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2011 IL App (3d) 100095-U

Order filed July 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

<i>In re</i> COMMITMENT OF)	Appeal from the Circuit Court
JAMES K. VANCE)	of the 10th Judicial Circuit,
)	Tazewell County, Illinois,
(The People of the State of)	
Illinois,)	
)	Appeal No. 3-10-0095
Petitioner-Appellee,)	No. 05-MR-91
)	
v.)	
)	
James K. Vance,)	Honorable
)	Scott A. Shore
Respondent-Appellant).)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice O'Brien concurred in the judgment .
Justice McDade specially concurred.

ORDER

- ¶ 1 *Held:* The State proved beyond a reasonable doubt that respondent was a sexually violent person, and therefore commitment to the Department of Human Services was appropriate.
- ¶ 2 The trial court found respondent, James K. Vance, to be a sexually violent person

pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2004)), and committed him to the Department of Human Services (DHS) until he was no longer sexually violent. On appeal, respondent argues that the State failed to prove beyond a reasonable doubt that he was a sexually violent person. We affirm.

¶ 3

FACTS

¶ 4 In June of 1993, respondent was investigated for the sexual assault of his five-year-old stepdaughter and an unrelated 11-year-old girl in 1990. Respondent was later indicted on four counts of aggravated criminal sexual assault and pled guilty to a single count charging aggravated criminal sexual assault of his stepdaughter. The respondent received a stipulated 20-year prison sentence. After serving 10 years of that sentence, respondent was released to serve 3 years of mandatory supervised release (MSR). One year into his parole, respondent was returned to the Department of Corrections (DOC) for violating the electronic detention condition of his parole. Respondent was released after serving approximately one month in DOC and violated his parole a second time one year later. While respondent was in custody for his second parole violation, the State petitioned the trial court to commit him as a sexually violent person under the Act. Following a bench trial, the trial court adjudicated respondent a sexually violent person and committed him to DHS custody until he was no longer deemed sexually violent.

¶ 5 At trial, three expert witnesses testified regarding respondent's mental state. The State's two psychologists, Dr. Michael Fogel and Dr. Robert Brucker, Jr., testified that respondent suffered from pedophilia, making him likely to commit acts of sexual violence in the future. Both psychologists assessed the respondent's mental state with the Static-99 test. The results of these two tests were similar and showed that respondent was at a statistically low rate for

reoffending. However, both psychologists opined that this test provided only a baseline measurement. Brucker conducted a second test, using the Minnesota Sex Offender Screening Tool-Revised. He stated that this test was better suited to predict sexual reoffense rates for rapists and extra-familial child molesters. On this test, respondent scored in the high-risk category for being arrested for committing a sexual offense in the next six years.

¶ 6 Fogel and Brucker also considered additional factors when determining that respondent was a sexually violent person. Both psychologists interviewed the respondent and noted his lack of remorse, violations of the terms of his MSR, and failure to complete sex offender treatment. The experts were particularly concerned by respondent's second parole violation. After being unsuccessfully discharged from sex offender counseling, respondent permitted his parole agent to search his apartment. The search uncovered: (1) a machete and large folding knife; (2) adult pornography; (3) 8 mm. tapes depicting in part children bathing and running around a room naked; (4) a child's electric toothbrush; and (5) a tube of lubricating jelly. Respondent also had letters written to him by his 15-year-old niece that discussed sexual situations. Considering these factors, in combination with respondent's test results, the State's experts both opined that respondent continued to suffer from pedophilia and was therefore likely to engage in acts of sexual violence.

¶ 7 Contrary to the State's experts, respondent's sole expert, Dr. Kirk Witherspoon, testified that respondent no longer suffered from pedophilia and would be most successful in community treatment. In particular, Witherspoon noted that respondent's incidents of pedophilia last occurred in 1993. He also noted that respondent was now in a wheelchair, making him physically less capable of committing another act of sexual violence. Additionally, Witherspoon

disagreed with the diagnoses of the State's experts because he believed that pedophilia was not a chronic condition. He stated that the State's diagnoses were based too heavily on historical data. Witherspoon opined that respondent was not a sexually violent person because respondent did not suffer from a statutorily defined mental disorder. However, if the court found otherwise, he recommended that respondent be placed in community treatment.

¶ 8 In considering the testimony of these experts, the trial court stated "none of [this evidence] alone would be a mountain of evidence, but together it is and together it is extremely convincing and much more bold than not and actually proven beyond a reasonable doubt and then some--That there is a risk of reoffending" and therefore "the State ha[d] fully met its burden of proof beyond a reasonable doubt of the elements of its case and Petition to declare this [r]espondent a sexually violent person." The trial court later held an adjudicatory hearing where it committed respondent to DHS custody until he was no longer a sexually violent person. Respondent appeals.

¶ 9 ANALYSIS

¶ 10 Respondent argues that the State failed to prove beyond a reasonable doubt that he suffered from a mental disorder making him substantially likely to engage in future acts of sexual violence. However, we conclude that the State presented sufficient evidence for the trier of fact to conclude beyond a reasonable doubt that the respondent suffered from such a disorder.

¶ 11 For the trial court to find that an individual is a sexually violent person, the prosecution must have proven beyond a reasonable doubt that: (1) he had been previously convicted of a sexually violent offense; (2) he suffers from a mental disorder; and (3) his mental disorder makes it substantially probable that he will engage in an act of sexual violence. 725 ILCS 207/5(f)

(West 2004). An individual's mental condition can be established by the testimony of two experts stating that he suffers from a mental disorder that makes him substantially likely to commit sexually violent acts. See *People v. Winterhalter*, 313 Ill. App. 3d 972 (2000).

Additionally, an individual's failure to "take advantage of treatment opportunities while incarcerated" and "fail[ing] to attend counseling when required as a condition of his mandatory supervised release" demonstrate that he is not an appropriate candidate for conditional release. *Winterhalter*, 313 Ill. App. 3d at 981.

¶ 12 When a respondent contests the sufficiency of the evidence, our standard of review is whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *Winterhalter*, 313 Ill. App. 3d 972. Applying this standard, we give great deference to the trial court's determination because it was in the best position to evaluate the evidence presented. *People v. Sutherland*, 223 Ill. 2d 187 (2006). As a court of review, we may not substitute our judgment for that of the trier of fact. *People v. Owens*, 386 Ill. App. 3d 765 (2008).

¶ 13 Respondent argues that the State failed to prove beyond a reasonable doubt that he suffered from a mental disorder. Specifically, he contends that the State's psychologists incorrectly based their opinions on historical data which was no longer reflective of his current mental state. Respondent states that he no longer suffered from pedophilia because he had not committed a sexually violent act since his 1993 conviction. Furthermore, he had attended some sex offender counseling sessions, and he submits that he had learned to control his urges and not act upon them again.

¶ 14 We are not persuaded by respondent's arguments. Sufficient evidence was presented at

trial for the trier of fact to determine that respondent continued to suffer from a mental disorder. Although respondent offered alternative explanations and criticism of the State's experts' analyses, we are not in a position to reweigh this evidence. *Owens*, 386 Ill. App. 3d 765. Viewed under the appropriate standard of review, respondent's argument that the State's psychologists' diagnoses were erroneous did not indicate that the evidence was insufficient for a sexually violent person finding.

¶ 15 We have previously held that reports and testimony of two psychologists finding that respondent suffered from a mental disorder is sufficient proof to satisfy the State's burden in a sexually violent persons case. *Winterhalter*, 313 Ill. App. 3d 972. Consequently, the State presented evidence sufficient for the trier of fact to find beyond a reasonable doubt that respondent suffered from a mental disorder making him likely to commit future acts of sexual violence.

¶ 16 Respondent argues in the alternative that if he is determined to be a sexually violent person, the trial court's dispositional order committing him to DHS custody was not an appropriate course of treatment. Rather, he should be released for community care because it is more conducive to his psychological treatment and recovery. In support of this contention, respondent states that while on MSR, he completed two counseling courses and attended a third course for 4½ months. He further contends that he was responding well to treatment for bipolar disorder and felt that he would be more able to control himself as a result of this treatment.

¶ 17 Although respondent has arguably made some progress and has not committed another sexually violent act since 1993, he has violated the conditions of his MSR on each occasion following his conditional release. Moreover, the second violation was not trivial but involved

defendant's decision to acquire and then possess weapons, adult pornography, 8 mm. footage of nude children engaging in nonsexual conduct, and suggestive communications with his niece who was also a minor. Further, respondent's failure to complete sex offender treatment during the lengthy time that he remained committed in DHS supports the experts' decisions that this respondent is not an appropriate candidate for conditional release at this time. See *Winterhalter*, 313 Ill. App. 3d 972. We also note that the record reveals respondent has twice had the opportunity to prove that he would be successful in community treatment and on both occasions he violated the terms of his MSR. Consequently, we conclude the evidence was sufficient for the court to find that respondent is best suited for treatment in DHS. Therefore, the trial court's dispositional order committing him to DHS custody was appropriate.

¶ 18

CONCLUSION

¶ 19 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed.

¶ 20 Affirmed.

¶ 21 JUSTICE McDADE, specially concurring:

¶ 22 I concur because the standard of review requires affirmance.

