2015 IL App (2d) 150068-U
No. 2-15-0068
Order filed December 24, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re COMMITMENT OF STEVEN KIRST	)	Appeal from the Circuit Court
	)	of Lee County.
	)	
	)	No. 09-MR-55
	)	
	)	
(The People of the State of Illinois, Petitioner-Appellee, v. Steven Kirst, Respondent-Appellant).	)	Honorable
	)	Daniel A. Fish,
	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in granting the State's motion finding that no probable cause existed to warrant an evidentiary hearing on the issue of whether respondent remained a sexually violent person. Even without regard to the results of an actuarial test for recidivism, there was ample evidence that respondent remained a sexually violent person, including several empirical risk factors that applied to him and his admission that he continued to fantasize about young girls and masturbate to those fantasies.

¶ 2 In these proceedings under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2014)), respondent, Steven Kirst, appeals from the trial court's order granting the State's motion to find that that no probable cause existed to warrant an evidentiary hearing on the issue of whether he remained a sexually violent person (SVP). For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2010, respondent stipulated that he was an SVP and agreed to be committed to the custody of the Illinois Department of Human Services (IDHS). The trial court accepted the stipulation and ordered respondent to be committed to IDHS for institutional treatment. During his commitment, respondent has received periodic evaluations as required by section 55 of the Act (725 ILCS 207/55 (West 2014)). Following each evaluation, the trial court found no probable cause to warrant an evidentiary hearing to determine whether respondent was still an SVP.

¶ 5 On October 3, 2014, following an annual reevaluation, the State filed a motion for a finding of no probable cause. In its motion, the State noted that respondent's failure to file a petition for discharge resulted in a probable-cause hearing consisting only of a review of the reexamination report and arguments on behalf of the parties. 725 ILCS 207/65(b)(1) (West 2014). In the motion the State alleged that respondent was substantially probable to engage in further acts of sexual violence. The motion was accompanied by the September 10, 2014, expert report of clinical psychologist Edward Smith.

¶ 6 In the report, Dr. Smith reviewed respondent's criminal history. A very detailed account of respondent's criminal history is set out in our earlier opinion, and we shall only summarize it here. See *In re Commitment of Kirst*, 2015 IL App (2d) 140543, ¶¶ 6-9. In 1995, respondent pled guilty to charges of telephone harassment for making two obscene phone calls to an eight-year-old girl. He was sentenced to 12 months of conditional discharge. In 1999, he pled guilty to child abduction and was sentenced to two years' imprisonment. When interviewed by police in connection with that case, respondent admitted that between April and June 1998 he attempted to lure three girls into his car.

¶ 7 Between September 2001 and February 2005, respondent made obscene phone calls to a number of six-to-eleven-year old girls. Respondent told police that he had made at least 30 such calls and would masturbate during the calls. He was convicted of one count of indecent solicitation of a child and was sentenced to four years' imprisonment. Less than two weeks after his release from prison for the indecent-solicitation offense in March 2007, respondent was charged again with indecent solicitation of a child and telephone harassment. He pled guilty to indecent solicitation of a child and was sentenced to five years' imprisonment.

¶ 8 Based upon his review of respondent's treatment records, police reports, and a personal interview with him, Dr. Smith diagnosed respondent with: (1) pedophilic disorder, sexually attracted to females, nonexclusive type; and (2) other specified paraphilic disorder (telephone scatalogia).[1]

¶ 9 In determining respondent's risk to reoffend Dr. Smith used an actuarial instrument, the Static-99R, combined with additional empirically-based known risk factors. Respondent scored a six on the Static-99R, which placed him in the "high risk" category to reoffend. Based on that score, Dr. Smith calculated respondent's "relative risk" to reoffend was 3.77 times more likely than a typical sex offender. In calculating respondent's "absolute risk" to reoffend, the Static-99R required that respondent be placed in one of four comparison groups ("routine correctional," "preselected for treatment needs," "preselected for high-risk/high needs," or "non-routine correctional"). Dr. Smith noted the differences among the four sample groups, and he stated

[1] "Telephone scatalogia" is defined as a disorder wherein a person experiences recurrent and intense sexual arousal from making obscene telephone calls. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM-5 *Paraphilic Disorders*, at 705 (2013).

that, depending upon which sample was used, the recidivism rates could vary widely. Dr. Smith placed respondent in the "high-risk/high needs" group. Sex offenders in this group who also had a score of six were charged with or convicted of another sexual offense at a rate of 31.2% within five years, and 41.9% within 10 years. Dr. Smith noted that he used the high risk/high needs sample because like offenders in that sample group, respondent had been referred for intensive sex-offender treatment after his SVP finding.

¶ 10 Dr. Smith opined that respondent had a number of additional risk factors independent of the Static-99R results. Specifically, he found these additional risk factors applied to respondent: intimate relationship conflicts, deviant sexual interest in children, paraphilic interest, employment instability, substance abuse, and identification with children. Respondent had no protective factors that might reduce his risk. Also, he was only in the early phase of sex offender treatment, and at 43 years old, any age-related reduction of risk was already accounted for by the Static-99R.

¶ 11 Dr. Smith also reported that in February 2013, respondent was removed from the "disclosure" treatment group due to significant treatment barriers, *i.e.*, his limited transparency and interfering attitude. Between February 2013 and the time of Dr. Smith's report in September 2014, respondent had participated in other treatment groups, and Dr. Smith reported that he was currently still trying to get readmitted into the disclosure group.

¶ 12 In his report Dr. Smith stated that on September 10, 2014, he interviewed respondent for approximately 35 minutes. In the interview, respondent told Dr. Smith that he was working on being less deceptive, and that he was addressing his "treatment interfering behaviors" in preparation for readmittance into the disclosure treatment group. Respondent said that two or three times a month he had deviant sexual thoughts about blonde and red headed girls between

the ages of 11 and 15. He reported that he had masturbated to one of these fantasies two months prior.

¶ 13 Based upon his review of respondent's records and the clinical interview, Dr. Smith concluded that respondent was still an SVP and had not made sufficient progress in treatment to be placed on conditional release. Respondent was not currently participating in the disclosure treatment group, but he had demonstrated his commitment to treatment through other groups. Dr. Smith noted that respondent needed to "continue with his motivation for treatment and to continue to overcome the treatment interfering behaviors in order to be able to progress meaningfully through the phases of the program." Dr. Smith also said that because respondent's condition had not changed since his most recent periodic examination, he remained an SVP.

¶ 14 On January 7, 2015, respondent filed a motion for the appointment of Dr. Kirk Witherspoon as an independent expert. In the motion respondent alleged that Dr. Smith's report of September 10, 2014, omitted material information regarding respondent's progress in treatment and his treatment status which were relevant in determining the "issues set by statute at an annual review" pursuant to section 55(a) of the Act. 725 ILCS 207/55(a). The respondent also alleged that the actuarial tool used by Dr. Smith was not empirically supported and did not produce reliable results.

¶ 15 On January 14, 2015, respondent's counsel and the State were present for a hearing on the State's motion for a finding of no probable cause. Respondent was also present in the custody of IDHS. The trial court initially said that the parties were present for a hearing on the State's motion, but noted that respondent had filed a motion for the appointment of an independent examiner. When it asked how the parties would like to proceed, respondent's counsel said she would like to proceed first on the motion for an independent examiner. The

State did not object. Instead, it argued that respondent's motion to appoint an independent examiner was untimely. The court then allowed respondent's counsel to proceed on the motion for an independent examiner.

¶ 16 Respondent testified that the interview with Dr. Smith on September 10, 2014, lasted only 15 minutes, and not 35 minutes that Smith noted in his report. He also said that Dr. Smith's report did not list all the treatment groups that he had been involved in during the review period even though respondent informed Dr. Smith about all the groups in which he participated. Specifically, he had also been involved in the "thinking errors" group, a substance abuse and decision making models group, "distressed tolerance group," healthy relationships, coping skills, mindfulness and advanced mindfulness. Respondent also told Dr. Smith that was going to be readmitted into the disclosure treatment group on October 3, 2014, but Dr. Smith did not put that information in his report.

¶ 17 When respondent was finished testifying his counsel proffered four exhibits, which were admitted into evidence without objection. Counsel argued that each of the exhibits addressed issues concerning the Static-99R, including the issues with its references groups and the methodologies used to arrive at a risk estimate for a given individual. Exhibit A, a "Timeline for Static-99 and 99R Development," showed that in October 2013 the Association for the Treatment of Sex Abusers addressed multiple issues with the selection procedure for the Static-99R. Exhibit B, a PowerPoint presentation entitled "Where Are We Now? Recent Developments in Static-99R Risk Communication," indicated that generally speaking, only the routine sample should be referenced and that that sample was the closest to a true population of convicted sex offenders. Exhibit C, an article entitled "Forensic Use of the Static-99R," made it clear that the routine correctional sample was most representative of the full range of convicted sex offenders.

Exhibit D, an article from *Open Access Journal of Forensic Psychology*, stated that the use of the high risk/high needs comparisons group concerning the Static-99R was not consistently supported by available empirical research.

¶ 18 The State argued that none of those exhibits stood for the proposition that an examiner should not use the Static-99R test. It also noted that Dr. Smith did not rely solely on the Static-99R in forming his opinions and conclusions in his report.

¶ 19 At the conclusion of the hearing, the trial court found that respondent and his attorney knew when the examination period had to be completed by, or at least started, which was at least every 12 months. Also, since the Act specifically required that the probable-cause hearing be held as soon as practical after the filing of the reexamination report (725 ILCS 207/65(b)(1) (West 2014)), it found that the motion for an independent examiner, filed only one week before the probable-cause hearing, was untimely. The court further said:

> "I also have found that the argument with regards to the instruments used here by Dr. Smith, specifically the Static-99R, I believe if I pronounced—have them in the correct order, while there may be some differences in the field, there is nothing to suggest that this is somehow an instrument so inaccurate that no consideration should be given to its basis for rendering an opinion. Furthermore, clearly this is only one basis for the doctor's conclusions within the report. Therefore I would deny that request for re-appointment of an—of an outside expert at this time."

¶ 20 Respondent's counsel then informed the court that all that remained was the State's motion for a finding of no probable cause based on the annual reexamination report. The court asked both parties if they were prepared to proceed on that motion and the State and respondent's counsel said they were prepared. The State then said that its arguments were contained in the

pleadings and that at the current time respondent had not shown that his condition was so changed that he was no longer a SVP. The State asked the court to consider Dr. Smith's report as well as the State's motion and find that there was no probable cause. In response, respondent's counsel asked the court if she could stand primarily on arguments already given in the hearing on the previous motion since they were "very much related." The court allowed counsel to do so. The court then ruled:

> "Okay. The court stands on its prior reasoning with regards to [counsel's] request. I would—in the report, I know that I have had an opportunity to take a look at it, and I do note that certainly the conclusion is that obviously [respondent] is not ready to be considered for any form of conditional release at this point in time but certainly progress, in fact, has been made and he continues to do so and seems to show a commitment for progress and change, which is good. I commend you for that, [respondent], but based upon the reports that's there, the pleadings here, I certainly grant the State's motion and it looks like this is a matter that we will be taking up later this year."

Respondent timely appealed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, respondent contends that the trial court erred in granting the State's motion for a finding of no probable cause. Specifically, he argues: (1) he testified that parts of Dr. Smith's report were inaccurate or incomplete; (2) Dr. Smith's 2014 report was based on respondent's history of offending and not on his current mental status; (3) Dr. Smith's report was not reliable because he did not discuss disagreements within the psychological community regarding choosing the appropriate sample comparison group in the Static-99R.; (4) Dr. Smith's

reference in his report that he was 3.77 times more likely than the average sex offender to re-offend was misleading since that figure was still a low risk of re-offending; (5) the exhibits that were admitted at the hearing contained "new professional knowledge" which showed that the Static-99R was unreliable and rendered Dr. Smith's opinion untrustworthy; and (6) Dr. Smith's report was devoid of any information that respondent had currently committed any offense, which showed that he has a current ability to control his sexual urges.

¶ 23 At a post-commitment probable-cause hearing under the Act, the trial court must "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." 725 ILCS 207/65(b)(1) (West 2014). If the court finds that probable cause does exist, then it must set an evidentiary hearing on the issue. 725 ILCS 207/65(b)(2) (West 2014). A reviewing court reviews *de novo* the trial court's finding that there was no probable cause to believe that, since the most recent periodic reexamination, respondent's condition has so changed that he is no longer an SVP. *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 49.

¶ 24 A sexually violent person is one who: (1) has been convicted of a sexually violent offense as defined in the Act; and (2) is dangerous to others because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2014). Therefore, a respondent is entitled to an evidentiary hearing only if there is probable cause to believe that he: (1) no longer suffers from a mental disorder; or (2) is no longer dangerous to others, because his mental disorder no longer creates a substantial probability that he will engage in acts of sexual violence. See *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 68 (quoting 725 ILCS 207/5(f), 15 (West 2008)).

¶ 25 Respondent first argues that the trial court erred in granting the State's motion because he testified that parts of Dr. Smith's report were inaccurate or incomplete. Specifically, he testified that: (1) Dr. Smith's report inaccurately noted the length of the interview; and (2) in his report Dr. Smith did not refer to additional treatment groups that respondent had attended.

¶ 26 Respondent has waived any issue regarding his testimony since he only testified at the hearing on his motion for an independent examiner and not at the probable-cause hearing. In her brief, respondent's counsel, the same counsel who represented respondent below, inaccurately states that respondent testified at the probable-cause hearing. The Attorney General's office, representing the State, does not contradict this allegation. However, it is clear from the record that respondent was present in court and testified at the hearing on his motion for the appointment of an independent examiner only. Although the trial court granted counsel's request to "stand on" the arguments she made at the motion for an independent examiner at the probable-cause hearing, that in no way meant that respondent's testimony at the first hearing, and the exhibited admitted at that hearing, were also admitted at the second hearing. Under Illinois law, since respondent did not file a petition for discharge, yet he did not waive his right to petition, the probable-cause hearing only consisted of a review of the reexamination report and the parties' arguments. 725 ILCS 207/65(b)(1) (West 2014). Although respondent asserted in his notice of appeal that he was appealing from both the denial of his motion to appoint an independent examiner and the grant of the State's motion finding no probable cause, in his brief respondent only raises one issue: whether the trial court erred in granting the State's motion finding no probable cause. Therefore, this issue is waived. See *Kincaid v. Ames Department Stores, Inc*., 283 Ill.App.3d 555, 570 (1996) (an issue raised in a notice of appeal but not argued in an appellate brief is deemed waived).

¶ 27 We also disagree with respondent's claim that Dr. Smith's conclusion that respondent was still an SVP was based solely on respondent's offense history and not on his current mental status. As we held in respondent's previous appeal, the fact that a large part of the reexamination report contained respondent's criminal history does not make the report flawed. "The history clearly was provided so that the reader—the trial court (and now this court)—could get a complete picture of respondent's mental illnesses in order to determine whether sufficient change had occurred in the previous 12 months such that respondent was no longer an SVP." *Kirst*, 2015 IL App (2d) 140532, ¶ 55. Moreover, we agree with the State that respondent's claim is incorrect. In addition to his criminal history, Dr. Smith discussed respondent's most recent treatment plan and his statements during his interview. Specifically, Dr. Smith noted that respondent had been kicked out of the disclosure treatment group and he was currently participating in other treatment groups in the hope of being readmitted to the disclosure group. More important, in the interview, respondent discussed his recurrent sexual fantasies involving blonde and red headed girls between the ages of 11 and 15. It is very clear, then, that Dr. Smith's conclusion that respondent remained an SVP was not based on respondent's criminal history alone.

¶ 28 We also reject respondent's contention that Dr. Smith's report was not reliable because in his report he did not discuss disagreements within the psychological community regarding choosing the appropriate sample comparison group in the Static-99R. In his report, Dr. Smith noted the differences among the four sample groups and he reported that, depending upon which sample was used, the recidivism rates could vary widely. He also said that he used the high risk/high needs sample because, like offenders in that sample group, respondent had been referred for intensive sex-offender treatment after his SVP finding. Dr. Smith clearly explained

his reasoning in using the high risk/high needs sample group, and he was not required to discuss disagreements within the psychological community about the use of the Static-99R in order to render a reliable report. Moreover, as in respondent's previous appeal, even if any error occurred in Dr. Smith's use of the Static-99R, "ample other evidence in the reexamination report supported Dr. Smith's conclusion that respondent was still an SVP." *Kirst*, 2015 IL App (2d) 140532, ¶ 56. Dr. Smith opined that respondent had a number of additional risk factors independent of the Static-99R results. Specifically, those risk factors were: intimate relationship conflicts, deviant sexual interest in children, paraphilic interest, employment instability, substance abuse, and identification with children. Also, respondent had no protective factors that might reduce his risk, and he was only in the early phase of sex offender treatment.

¶ 29 Respondent next contends that Dr. Smith's calculation that he is 3.77 times more likely to offend than the average sex offender is misleading because that number still indicates a low risk of reoffending. However, respondent does not dispute the accuracy of this number, and a low risk of reoffending, standing alone, is not evidence that he is no longer an SVP, especially in light of the empirical risk factors that Dr. Smith associated with respondent.

¶ 30 Respondent also argues that the exhibits admitted at the hearing contained "new professional knowledge" that demonstrated the unreliability of the Static-99R and rendered Dr. Smith's opinion untrustworthy. However, since the exhibits were only admitted into evidence at the hearing on respondent's motion for an independent examiner, this issue is waived as well.

¶ 31 Finally, respondent contends that Dr. Smith's report was devoid of any information that he had currently committed any offense, which showed that he has a current ability to control his sexual urges. We do not agree. The most obvious flaw in respondent's contention is that he has not had *access* to his preferred victims, young girls between the ages of 11 and 15, while in the

custody of IDHS. Therefore, the fact that he has not currently committed any offenses is not evidence of his current ability to control his sexual urges. In fact, Dr. Smith's report indicates quite the opposite—respondent's admission about his sexual fantasies and his masturbation to those fantasies is blatant evidence of his current inability to control his sexual urges.

¶ 32 III. CONCLUSION

¶ 33 In sum, there was ample evidence here that respondent was still an SVP. Aside from the results of the Static-99R, Dr. Smith found several empirical risk factors applied to respondent: intimate relationship conflicts, deviant sexual interest in children, paraphilic interest, employment instability, substance abuse, and identification with children. Also, respondent had no protective factors that might reduce his risk of reoffending, and he was only in the early phase of sex offender treatment. Most disturbing, however, was that respondent admitted to Dr. Smith that two or three times a month he had deviant sexual thoughts about blonde and red headed girls between the ages of 11 and 15, and he reported that he had masturbated to one of these fantasies two months before the September 2014 interview. For all these reasons, the trial court did not err in granting the State's motion finding that no probable cause existed to warrant an evidentiary hearing on the issue of whether respondent was still an SVP.

¶ 34 Accordingly, the judgment of the circuit court of Lee County is affirmed.

Affirmed.