

NOTICE  
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2014 IL App (5th) 130168-U

NO. 5-13-0168

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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<i>In re</i> DETENTION OF EARL DAVIS	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Madison County.
	)	
Petitioner-Appellee,	)	
	)	
v.	)	No. 98-MR-414
	)	
Earl Davis,	)	Honorable
	)	James Hackett,
Respondent-Appellant).	)	Judge, presiding.

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JUSTICE GOLDENHERSH delivered the judgment of the court.  
Justices Spomer and Stewart concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err in denying respondent's petition for discharge from commitment as a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2012)).

¶ 2 Respondent, Earl S. Davis, appeals from an order of the circuit court of Madison County denying his petition for discharge under section 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2012)). The issue raised in this appeal is whether the trial court erred in finding respondent is still a sexually violent person. We affirm.

¶ 3

## BACKGROUND

¶ 4 This case has a long history and has previously been before us. On April 16, 1990, respondent was sentenced to 15 years in the Department of Corrections after pleading guilty to aggravated criminal sexual assault (Ill. Rev. Stat. 1985, ch. 38, ¶ 12-14(b)(1) (now see 720 ILCS 5/11-1.30(b) (West 2012))). The victim was respondent's nine-year-old daughter. On September 9, 1998, shortly before respondent was scheduled to be placed on mandatory supervised release, the State filed a petition seeking his commitment pursuant to the Act and asked that he be committed to the custody of the Department of Human Services (Department) for control, care, and treatment until he is no longer a sexually violent person. On April 9, 2001, respondent waived his right to a jury trial and his right to cross-examine witnesses, and, based upon stipulated evidence, the trial court found respondent to be a sexually violent person.

¶ 5 On July 17, 2001, a dispositional hearing began during which Dr. Paul Heaton, a clinical psychologist, testified. Dr. Heaton diagnosed respondent with pedophilia, as well as alcohol dependence and antisocial personality disorder. Dr. Heaton concluded that respondent was at a high risk to reoffend, that it was substantially probable that he would engage in further acts of sexual violence, and that respondent should be treated in a secure facility. The dispositional hearing resumed in July 2002, and respondent's attorney again called Dr. Heaton and questioned him about extensive similarities in findings and opinions between respondent's evaluation and another unidentified resident's evaluation and argued Dr. Heaton's reports were "canned."

¶ 6 Respondent's attorney also called Dr. Larry Davis, a board-certified psychiatrist, who opined that respondent was not at a high risk for recidivism and that the risk would not justify detention in a secure facility. On cross-examination, Dr. Davis admitted that when he formed his opinion he was not aware of reports that respondent abused a 10-year-old child and exposed himself to two adolescents. Respondent also testified on his own behalf and admitted that in addition to the Illinois charges, he had been convicted of child molestation in Arizona, but took exception to psychological evaluations. On August 2, 2002, the trial court entered an order committing respondent to the Department for control, care, and treatment until he was no longer a sexually violent person.

¶ 7 In July 2004, respondent filed a *pro se* motion, seeking to discharge his trial attorney on grounds of ineffective assistance of counsel. A hearing was conducted on respondent's motion in August 2004; however, before the trial court ruled on the motion, respondent's attorney was permitted to withdraw and a different attorney was appointed to represent respondent.

¶ 8 On June 24, 2008, respondent filed a *pro se* motion, seeking to have his commitment orders vacated and a new trial on all issues. Respondent asserted he did not receive effective assistance of counsel during the proceedings on April 9, 2001, and during the dispositional proceedings. He also claimed he did not make a knowing and intelligent waiver of his right to a jury trial. After a hearing, the trial court found the motion to vacate was untimely and denied it. On appeal, a panel of this court determined that the motion was timely and reversed and remanded with instructions to conduct a sufficient inquiry into the factual basis of respondent's claims of ineffective assistance.

*In re Detention of Davis*, No. 5-08-0646 (June 16, 2010) (unpublished order under Supreme Court Rule 23).

¶ 9 After a hearing upon remand, the trial court denied respondent's motion to vacate the commitment orders and grant a new trial. Respondent appealed. This court affirmed, finding that the trial court did not err in denying either respondent's motion to vacate the commitment order or his request for a new trial because respondent did not establish that he was deprived of effective assistance of counsel during commitment proceedings or that he lacked the ability to make a knowing and intelligent waiver of his right to a jury trial. *In re Detention of Davis*, No. 5-10-0578 (June 27, 2012) (unpublished order under Supreme Court Rule 23).

¶ 10 On February 24, 2009, respondent, through counsel, filed a petition for discharge. A hearing was conducted on February 4, 2013, after which the trial court found probable cause to believe that respondent was no longer a sexually violent person. The matter then proceeded to a discharge hearing. Dr. Kirk Witherspoon, a licensed clinical psychologist whose work consists of primarily court-related evaluations, testified for respondent. Witherspoon testified that he performs approximately 30 evaluations per year and renders opinions on whether or not a person qualifies as a sexually violent person under the Act.

¶ 11 Dr. Witherspoon noted that respondent was born on February 8, 1943, and would be 70 years old in four days. Witherspoon was aware that respondent refused to participate in sexual offender treatment at the Department facility where he is committed and was also aware that respondent has not been written up for any violations sexual in nature during his commitment. Dr. Witherspoon evaluated respondent four times,

beginning in 2008 and finally in 2012, approximately five months before the instant court proceedings. He estimated that he spent somewhere between 14 and 15 hours total with respondent during the course of the four evaluations. Dr. Witherspoon utilized the Static-2002R and the MATS-1 in assessing the risk of respondent reoffending.

¶ 12 Dr. Witherspoon testified that the Static-2002R estimated respondent's risk of reoffending at 3.6%, or less than 1% per year, while the results of the MATS-1 estimated respondent's risk of reoffending at 2.5% over an eight-year span. Dr. Witherspoon noted that, given respondent's age, there was "virtually no risk" of his reoffending. Dr. Witherspoon testified that respondent is less likely to reoffend because he is "quite infirm." He noted that respondent told him he has been impotent for 15 years, has no sex drive, and has low testosterone. In addition, respondent suffers from extreme pain from arthritis, hepatitis C, and asthma.

¶ 13 Dr. Witherspoon testified that respondent "does not now have a personality disorder that is significant or detectable." According to Dr. Witherspoon, the fact that respondent has not participated in treatment is not dispositive because "given his risk is so low, the issue truly is moot at this point." Because he believes respondent's risk of reoffending is so low, Dr. Witherspoon concluded that, ethically, respondent should be discharged from the care of the Department because a person should not be treated for a problem he does not have and because to continue to keep respondent committed is a waste of taxpayers' money. Based upon a reasonable degree of psychological certainty, Dr. Witherspoon found that respondent does not meet the necessary criteria to find him a

sexually dangerous person and opined that respondent should be discharged from the care of the Department.

¶ 14 On cross-examination, Dr. Witherspoon admitted that respondent denied engaging in the sexual crimes and other criminal acts of which he was convicted. Dr. Witherspoon also admitted that he did not verify whether defendant has been impotent for 15 years or whether he suffers from low testosterone. Dr. Witherspoon could not remember if there were any medical records supporting low testosterone. On redirect, it was pointed out that respondent was administered a serum testosterone test by a treating physician which indicated respondent has low testosterone. As to impotence, Dr. Witherspoon admitted that he based that upon respondent's self-report of such. Dr. Witherspoon also admitted that respondent has not taken a penile plethysmograph or a sexual history polygraph during his commitment.

¶ 15 Dr. David Suire, a sexually violent person psychologist with the Department, testified for the State. He evaluates whether a person meets the criteria to be designated a sexually violent person and whether the person's condition has changed so as to allow for less restrictive management or discharge. Dr. Suire has found some people who do not meet the criteria to be designated a sexually violent person and has found some who have been designated as such who are qualified for conditional release, but has never found anyone who qualifies for discharge. He has been assigned to respondent's case since 2007.

¶ 16 Dr. Suire testified that respondent has never acknowledged committing a sexual offense, despite the fact that he was convicted by a jury in one case and pled guilty in

another. Dr. Suire said respondent has never agreed to participate in sex offender treatment since he has been in the detention facility. Because respondent has refused treatment, there is no sexual history polygraph and he has never completed a penile plethysmograph. As a result, Dr. Suire has a limited history of respondent's offending history and his sexual arousal pattern.

¶ 17 Dr. Suire diagnosed respondent with the following three conditions: (1) pedophilia, sexually attracted to females, nonexclusive type; (2) alcohol abuse in a controlled setting; and (3) personality disorder. Dr. Suire testified that once a person is found to be a pedophile, it is generally a chronic condition which can only be managed, not cured, because once a person is attracted to children, that person does not wake up one day no longer attracted to children. It can only be managed by acknowledging its presence, coming to understand what the pedophile's high-risk situations are, coming to understand what the pedophile is seeking through this sexual contact, and then designing interventions to avoid high-risk situations or finding other ways to meet the needs one is seeking through pedophilia. Respondent has failed to take any of the steps necessary to manage his pedophilia.

¶ 18 With regard to alcohol abuse, Dr. Suire testified that if a pedophile drinks, then the ability to manage pedophilic urges is reduced because alcohol intake makes a person more willing to take chances. With regard to the personality disorder, Dr. Suire testified respondent has a number of characteristics of a person with antisocial personality disorder and also exhibits some narcissistic traits. The antisocial personality disorder involves a pervasive pattern of disregard for or violation of the rights of others, while

narcissistic traits are generally characterized by a pattern of grandiosity, lack of empathy for others, and a lifestyle of predatory behavior. According to Dr. Suire, managing pedophilia is more difficult for someone with a personality disorder, and because of his personality disorder, respondent is less concerned that sexual conduct with children is against the rules.

¶ 19 Dr. Suire explained that actuarial tools such as Static assign values to factors that research has shown as correlating with recidivism. Dr. Suire used Static-99, Static-99R, and the Minnesota Sex Offender Screening Tool Revised (MnSOST-R) on respondent. On the Static-99 test, respondent scored in the moderate-high range, on the Static-99R he scored in the low-risk range, and on the MnSOST-R respondent scored high risk. Dr. Suire was especially critical of the reduction in risk at age 60 on the Static-99R because he believes there is nothing magical about attaining the age of 60. With regard to respondent's age, Dr. Suire specifically stated:

"In my opinion it is not a sufficient factor to reduce his risk below substantially probable. His risk is probably somewhat lower than it was at 37 or 43, but I don't believe it is at such a reduction that I would say—that I would be comfortable to say that it is below substantially probable."

Dr. Suire does not believe the developers of the assessment understand how age affects risk. He believes age should reduce consistently across time, not show a big drop-off at a particular age.

¶ 20 Dr. Suire testified that respondent has additional risk factors to reoffend, including personality disorder, sexual interest in children, substance abuse, antisocial lifestyle, as

well as the fact that respondent sees himself as no risk to reoffend. Dr. Suire explained there are three potential protective factors that might reduce the risk of recidivism: (1) advanced age, (2) treatment progress, and (3) health. However, with regard to respondent, none of these, either alone or in combination, was sufficient to reduce respondent's risk below substantially probable. Therefore, Dr. Suire opined that respondent was substantially probable to engage in further acts of sexual violence. On cross-examination, Dr. Suire admitted that there have been no reports of sexual offenses against respondent since his second offense in 1986, with which he was not charged until 1989, but did not give much weight to that because respondent has been in a secure setting without access to children nearly all of that time.

¶ 21 After hearing all the evidence, the trial court found that the State proved by clear and convincing evidence that respondent remains a sexually violent person and denied respondent's petition for discharge. Respondent now appeals.

¶ 22 ANALYSIS

¶ 23 The issue raised on appeal is whether the trial court erred in finding respondent is still a sexually violent person. Respondent argues that the actuarial evidence places him in the lowest category of risk and that the contrary personal opinion of Dr. Suire is not enough to prevent his release, and, thus, he is entitled to discharge. We disagree.

¶ 24 Section 5(f) of the Act defines "sexually violent person" as follows:

" 'Sexually violent person' means a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity and

who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 2012).

¶ 25 Section 65(b)(1) of the Act provides in pertinent part as follows:

"A person may petition the committing court for discharge from custody or supervision without the Secretary's approval. At the time of an examination under subsection (a) of Section 55 of this Act, the Secretary shall provide the committed person with a written notice of the person's right to petition the court for discharge over the Secretary's objection. \*\*\* If the person does not affirmatively waive the right to petition, the court shall set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic reexamination \*\*\*, the condition of the committed person has so changed that he or she is *no longer* a sexually violent person. However, if a person has previously filed a petition for discharge without the Secretary's approval and the court determined, either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person was *still* a sexually violent person, then the court shall deny any subsequent petition under this Section without a hearing unless the petition contains facts upon which a court could reasonably find that the condition of the person had so changed that a hearing was warranted." (Emphases added.)  
725 ILCS 207/65(b)(1) (West 2012).

Section 65(b)(2) of the Act further provides that if the trial court determines at a probable cause hearing that a plausible basis exists to believe that "the condition of the committed

person has so changed that he or she is *no longer* a sexually violent person," the court shall schedule an evidentiary hearing on the respondent's petition for discharge. (Emphasis added.) 725 ILCS 207/65(b)(2) (West 2012).

¶ 26 If the court, as here, finds that there is probable cause to believe that the committed individual "is no longer a sexually violent person," it must set a hearing on the issue and the State has the burden of proving by clear and convincing evidence that the committed individual is "still a sexually violent person." 725 ILCS 207/65(b)(2) (West 2012). The trial court's finding that a respondent is still a sexually dangerous person should not be disturbed on review unless that decision is against the manifest weight of the evidence. *People v. Donath*, 2013 IL App (3d) 120251, ¶ 1, 986 N.E.2d 1222. A decision is contrary to the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 978, 857 N.E.2d 295, 318 (2006).

¶ 27 The instant case boils down to a clash between two experts, Dr. Witherspoon and Dr. Suire. Dr. Witherspoon testified that because of respondent's advanced age, there was virtually no chance of his reoffending. In forming this opinion, Dr. Witherspoon relied heavily on an actuarial assessment which provides for a significant reduction in recidivism for male sex offenders once they attain the age of 60. Dr. Witherspoon also relied on respondent's word that respondent is impotent, but acknowledged that he has no medical proof of such. Dr. Witherspoon also found no evidence that respondent suffers from a personality disorder.

¶ 28 On the other hand, Dr. Suire testified that respondent remains a sexually violent person, and he diagnosed respondent with pedophilia toward females, alcohol abuse in a controlled setting, and a personality disorder. Dr. Suire testified that respondent has a number of characteristics of a person with antisocial personality disorder and some narcissistic traits. Dr. Suire explained that the combination of the alcohol abuse and personality disorder act to make respondent more likely to act on his pedophilic urges.

¶ 29 Dr. Suire also found that respondent does not suffer from any serious or debilitating medical condition which would warrant a significant reduction in risk and pointed out that while respondent has reported that he has been impotent for at 15 years, there is no independent confirmation of such. Dr. Suire also explained that pedophilia cannot be cured, but only managed, and it can only be managed if the pedophile acknowledges its presence and takes the steps necessary to manage it.

¶ 30 In the instant case, respondent still refuses to acknowledge that he has ever committed a sexual offense, despite the fact that he was convicted by a jury in one case and pled guilty in another. Respondent has refused to participate in sexual offender treatment since he was designated a sexually violent person. As a result, respondent has not taken a sexual history polygraph or penile plethysmograph. Moreover, Dr. Suire debunked the theory that a 70-year-old will never reoffend. Dr. Suire finds nothing magical about a male attaining the age of 60 and feels that a large drop-off in the likelihood of reoffending at the age of 60 is unwarranted.

¶ 31 Nevertheless, respondent insists that he is entitled to discharge because revised actuarial tests indicate that he is low risk for recidivism. We are unconvinced by

respondent's reliance on the revised assessments. In his supplemental reexamination report filed on July 16, 2012, Dr. Suire discussed at length how actuarial measures only have a moderate degree of predictive accuracy and that no single actuarial measure has been consistently superior across samples. Respondent also attempts to impeach Dr. Suire with articles supplied in a "separate appendix." However, we agree with the State that our role as a reviewing court is to review the evidence presented to the trial court and its rulings and findings thereon. We cannot receive any additional evidence. *In re L.L.S.*, 218 Ill. App. 3d 444, 465, 577 N.E.2d 1375, 1389 (1991).

¶ 32 We find Dr. Suire's testimony was sufficient for the trial court to find by clear and convincing evidence that respondent is still a sexually violent person. Where experts offer divergent conclusions, the trier of fact is entitled to believe one expert over the other. *People v. Sims*, 374 Ill. App. 3d 231, 251, 869 N.E.2d 1115, 1132 (2007). In addition to his convictions, respondent has been diagnosed with pedophilia, alcoholism, and personality disorder. He has refused to participate in sexual offender treatment.

¶ 33 After hearing all the evidence, the trial court specifically found as follows:

"At hearing, the testimony and evaluations of the state's expert prevailed. The court found the opinion clear and convincing. The diagnosis and risk factors involved here reach beyond mere actuarial guidelines. The strongest point argued by respondent was the decline in risk due to age. While there is undeniably some great merit to that, the adjustment may be dramatic in scoring but is progressive in reality. That factor of itself does not reduce risk summaries for respondent below substantially probable. While generally applicable, it must be specifically applied

to the individual and his circumstances. Herein with the specific individual diagnosis, treatment history, offense history, risk factors, and additional protective factor assessment as a constellation to be considered, the risk is at this time still substantially probable."

Here, the trial court properly weighed the conflicting opinions of the experts and decided Dr. Suire was more credible.

¶ 34 After careful consideration of the record before us, we cannot say the trial court's decision is against the manifest weight of the evidence. Accordingly, we hereby affirm the order of the circuit court dismissing respondent's petition for discharge.

¶ 35 Affirmed.