IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2280

JERRY REGIER,
Secretary, Florida Department of
Children and Families,

Petitioner,

vs.

JACK KEPHART, et al.,

Respondents.

_____

ON PETITION FOR DISCRETIONARY REVIEW

_____

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Counsel for the Respondents herein have submitted two independent Answer Briefs on the Merits. The Office of the Public Defender for the 19th Judicial Circuit has submitted a brief on behalf of 11 named Respondents in this Court. Attorney Juan F. Torres, III, Esq., has submitted a similar Answer Brief on behalf of one additional Respondent in this Court, George Thayer. The instant Reply Brief of the Petitioner herein, Jerry Regier, Secretary, Florida Department of Children and Families, is in response to both of those Answer Briefs.

SUMMARY OF ARGUMENT

The lower court erroneously held that the oath requirement of the fourth amendment of the United States Constitution and Article I, § 12, of the Florida Constitution, could be satisfied, in a sexually violent predators commitment case, only by the oath or testimony of a mental health professional who has evaluated the individual.

ARGUMENT

THE LOWER COURT ERRED IN HOLDING THAT A VERIFIED PETITION, SIGNED BY AN ASSISTANT STATE ATTORNEY, UNDER OATH, SETTING FORTH PROBABLE CAUSE TO PLACE AN INDIVIDUAL IN CUSTODY PENDING SEXUALLY VIOLENT PREDATOR CIVIL COMMITMENT PROCEEDINGS, IS INSUFFICIENT.

The Petitioner, in the Initial Brief on the Merits, argued that the Fourth District erroneously held that a verified petition, signed by a prosecutor, can not satisfy the constitutional requirement of an oath in support of a probable cause determination resulting in a seizure of an individual to be held for civil commitment proceedings. While that requirement can undoubtedly be satisfied through an affidavit or sworn testimony from a mental health professional, the Fourth District erroneously concludes that that is the only manner in which the oath requirement can be satisfied.

The Respondents herein suggest that the State is improperly relying on Johnson v. State, 660 So. 2d 648 (Fla. 1995). Johnson does not deal with the question of who may execute an affidavit used for a probable cause determination resulting in a fourth amendment seizure of an individual. Rather, it deals with the nature of the oath. This Court, in Johnson, recognized that a police officer, submitting an affidavit in support of a search warrant, necessarily relies on permissible hearsay information for the probable cause determination. As a result, the officer could not be put in the position

of having to personally swear to the accuracy of the hearsay information. The same principle applies in the instant case, whether the affidavit or testimony comes from a mental health professional or an assistant state attorney. As detailed in the prior brief herein, a prosecutor, in a verified petition, or a mental health professional, in an affidavit, would necessarily be relying on extensive hearsay information, in the form of prior records, transcripts, and similar materials. Neither the prosecutor nor the mental health professional can personally swear to the various facts, but, such hearsay information is properly considered in a probable cause determination. As a result, as in Johnson, it must necessarily be concluded that whether the affidavit/oath comes from the prosecutor, in a verified petition, or a mental health professional, in an affidavit in support of a probable cause determination, the proper oath is one which permits the affiant to state that the information is true and correct to the best of his or her knowledge. There is no basis for distinguishing between the situation at issue in Johnson and that which is at issue in the instant case.

The Respondents herein attempt, at great length, to assert that any oath/affidavit must be from one "with personal knowledge of the facts." Brief of Respondent, pp. 6-7. However, as detailed in the Initial Brief of Petitioner herein, a probable cause determination to take an individual into custody is one which, in accordance with constitutional requirements, may be based on hearsay. The job of the magistrate, in

making the probable cause determination, is to ascertain the reliability of any hearsay relied upon. Insofar as hearsay is a well-recognized basis for probable cause determinations for arrests, searches, or other fourth amendment seizures, neither the federal nor state constitution can mandate that an affidavit or testimony in support of a warrant for arrest or detention for commitment proceedings be based solely on the affiant's personal knowledge.

The Respondents appear to be relying, in large part, on Rule 3.840, Florida Rules of Criminal Procedure. That rule sets for the procedures for the issuance of an order to show cause in indirect criminal contempt proceedings. The rule is not a constitutional mandate. Moreover, that rule is not being used as a predicate for a seizure under the fourth amendment.

The Respondents also rely, in large part, on § 92.525, Florida Statutes. That section, as noted by the Respondents, limits verifications of documents to assert that "the facts stated in it are true," "except when a verification on information or belief is permitted by law, in which case the words 'to the best of my knowledge and belief' may be added." Based on the reasoning of this Court's opinion in Johnson, such verification based on information or belief is permitted by law under the circumstances presented herein.

The Respondents' comparison of the instant case to a pleading in a foreclosure

case, Brief of Respondents, pp. 9-10, is inappropriate. In such cases, affidavits based on personal knowledge are readily available. In the instant case, for reasons detailed in the Petitioner's Initial Brief herein, the scope of the information which provides the basis for a probable cause determination in a sexually violent predator civil commitment proceeding is vast. It draws on a wide array of documentary history, prior criminal cases, prior police reports, prior witness statements, some of which are sworn, interviews of potential commitment defendants, interview of other family members and/or victims of prior offenses, etc. No person preparing an affidavit for use in a probable cause determination at the outset of the commitment case is going to have personal knowledge of all of the relevant facts. Such an individual, whether the mental health professional, or the prosecutor, in a verified petition, can identify the sources of information, so that the magistrate is aware of what is or is not hearsay, and, the document describing such information can provide detailed background, enabling the magistrate to determine the reliability of such information for the purpose of issuing a warrant which has consequences under the fourth amendment or Article I, § 12 of the Florida Constitution. Given the problems of delineating the reliability of hearsay, when it is relied on, it is the Petitioner's position herein that a prosecutor, through a verified petition, is in a better position to do this than a mental health expert. For such reasons, a verified petition from a prosecutor should be deemed an

acceptable alternative to an affidavit or testimony from the mental health professional, which the Fourth District, below, was willing to accept.

The Petitioners also appear to be relying on a provision of the Baker Act, § 394.463(2)(a)1., Florida Statutes. That section authorizes a court to issue an ex parte order, subjecting an individual to an involuntary examination, based upon sworn testimony, written or oral. Apart from the legislature's express disavowal of the applicability of Baker Act provisions to sexually violent predator commitment cases, § 394.911, Florida Statutes, several other facts must be noted as to this inappropriate comparison. First, the provision of the Baker act does not specify from whom the sworn testimony must come; it does not limit the sworn testimony to a mental health expert who has evaluated the individual. Indeed, since the purpose of the testimony in 394.463(2)(a)1., is to obtain an involuntary examination, no such examination has yet been conducted. That means, of necessity, that the testimony under that provision would generally be coming from individuals other than mental health experts - i.e., police officers investigating abnormal behavior. Second, there is nothing in the quoted Baker Act provision which limits the oath or testimony to "personal knowledge." Third, in the context of sexually violent predator commitment proceedings, the oath/affidavit at issue is coming after the mental health professionals have made their evaluations. See, §§ 394.913, 394.914, 394.915, Florida Statutes. Under such

circumstances, there is less likelihood of an erroneous result in a probable cause determination than in the Baker Act provision where custody is being determined prior to any such mental health evaluation. For such reasons, the comparison to the non-constitutional, statutory requirement of the Baker Act, is not appropriate in the context of sexually violent predator civil commitment proceedings.

The Petitioner would further note that there is absolutely nothing in the Respondents' briefs which supports the proposition that an affidavit or testimony in support of a probable cause determination in a commitment case must come solely from a mental health professional who has evaluated the individual. Just as the constitution does not mandate that arrest warrants in criminal cases be predicated on sworn testimony or affidavits from individuals with personal knowledge, so too, in commitment cases, affidavits resulting in warrants or orders for custody pending trial, need not come from any particular individual, as long as they satisfy the constitutional requirement of enabling the magistrate to determine the existence of sufficient facts and to determine the reliability of sources of hearsay which are being relied upon.

Lastly, the State would note that there is no compelling need for anything further than that which is outlined above. After the initial ex parte probable cause determination is made, pursuant to decisions from the Fourth District Court of Appeal, an individual who has been taken into custody pending a sexually violent predator civil

commitment trial, has the right to demand an in-court, adversarial probable cause determination, to be held within five days of the demand. See, Valdez v. Moore, 745 So. 2d 1009 (Fla. 4th DCA 1999); State v. Kobel, 757 So. 2d 556 (Fla. 4th DCA 2000). The ex parte probable cause determination is merely a preliminary determination, and any individual detained pursuant to that determination is entitled to a full adversarial proceeding, with counsel present and with the right to present witnesses and cross-examine the State's witnesses. The proceeding is, in essence, a mini-trial. Given that the initial probable cause determinations, oaths, affidavits, etc., are of consequence only until a defendant in a commitment case asks for, and receives, the adversarial probable cause hearing to which there is a prompt entitlement based on existing case law, there is no valid reason for requiring more than a verified petition from a prosecutor.

CONCLUSION

Based on the foregoing, the decision of the lower Court should be disapproved, to the extent that it held that the oath requirements of the state and federal constitutions could be satisfied solely by affidavit or testimony from a mental health expert who has evaluated the individual.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was mailed this ___ day of December, 2002, to RUSSELL L, AKINS, Assistant Public Defender, Office of the Public Defender, 216 South Second Street, Ft. Pierce, FL 34950; and JUAN F. TORRES, III, Esq., 423 Delaware Avenue, Ft. Pierce, FL 34950.

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RICHARD L. POLIN

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Reply Brief of Petitioner has been typed in Times New Roman, 14-point type.

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RICHARD L. POLIN