant had stacked mounds of clothes throughout his apartment had had duct taped his dropped ceiling. Appellant's behavior caused Dr. Clayman to become

³ Appendix, p. 37.

⁴ Appendix, p. 47.

⁵ Appendix, pp. 60-64.

⁶ Appendix, pp. 71-72.

⁷ Appendix, p. 88.

⁸ Appendix, p. 129.

gravely concerned. Dr. Clayman testified that Appellant's behavior was "part and parcel of a delusional disorder."⁹

In addition to the chaotic condition of the apartment, Dr. Clayman testified that Appellant began to socially isolate himself while residing in the community. Appellant did not want to be around people and began to have a perceived conflict with the neighbor above him.¹⁰ Based on Appellant's behavior while in the community, Dr. Clayman testified that, "When he's out in the world without an enormous amount of structure, something to fight against, he deteriorates, and that's what we saw."¹¹

Appellant resided at Bateman Hospital from March to September. During this period, Appellant's treating physician, Dr. Bobby Miller, testified he had little to offer Appellant besides managing his behavior daily.¹² Having exhausted all available treatment options in West Virginia, the Department began to look for other viable treatment options.

The Department found appropriate placement was found for Appellant at Geo-Care, a psychiatric hospital, in South Carolina.¹³ Geo-Care differs from the available psychiatric facilities in West Virginia in that it has a more homogenous population, meaning there are higher functioning patients like Appellant. Unlike Geo-Care, Sharpe and Bateman Hospitals have a diverse milieu, which includes intellectually disabled patients and dementia patients.¹⁴ Geo-Care is not only focused on treatment but also

⁹ Appendix, p. 131.

¹⁰ Appendix, p. 130.

¹¹ Appendix, p. 136.

¹² Appendix, p. 106.

¹³ Appendix, p. 166.

¹⁴ Appendix, p. 167.

operates on a forensic hospital model which seeks to prevent patients from isolating themselves by not participating in group and individual therapy. Should the patient choose not to participate once he is in therapy, that is allowed, but the patient is continually encouraged to engage in treatment and interact with their fellow patients.¹⁵ The Department's goal is for Appellant to receive necessary treatment unavailable in this State, so that Appellant can return to West Virginia and be placed in an appropriate environment.¹⁶

On September 21, 2011, the Circuit Court of Raleigh County held a hearing to determine the appropriate placement for Appellant. Based on the testimony of the clinicians and the testimony of the Statewide Forensic Coordinator, Georgette Bradstreet, the Circuit Court determined Appellant to be a danger to himself and/or others. The Court further found Appellant needed a secure, structured environment, and West Virginia does not have a reasonably available facility in the State to treat Appellant. The Circuit Court then ordered Appellant be transferred to Geo-Care.¹⁷ The Court also ordered that Appellant's case be reviewed every 90 days.¹⁸ It is from this Order that the appeal is taken.

III.

SUMMARY OF ARGUMENT

Argument #1: Appellant's transfer to Geo-Care does not violate Article III, Section 5 of the West Virginia Constitution, commonly referred to as the Transportation Clause.

¹⁵ Appendix, p. 173.

¹⁶ Appendix, p. 178.

¹⁷ Appendix, p. 226.

¹⁸ Appendix, p. 226.

Appellant remains under the jurisdiction of the Circuit Court of Raleigh County by virtue of his plea of not guilty by reason of mental illness. The West Virginia Judicial System and the Department have an obligation to find the most appropriate treatment for Appellant in addition to a statutory duty to place Appellant in the least restrictive environment while still providing for the safety of the public. See W. Va. Code § 27-6A-4. The Circuit Court appropriately transferred Appellant to Geo-Care to accomplish these competing goals. As no appropriate West Virginia facility exists the Court had no alternative but to transfer Appellant to an out-of-state facility where he can receive the necessary treatment.

Argument #2: Appellant has already had placements in both Sharpe and Bateman Hospitals. Both placements have failed. Appellant has also been placed in the community with a support structure, and that placement has failed also. Despite its best efforts, the Department is unable to find a private facility in West Virginia willing to provide treatment to Appellant. The Department cannot statutorily force a private facility to accept Appellant. See W. Va. Code § 27-6A-4(g). The placement at Geo-Care is the least restrictive alternative available to effectively treat Appellant.

Argument #3: West Virginia Code § 27-15-1, commonly referred to as the Interstate Compact Clause, does not prohibit contractual agreements between a state and a private entity. West Virginia was able to contract with Geo-Care to ensure its obligation of treating Appellant was met.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary in this case as the facts and legal arguments are adequately presented in the briefs and the record on appeal. See Rule 18(a)(4) of the Revised Rules of Appellate Procedure. The decisional process would not be aided in any way by oral argument.

Should the Court determine, however, that oral argument would assist, the Appellant reserves the right to provide argument on these issues.

V.

ARGUMENT

1. The Final Order Transferring Appellant to Geo-Care, a Private Treatment Facility in South Carolina Does Not Violate the Transportation Clause As Appellant Was Transferred so as To Obtain Appropriate Treatment.

In reference to the Transportation Clause found in the W. Va. Const., art. III, § 5, this Court has held:

The clause “[n]o person shall be transported out of, or forced to leave the State for any offense committed within the same,” of W. Va. Const., art. III, § 5, prevents a prisoner convicted under West Virginia law from involuntarily serving any portion of a state sentence beyond the West Virginia borders.

Ray v. McCoy, Syl. pt. 1, 174 W. Va. 1, 321 S.E.2d 90 (1984). Appellant rightfully points out that an analysis of this matter does not require that the transfer out of state be for punishment, yet his argument that the transfer to Geo-Care is punishment is misguided.

First, it should be duly noted that Appellant is not convicted of a crime, and therefore, he is neither a prisoner nor is he serving a sentence, as is referenced in the *Ray* case. Appellant entered a plea of not guilty by reason of mental illness to the crime of First Degree Arson. As a result, treatment of Appellant must comply with W. Va. Code § 27-6A-1 *et. seq.* Specifically, W. Va. Code § 27-6A-4(e) requires:

The ***acquittee*** shall remain under the court's jurisdiction until the expiration of the maximum sentence or until discharged by the court. The court shall commit the ***acquittee*** to a mental health facility designated by the department that is the least restrictive environment to manage the ***acquittee*** and that will allow for the protection of the public.

(Emphasis added).

Second, Appellant was not transferred to Geo-Care as a punishment for his personality disorder, as suggested in Appellant's brief. Instead, he was transferred to obtain the appropriate treatment for his diagnoses. Treatment Appellant cannot receive in this State. Appellant has already had placements at both West Virginia psychiatric facilities and within the community. Each of these West Virginia placements failed. Both of Appellant's treating physicians have testified Appellant cannot receive appropriate treatment within the confines of the State.

Dr. Miller testified that all Bateman Hospital could offer Appellant was daily maintenance.¹⁹ Such a placement would essentially warehouse Appellant with no hope of improvement. Geo-Care operates on a rehabilitative, vocational-based model, unlike either Sharpe or Bateman.²⁰ The environment at Geo-Care is also different from the two state run hospitals in that Bateman and Sharpe Hospitals have a diverse milieu, with acutely psychotic patients, intellectually disabled patients, and patients with

¹⁹ Appendix, p. 106.

²⁰ Appendix, p. 177.

dementia. In addition, these two West Virginia hospitals also house civilly committed patients who are there by virtue of the involuntary commitment process. By contrast, Geo-Care has higher functioning patients more like Appellant. This is very important, as Appellant has a history of bullying lower functioning patients.²¹

Geo-Care is structured in such a way so as to provide patients with a cognitive behavior plan, along with skills and education to assist them in returning to their home state for placement.²² Appellant has a treatment team at this facility that is comprised of a psychiatrist, psychologist, social workers, and nurses.²³ The goal of treatment is to return Appellant to West Virginia where he will be successful with community placement. Indeed, it would be more of a “punishment” to allow Appellant to be warehoused at a West Virginia facility where he cannot receive appropriate placement.

Appellant asserts that his placement at Geo-Care is in essence forced banishment, as he did not agree to be transferred to an out-of-state facility. Patients who are committed do not get to agree to their placement. While they are afforded due process which provides them a voice, ultimately it is the judge who decides appropriate placement after considering all the evidence and weigh the arguments of both sides. Appellant was afforded due process. Not only was a hearing held where Appellant was represented, but prior to that hearing, the Circuit Court Judge ordered that a multidisciplinary team be organized and make recommendations to the court. At the hearing held on September 21, 2011, the issue before the court was appropriate

²¹ Appendix, p. 168.

²² Appendix, p. 177.

²³ Appendix, p. 171.

placement for Appellant that is least restrictive while still providing treatment.²⁴ Based on the testimony of Dr. Miller and Dr. Clayman, the court determined Appellant was a danger to himself and/or others. The court found there was not a reasonable facility in West Virginia to treat Appellant, and further noted that private owned facilities within the State could not be forced to accept Appellant pursuant to W. Va. Code § 27-6A-4(g).²⁵ Given Appellant's extreme and at times violent behaviors, no private facility in the State would consider accepting him into their facilities. This is in complete contrast to the two prisoners in the *Ray* case who were not afforded due process, and were transferred based solely on a decision by Commissioner of the West Virginia Department of Corrections which seemed to cause concern as this Court stated:

The provision would, for example, deny a warden the ability to exile an inmate who became a vocal advocate of prisoners' rights and hence irksome to overworked and understaffed officials. The warden could not silence her voice by sending her to another facility in another state.

Appellant has not been exiled by the court for convenience. Appellant is mentally ill. Appellant needs treatment – treatment that is unavailable to him in this State. Based on the testimony of the two clinicians intimately familiar with Appellant, as well as the services offered by the State of West Virginia, the Circuit Court determined that Appellant could not receive the appropriate treatment at either Sharpe or Bateman Hospitals.

Appellant also argues that the Circuit Court's determination that Appellant was not competent to object to the transfer to Geo-Care is in error. Clearly, Appellant is and remains under the Circuit Court's jurisdiction. It is the court's

²⁴ Appendix, p. 225.

²⁵ Appendix, p. 226.

responsibility to ensure that the Department places Appellant in the least restrictive environment while ensuring the safety of the public. Clearly given the requirements set forth in code, the Circuit Court is not constrained with respect to placement by the desires or approval of Appellant.

The Circuit Court has likened Appellant's situation to that of a juvenile who is transferred to an out-of-state facility. Appellant argues that not only is a juvenile considered incompetent, as a matter of law, due to the juvenile's age but also there is a requirement of a multidisciplinary team which makes recommendations concerning the juvenile, including placement out-of-state. Appellant's case has been handled in the same manner. As stated above, the Circuit Court ordered a multidisciplinary team review Appellant's case and report recommendations to the Court. This was completed prior to the September 21, 2011, hearing where the decision was made to transfer Appellant to Geo-Care for treatment, as it was the facility that best met Appellant's therapeutic needs. In addition, the Circuit Court has ordered that a review hearing be held every 90 days.²⁶

Appellant's argument concerning transfer out of state violates the Equal Protection Clause of the United States Constitution is misplaced in this instance. By virtue of Appellant's mental illness and personality disorder, the Court has ordered that he be transferred to a facility where he will obtain the appropriate treatment. Appellant is not a prisoner, but a patient, who deserves appropriate treatment so he may come back to West Virginia and be in a lesser restrictive environment.

²⁶ Appendix, p. 226.

For these reasons, the Circuit Court did not err when it ordered Appellant transferred to Geo-Care for treatment.

2. The Circuit Court's Order Transferring Appellant to Geo-Care is Consistent with the Statutory Requirement That Appellant Be Placed in the Least Restrictive Environment.

When Appellant entered a plea of not guilty by reason of mental illness, the Circuit Court was required to follow W. Va. Code § 27-6A-4(e) which requires:

The acquittee shall remain under the court's jurisdiction until the expiration of the maximum sentence or until discharged by the court. The court shall commit the acquittee to a mental health facility designated by the department that is the least restrictive environment to manage the acquittee and that will allow for the protection of the public.

Appellant's brief makes numerous references to the time Appellant was placed at the Forensic Evaluation Unit at the South Central Regional Jail. Appellant's placement in that unit is now a moot issue, as it was remedied by a federal lawsuit referenced repeatedly throughout Appellant's brief. Appellant argues that the Department should not be able to warehouse him in a prison structure, equating the hospital in South Carolina to the Forensic Evaluation Unit.

Clearly, Appellant is not being warehoused at Geo-Care. In fact, the complete opposite is true. Geo-Care has a similar population to Appellant. Appellant has a treatment team which consists of medical professionals trained to deal with special issues presented by Appellant. Appellant receives treatment from these individuals. Because Geo-Care operates on a cognitive behavior modification plan, Appellant skirts over the fact that behavior modification is one aspect of treatment. For Appellant behavior modification is the most critical aspect of effective treatment.

The court must place Appellant in the least restrictive environment where he can receive appropriate treatment. The results of Appellant's prior placements belie Appellant's argument that such a placement can be made in West Virginia. Appellant has been a patient at both Sharpe and Bateman Hospitals, and has resided in the community. All of these placements have failed. When looking at placement options for Appellant during the September 21, 2011, hearing, Sharpe Hospital was not an option as even the Dangerousness Assessment conducted in 2010 recommended he not be returned to Sharpe Hospital because given his history this placement would likely fail yet again.²⁷

The community was not a viable placement option either as previous experience showed that while in the community with a support network in place Appellant still suffered several psychotic episodes. The court then looked to Bateman Hospital and determined it was not a viable option as Dr. Miller testified that Appellant has a diagnoses of AXIS I psychotic disorder, not otherwise specified, and an AXIS II diagnosis of anti-social personality disorder.²⁸ Appellant's AXIS I psychotic disorder appears when he is under stress from the AXIS II anti-social personality disorder.²⁹ Given this diagnosis and Appellant's behavior, Dr. Miller testified that he could do no more than try and manage Appellant's daily outbursts.³⁰ This, it could be argued, would result in merely warehousing Appellant, instead of working to treat his specific needs. While Appellant alleges the Department has refused to consider placement for Appellant into the Transitional Living Facility. Appellant avers he has been refused

²⁷ Appendix, p. 59.

²⁸ Appendix, pp. 121-122.

²⁹ Appendix, p. 122.

³⁰ Appendix, p. 123.

consideration into the Transitional Living Facility simply because Georgette Bradstreet, the Statewide Forensic Coordinator, determined he would not abide by the rules. Yet, in actuality prior to Appellant's placement in the community he refused to even consider the Transitional Living Facility.³¹ Ms. Bradstreet also testified that to be considered for the Transitional Living Facility, the patient must maintain a behavioral standard over a period of time. Appellant is not appropriate because the longest he can maintain a behavioral standard is two weeks.³² Given the testimony from the clinicians, placement in the Transitional Living Facility would amount to setting Appellant up for failure, which is counter-therapeutic and contrary to the way the Department operates, and would put the other lower functioning residents at risk for danger. For those reasons, the court determined the Transitional Living Facility was no an appropriate placement.

Ultimately, the least restrictive alternative left to the court was Geo-Care. For the court to have found otherwise was to simply repeat past failures. Therefore, no error was committed in transferring Appellant to Geo-Care.

3. The Interstate Compact does not Preclude Transfers from the State of West Virginia to a Privately Owned Facility in Another State.

West Virginia Code § 27-15-1, *et. seq.* is identified as the "Interstate Compact on the Mentally Disorder Offender." This section allows for party states to engage in a compact for "common action to improve their programs for the care and treatment of mentally disordered offenders." W. Va. Code § 27-15-1(a).

³¹ Appendix, pp. 181-182.

³² Appendix, p. 182.

Appellant argues that the Department has violated this provision of code because it has not contracted with the State of South Carolina. West Virginia Code § 27-15-1, Article X states:

Nothing contained in this compact shall be construed to abrogate or impair any agreement or other arrangement which a party state may have with a nonparty state for the custody, care, treatment, rehabilitation or aftercare of patients nor to repeal any other laws of a party state authorizing the making of cooperative arrangements.

It is clear from this Article that the Interstate Compact Clause was not meant to be restrictive, but instead was to be a mechanism to assist states in treating mentally disordered offenders. The Department has contracted with a private entity, not a state-run facility. First, Ms. Bradstreet travelled to Geo-Care and reported her findings to the multidisciplinary team prior to the September 2011 hearing.

Ms. Bradstreet testified that Geo-Care would initially meet with Dr. Miller, Dr. Clayman, and Ms. Bradstreet to discuss Appellant's issues. Then, Geo-Care would create a treatment plan and would allow the multidisciplinary team in West Virginia to participate, should it be desired.³³

The goal of the Interstate Compact is to make it easier for states to work together to get treatment needed for various mentally ill patients. That is exactly what has occurred here by contracting with a private facility. There is no prohibition to contracting with a private entity to obtain treatment for a patient. Therefore, the Circuit Court did not err when it transferred Appellant to Geo-Care.

³³ Appendix, pp. 171-172.

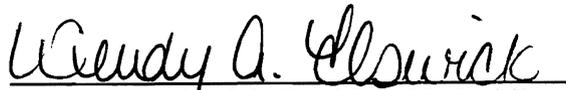
VI.
CONCLUSION

For the reasons set forth above, Respondent respectfully requests this Court uphold the order from the Circuit Court of Raleigh County transferring Appellant to a private facility in South Carolina as the appropriate placement for Appellant to receive treatment.

RESPECTFULLY SUBMITTED,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES

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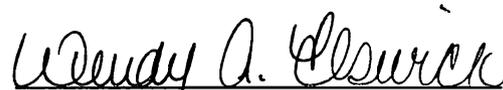
JAMES ROBERTSON,

Defendant below/Petitioner.

CERTIFICATE OF SERVICE

I, Wendy A. Elswick, Assistant Attorney General, do hereby certify that I have this 20th day of April 2012, served a true copy of the foregoing *Brief of Appellant* on the following individual(s) by depositing the same in the United States Mail, postage prepaid, addressed as follows:

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