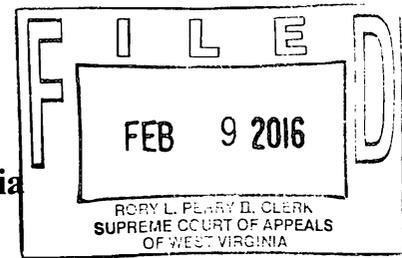


In the Supreme Court of Appeals of West Virginia
Docket No. 15-0876



CHIP MELTON DAVIDOW

Petitioner

v.

STATE OF WEST VIRGINIA,

Respondent

Petitioner's Reply Brief

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Introduction

West Virginia law is clear: A person found not guilty by reason of mental illness is entitled to be placed in the least restrictive environment available to manage his condition. W. Va. Code § 27-6A-4(e). Chip Melton Davidow, such an acquitee, has nonetheless been placed in an environment that is indisputably more restrictive than necessary to manage his condition. The Circuit Court therefore erred in failing to order him transferred to a less restrictive environment.

The State's brief never claims that Highland Hospital is the least restrictive environment to manage Mr. Davidow, nor could it have. Mr. Davidow was placed in a less restrictive environment – peacefully and without incident – for nearly twenty years. Rather than directly addressing this problem, the State obfuscates the issue, claiming that Mr. Davidow is not entitled to “pick his own placement” and suggesting that if he wishes to be placed in a less restrictive environment – as he is entitled to be – he can wait to advance through the step-down procedures at Highland. But that is not the law. Mr. Davidow already worked through years of step-down procedures after his admission to Bournewood Hospital in Massachusetts. His twenty-year residency, first at Bournewood and then at Wild Acre Inn,¹ prove that a less restrictive environment is sufficient to manage his illness. The restraints on his liberty at Highland Hospital go well beyond what is

¹ Of note, both placements were agreed to by the State and ordered by the Circuit Court of Raleigh County, WV. (App. 14-16, App. 50-51, App. 89.)

necessary to manage his present condition. He should therefore be transferred to a less restrictive environment. *See* W. Va. Code § 27-6A-4(e).

Argument

- 1. Mr. Davidow is not seeking to pick his own placement; he is seeking to be placed in – indeed, returned to – the least restrictive environment to manage his condition.**

At the outset, the State concedes that Mr. Davidow is entitled to placement in the least restrictive environment. (*See* Resp. Br. at 6.) The State goes on to claim, however, that what Mr. Davidow really wants is to pick his own placement. This argument misses the point.

Mr. Davidow's Motion for a Transfer to a Less Restrictive Placement sought just that – a transfer to a less restrictive placement. (App. 71-135.) To be sure, the Motion also asserted that the Wild Acre Inn Belmont program would be the most appropriate placement, as it is the sister program to Wild Acres Inn Lexington. (*Id.*)

In 1995, the Circuit Court ordered Mr. Davidow placed at the Wild Acre Inn Lexington program. (App. 89.) He lived there peacefully for nearly twenty years. When he learned of its impending closure, he notified the Circuit Court and asked to relocate to Wild Acres Inn's comparable Belmont program. Mr. Davidow identified the Belmont program because of its proximity and similarity to the therapeutic programs at Wild Acre Inn, where he had lived successfully for nearly

two decades, making vast strides in his treatment. (App. 110-14.) In addition to allowing him to remain under the supervision of his long-time treating psychiatrist, Dr. Kantar, placement at Wild Acre Inn Belmont would have allowed him to continue his therapy regimen, which included group music therapy.² (App. 111-114, 153.) This music therapy has been crucial to Mr. Davidow's recovery and well-being. No comparable programming is available to Mr. Davidow in West Virginia, where he is kept in a locked ward under GPS monitoring.

The fact that Mr. Davidow, rather than the State, suggested the Wild Acre Inn Belmont program as an appropriate alternative after the Wild Acre Inn Lexington program closed is of no consequence. In support, Mr. Davidow submitted a proposed treatment plan and numerous evaluations, both by the individuals who have cared for him and by a retained forensic psychiatrist. (App. 21-22, 25-70, 111-14, 136-82.) Mr. Davidow identified an appropriate subsequent placement and provided all of the information requested by the Circuit Court in its 2014 order. (*Id.*) The Circuit Court erred in denying his motion.

² See www.tunefoolery.org. Tunefoolery is "musicians in mental health recovery committed to personal and artistic growth. Through our musical performances, we share empowerment and healing." As demonstrated on its website, Tunefoolery was started by a psychotherapist/musician. The organization is staffed in part by mental health professionals and is funded in part by the Massachusetts Department of Mental Health.

2. The Circuit Court, not DHHR, ordered Mr. Davidow returned to West Virginia.

The State further suggests that the Circuit Court was correct in denying Mr. Davidow's motion because mental health facilities are normally designated by DHHR. But in this case, the Circuit Court was responsible for determining whether an out-of-state placement was the least restrictive alternative to manage Mr. Davidow's condition. *See State v. Robertson*, 230 W. Va. 548, 555, 741 S.E.2d 106 (2013) (determining that an out-of-state placement was the least restrictive alternative). It was the Circuit Court that ordered Mr. Davidow be institutionalized in Massachusetts twenty years ago and that retains continuing jurisdiction over him. *See* W. Va. Code § 27-6A-4(e); (App. 13, 50-51.) And the Circuit Court, not DHHR, ordered his return to West Virginia in 2010 – even though there was no change in his condition to warrant such a move.

The State further argues that “West Virginia Code provides that the determination about which facilities are acceptable for placement is made by the DHHR.” (Resp.’s Br. at 14.) The State cites two code sections in support of this argument. The first, West Virginia Code § 27-6A-3, addresses the competency of a defendant to stand trial. Because Mr. Davidow was long ago determined to be not criminally responsible due to his mental illness, his competency to stand trial is not at issue here.

The second, West Virginia Code § 27-6A-4, requires that the Circuit Court order the acquittee placed in the least restrictive environment: “*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.” W. Va. Code § 27-6A-4(e) (emphasis added).

Accordingly, the Circuit Court was obligated to order Mr. Davidow placed in the least restrictive environment.

Mr. Davidow relied on the 1995 order that placed him at Wild Acres Inn Lexington. (App. 89.) He has complied with the terms and conditions of that order, and has not been without Wild Acre Inn’s supervision – not even to attend his mother’s funeral. (App. 91-93.) His address has not changed, and he has been represented by the same attorney, Roberta Green, since 1999. Just as the Circuit Court placed Mr. Davidow in Wild Acre Inn Lexington in 1996, it had the authority to permit his relocation to the Wild Acre Inn Belmont program, and it erred in refusing to do so.

3. While in Massachusetts, Mr. Davidow complied with all requirements of the Circuit Court.

The State goes on to suggest that Mr. Davidow failed to adequately communicate with the Circuit Court while he was institutionalized in Massachusetts. That is simply untrue. Mr. Davidow was careful to keep the Court informed of relevant developments. When he needed to travel to attend his

mother's funeral, he contacted the Circuit Court and obtained permission to do so. (App. 17-18, 91-93.). When he learned Wild Acre Inn Lexington would be closing, Mr. Davidow promptly notified the Court of that fact and requested that he be allowed to relocate to the Wild Acre Inn Belmont program. (App. 25-70.)

During his twenty years in Massachusetts, Mr. Davidow never failed to comply with any direction or Order delivered to him by the Court. The only evidence of a communication breakdown is the puzzling May 24, 2000 Order for Transport and Commitment to William Sharpe Hospital. (App. 3 & n.4.) Neither the State nor Mr. Davidow was aware of this Order until the State obtained a copy from Sharpe Hospital nearly fourteen years later. *See* App. 279: 12-20 ("Also, we received from Sharpe Hospital after all this happened, the - - a copy of the attested order, which was not - - I don't believe maintained in the prosecutor's files . . . It seemed to have disappeared."). There is no indication that the Order was ever sent to Mr. Davidow, Wild Acre Inn, or anyone acting on Mr. Davidow's behalf. (App. 3 n.4.)

If the Circuit Court had requested more frequent updates about Mr. Davidow's condition, those updates could have been provided. In fact, Mr. Davidow's treating physician in Massachusetts completed monthly reports of his condition. These reports were not provided to the Circuit Court because it never requested them, and the Agreed Order did not require them. (App. 13-16.)

Mr. Davidow's address did not change from 1996 until he was transported back to West Virginia in 2014. Mr. Davidow's treating psychiatrist did not change from 1996 until 2014. The Court's file is replete with contacts between Mr. Davidow's counsel, the Prosecuting Attorney's Office and the Circuit Court of Raleigh County. Additional contacts were available to the Court then and now, and any suggestion that Mr. Davidow failed to report or eluded the Court's oversight is unsupported by the record.

4. The Circuit Court made no findings as to whether Mr. Davidow's current placement is the appropriate one to manage his condition.

As is explained in Petitioner's opening brief, the Circuit Court erred as a matter of law by denying Mr. Davidow's motion for a transfer without determining whether his current placement, Highland Hospital, was the least restrictive environment to manage his condition and ensure protection of the public. (App. 1-12.) The Court's Order makes no findings on this question, and reaches no conclusion as to whether Mr. Davidow's current placement is the appropriate one.

The State disputes this, but nonetheless fails to identify any such findings in the Court's order. Instead, the State claims the Circuit Court found that "West Virginia is *capable* of providing Petitioner with a placement in the least restrictive environment." (Resp. Br. at 13 (emphasis added)). But even if West Virginia were capable of providing such a placement, it has not done so. The Circuit Court failed to make findings on the essential question: Whether Mr. Davidow's current

placement is the least restrictive alternative to manage his condition. The State has not identified any findings on this issue because none were made. Denying Mr. Davidow's motion for transfer without determining whether his placement at Highland Hospital is the least restrictive environment is plain error under § 27-6A-4(e).

5. The Circuit Court placed undue weight on the testimony of Georgette Bradstreet, who conceded that she had not reviewed Mr. Davidow's most recent evaluations.

Next, the State claims that the Circuit Court rightly placed significant weight on Georgette Bradstreet's testimony that West Virginia is capable of providing Mr. Davidow with an appropriate environment to manage his condition. As the State admits, Ms. Bradstreet had not reviewed Mr. Davidow's recent evaluations. (Resp. Br. at 16.) Instead, Ms. Bradstreet had only reviewed Mr. Davidow's evaluations from 1994, shortly after the crime occurred and prior to his transfer, and was not familiar with the contemporary opinions and reports of Dr. Saar and Mr. Davidow's treatment providers. (App. 285:7-14, App. 298:17-App. 299:12.) She also had not reviewed either Mr. Davidow's prior treatment plan or the proposed treatment plan for him at Wild Acre Inn Belmont. (App. 293:22-App. 294:1.) Meanwhile, the State's only assessment of Mr. Davidow was that done by Dr. Law at Sharpe Hospital, which demonstrated that he was compliant and that it was appropriate to provide him additional freedoms. (App. 149-155)

Because she had not reviewed the necessary information, Ms. Bradstreet could only present an outdated picture of Mr. Davidow. Her opinion was based on the circumstances of the underlying crime and his condition at the time of the offense. Her testimony did not account for his current condition and was therefore largely irrelevant to the type of environment needed to manage that condition. *See Jones v. United States*, 463 U.S. 354, 369 (1983) (noting that “[t]here is simply no necessary correlation between severity of the offense and length of time necessary for recovery.”) Because Ms. Bradstreet lacked the necessary information to form her opinions of the proper treatment for Mr. Davidow, the Circuit Court erred in relying on her testimony.

6. If West Virginia is capable of placing Mr. Davidow in the least restrictive environment for his condition, it has not done so.

Finally, the State claims that West Virginia has options for acquitees that are less restrictive than Highland Hospital. The State suggests that if Mr. Davidow continues to progress through the step-down procedures at the hospital, he may be able to eventually progress to an environment that is less restrictive than where he is currently placed. But this argument misses the point. Mr. Davidow, in his present condition, can be managed – and much more effectively managed – in an environment that is much less restrictive than where he is being housed. His twenty-year successful residency at Wild Acre Inn demonstrates as much. Nothing

in the statute requires that he first work through “step-down” procedures when it is apparent from the facts that a less restrictive environment is appropriate – he lived in one for the last twenty years. He is entitled to be placed, immediately, in an appropriate setting for his present condition.

Conclusion

For the reasons set forth above, Mr. Davidow asks that the Court reverse the Circuit Court’s Order Denying his Motion for Transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 9, 2016, she served a true and correct copy of the foregoing **Petitioner's Reply Brief** by sending the same in the U.S. Mail, first class, postage prepaid, upon the following:

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