

No. 1-13-2151

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE COMMITMENT OF,)	Appeal from the
MICHAEL SEWELL)	Circuit Court of
)	Cook County.
(THE PEOPLE OF THE STATE)	
OF ILLINOIS,)	
)	
Petitioner-Appellee,)	No. 06 CR 80015
)	
v.)	
)	
MICHAEL SEWELL,)	The Honorable
)	Paul P. Biebel, Jr.,
Respondent-Appellant.))	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court, with opinion.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

ORDER

¶ 1 *Held*: This court improvidently granted the interlocutory appeal under Supreme Court Rule 308. Having decided that the questions presented encompass factual issues inappropriate for consideration under Rule 308 and that the matter does not otherwise satisfy Rule 308 requirements, we vacate our previous order and dismiss this appeal.

¶ 2 Defendant Michael Sewell filed this interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Feb. 26, 2010) to determine the propriety of the State's petition for his civil

commitment under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2010)) (SVP) (the Act). For the reasons stated below, we dismiss this appeal.

¶ 3

BACKGROUND

¶ 4 The limited record before us shows that defendant, a burglar, robber and serial rapist, was taken into custody for a parole violation while serving concurrent sentences for various offenses in the late summer and early fall of 2006. In September 2006, the prisoner review board determined defendant had violated his parole, but rather than revoking parole, the board determined it would continue "[e]ffective when plans are approved." A month later, on October 5, 2006, the State filed a petition to commit defendant as a sexually violent person under the Act to the custody of the Department of Human Services (DHS), attaching a psychological assessment that concluded defendant had a substantial and continuing risk of recidivism. In February 2007, defendant, through counsel, moved to dismiss the petition alleging *inter alia* that it was not timely filed under section 15(b-5), which required that the State file the SVP petition "[n]o more than 90 days before discharge or entry into mandatory supervised release [MSR] from a Department of Corrections [DOC] correctional facility for a sentence that was imposed upon a conviction for a sexually violent offense, or for a sentence that is being served concurrently or consecutively with a sexually violent offense, and no more than 30 days after the person's entry into parole or mandatory supervised release." (Emphasis added.) 725 ILCS 207/15(b-5) (West 2006). Defendant argued that the State's petition was filed "prematurely" because defendant never received a reentry date for his MSR term, but rather was simply transferred to DHS when the State filed its petition. He also argued the petition was filed well before his release date of August 2008, all in violation of the statute.

¶ 5 A hearing ensued during which the defense submitted the deposition testimony of the DOC's assistant records officer to prove defendant's MSR dates. Apparently the hearing also included argument from both the defense and the State. The State argued that on October 6, the day after the State had filed its petition, a "host site" for defendant's reentry into MSR was determined to be DHS.

¶ 6 The trial court rejected defendant's motion to dismiss and in so doing concluded that defendant had reentered MSR on October 6, thus making the State's petition filed one day before timely or "within 90 days" of his entry into MSR. The court stated this conclusion was buttressed by the fact that defendant's discharge had been recalculated accordingly.

¶ 7 Four years after the original motion to dismiss was filed, defendant filed another in September 2011. Newly represented, defendant moved to dismiss the State's petition under section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2010)) (the Code), arguing that the petition was not timely filed because "(1) the respondent's parole plan was pending approval; (2) parole plans had not been submitted to or approved by the Office of Adult Parole Services; (3) the respondent had not had a parole plan communicated to him in writing; (4) the respondent had no fixed parole out-date; (5) the SVP petition itself was the mechanism used to effect the approval of parole plans and fictitiously create a parole out-date; and (6) the respondent did not cause any of the foregoing deficiencies." In response, the State moved to strike defendant's motion arguing it was duplicative and already properly denied. In September 2012, the parties argued the matter before Judge Paul Biebel, who had previously denied defendant's motion to dismiss in 2007. Shortly thereafter, Judge Biebel denied defendant's motion to dismiss citing the same reasons as before.

¶ 8 Defendant then filed a motion for leave to file an interlocutory appeal, and the State opposed it, arguing the issue did not qualify under Rule 308 because there was no ground for a substantial difference of opinion and the appeal would not materially advance the termination of litigation. The State noted that the parties essentially were ready for trial.

¶ 9 The parties argued their positions before Judge Biebel who ultimately granted defendant's motion. Judge Biebel noted the SVP law was not particularly well developed, then stated: "I believe I'm right. But I believe since this is a situation that might come up again where somebody doesn't have a place to go, as I say, I believe I'm right, but I think the timeliness, the issue perhaps should be addressed by the Appellate Court." Judge Biebel certified the following questions:

"1. Was the State's Petition for Sexually Violent Person Commitment in this case timely filed?

2. If the State's SVP petition was untimely filed, should the petition be dismissed pursuant to Section 2-619 of the Code of Civil Procedure?"

On August 5, 2013, this court allowed defendant's petition for leave to appeal.

¶ 10 ANALYSIS

¶ 11 Supreme Court Rule 308 authorizes this court to allow appeal of interlocutory orders not otherwise appealable if an appropriate application is filed and the trial court has found (1) that the order involves a question of law as to which there is substantial ground for difference of opinion and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. Ill. S. Ct. R. 308 (eff. Feb. 26, 2010); *Voss v. Lincoln Mall Management Company*, 166 Ill. App. 3d 442, 444 (1988). Appeals under Rule 308 should be limited to "exceptional" circumstances; the rule should be strictly construed and sparingly exercised. *Morrissey v. City of*

Chicago, 334 Ill. App. 3d 251, 258 (2002); *Voss*, 166 Ill. App. 3d at 445. In addition, prior to considering an appeal on its merits, we must determine whether the appeal has been properly taken by this court to invoke our jurisdiction. *Voss*, 166 Ill. App. 3d at 451. We may reconsider the question of jurisdiction if our earlier ruling seems erroneous. *Id.* Assuming the facts are as the parties represent them, and having reviewed the record in full, as well as considered the parties' briefs, we now conclude this appeal was improvidently granted for three reasons.

¶ 12 First, the certified questions as framed improperly request that this court render an advisory opinion on the factual circumstances in defendant's case. See *Morrissey*, 334 Ill. App. 3d at 258. As a general rule, however, a court of review will not render advisory opinions. *People v. Campa*, 217 Ill. 2d 243, 269 (2005). Rule 308 was not intended to allow for an interlocutory appeal of merely an application of the law to the facts of a specific case. *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008). Thus, the questions presented do not satisfy Rule 308 parameters.

¶ 13 Second, given what appear to be the rather unique circumstances of this case, we also fail to see how the intertwined legal issues would be a hot-topic legal question leading to a substantial difference of opinion. Moreover, the law also strongly suggests that an SVP petition can easily be filed based on an anticipated date of entry into MSR. See *In re Detention of Powell*, 217 Ill. 2d 123, 138-39 (2005) (recognizing that an SVP petition can be filed based on a defendant's "anticipated entry into MSR" given the statute's plain language and the legislature's goal under the Act of keeping communities safe from predatory sex offenders who pose an ongoing threat to society); *In re Allen*, 331 Ill. App. 3d 996, (2002) (the State has "unlimited bites of the apple," insofar as the State's SVP petition will be timely as long as it is within the

120-day period, *i.e.* 90 days before the anticipated or actual MSR reentry date or within 30 days after reentry into MSR).

¶ 14 Third, defendant has not established how resolution of the underlying legal questions would materially advance the litigation. See *Voss*, 166 Ill. App. 3d at 451-52. Although defendant suggests this case would be completely disposed of with a dismissal of the petition, defendant has not cited any legal authority to demonstrate that the remedy for an untimely petition would be strict dismissal of the petition. Even assuming the State's petition were untimely and subject to dismissal, the SVP statutory scheme does not appear to preclude the State from refileing an SVP petition either before or after the MSR date is set. Thus, on a very practical level, the timeliness arguments seem to be much ado about nothing and our answer would not materially advance litigation. See *Kincaid v. Smith*, 252 Ill. App. 3d 618, 623 (1993). Moreover, although defendant filed his 2011 motion to dismiss under the Code, he presented essentially the same argument regarding the State's untimely SVP petition in 2011 as he did in 2007, thus filing duplicative motions to dismiss. The trial court rather decidedly rejected defendant's arguments, not once but twice, and even reiterated it was correct while considering defendant's 308 motion. This hardly supports the notion that there could be a substantial difference of opinion on the matter or that our addressing it would really advance the litigation. This case apparently is now close to being tried. If anything, the questions posed seem to be delaying trial rather than advancing it. See *Voss*, 166 Ill. App. 3d at 449 (noting that "[d]elay has been said particularly to argue against interlocutory appeal if the appeal is from a ruling made shortly before trial" and if it appears an interlocutory appeal will delay a trial, rather than expedite or eliminate it, leave to appeal should be denied).

¶ 15 The record indicates that this case has been pending since mid-2000, and it is now well past defendant's recalculated MSR date and the suggested statutory time frame for the SVP trial (see 725 ILCS 207/35 (West 2010) noting that unless agreed otherwise, an SVP trial should commence "no later than 120 days after the date of the probable cause hearing" under the Act). It would therefore behoove the court and the parties to expedite the matter.

¶ 16 CONCLUSION

¶ 17 Based on the foregoing, we vacate our order dated August 5, 2013, allowing this interlocutory appeal. See *Voss*, 166 Ill. App. 3d at 453. Defendant's petition for leave to appeal is denied, and this appeal is dismissed. *Id.*

¶ 18 Appeal Dismissed.