

¶ 4 Because we conclude respondent received ineffective assistance of counsel, we reverse and remand for a new trial.

¶ 5 I. BACKGROUND

¶ 6 In January 1994, a jury found defendant guilty of two counts of aggravated kidnapping and one count of aggravated criminal sexual assault against H.L.W., a fourteen-year-old girl. The trial court entered judgment on one count of aggravated kidnapping and one count of aggravated criminal sexual assault. In February 1994, the court sentenced respondent to 18 years in the Illinois Department of Corrections (DOC).

¶ 7 On September 9, 2011, shortly before respondent was scheduled to be released from prison, the State filed a petition to commit respondent as a sexually violent person pursuant to the Commitment Act. 725 ILCS 207/15 (West 2010). The State attached to its petition an evaluation prepared by DOC consultant psychologist Dr. Vasiliki Tsoflias. Based on Tsoflias' interview with respondent and Tsoflias' review of (1) respondent's criminal record, (2) the DOC master files, (3) treatment summaries, and (4) respondent's DOC pre-release evaluation, Tsoflias diagnosed respondent as suffering from paraphilia, not otherwise specified (NOS), and a personality disorder, NOS, with antisocial and narcissistic features. Tsoflias also opined a substantial probability existed respondent would engage in future acts of sexual violence and recommended respondent be found to be a sexually violent person under the Commitment Act and committed for treatment.

¶ 8 That day, the court ordered that respondent be detained and transferred to a detention facility approved by the Department pending the adjudication of the petition. The court also appointed the public defender's office to represent defendant. Thereafter, Keith Davis, a

private attorney who performs part-time contract work for the public defender, became respondent's attorney.

¶ 9 On September 12, 2011, the parties appeared for a probable cause hearing during which respondent stipulated to probable cause and the trial court ordered respondent to submit to an evaluation by the Department. That day, the State also filed a jury demand pursuant to section 207/35(c) of the Commitment Act. 725 ILCS 207/35(c) (West 2010). Defendant did not make a jury demand.

¶ 10 In October 2011, Dr. Kimberly Weitzl, a psychologist, examined respondent. Based on her review of the records and interview notes, Weitzl diagnosed respondent with paraphilia, NOS, and antisocial personality disorder. Weitzl concluded respondent was at a high risk to reoffend and a substantial probability existed that respondent would engage in acts of sexual violence if released.

¶ 11 In November 2011, the trial court appointed Dr. Terry Killian, a psychiatrist, to examine respondent on respondent's behalf. Like Tsoflias and Weitzl, Killian diagnosed respondent as suffering from paraphilia, NOS, and antisocial personality disorder. Killian concluded respondent "pretty clearly meets criteria for an SVP commitment" and found respondent demonstrated a high risk of recidivism.

¶ 12 According to the docket sheet, counsel appeared before the court again on April 2, 2012. There is no indication respondent was present on this date. A docket entry from that date indicates the State waived a jury trial, and the trial court set respondent's bench trial for June 4, 2012. The record does not contain a transcript of the proceedings from that date, and it appears a court reporter was not present at the proceedings.

¶ 13 On April 25, 2012, Davis filed a motion to withdraw as respondent's counsel. Davis explained that respondent insisted Davis subpoena the victim of respondent's 1994 conviction, H.L.W., to prove "there was no violence" in that case. According to Davis, respondent's request "ignore[d] the fact" that respondent was convicted of aggravated criminal sexual assault, a crime that is, by definition, a "sexually violent offense." Respondent also did not believe Davis when Davis told respondent he could not obtain transcripts from the January 1994 trial because a fire at the McLean County courthouse had destroyed the transcripts. Davis attached to his motion a news report describing the fire.

¶ 14 On April 26, 2012, respondent filed a *pro se* motion for "re-appointment" of counsel. Respondent asserted Davis (1) refused respondent's requests to obtain evidence, facts, and witnesses to use in respondent's defense; and (2) had not visited, called, or written to respondent about his case. Respondent further alleged Davis told him he would not "put up any defense." In addition, Davis had not provided respondent transcripts, claiming the fire at the courthouse burned the transcripts.

¶ 15 Following a hearing that commenced in June 2012 and continued in July 2012, the trial court denied both Davis' motion to withdraw and respondent's *pro se* motion to reappoint counsel. The court then asked Davis how he would like to proceed, and Davis responded that the assistant attorney general and Davis "had contemplated simply submitting the reports, stipulating to the various reports in the case and having the court rule on those reports." The court set a hearing for August 1, 2012. The following colloquy then ensued:

"[RESPONDENT]: If I'm not going to be able to be defended in any way, I might as well go ahead and sign the papers

and do what you want. If I can't get no defense of any kind, I have no fair trial so I might as well sign the commitment papers. I can't fight without nobody to defend me.

THE COURT: Well, we are set for August 1st. I'll let you think about that [respondent] but—

[ASSISTANT ATTORNEY GENERAL]: Well Judge, I think he's talking about a stipulation which the State often puts together, it had admonishments and documents attached. I mean at this point I'm going with the ruling, I'm going to ask that you rule. I am not planning to put together a stipulation for the 1st.

THE COURT: That's fine.

[ASSISTANT ATTORNEY GENERAL]: Unless the court orders me to do so.

THE COURT: Well if you want to bring one with you I suppose we can decide at that time. We'll see what [respondent] and Mr. Davis asks to do on that date."

¶ 16 On July 26, 2012, respondent filed several *pro se* motions, including a "Motion: For Jury Trial," in which he contended at the April 2, 2012, status hearing, he "was asked what type of trial" he wanted. According to respondent, at that time he "requested a jury trial in front of Honorable Judge Paul Lawrence and was granted a jury trial by said judge," but was "now being told" he would have a bench trial. However, this is the date we previously noted, according to the docket sheet, respondent was not present.

¶ 17 In August 2012, the parties appeared before the trial court as scheduled. The court first addressed respondent's motions. With respect to respondent's motion for a jury trial, the court noted although the State made a jury demand within ten days of respondent's probable cause hearing, respondent did not make a similar demand. Thus, the court denied respondent's motion. Respondent then left the courtroom, stating "you can hold me in contempt, you can hold your court without me because without being allowed to have a fair trial, with [no] defense[,] there is no reason for me being here." After respondent left the courtroom, the hearing then proceeded as follows:

"THE COURT: All right, proceeding on the reports then [assistant attorney general], what are you asking the court to consider?"

THE STATE: Judge, I'm asking that you consider all of the reports and the respondent did have an evaluation that was completed by Dr. Killian, that you consider all of the reports and that based on all these reports you find that the respondent is a sexually violent person. I'll also make—if you do make that finding I'll also have the same oral motion.

THE COURT: All right. Anything else Mr. Davis?

MR. DAVIS: No, sir.

THE COURT: All right. The court has reviewed the reports from all three experts in the case, including Dr. Killian who was the respondent's expert as well as Dr. Tsoflias who is the

State's expert as well as Dr. Kimberly Weitzel, W-E-I-T-L. And after a review of those reports, the court does find that the State has proven beyond a reasonable doubt that the defendant is a sexually violent person as he has been convicted of a sexually violent offense and is dangerous because he suffers from a mental disorder that makes it substantially probable that he'll engage in acts of sexual violence.

So the court will go ahead and make that finding here today. And what are you asking for then after that, [assistant attorney general]?

[ASSISTANT ATTORNEY GENERAL]: Your Honor, based on the fact that in this case all three evaluators including the respondent's evaluator agree that he meets the criteria to be found a sexually violent person, at this time pursuant to statute I would be making the oral motion that you also commit him to secure care in the custody of the Department of Human Services at the Rushville treatment and detention facility until further order of court.

THE COURT: All right. Anything else on that Mr. Davis?

MR. DAVIS: No, sir."

¶ 18 Thereafter, the trial court entered an order finding respondent to be a sexually violent person and committing respondent to the custody of the Department.

¶ 19 This appeal followed.

¶ 20

II. ANALYSIS

¶ 21 On appeal, respondent asserts (1) his counsel was ineffective; (2) Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971), as applied to the facts of respondent's case, impermissibly interferes with the right to effective counsel; and (3) the trial court erred by denying counsel's motion to withdraw and denying respondent's *pro se* motion for reappointment of counsel.

Before addressing defendant's assertions, we outline the pertinent provisions of the Commitment Act.

¶ 22

A. The Commitment Act

¶ 23 To prove a respondent is a sexually violent person under the Commitment Act, the State has the burden of proving, beyond a reasonable doubt, (1) the respondent has been previously convicted of a sexually violent offense; (2) the respondent suffers from a mental disorder; and (3) the mental disorder makes it substantially probable the person will engage in an act of sexual violence. 725 ILCS 207/5(f), 35(d)(1) (West 2010); *In re Commitment of Stevens*, 345 Ill. App. 3d 1050, 1061-62, 803 N.E.2d 1036, 1046 (2004).

¶ 24

Proceedings under the Commitment Act are civil in nature and thus "do not trigger respondent's criminal constitutional rights." *In re Tiney-Bey*, 302 Ill. App. 3d 396, 399, 707 N.E.2d 751, 754 (1999). Nonetheless, section 25 of the Commitment Act outlines specific rights of a person who is the subject of a sexually violent person petition. 725 ILCS 207/25 (West 2010). That section provides, at any hearing conducted under the Commitment Act, except for certain discharge hearings, a respondent has the right to (1) be present and be represented by counsel; (2) remain silent; (3) present and cross-examine witnesses; and (4) have any hearing recorded. 725 ILCS 207/25(c)(1-4) (West 2010).

¶ 25 Section 35 of the Commitment Act provides that a trial to determine whether a respondent is a sexually violent person shall commence no later than 120 days after the probable cause hearing. 725 ILCS 207/35(a) (West 2010). At the trial, the State has the burden of proving the allegations in its petition beyond a reasonable doubt and may do so by introducing evidence of a respondent's commission of prior crimes together with whatever punishments, if any, were imposed. 725 ILCS 207/35(b), (d)(1) (West 2010). The State may also present expert testimony from the DOC evaluation and the Department psychologist. 725 ILCS 207/35(b) (West 2010). The respondent, the respondent's attorney, or the State may request a trial by jury; however, if this request is not made within 10 days of the probable cause hearing, "the trial shall be by the court." 725 ILCS 207/35(c) (West 2010).

¶ 26 Having outlined the relevant provisions of the Commitment Act, we now turn to respondent's arguments.

¶ 27 B. Whether Respondent Received Effective Assistance of Counsel

¶ 28 Respondent first contends his counsel was ineffective under *Strickland v. Washington*, 466 U.S. 688 (1984), because counsel failed to (1) examine or cross-examine the expert witnesses and (2) communicate to respondent his right to a jury trial. The State responds that, in light of recent revisions to the Commitment Act, the standard set forth in *Strickland* may no longer control respondent's case. Further, the State argues that, even assuming *Strickland* applies, respondent has failed to show counsel's performance prejudiced respondent.

¶ 29 1. *Whether Respondent Was Entitled to Effective Assistance of Counsel*

¶ 30 In *People v. Rainey*, 325 Ill. App. 3d 573, 584-86, 758 N.E.2d 492, 501-03 (2001), this court concluded respondents under the Commitment Act are entitled to effective

assistance of counsel, as measured by the *Strickland* standard. In so concluding, we rejected the State's argument that ineffective-assistance-of-counsel claims under the Commitment Act should be evaluated under the Post-Conviction Hearing Act's (725 ILCS 5/122) (West 2010))

"reasonable assistance standard." *Rainey*, 321 Ill. App. 3d at 584, 758 N.E.2d at 502. We noted (1) proceedings under the Commitment Act more closely resemble criminal prosecutions than postconviction proceedings and (2) the Commitment Act, unlike the Post-Conviction Hearing Act, contained a provision providing that respondents in sexually violent person proceedings are entitled to " 'all constitutional rights available to a defendant in a criminal proceeding.' " *Rainey*, 325 Ill. App. 3d at 586, 758 N.E.2d at 502-03 (quoting 725 ILCS 207/35(b) (West 1998)).

¶ 31 Subsequent to *Rainey*, the legislature amended the Commitment Act to remove the language granting respondents "[a]ll constitutional rights available to a defendant in a criminal proceeding." 725 ILCS 207/35(b) (2000) (as amended by Pub. Act 92-415 § 15, eff. Aug. 17, 2001). The amendment, however, did not remove the statutory right to counsel. Thus, we must decide what level of assistance a respondent is entitled to under the current statutory language, and what standard should be utilized in evaluating a claim regarding counsel's performance. We find guidance in making these determinations in our decision in *In re Carmody*, 274 Ill. App. 3d 46, 653 N.E.2d 977 (1995). *Carmody* addressed what level of assistance must be provided by counsel under section 3-805 of the Mental Health and Developmental Disabilities Code (405 ILCS 5/3-805 (West 1992)) for a person subject to involuntary commitment. In *Carmody*, we determined a respondent is entitled to effective assistance of counsel whose performance is evaluated under the *Strickland* standard. *Carmody*, 274 Ill. App. 3d at 54, 653 N.E.2d at 984. *Carmody* pointed out " '[i]f the representation of an

alleged mental incompetent is not required to be "effective" in the same constitutional sense as the representation of the criminally accused, the right to counsel provided by [statute] would become a hollow gesture serving only superficially to satisfy due process requirements.' " *Carmody*, 274 Ill. App. 3d at 55, 653 N.E.2d at 984 (quoting *In re Hutchinson*, (1980) 279 Pa. Super. 401, 408-09, 421 A.2d 261, 264-65). The same reasoning applies here.

¶ 32 In addition, we are persuaded that *Rainey* is helpful in understanding why "reasonable assistance" is not the appropriate level of assistance to apply to the case before us. As discussed in *Rainey*, the rationale behind providing petitioners under the Post-Conviction Hearing Act with only "reasonable assistance" of counsel as opposed to "effective assistance" of counsel is postconviction petitioners have already been stripped of the presumption of innocence and are initiating the postconviction proceedings; thus, attorneys in postconviction cases serve to "shape [the petitioners'] complaints into the proper legal form and to present those complaints to the court." *People v. Owens*, 139 Ill. 2d 351, 365, 564 N.E.2d 1184, 1190 (1990). By contrast, a trial attorney in a criminal proceeding "acts as a shield to protect defendants from being 'haled into court' by the State and stripped of their presumption of innocence." *Owens*, 139 Ill. 2d at 364, 564 N.E.2d at 1190 (quoting *Ross v. Moffitt*, 417 U.S. 606, 610-11 (1974)).

¶ 33 As in criminal proceedings, the State initiates proceedings under the Commitment Act and respondent's counsel "serves as a shield to protect defendant from the 'prosecutorial forces' of the State." *Rainey*, 325 Ill. App. 3d at 586, 758 N.E.2d at 502. Also, in a case such as this, a respondent faces the potential loss of his liberty for an indeterminate period. Accordingly, we conclude respondents under the Commitment Act are entitled to effective assistance of counsel.

¶ 34 2. *Whether Respondent Received Effective Assistance of Counsel*

¶ 35 Having determined respondent was entitled to effective assistance of counsel, we now consider whether respondent has shown counsel was ineffective. To set forth a claim of ineffective assistance of counsel under *Strickland*, a respondent must show (1) counsel's performance was deficient and (2) the deficient performance prejudiced the respondent. *Strickland*, 466 U.S. at 688, 694. However, where counsel entirely fails to subject a prosecutor's case to meaningful adversarial testing, prejudice is presumed and the two-part *Strickland* test need not be applied. *People v. Kozlowski*, 266 Ill. App. 3d 595, 600, 639 N.E.2d 1369, 1373 (1994) (citing *U.S. v. Cronin*, 466 U.S. 648, 659 (1984)).

¶ 36 We conclude that, here, respondent's counsel failed to conduct any meaningful adversarial testing and we must presume respondent was prejudiced by counsel's performance. Although the State attempts to characterize the August 2012 hearing as a "stipulated bench trial," our review of the record indicates the proceeding was not, in fact, a stipulated bench trial. Neither the common-law record nor the transcript from August 2012 reflects the parties entered into a stipulation. In fact, at the July 2012 hearing, the assistant attorney general stated as follows:

"Well Judge, I think [respondent]'s talking about a stipulation which the State often puts together, it had admonishments and documents attached. I mean at this point I'm going with the ruling, I'm going to ask that you rule. I am not planning to put together a stipulation for the 1st."

¶ 37 At the August 2012 proceeding, the assistant attorney general again indicated she

sought to have the trial court rule on the reports, stating as follows:

"Judge, I'm asking that you consider all of the reports and the respondent did have an evaluation that was completed by Dr. Killian, that you consider all of the reports and that based on all these reports you find that the respondent is a sexually violent person. I'll also make—if you do make that finding I'll also have the same oral motion."

The court asked respondent's attorney whether he wanted to add "[a]nything else," and counsel answered, "No, sir." Thereafter, the court concluded respondent was a sexually violent person based on the reports of the three psychologists—whose qualifications, we note, were never established. See *In re Detention of Tittlebach*, 324 Ill. App. 3d 6, 10, 754 N.E.2d 484, 487 (2001) (the Illinois Administrative Code requires an evaluator be a physician, psychiatrist, or clinical psychologist who has a minimum of two years' experience providing sex offender evaluation and treatment).

¶ 38 The State argues respondent suffered no prejudice in this case because in their reports, all three experts—including respondent's own expert—concluded respondent qualified as a sexually violent person. However, despite the strength of the experts' reports, we cannot conclude they rendered respondent's right to a trial under the Commitment Act meaningless. 725 ILCS 207/35 (West 2012).

¶ 39 Moreover, even if we were to deem the August 2012 proceeding a "stipulated bench trial," the record clearly demonstrates defendant did not agree to proceed in such a fashion. In criminal proceedings, defense counsel may validly waive a defendant's right to confront

witnesses and enter into a stipulation only where (1) the defendant does not object to the stipulation, and (2) the decision to stipulate is a matter of trial tactics and strategy. *People v. Clendenin*, 238 Ill. 2d 302, 324, 939 N.E.2d 310, 323 (2010). While there is a dispute as to whether respondent asked for a jury trial (respondent says he did on April 2, 2012, a date where no reporter was present and the docket shows respondent present by counsel), there is no record of respondent waiving his right to a bench trial. We conclude that, in this proceeding under the Commitment Act, counsel could not waive respondent's right to a trial where respondent objected and consistently expressed he was upset over having "no defense" at both the July 2012 and August 2012 proceedings.

¶ 40 We are aware finding prejudice is presumed in this matter is extraordinary. Although this is a civil matter, as we have previously noted, it is akin to a criminal case. Given the liberty interest at stake and the role of counsel in these types of cases, we believe our analysis is appropriately applied. Also, we note, in cases where in spite of the potential loss of liberty, reviewing courts adhere to the two-pronged *Strickland* analysis, they have explained counsel's strategic decisions were reasonable and that adversarial testing did take place regarding matters to which counsel did not concede. See *Florida v. Nixon*, 543 U.S. 175, 190 (2004) (the Supreme Court applied *Strickland* where trial counsel conceded defendant's guilt in a capital case); see also *People v. Adkins*, 239 Ill. 2d 1, 36-46, 940 N.E.2d 11, 31-37 (2010) (*Strickland* applied when trial counsel conceded defendant committed residential burglary in a capital case). The record in this matter lacks a showing of a reasonable strategy or any adversarial testing. In short, the adversary process to which respondent was entitled failed to take place. This failure renders the process presumptively prejudicial.

¶ 41 In sum, respondent's counsel failed to subject the State's case to adversarial testing when he, with full knowledge of respondent's objection, gave up respondent's right to a bench trial by acquiescing in the assistant attorney general's request that the court simply "rule on the reports." Accordingly, we must remand for a new trial.

¶ 42 Although we are remanding this matter for a new trial, we note the following long-standing rule continues to apply: decisions as to which witnesses to call at trial and what evidence to present on a respondent's behalf ultimately rest with trial counsel. *People v. Reid*, 179 Ill. 2d 297, 310, 688 N.E.2d 1156, 1162 (1997).

¶ 43 C. Respondent's Remaining Contentions

¶ 44 Because we are remanding respondent's case based on counsel's ineffective assistance, we need not address respondent's remaining contentions that (1) Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971) impermissibly interfered with the right to effective counsel, and (2) the trial court erred by denying respondent's and respondent's counsel's motions.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we reverse and remand for a new trial.

¶ 47 Reversed and remanded.