

VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the
City of Richmond on Friday the 14th day of August, 2015.*

Richard Tyson, Appellant,

against Record No. 140917
Circuit Court No. CL13001220-00

Commonwealth of Virginia, Appellee.

Upon an appeal from a
judgment rendered by the Circuit
Court of the City of Williams-
burg and James City County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that there is no reversible error in the circuit court order committing Richard Tyson ("Tyson") to the custody of the Department of Behavioral Health and Developmental Services.

On August 21, 2002, Tyson pled guilty and was convicted of raping a twelve-year old girl who was his piano student. He was sentenced to life imprisonment, with all but 13 years suspended. The Commonwealth filed a petition to have Tyson civilly committed as a sexually violent predator ("SVP"). A jury trial was held on February 24-25, 2014, at the conclusion of which, the jury unanimously found that Tyson was a SVP.

After the jury returned its verdict, the circuit court stated that the next step in the proceedings would be for the court to determine whether there was a less restrictive alternative to commitment. The circuit court then asked the Commonwealth whether it had any additional information to present.

The Commonwealth argued that, under this Court's decision in Commonwealth v. Bell, 282 Va. 308, 714 S.E.2d 562 (2011), the burden of proof was on Tyson to prove that he was an appropriate candidate for conditional release under Code § 37.2-912. The Commonwealth explained that the circuit court had the option of deciding whether to commit Tyson that day, or to continue the case for a hearing on the issue of conditional release. But the Commonwealth argued that the evidence presented at trial was sufficient for the court to "go ahead and commit him now."

The circuit court then asked counsel for Tyson if she had anything she wished to say. Counsel did not respond to the Commonwealth's argument regarding the allocation of the burden of proof. Instead, counsel merely requested a continuance to have an opportunity to present a plan that would support conditional release.

The circuit court determined that, based upon the evidence already presented by the Commonwealth at trial, Tyson was in need of treatment that could not be provided in a less secure alternative than an involuntary secure inpatient treatment program. The circuit court then committed Tyson to the custody of the Department of Behavioral Health and Development Services.

At trial, the circuit court never specifically stated that it was shifting the burden of proof to the Respondent; but in its final order, it stated that Tyson did not meet "his burden of proof" that he satisfied the criteria for conditional release. Counsel for Tyson signed the final order "SEEN AND objected to for the reasons stated on the record."

Two months after Tyson was civilly committed as a SVP, we issued our opinion in Gibson v. Commonwealth, 287 Va. 311, 756 S.E.2d 460 (2014). In Gibson, we held that "the burden of proof by clear and convincing evidence rests on the Commonwealth, not the respondent, and never shifts." Id. at 319, 756 S.E.2d at 464-65. We noted that the question regarding which party had the burden of proof to establish the criteria for conditional release was not at issue in Bell, and therefore our statement regarding the burden was dicta, but to the extent Bell was contrary to our holding in Gibson, it was overruled. Id. at n.2.

We granted Tyson's appeal on the following assignment of error:

1. The trial court erred in holding that Tyson bore the burden of proof to establish he met the criteria for conditional release under Virginia Code § 37.2-912(A). If this Honorable Court holds that this issue is barred for consideration pursuant to this Court's Rule 5:25, Tyson asks the Court to consider the issue in order to meet the ends of justice on the basis of this Court's ruling in Gibson v. Commonwealth, 287 Va. 311, 756 S.E.2d 460 (2014).

The Commonwealth argues that Tyson is procedurally barred from raising this argument on appeal because he never objected to the circuit court's allocation of the burden of proof. It is clear from the record that, despite being given an opportunity by the circuit court to respond to the Commonwealth's argument, Tyson never addressed the allocation of the burden of proof or objected to the Commonwealth's portrayal of Bell as controlling.

Even if our decision in Gibson changed existing law, such change would not provide good cause to make an exception to the contemporaneous objection requirement of Rule 5:25. We considered

a similar issue in Gheorghiu v. Commonwealth, 280 Va. 678, 701 S.E.2d 407 (2010), where a defendant failed to object to improper venue at trial. After his conviction, this Court issued its decision in Meeks v. Commonwealth, 274 Va. 798, 651 S.E.2d 637 (2007), which was favorable to the defendant, and Gheorghiu argued on appeal that venue was improper based on the Court's decision in Meeks. He argued that the change of law provided good cause to excuse his failure to object at trial. We rejected that position, holding that:

[a]lthough the law may have been adverse to Gheorghiu at the time of trial, it was equally adverse to the defendant in Meeks; nevertheless, that defendant objected to venue thereby preserving the issue for appellate consideration. Additionally, Gheorghiu had the opportunity to bring the issue to the attention of the Court of Appeals as early as November 2, 2007, the date the Meeks opinion was issued. While Gheorghiu requested a rehearing and a belated appeal in the Court of Appeals on December 21, 2007, he did not raise the venue issue on these counts in that request. The first time Gheorghiu raised this venue issue was in May 2008 in his brief on the merits filed following the grant of his motion. Under these circumstances we find no good cause to make an exception to the contemporaneous objection requirement of Rule 5:25.

Id. at 688, 702 S.E.2d at 413. The "perceived futility" of challenging existing law "does not excuse a defendant's procedural default at trial." Commonwealth v. Jerman, 263 Va. 88, 94 (2002) ("Our conclusion is not altered by the fact that the [old rule] was still in effect on the date of [defendant's] trial."); see also McGhee v. Commonwealth, 280 Va. 620, 650 (2010) (holding no

exception to Rule 5:25 applied on direct appeal based upon a post-conviction change in Fourth Amendment law governing vehicular searches incident to arrest). Accordingly, Tyson's failure to object to the trial court's holding that he bore the burden of proof is barred from consideration pursuant to Rule 5:25.

In his assignment of error, Tyson asks this Court, if it finds that his argument is barred under Rule 5:25, to consider the issue under the ends of justice exception to Rule 5:25. Rule 5:25 allows us to consider matters not preserved for appeal to attain the ends of justice. Id. at 689, 702 S.E.2d at 413. Whether the ends of justice provision should be applied involves two questions:

(1) whether there is error as contended by the appellant; and
(2) whether the failure to apply the ends of justice exception would result in a "grave injustice." Id. We have applied the ends of justice exception to Rule 5:25 in only very limited circumstances. Id. at 689, 701 S.E.2d at 414.

Assuming there was error as contended by Tyson, Tyson has not established that failure to apply the ends of justice exception would result in a "grave injustice." In order to place a respondent on conditional release, a circuit court must find that:

- (i) [the respondent] does not need secure inpatient treatment but needs outpatient treatment or monitoring to prevent his condition from deteriorating to a degree that he would need secure inpatient treatment;
- (ii) appropriate outpatient supervision and treatment are reasonably available; (iii) there is significant reason to believe that the respondent, if conditionally released, would comply with the conditions specified; and

(iv) conditional release will not present an undue risk to public safety.

Code § 37.2-912.

In this case, the Commonwealth presented overwhelming evidence at trial that Tyson met the definition of a sexually violent predator, that he has a high risk of reoffending, and conditional release would not be appropriate. In denying Tyson's request for conditional release, the circuit court highlighted key portions of evidence presented at trial that demonstrated Tyson did not meet the criteria for conditional release. The circuit court stated that conditional release would require family support, but noted that Tyson had that support structure already in place when he committed his offense. The circuit court also highlighted Tyson's history of disciplinary infractions while incarcerated, and his dangerous attraction to young females.

Tyson's disciplinary infractions involved numerous instances where he was caught hiding photographs of young girls in his cell, in direct violation of his treatment plan, which in this case demonstrated he would have difficulty complying with the conditions of his treatment plan. The young age of Tyson's victim and his attraction to young girls in addition to the other evidence presented is sufficient to support a determination that he would present an undue risk to public safety if he were conditionally released. Therefore, it appears that inpatient commitment was appropriate in this case, and no grave injustice has occurred. Accordingly, we deny Tyson's request to apply the ends of justice exception to Rule 5:25. The circuit court's commitment order is

affirmed. Appellant shall pay to the Commonwealth of Virginia two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

Pat L Hamington

Clerk