

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> COMMITMENT OF JOHN TITTELBACH)	Appeal from the Circuit Court of Du Page County.
)	
)	No. 99-MR-285
)	
(The People of the State of Illinois, Petitioner-Appellee, v. John Tittelbach, Respondent-Appellant).)	Honorable Terence M. Sheen, Judge, Presiding.

JUSTICE SCHOSTOK entered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court’s denial of respondent’s petition for conditional release under the Sexually Violent Persons Commitment Act was not against the manifest weight of the evidence, as the court was entitled to find that his risk of reoffending and his aversion to undergoing treatment showed insufficient progress; (2) we refused to consider respondent’s claim that his counsel was ineffective, as it was based on matters outside the record.
- ¶ 2 Respondent, John Tittelbach, who had previously been adjudicated a sexually violent person (SVP) under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2000)), appeals from a judgment denying his petition for conditional release under section 60 of the Act (725 ILCS 207/60 (West 2010)). On appeal, respondent contends that (1) the judgment is against the manifest weight of the evidence; and (2) his trial counsel was ineffective. We affirm.

¶ 3 In 1980, respondent pleaded guilty to two counts of indecent liberties with a child (Ill. Rev. Stat. 1979, ch. 38, ¶ 11-4(a)) and was sentenced to four years' probation (case No. 80-CF-596). In 1996, a jury convicted defendant of one count of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 1994)), and he was sentenced to four years' imprisonment (case No. 96-CF-1429). On October 1, 1999, shortly after defendant was released from prison, the trial court adjudicated him an SVP and committed him to a treatment detention facility (TDF) of the Department of Human Services (DHS). This court affirmed. *In re Detention of Tittlebach*,¹ 324 Ill. App. 3d 6 (2001).

¶ 4 On January 22, 2010, respondent petitioned for conditional release, per section 60 of the Act, which requires a trial court to grant such a petition unless it finds by clear and convincing evidence that “the person has not made sufficient progress to be conditionally released,” considering “the nature and circumstances of the behavior that was the basis of the allegation [in the original petition to declare the person sexually violent], the person’s mental history and present mental condition, and what arrangements are available to ensure that the person has access to and will participate in necessary treatment.” 725 ILCS 207/60(d) (West 2010).

¶ 5 On March 26, 2012, the trial court heard evidence on the petition. The State called Dr. David Suire, a licensed clinical psychologist, who testified on direct examination as follows. Since 2006, he had worked for DHS as an SVP evaluator. His work involved (1) assessing whether a convicted sex offender meets the criteria to be adjudicated an SVP and, if so, the least restrictive environment in which he can be treated and managed; and (2) providing trial courts in SVP cases with assessments. His standard procedure was to review the pertinent records, including those compiled

¹Apparently, our opinion misspelled respondent’s surname, which, according to documents of record that he signed, is “Tittelbach.”

by the police, the courts, and mental-health treaters; interview the person; and consult the person's mental-health treaters.

¶ 6 Suire testified that he had evaluated respondent yearly since 2006. He interviewed respondent in 2006 and 2008 and spoke briefly with him in 2010; in other years, respondent refused to talk to Suire. For the present evaluation, Suire filed a report on June 21, 2011. However, after that date, he had examined updates from respondent's mental-health treaters.

¶ 7 Suire testified as follows about his 2011 evaluation of respondent. He considered case No. 80-CF-596, in which respondent had been charged with one count of deviate sexual assault and five counts of indecent liberties with a child and eventually convicted of two counts of indecent liberties. From examining police reports and court records, Suire learned about respondent's relationship to the victims, his two stepdaughters. Specifically, although the events on which the charges were based had occurred when one victim was 12 years old and the other was 13, the victims reported that respondent had steadily abused one since she was 5 and the other since she was 7. In case No. 96-CF-1429, respondent sexually assaulted his girlfriend's eight-year-old daughter. He committed the charged offenses in 1985 and 1986, but he continued to have sexual contact with the victim into 1994. She estimated conservatively that he had "offended against her" 600 times.

¶ 8 Suire testified that he had also considered respondent's mental history and present mental condition. In 2011, he diagnosed respondent with three mental disorders predisposing him to engage in future sexual violence: pedophilia; alcohol abuse; and personality disorder not otherwise specified with antisocial and narcissistic features. As to pedophilia, the frequency of respondent's sexually abusive acts over a long period demonstrated "the strength and even the overpowering nature" of his "urges." A diagnosis of antisocial personality disorder requires showing "a pervasive pattern and

disregard for and violation of the rights of others.” In respondent’s case, that showing was made not only by his criminal acts but also by his failure to show remorse and his hostility toward his therapists. Narcissistic personality disorder is characterized by a pattern of grandiosity, exploiting others, and a lack of empathy; respondent demonstrated the second tendency by his conduct and the third tendency when, in an interview, he referred to one victim as “it.”

¶ 9 Suire testified that he conducted a “risk assessment” of respondent. He examined the results of actuarial instruments that measure certain known risk factors; considered additional risk elements, or “aggravating factors,” that are not factored in by the actuarial instruments; and considered additional “protective factors,” *i.e.*, those that suggest that the risk is less than what the actuarial instruments indicate. The actuarial instruments included the Static-99; the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R); and the revised Static-99 (Static-99-R). The Static-99-R differs from the Static-99 in only one respect: it accounts more precisely for the person’s age. On the Static-99, respondent scored in the moderate-to-high-risk range. However, on the Static-99-R, he scored in the low-risk range. On the MnSOST-R, he scored in the “moderate risk” range.

¶ 10 Suire testified that these results were a “notable underestimation” of respondent’s risk to reoffend. This was partly because he had offended against his victims “hundreds of times over many years,” yet these “potentially thousands of separate sexual offenses led to only two actual charging incidents, [which is] rare.” Also, several aggravating factors applied to respondent. These included deviant sexual arousal, substance abuse, and, especially, victim-blaming: in 2008, respondent said that the victims “were responsible for their actions because of their sexually provocative behavior.”

¶ 11 Suire testified that he considered whether any protective factors applied to respondent. One, the completion of sex-offender treatment, did not. Another, age, might. Respondent was 64 at the

time of the hearing, and “some research” suggested “in a general sense” that the older a person is, especially if he is over 65, the less his risk of recidivism. Age was “probably something of a protective factor” for respondent. Nonetheless, respondent was “substantially probable to reoffend.”

¶ 12 Suire testified that he had considered what arrangements would be available to ensure that, upon release, respondent would participate in necessary treatment. One factor was whether he had undergone any sex-offender treatment while he was in the TDF; there was no record that he had. Moreover, respondent had repeatedly told Suire that he would not do so, because (1) his willingness to engage in sexual offenses had been “deterred” by his confinement; (2) he had religious objections to viewing pornography, a component of the penile plethysmograph (PPG) test; and (3) he feared he would be harmed if others learned that he had been a police officer. In 2006, respondent was permitted to undergo treatment without the PPG test, but he declined. As far as Suire knew, respondent had never had sex-offender treatment in the Illinois Department of Corrections, the TDF, or the community.

¶ 13 Suire testified that the community could provide respondent with the standard combination of 2½ hours a week of group therapy and 1 hour a week of individual therapy. However, respondent had never participated in group therapy, even though he would be required to do so were he released into the community. In Suire’s expert opinion, the least restrictive appropriate environment in which respondent can be treated is the TDF or a similar secure DHS facility. Suire based this opinion in part on respondent’s treatment needs in light of what would be available in the TDF and in the community, and in part on the safety of the community. Also, in Suire’s opinion, respondent remained sexually violent and had not made sufficient progress to be released into the community.

¶ 14 Suire testified as follows on cross-examination. In 2008, respondent said that his sex drive had diminished greatly and that he had never really felt that he was sexually attracted to children. Suire's basis for concluding that respondent had committed 600 or more sexually offensive acts was the information the victims provided in police reports; Suire had never spoken to the victims.

¶ 15 Suire recounted the scores he had given respondent on the various actuarial tests. In 2008, respondent scored 4 (medium to high range) on the Static-99 and 5 on the MnSOST-R (moderate range); in 2010, he scored 1 (low range) on the Static-99-R and 6 (moderate) on the MnSOST-R. The low score on the Static-99-R was attributable to the revised test's greater emphasis on age; the Static-99 had distinguished only between persons under 25 and persons over 25. Suire conceded that, in a general sense, the risk of recidivism lessens with age. Asked whether it was correct that, for a 10-year period, "the recidivism rate is at 15 percent," Suire responded "it is 15.7 percent based on the various caveats as to that, but, yes."

¶ 16 Suire testified that conditional release does not legally require a person to participate in sex-offender treatment and that treatment might not be clinically needed in every case. Also, a high-risk person might be easier to "manage" than a low-risk person might be, depending on their respective attitudes toward getting treatment. In respondent's case, the difficulty with conditional release was not merely his present risk of reoffending but also the degree to which the risk could be managed in the community. Treatment would be necessary, but, even if respondent attended, he would probably not participate effectively; more likely, he would do the "absolute minimum." Suire acknowledged that, in the TDF, respondent had followed the rules and presented no major disciplinary problems, and Suire had taken this factor into account.

¶ 17 Respondent called Dr. William Hillman, a licensed clinical psychologist whom the court had appointed to examine respondent. On direct examination, he testified as follows. He reviewed respondent's records and, on April 21, 2011, he interviewed him for about four hours. On June 13, 2011, Hillman submitted his report. In the interview, respondent said that he felt ashamed, guilty, and remorseful about all his offenses. Asked whether respondent tried to minimize the harm to the victims in the 1980 case, Hillman testified that respondent said that he had harmed psychologically but not physically. Respondent said that he had never been sexually interested in minor females but had always been interested primarily in adult females.

¶ 18 Hillman testified that respondent told him that he was morally opposed to undergoing treatment in the TDF because it required viewing pornography as part of taking the PPG test. Respondent admitted that he had not undergone any treatment in the TDF, except in the first couple of weeks or so, because he feared for his safety if he revealed that he had been a police officer.

¶ 19 Hillman testified that he diagnosed respondent with pedophilia and personality disorder, not otherwise specified, with antisocial and narcissistic tendencies. His diagnosis was based on respondent's history and the reports of other evaluators; during the interview, respondent did not present symptoms of any personality disorder. He was not resistant or defensive when questioned on sensitive topics. Moreover, he had had no major disciplinary problems in the TDF. Thus, he appeared to be "flexible" and "capable of following rules and adapting to [his] environment," which was not consistent with a personality disorder.

¶ 20 Hillman testified that he had reviewed respondent's scores on the actuarial instruments. As Hillman recalled, the actuarial data used in connection with the Static-99-R show that the recidivism rate declines with age; for incest by people age 64, it is "around five or six percent" over a 10-year

period and about twice as high for nonincest cases over a 10-year period. He could not recall the recidivism rate for people who scored 1 on the Static-99.

¶ 21 Hillman testified that he had considered various factors in evaluating respondent's volitional control. One was that respondent had adapted well to TDF rules. Another was that he had told Hillman and others that in 1994 he voluntarily discontinued molesting his stepdaughter and that they lived together 15 months more without him molesting her. Also, he expressed remorse to Hillman for the psychological damage that he had caused his victims.

¶ 22 Hillman testified that, in his report, he had recommended that respondent be released on the conditions that his access to potential victims be restricted; that he abstain from alcohol; and that he participate in one-on-one treatment. In Hillman's opinion, as summarized in his report, "[t]he weight of the actuarial evidence indicate[d]" that respondent was a "low risk for criminal recidivism." Hillman testified that, in reaching his opinion, he considered not only the actuarial tests but also the recommended conditions, including that respondent's location be monitored and that he not reside in a home with minor children. Hillman opined that respondent should be placed on conditional release, because, with the recommended conditions, he would be a "minimal risk to the community."

¶ 23 Hillman testified on cross-examination as follows. Before interviewing respondent, he had not reviewed the DOC "master file." He had reviewed some TDF records, but no "master treatment plans." Hillman had relied primarily on evaluations by psychologists who had been involved in the proceedings on the original petition or in respondent's treatment in the TDF.

¶ 24 Hillman testified that he was aware that, as soon as respondent finished probation in the 1980 case, he moved in with a woman who had a young daughter and he sexually assaulted the daughter for approximately eight years. Respondent told him that, in the 1980 case, he started to assault the

two girls because he was having marital problems; Hillman conceded that, in this manner, respondent had “minimized” the offenses. Also, respondent’s statement that his primary sexual interest had always been in adult females was untrue. Asked whether, in his opinion, respondent had had control over his sexual urges in the long periods when he was committing sexual assaults, Hillman conceded, “I would have to answer that he didn’t have control.” To Hillman’s knowledge, respondent had never undergone sex-offender treatment in the community and had done so in the TDF for only his first month there. Respondent told Hillman that he had moral objections to the PPG, but Hillman saw no mention of these objections in any records. Also, respondent had conceded that his moral objection to viewing pornography as part of the PPG was inconsistent with his having had sex with minors. Hillman was unaware of any court order that had allowed respondent to begin therapy in the TDF without undergoing PPG testing.

¶25 Hillman testified that what was most important to him was not respondent’s proclivity toward being aroused by female minors, but his ability to control his behavior. He conceded that respondent had not been able to control his behavior when he was in the community and that respondent had not been in the community since 1996. Thus, he had not been around young girls for approximately 15 years. Hillman acknowledged that treatment for SVPs on conditional release usually includes group therapy and that respondent had objected to undergoing group therapy in any setting.

¶26 Hillman testified that respondent had told him that, for a while, he had stopped molesting his girlfriend’s daughter. Hillman could not recall whether respondent said that he had done so voluntarily or because the victim told her mother. Although respondent expressed remorse for his offenses, Hillman had no way to test whether he had been sincere.

¶ 27 The trial court denied respondent's petition for conditional release. In a letter opinion dated March 29, 2012, the judge stated as follows. Suire's report and testimony were credible, as they had a sound empirical and analytical basis. Hillman's report and testimony were not credible. Both were based on respondent's subjective representations, which were largely unsupported by fact or by the record. Hillman had admitted that much of what respondent had told him was contradicted by respondent's actions, yet this discrepancy was not reflected in Hillman's opinion of respondent's probable future conduct. One crucial example was that, although respondent had told Hillman that his primary sexual interest had always been in adult females, all of the other evidence proved otherwise. Hillman's opinion on respondent's volitional control relied on respondent's statements, which Hillman apparently had not attempted to verify.

¶ 28 The opinion continued as follows. Respondent's reasons for refusing treatment were not credible. His purported religious objections to PPG testing did not explain why he declined treatment without PPG testing. He simply did not want to be treated. The evidence proved that, if released, he would not participate in group therapy, even though that is the primary treatment for SVPs on conditional release. Thus, the State had proved that respondent was still an SVP; that it was substantially probable that, if not confined, he would commit acts of sexual violence; and that he had not made sufficient progress to be released conditionally. Respondent timely appealed.

¶ 29 On appeal, respondent contends first that the trial court's finding that he did not satisfy the criteria for conditional release is against the manifest weight of the evidence. For the following reasons, we disagree.

¶ 30 The State was required to prove by clear and convincing evidence that respondent had not made sufficient progress to be conditionally released. 725 ILCS 207/60(d) (West 2010). The trial

court's finding that the State met this burden may not be disturbed unless it is against the manifest weight of the evidence. *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 978 (2006). A judgment is not against the manifest weight of the evidence unless "the opposite conclusion is clearly evident or the [factual] finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 543 (2007).

¶ 31 Respondent's argument is terse yet somewhat scattershot, but we discern the following. He contends primarily that the trial court's judgment ignored the evidence that, in part because of his advanced age, the Static-99-R test showed that his risk of reoffending is extremely low. We disagree. We have no reason to assume that the trial court did not consider this evidence. We also note that respondent ignores ample evidence that, despite his low score on one test, he had not made sufficient progress to be conditionally released (see 725 ILCS 207/60(d) (West 2010)).

¶ 32 First, the Static-99-R was not the only actuarial instrument used to test respondent. The Static-99 placed respondent in the moderate-to-high-risk range. Although it could be argued that this instrument was superseded by the Static-99-R, that would still leave the MnSOST-R, which placed respondent in the "moderate risk" range. Thus, respondent's sole focus on the Static-99-R is misleading, even had the trial court considered only the actuarial evidence.

¶ 33 Crucially, however, the court was not limited to considering the actuarial results, even on the issue of risk. The court could and did credit Suire's testimony that the actuarial tests underestimated the risk by failing to account for important "aggravating factors," including the frequency of respondent's sexually abusive acts over long periods; his attempts to minimize the acts by blaming the victims; and his inaccurate statement that his primary sexual attraction had always been to adult females. Even Hillman conceded that respondent had "minimized" the offenses by blaming the

victims and that he had been untruthful in describing his sexual proclivities. Hillman also conceded that, during the lengthy periods when respondent was regularly abusing his victims, he had lacked control over his volition. Thus, the court could credit Suire's testimony that, despite respondent's age, the actuarial test results were a "notable underestimation" of his risk to reoffend.

¶ 34 On top of these considerations, furthermore, the court could and did consider that the risk of reoffending was not the sole criterion for deciding whether respondent had made sufficient progress to be released conditionally. Progress is not synonymous with reduced risk; as Suire testified, it also includes improvements in the ability to manage and treat that risk. In this respect, the evidence showed that respondent's progress had been negligible. As the judgment emphasized, respondent had steadfastly refused to undergo any form of group therapy while he was in custody and made it plain that he would not do so if he were released into the community. In that respect, his progress was zero. His absolute rejection of group therapy was especially significant, as Suire testified that group therapy is the primary means of treatment for SVPs on conditional release. From this evidence, the court could infer that group therapy is normally required of SVPs on conditional release because other treatment is not usually adequate. Respondent's continued refusal to undergo what the court could reasonably have found was an essential component of treatment enabled the court to find that he had not made sufficient progress.

¶ 35 Respondent also contends that the court ignored a journal article that, in his words, shows that "age alone can lower the risk of sex offending to an almost negligible level." Respondent forgets that this study was never introduced into evidence. We express no opinion on whether respondent's characterization of the study is accurate or whether the article is persuasive.

¶ 36 For the foregoing reasons, we hold that respondent has not shown that the judgment is against the manifest weight of the evidence.

¶ 37 Respondent contends second that his trial counsel did not provide effective assistance. Respondent asserts that his counsel erred prejudicially in that he failed to cross-examine Suire on (1) the actual recidivism rate for offenders with his profile, as (allegedly) shown by the literature in the field; and (2) the deficiencies of the MnSOST-R as a tool to predict risk, also as (allegedly) shown by studies by experts in the field. For the following reasons, we must decline to consider the merits of respondent's argument.

¶ 38 Respondent's argument depends entirely on evidence outside the record on appeal. He contends that, in testing the evidentiary basis of Suire's opinion testimony, his trial counsel failed to utilize (1) information from a website (date not given) allegedly explaining the range of recidivism for people scoring 1 on the Static-99-R; (2) a 2010 journal article discussing the effect of the choice of (in respondent's words) "the sample which is applied to the determined risk level"; (3) an August 2011 journal article allegedly showing "a substantial reduction in the recidivism rates over age ranges"; and (4) a January 2012 journal article allegedly stating that the MnSOST-R has been updated by a revised version because of the MnSOST-R's "lack of reliability and predictive accuracy" (again, we are quoting respondent's brief, not the article that he cites).

¶ 39 None of the articles or studies on which respondent's ineffectiveness argument is based were introduced into evidence at trial or even, as far as we are aware, referenced in the testimony. When an ineffective-assistance claim is raised on direct appeal, the court should not reach the merits if to do so would require the consideration of evidence outside the record. See, e.g., *People v. Phillips*, 383 Ill. App. 3d 521, 544-45 (2008) (in aggravated-arson case, argument that trial counsel was

ineffective for failing to introduce fire investigators' report as substantive evidence would not be considered, as report was not in record); *People v. Kunze*, 193 Ill. App. 3d 708, 725-26 (1990) (court did not reach defendant's claim that counsel was ineffective for advising defendant to testify, as resolving issue would require going beyond record to decide what would have happened had counsel not so advised defendant). In this type of situation, the claim of ineffectiveness is properly raised in a collateral proceeding in which a sufficient record can be made. *Kunze*, 193 Ill. App. 3d at 725-26.²

¶ 40 Here, respondent's claim that his trial counsel was ineffective would require us to consider evidence outside the record, *i.e.*, the journal articles on which the claim rests. Moreover, we would be put in the dubious position of deciding, at least to some degree, the credibility, soundness, and weight to be accorded to these articles. We must decline respondent's request to disregard our obligation to consider only that evidence that is in the record (or of which we can take judicial notice). Therefore, we shall not address the merits of respondent's ineffectiveness claim.

¶ 41 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 42 Affirmed.

²In *In re Carmody*, 274 Ill. App. 3d 46 (1995), the Fourth District cautioned against applying cases such as *Phillips* and *Kunze* to appeals in involuntary-commitment cases. The court reasoned that, in contrast to the record in a criminal appeal, the record in an involuntary-commitment appeal "typically demonstrates whether counsel's performance provided a sufficient defense for the respondent." *Id.* at 56. Even were we to accept this observation (and we express no opinion either way on this matter), we would conclude that this case is "atypical." Reaching the merits of respondent's ineffective-assistance claim would be improper for the same reasons that the *Phillips* and *Kunze* courts declined to address the claims there.