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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<u>In re</u> THE DETENTION OF RICHARD A. KASTMAN)	Appeal from the Circuit Court of Lake County.
)	
)	No. 93—CM—4621
)	
(The People of the State of Illinois, Petitioner-Appellee, v. Richard A. Kastman, Respondent-Appellant).)	Honorable Michael J. Fusz, Thomas M. Schippers, Judges, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The trial court's denial of respondent's motion for summary judgment was not reviewable on appeal; section 9 of the Act comports with the minimum requirements of due process; and the issue of whether the jury was properly instructed with respect to the conditional release verdict form would have no effect on the outcome of the case and is moot. We affirmed the judgment of the trial court.

¶ 1 Respondent, Richard A. Kastman, appeals from the trial court's order, following a jury trial, denying his application for recovery pursuant to section 9(a) of the Sexually Dangerous Persons Act (the Act) (725 ILCS 205/9(a) (West 2006)). He contends that (1) the trial court erred when it denied his motion for summary judgment; (2) his constitutional rights were violated when the trial court

ruled that the State's burden of proof was the clear and convincing standard and not beyond a reasonable doubt; and (3) the proposition instruction failed to properly place the burden of persuasion on the State on all issues of ultimate fact. We affirm.

¶ 2 In October 1993 respondent was charged with disorderly conduct and public indecency involving children. In November 1993 the State filed a petition to declare respondent a sexually dangerous person pursuant to section 3 of the Act (725 ILCS 205/3 (West 1992)). Following a jury trial, respondent was adjudicated a sexually dangerous person. The trial court ordered respondent committed to the Department of Corrections until he had recovered from his mental disorders and was no longer sexually dangerous. Respondent appealed, and this court affirmed his commitment. See *People v. Kastman*, No. 2—94—0631 (1996) (unpublished order pursuant to Supreme Court Rule 23).

¶ 3 In October 1999, respondent filed a recovery application requesting release. Following a bench trial, the trial court denied the application, finding that respondent failed to meet his burden of proving he was no longer sexually dangerous. Respondent appealed. On appeal, this court found, *inter alia*, that the trial court erred when it placed the burden of proof on respondent to show that he was no longer sexually dangerous. *People v. Kastman*, 335 Ill. App. 3d 87, 93 (2002). Rather, the burden of proof belonged on the State to show beyond a reasonable doubt that respondent remained sexually dangerous. *Kastman*, 335 Ill. App. 3d at 93. We reversed and remanded for a new hearing. *Kastman*, 335 Ill. App. 3d at 94.

¶ 4 At the time of remand, the Act did not explicitly state the burden of proof applicable in a recovery proceeding. See *People v. Trainor*, 196 Ill. 2d 318, 332 (2001). Courts interpreting the Act held that the burden of proof at the recovery hearing was the same as at the initial commitment

hearing, that is, beyond a reasonable doubt. See *People v. Burns*, 209 Ill. 2d 551, 563 (2004); *Trainor*, 196 Ill. 2d at 335; *Kastman*, 335 Ill. App. 3d at 94. The legislature subsequently amended section 9 of the Act, effective January 1, 2006, to require the State to prove its case at the recovery hearing by clear and convincing evidence. See 725 ILCS 205/9(b) (West 2006). In July of 2006, at respondent's new recovery hearing, the jury found that the State had proved beyond a reasonable doubt that respondent remained a sexually dangerous person under the Act, and his application for recovery was denied. Respondent appealed, and this court affirmed. See *In re Detention of Kastman*, No. 2—06—1179 (2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 5 As it pertains to the instant case, in July 2007, respondent filed an application for discharge or conditional release. On December 20, 2007, respondent propounded requests to admit on the State. The responses were due by January 17, 2008. The State did not respond to the requests, and on January 31, 2008, respondent filed a motion for summary judgment. Thereafter, the State filed a motion requesting leave to file a motion for an extension of time to respond to respondent's requests to admit, and on February 8, 2008, the trial court granted the State leave to file its motion for an extension of time. On February 15, 2008, the State filed its motion for extension of time in which to respond to respondent's first request to admit facts. On February 22, 2008, respondent filed his response to the State's motion.

¶ 6 On March 14, 2008, the trial court conducted a hearing on the State's motion for extension of time. Following arguments of the parties, the trial court granted the State's motion and allowed the proposed responses that were attached to the State's motion for extension to stand as its responses. The trial court also allowed respondent to file a responsive pleading with respect to the State's responses.

¶7 On June 6, 2008, following a hearing, the trial court denied respondent's motion for summary judgment, "in light of the Court's ruling on the State's 'Motion for Extension of Time in Which to Respond to [Respondent's] First Request to Admit Facts and Genuineness of Documents,' " which the trial court had previously granted.

¶8 On December 10, 2008, the State filed a motion asking that the trial court to apply the "clear and convincing evidence" standard at trial pursuant to section 9(b) of the Act (725 ILCS 205/9(b) (West 2008)). On December 12, 2008, respondent filed a brief in opposition to the State's motion. In his motion, respondent urged that due process necessitated that the trial court apply the "beyond a reasonable doubt" standard at trial. On February 24, 2009, the State filed its response.

¶9 On March 6, 2009, the trial court conducted a hearing on the State's motion. The trial court heard arguments from the parties. Respondent argued that due process required that the State continue to show beyond a reasonable doubt that any sexually dangerous person remained sexually dangerous for continued commitment. The trial court found that respondent filed his petition for discharge in 2007 after the legislature amended the Act to require the State to prove by clear and convincing evidence that a respondent seeking to be released in a recovery proceeding remained sexually dangerous. The trial court further found that section 9(b) of the Act "enjoys the presumption of constitutionality" and that respondent failed to establish the statute's unconstitutionality. The trial court ruled that it would apply the clear and convincing standard.

¶10 Thereafter, the parties tendered their proposed jury instructions. The record reflects that, on March 12, 2009, the trial court conducted an informal jury conference. On March 16, the parties and the trial court addressed outstanding matters, one of which was verdict forms. The trial court noted that the parties had agreed to a proposed "Verdict Form C," which essentially stated that if the jury

found that respondent appeared no longer sexually dangerous but it was impossible to determine with certainty whether he had recovered in institutional care, then the jury would sign that verdict. The trial court stated that it did not believe Verdict Form C should be presented to the jury. The trial court explained that it had previously ruled that it was not going to allow anything on conditional release.

¶ 11 On March 19, 2009, respondent filed a motion, brief, and argument to reconsider the trial court's decision not to tender Verdict Form C to the jury. On March 26, 2009, the parties appeared before the trial court. The trial court decided it would allow the verdict form to go back to the jury, but reserved the manner in which the proposition instruction would be given. The parties then presented argument on the manner in which the proposition instruction would be given. Respondent argued for the *Cooper* approach, based on *People v. Cooper*, 132 Ill. 2d 347 (1989), or for the *Masterson* approach, based on *People v. Masterson*, 207 Ill. 2d 305 (2003). The trial court's written order of March 29, 2009, reflects that "[t]he parties have agreed that the jury will be given the option of deciding if the respondent will be placed on conditional release." On March 30, 2009, prior to jury selection, the trial court summarized the amended version of section 9(e) of the Act and its application. The trial court ruled that it would "follow the language of the statute" and deny respondent's requested instructions and allow the State's instructions. On March 31, 2009, the trial court's written order reflected its ruling and outlined its rationale in the order.

¶ 12 The case proceeded to a jury trial. During the jury instructions conference, respondent renewed his objection to the State's propositions instructions that incorporated the clear and convincing evidence standard. The trial court, however, gave the State's proposed instructions over respondent's objection. Respondent also objected to the State's propositions because they did not

allocate a burden with respect to the conditional release determination. The trial court accepted the State's instructions, and they were given to the jury.

¶ 13 On April 3, 2009, the jury found that respondent "continued to be sexually dangerous." The trial court thereafter entered judgment on the jury's verdict. On May 4, 2009, respondent filed a motion for judgment notwithstanding the verdict, or alternatively, for a new trial. The State filed its response, and on July 31, 2009, the court's minute order reflects that the trial court denied respondent's posttrial motion. Respondent filed a timely notice of appeal.

¶ 14 Respondent first contends that the trial court erred when it denied his motion for summary judgment. The trial court had granted the State's motion for a continuance to respond to respondent's request to admit facts, and thereafter denied respondent's summary judgment motion. The case proceeded to a jury trial. We conclude that any error in the denial of respondent's summary judgment motion was merged into the trial result and, thus, is not reviewable on appeal.

¶ 15 Denial of a motion for summary judgment is not immediately appealable because it is an interlocutory order. *In re Estate of Funk*, 221 Ill. 2d 30, 85 (2006). Generally, when a trial court denies a motion for summary judgment and the case proceeds to trial, the trial court's ruling is not subject to appellate review because the result of any error is merged into the judgment entered at trial. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 355 (2002) (citing *Labate v. Data Forms, Inc.*, 288 Ill. App. 3d 738, 740 (1997)). The rationale for this rule is that review of the denial order would be unjust to the prevailing party, who obtained a judgment after a more complete presentation of the evidence. *Belleville Toyota, Inc.*, 199 Ill. 2d at 355 (citing *People v. Strasbaugh*, 194 Ill. App. 3d 1012, 1016-17 (1990)). In his summary judgment motion, respondent asserted that the State's failure to timely respond to his request to admit rendered his

version of the facts admitted, and concluded that, with those admitted facts, summary judgment was appropriate. Whether the State should have been granted an extension of time to respond was a matter of the trial court's discretion. See *Vision Point of Sale, Inc. v Haas*, 226 Ill. 2d 334, 353 (2007). Accordingly, any error, if one occurred at all, in the denial of respondent's summary judgment motion was merged into the trial result and is not reviewable on appeal here. See *Labate*, 288 Ill. App. 3d at 740.

¶ 16 Our conclusion here is supported by *Home Indemnity Co. v. Reynolds & Co.*, 38 Ill. App. 2d 358 (1963). In *Home Indemnity*, the plaintiff issued an employee's fidelity bond to the defendant. The defendant sought reimbursement on the bond for acts of its employees which were, according to the plaintiff, excluded from coverage. The plaintiff sought a declaratory judgment to judicially determine the coverage question. Its motion for summary judgment was denied, and a jury trial followed, resulting in a verdict for the defendant. *Id.* at 364-65.

¶ 17 On appeal, the plaintiff asserted that its earlier request for summary relief was improperly denied. The reviewing court considered two scenarios: (1) if the trial court erroneously denied a motion for summary judgment, then holding the decision is never reviewable would be unjust; however, (2) if the party opposing the motion prevailed after trial on the merits, it would be similarly unjust to set aside the judgment merely because the opponent was able to produce more evidence at trial than it adduced during pretrial proceedings. *Id.* at 366. The reviewing court determined,

“The greater injustice would be to the party which would be deprived of the jury verdict. Otherwise, a decision based on less evidence would prevail over a verdict reached on more evidence and judgment would be taken away from the victor and given to the loser

despite the victor having the greater weight of the evidence. This would defeat the fundamental purpose of judicial inquiry.” *Id.* at 366.

The reviewing court held that, even if a motion for summary judgment was improperly denied, the error was not reversible because the result became merged in the subsequent trial. *Id.* at 367; see also R.F. Chase, Annotation, *Reviewability of Order Denying Motion for Summary Judgment*, 15 A.L.R. 3d 899 (1967).

¶ 18 More recent, in *People v. Strasbaugh*, 194 Ill. App. 3d 1012 (1990), the defendant appealed the denial of her petition to rescind the statutory summary suspension of her driver’s license. In *Strasbaugh*, the defendant’s counsel filed a request for admission of facts, and the State failed to respond to the request. The defendant thereafter filed a motion for summary judgment, and the trial court denied the motion. The matter proceeded to a hearing, and the trial court denied the defendant’s petition. *Id.* at 1013-15.

¶ 19 On appeal, the defendant contended that the trial court improperly denied her motion for summary judgment based on the State’s failure to answer a request for admission of facts. *Id.* at 1016. The reviewing court, citing *Home Indemnity* in support, rejected the defendant’s contention because the denial of the motion for summary judgment was not reviewable after a hearing on the merits and because the case did not fit into any exception to the general rule. *Id.* at 1016-17. Moreover, the reviewing court noted that the facts that the defendant sought to have admitted were the ultimate facts of the case. *Id.* at 1017. In so noting, the reviewing court conveyed that a request to admit facts was designed to eliminate the need to prove facts that were not in dispute, and concluded that the defendant’s use of this procedure was inappropriate where the ultimate facts were fairly disputed. *Id.* at 1017.

¶ 20 Accordingly, based on our review of the proceedings and the relevant case law, we hold that any error of the trial court, if one occurred at all, in its denial of respondent's summary judgment motion was merged into the trial result and is not reviewable on appeal.

¶ 21 Respondent next contends that his due process rights were violated when the trial court ruled that the State bore the burden of proof by "clear and convincing" evidence rather than the "beyond a reasonable doubt" standard. We review *de novo* the constitutionality of a statute. *People v. Malchow*, 193 Ill. 2d 413, 418 (2000). "Legislative enactments enjoy a strong presumption of constitutionality, and the burden rests upon the challenger to demonstrate the invalidity of a particular statute." *Kunkel v. Walton*, 179 Ill. 2d 519, 529 (1997). A reviewing court has the duty to construe a statute to uphold its validity whenever reasonably possible. *People v. Huddleston*, 212 Ill. 2d 107, 129 (2004). Reviewing courts should avoid constitutional questions when a case may be decided on other grounds. *Behringer v. Page*, 204 Ill. 2d 363, 370(2003).

¶ 22 Respondent argues that our supreme court's holdings in *Trainor* and in *People v. Pembrock*, 62 Ill. 2d 317 (1976), mandate the use of the reasonable doubt standard under all proceedings under the Act. Respondent asserts it is a constitutional requirement.

¶ 23 The State counters that respondent's argument has been resolved in *People v. Craig*, 403 Ill. App. 3d 762 (2010). In *Craig*, the Fifth District upheld the denial of a discharge or conditional release petition filed by a sex offender who was committed pursuant to the Act (725 ILCS 205/0.01 *et seq.* (West 2006)), finding that the trial court did not violate due process when it (1) refused to grant an independent psychiatric evaluation at the State's expense for the discharge hearing, or (2) instructed the jury in the statutory standard for the State's proof in the hearing, *i.e.*, clear and convincing evidence. We agree with the State.

¶ 24 The *Craig* court began its analysis by reviewing the legislative history of section 9 of the Act, and then it reviewed the *Trainor* decision. See *Craig*, 403 Ill. App. 3d at 766-68. The reviewing court discussed the “clear and convincing” standard of proof in general and specifically, the involuntary civil commitment proceeding. The reviewing court turned to *Addington v. Texas*, 441 U.S. 418 (1979), for guidance regarding the minimum standard of proof to satisfy due process, which concerns the weight of the private and public interests affected and a societal judgment about how the risk of error should be allocated between the parties. *Craig*, 403 Ill. App. 3d at 768 (citing *Addington*, 441 U.S. at 423).

¶ 25 The reviewing court in *Craig* determined that the recovery proceeding in the Act met the minimum demands of due process under *Addington* and was, therefore, constitutionally sound. *Craig*, 403 Ill. App. 3d at 769-72. The reviewing court noted that the Act provided that the standard of proof at the initial commitment proceeding was beyond a reasonable doubt and noted that the standard at the recovery proceeding was the lower clear and convincing evidence standard and determined that the distinction did not violate due process. *Id.* at 769-70. The reviewing court stated that the legislature could have rationally concluded that a more stringent standard was required at the initial commitment proceeding, because the respondent had not previously been found to be a sexually dangerous person. *Id.* at 769. By contrast, at the recovery proceeding, the standard of proof should be less, because the State has already been proved that the respondent was a sexually dangerous person, and, thus, should bear some of the risk of an erroneous deprivation of liberty. *Id.* at 769-70; see also *Addington*, 441 U.S. at 423-24 (stating that the purpose of due process is to minimize risk of an erroneous decision).

¶ 26 We agree with the reviewing court’s analysis in *Craig* and adopt it here. We also agree with the court’s holding in *Craig* that section 9 of the Act comports with the minimum requirements of due process. Inasmuch as statutory enactments are presumed constitutional, and the party challenging the constitutionality of the statute bears the burden to clearly establish the statute’s infirmity (*People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 200 (2009)), respondent’s claim fails.

¶ 27 Respondent’s third contention is whether the trial court erred when it instructed the jury. Respondent argues that the State’s propositions instructions did not allocate a burden with respect to the conditional release determination. Respondent argues that the instructions did not reflect the factual determinations in a recovery proceeding when conditional release is requested. Respondent asserts that the jury was given no direction on how to distinguish between full release and conditional release.

¶ 28 The State counters first, that the issue is moot because the jury found respondent remained sexually dangerous by clear and convincing evidence and the record does not reflect otherwise. The State counters second, that section 9(e) of the statute upon which respondent relies, plainly indicates that the conditions for release into society are determined by the trial court, and therefore, there is no burden of proof on the State in setting the conditions for statutory release. We agree with the State that respondent’s contention is moot.

¶ 29 The jury must be instructed on the applicable legal rules so as to guide the deliberations toward a proper verdict. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). “The task of a reviewing court is to determine whether the instructions, considered together, fully and fairly announce the law applicable to the theories of the State and the defense. [Citations.] The proper standard of review is whether the trial court abused its discretion.” *Mohr*, 228 Ill. 2d at 65–66. However, whether the

jury instructions accurately conveyed to the jury the applicable law is reviewed *de novo*. *People v. Parker*, 223 Ill. 2d 494, 501 (2006) (citing *People v. Herron*, 215 Ill. 2d 167, 174 (2005)).

¶ 30 In the present case, the State was required to establish that respondent remained sexually dangerous and that his application for recovery should be denied. Following deliberations, the jury returned a verdict form finding that respondent “continued to be sexually dangerous.” Any determination of whether the jury was properly instructed with respect to the conditional release verdict form would have no effect on the outcome of the case in light of the verdict the jury rendered when it found that respondent remained sexually dangerous. See, *e.g.*, *Sloan v. O’Dell*, 159 Ill. App. 3d 268, 274 (1987) (finding instructions issue moot). Moreover, the record reflects no jury confusion over the instructions or verdict forms, and respondent cannot point to anywhere in the record to establish that the jury’s verdict represented anything other than its decision. See *Gale v. Hoekstra*, 59 Ill. App. 3d 400, 409-10 (1978). Accordingly, the issue is moot.

¶ 31 For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

¶ 32 Affirmed.