

OP. NO. 04-091

MENTAL HEALTH, SUBSTANCE ABUSE SERVICES, ETC.: EMERGENCY CUSTODY AND VOLUNTARY AND INVOLUNTARY CIVIL ADMISSIONS – INVOLUNTARY ADMISSIONS.

CIVIL REMEDIES AND PROCEDURE: APPEALS TO THE SUPREME COURT.

Initial appeal of district court order of civil commitment to circuit court for trial *de novo* is appeal of right granted and governed by statute. Person aggrieved by decision of circuit court from initial commitment hearing may appeal to Virginia Supreme Court. No affirmative duty for circuit court judge to inform individual of right to appeal; judge must appoint attorney for appeal to Virginia Supreme Court if individual does not have private counsel.

The Honorable Lon E. Farris
Judge, Thirty-First Judicial Circuit of Virginia
April 28, 2006

Issues Presented

You inquire concerning the duties of the circuit court in involuntary civil commitment appeals under Title 37.2, which governs mental health issues. First, you ask whether following an appeal to the circuit court of an order of a district court in an involuntary commitment hearing, the circuit court is required to inform the person committed of the right to an appeal to the Supreme Court of Virginia. You also ask whether the circuit court is required to appoint an attorney for such an appeal to the Supreme Court.

Response

It is my opinion that the initial appeal of a district court's order of civil commitment to a circuit court for a trial *de novo* is an appeal of right granted and governed by statute. Since further appeals are not prohibited, it is my opinion that a person aggrieved by a decision of the circuit court on appeal from a commitment hearing may petition for appeal to the Virginia Supreme Court under the general appeal provisions of Title 8.01. It further is my opinion that a circuit court judge has no affirmative duty to inform the individual committed of the right to such an appeal. Finally, when an individual chooses to appeal a civil commitment order to the Virginia Supreme Court, it is my opinion that a circuit court judge must appoint an attorney for the individual if he does not have privately retained counsel.

Applicable Law and Discussion

The Supreme Court of the United States consistently has stated that civil commitment involves a significant deprivation of personal liberty that requires due process protection.¹

In *Vitek*,^[2] the Court identified the following as minimum safeguards to which due process entitles a respondent in a [civil] commitment proceeding: a hearing at which evidence is presented and the respondent is provided a chance to be heard and to present documentary evidence as well as witnesses; the right to confront and to cross-examine government witnesses at the hearing, except upon a showing of good cause; an independent decisionmaker; a written, reasoned decision; the availability of an independent advisor, not necessarily an

attorney; and effective and timely notice of the pendency of the hearing and of all these rights.^[3]

Due process mandates, among other things, that a hearing be provided as expeditiously as possible following an individual's involuntary commitment in a mental health facility.⁴ The statutory rights possessed by an individual facing deprivation of his liberty include the rights to be represented by an attorney at his initial commitment hearing, to be present during his hearing, to offer defenses, and to testify if he so chooses.⁵ In addition, civil commitment hearings generally are to be open to the public.⁶

Your inquiry involves the right to appeal and the right to an attorney at the appellate level. "The substantive right of appeal is one granted by statute."⁷ You note that while § 37.2-821 provides guidance on an appeal to the circuit court, it does not address how an appeal to the Virginia Supreme Court should be handled. There is no constitutional right to appeal, even in a criminal case.⁸ Any person involuntarily committed by a district court is given a statutory right to appeal the commitment order to the circuit court for a trial *de novo* in the jurisdiction where he was committed or where the facility to which he was admitted is located.⁹ "A written explanation of the involuntary admission process," including an explanation of the person's right to "appeal any order for involuntary admission *to the circuit court*," must be given to the individual and its contents "explained by an attorney prior to the commitment hearing."¹⁰ Both of these relevant sections mention only the circuit court; unlike some statutes in the mental health arena, the civil commitment statutes are silent on whether there is a right to appeal beyond the circuit court level.¹¹ Since further appeals are not prohibited, it is my opinion that a person aggrieved by the decision of the circuit court on appeal from the initial commitment hearing may petition for appeal to the Virginia Supreme Court under the general appeal provisions in Title 8.01.¹² Because there is nothing in Title 8.01 that affirmatively requires a circuit court judge to inform the person so committed of this right to petition for appeal to the Virginia Supreme Court, I must conclude that this is not a requirement. In addition, I find no such requirement in the Rules of the Supreme Court of Virginia.

Your second question is whether the circuit court is required to appoint an attorney for an appeal of a civil commitment to the Virginia Supreme Court. While an individual has a statutory right to counsel at both the initial hearing and at the *de novo* appeal to a circuit court,¹³ there is no equivalent statutory provision for the appeal of a civil commitment to the Virginia Supreme Court. Once a right to appeal is afforded by state law, however, it must satisfy due process requirements.¹⁴ A person involuntarily committed is deprived of his liberty, as recognized by the United States Supreme Court,¹⁵ making the matter analogous to a criminal proceeding. In 1995, the United States Court of Appeals for the Fourth Circuit considered an appeal by a prisoner civilly committed for mental health treatment under the federal statute for hospitalization of imprisoned persons suffering from mental disease or defect.¹⁶ The individual alleged that the hearing procedures violated his constitutional due process rights.¹⁷ Further, he claimed the procedures should approximate, if not be coextensive with, the corresponding rights to which a criminal defendant is entitled under the Sixth Amendment including the right to counsel.¹⁸ In rejecting this view, the Fourth Circuit stated:

A commitment hearing is a civil matter. Thus, the constitutional rights to which a defendant in a criminal trial is entitled do not adhere to a respondent in a commitment hearing. Nonetheless, because an adverse result in a commitment hearing results in a substantial curtailment of the respondent's liberty (whether the

respondent is already a prisoner or not), the Supreme Court has held that procedural due process does guarantee certain protections to civil commitment respondents[.]^[19]

However, while substantial, the curtailment is not as great as the curtailment inherent in criminal imprisonment. The government's efforts to civilly commit a person are not punitive in nature. Additionally, civil commitment lasts only so long as the person committed continues to suffer from a mental disease or defect such that he or she is a danger to self or others.^[20]

The goal of a criminal proceeding is to uncover the truth by examining rigorously the reliability of conflicting evidence presented and then engaging in extensive factfinding. The rights of cross-examination and confrontation, as well as the right to effective assistance of counsel, are all directed toward this goal.

....

[T]he goal of a commitment hearing is far different; whether the respondent is mentally competent.^[21]

In short, providing rights to civil commitment respondents less extensive than the counterpart Sixth Amendment rights to which criminal defendants are entitled runs far less risk of erroneous deprivation of liberty than would affording similarly limited rights to criminal defendants.^[22]

Despite drawing this distinction between criminal defendants and those facing involuntary civil commitment, the Fourth Circuit declined to answer the question of “whether due process in fact requires that respondents in civil commitment hearings be afforded representation by an attorney” because the defendant therein was represented by an attorney.²³ Instead, the Fourth Circuit noted the United States Supreme Court’s plurality opinion in *Vitek*.²⁴ In *Vitek*, four of five justices voting on the issue expressed the belief that due process entitles a commitment hearing respondent to representation by an attorney.²⁵ Although voting in the plurality, Justice Powell disagreed on this point.²⁶ He concluded that although a state is free to appoint an attorney, it is not constitutionally required to do so; due process will be satisfied so long as the individual is provided “qualified and independent assistance.”²⁷ The remaining four justices did not reach the issue because they believed the controversy to be moot or not ripe.²⁸ *Vitek* continues to be cited by the Fourth Circuit as the case identifying the minimum procedural safeguards for civil commitment.²⁹

The Virginia Supreme Court recently considered whether an individual who is the subject of an involuntary civil commitment proceeding pursuant to Virginia’s Sexually Violent Predator Act has the right to counsel during his appeal.³⁰ After discussing the plurality opinion in *Vitek*, the *Jenkins* Court held that “the due process protections embodied in the federal and Virginia Constitutions mandate that the subject of the involuntary civil commitment process has the right to counsel at all significant stages of the judicial proceedings, *including the appellate process.*”³¹

Given the plurality opinion of *Vitek* and the recent pronouncement of the Virginia Supreme Court in *Jenkins*, it is my opinion that counsel to represent a person who is appealing a civil commitment to the Virginia Supreme Court is required by due process, despite the absence of a specific statute.³² Consequently, the circuit court must appoint an attorney to represent an individual seeking an appeal of a civil commitment to the Virginia Supreme Court if he does not have privately retained counsel.³³

Conclusion

Accordingly, it is my opinion that the initial appeal of a district court's order of civil commitment to a circuit court for a trial *de novo* is an appeal of right granted and governed by statute. Since further appeals are not prohibited, it is my opinion that a person aggrieved by a decision of the circuit court on appeal from a commitment hearing may petition for appeal to the Virginia Supreme Court under the general appeal provisions of Title 8.01. It further is my opinion that a circuit court judge has no affirmative duty to inform the individual committed of the right to such an appeal. Finally, when an individual chooses to appeal a civil commitment order to the Virginia Supreme Court, it is my opinion that a circuit court judge must appoint an attorney for the individual if he does not have privately retained counsel.

¹Zinermon v. Burch, 494 U.S. 113, 131 (1990); Vitek v. Jones, 445 U.S. 480, 491-92 (1980); Addington v. Texas, 441 U.S. 418, 425 (1979).

²445 U.S. 480.

³United States v. Baker, 45 F.3d 837, 843 (4th Cir. 1995) (footnote omitted) (citing *Vitek*, 445 U.S. at 494-96).

⁴See 1996 Op. Va. Att'y Gen. 154, 155.

⁵See VA. CODE ANN. § 37.2-814(D) (2005).

⁶See § 37.2-820 (2005).

⁷Commonwealth v. Rafferty, 241 Va. 319, 323, 402 S.E.2d 17, 20 (1991) (citing *Payne v. Commonwealth*, 233 Va. 460, 473, 357 S.E.2d 500, 508 (1987)).

⁸See *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *West v. Commonwealth*, 249 Va. 241, 243, 455 S.E.2d 1, 2 (1995) (quoting *Abney v. United States*, 431 U.S. 651, 656 (1977)).

⁹See § 37.2-821 (2005). Section 37.2-821 provides:

"Any person involuntarily admitted pursuant to §§ 37.2-814 through 37.2-819 or certified as eligible for admission pursuant to § 37.2-806 shall have the right to appeal the order to the circuit court in the jurisdiction where he was involuntarily admitted or certified or where the facility to which he was admitted is located. Choice of venue shall rest with the party noting the appeal. The court may transfer the case upon a finding that the other forum is more convenient. An appeal shall be filed within 30 days from the date of the order and shall be given priority over all other pending matters before the court and heard as soon as possible, notwithstanding § 19.2-241 regarding the time within which the court shall set criminal cases for trial. The clerk of the court from which an appeal is taken shall immediately transmit the record to the clerk of the appellate court. The clerk of the circuit court shall provide written notification of the appeal to the petitioner in the case in accordance with procedures set forth in § 16.1-112. No appeal bond or writ tax shall be required, and the appeal shall proceed without the payment of costs or other fees. Costs may be recovered as provided for in § 37.2-804.

"The appeal shall be heard *de novo* in accordance with the provisions set forth in § 37.2-806 or this article. An order continuing the involuntary admission shall be entered only if the criteria in § 37.2-817 are met at the time the appeal is heard. The person so admitted or certified shall be entitled to trial by jury. Seven persons from a panel of 13 shall constitute a jury.

"If the person is not represented by counsel, the judge shall appoint an attorney to represent him. Counsel so appointed shall be paid a fee of \$75 and his necessary expenses. The order of the court from which the appeal is taken shall be defended by the attorney for the Commonwealth."

¹⁰Section 37.2-814 (D) (emphasis added).

¹¹See, e.g., VA. CODE ANN. § 53.1-40.4(A) (2005) (stating that prisoners involuntarily committed for mental health treatment have right to appeal to circuit court, and “[t]he decision of the circuit court shall be final with no further right of appeal”); § 37.2-1105 (2005) (stating that judicial authorization for treatment order may be appealed to circuit court and then to Court of Appeals); VA. CODE ANN. § 8.01-670(A)(1)(d) (Supp. 2005) (stating that person aggrieved by appointment of guardian or conservator may present petition for appeal to Virginia Supreme Court).

¹²Section 8.01-670(A)(3) provides the right to present a petition for appeal to the Virginia Supreme Court if a person believes himself aggrieved by, among others, “a final judgment in any other civil case.” The facts you present would meet this condition. In addition, § 8.01-672 requires that in order to appeal a circuit court judgment, the matter must involve either a controversy for a matter of \$500 or more, a matter where the right to petition the Supreme Court for appeal is expressly provided, “or some other matter not merely pecuniary.” The fact that the liberty interest of the civilly committed individual is at issue would meet this requirement.

¹³See §§ 37.2-814(C); 37.2-821.

¹⁴See *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); see also *Nelson v. Peyton*, 415 F.2d 1154, 1157 (4th Cir. 1969) (noting that in states under no obligation to provide appellate review which do so provide, indigent defendants have right to counsel through all phases of proceeding and appellate review).

¹⁵See cases cited *supra* note 1.

¹⁶See *Baker*, 45 F.3d at 840. The statute under which Baker was committed is 18 U.S.C. § 4245, which provides for a civil hearing to determine if a prisoner is suffering from a mental disease or defect that warrants care in a treatment facility. *Id.*

¹⁷*Id.* at 843.

¹⁸*Id.*

¹⁹*Id.* at 842-43 (citations omitted).

²⁰*Id.* at 844 (citation omitted).

²¹*Id.* (citation omitted).

²²*Id.* at 845.

²³*Id.* at 846 n.7 (noting that attorney was appointed as required by 18 U.S.C. § 4247(d)).

²⁴*Id.* (citing *Vitek*, 445 U.S. 480) (5-4 decision).

²⁵*Vitek*, 445 U.S. at 496-97.

²⁶*Id.* at 500 (Powell, J., concurring in part).

²⁷*Id.*

²⁸*Id.* at 500-01 (Stuart, J., dissenting), 503 (Blackmun, J., dissenting).

²⁹See *United States v. Newton*, 2004 U.S. App. LEXIS 8488, at *3 (4th Cir. Apr. 29, 2004).

³⁰*Jenkins v. Director*, 624 S.E.2d 453, 2006 Va. LEXIS 12 (Va. Jan. 13, 2006).

³¹*Id.*, at *20 (emphasis added).

³²In Virginia, a right to counsel at hearings and trials for persons civilly committed as sexually violent predators is established by §§ 37.2-901 and 37.2-906(B). Section 37.2-804 establishes

the fee for court appointed counsel in civil commitment hearings, and § 37.2-821 sets the fee for such counsel on appeal to the circuit court; however, these statutes are silent on appeals to the Virginia Supreme Court. Nonetheless, such fees should be borne by the Commonwealth. See, e.g., § 37.2-1008 (2005) (providing that Commonwealth is to bear costs of fees and costs of proceedings for appointment of guardians or conservators for indigent persons).

³³This conclusion is consistent with the holdings of courts in other jurisdictions that have examined the issue. See, e.g., *Project Release v. Prevost*, 722 F.2d 960, 976 (2d Cir. 1983); *Pullen v. State*, 802 So. 2d 1113, 1116-17 (Fla. 2001); *Ex Parte Ullmann*, 616 S.W.2d 278, 283 (Tex. App. 1981); *State ex rel Seibert v. Macht*, 627 N.W.2d 881 (Wis. 2001).