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2015 IL App (3d) 130748-U

Order filed January 28, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

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| PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois, |
| Respondent-Appellee, |) | |
| v. |) | Appeal Nos. 3-13-0748 and 3-13-0749 Circuit Nos. 07-CF-64 and 07-CF-87 |
| SHANE A. TYNE, |) | |
| Petitioner-Appellant. |) | Honorable Stanley B. Steines, Judge, Presiding. |

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court's finding that petitioner remained a sexually dangerous person was not contrary to the manifest weight of the evidence.
- ¶ 2 Petitioner, Shane A. Tyne, having been previously declared a sexually dangerous person, filed a petition for recovery. After a two-day bench trial, the court found that petitioner remained a sexually dangerous person. 725 ILCS 205/0.01 *et seq.* (West 2012). Petitioner appeals, arguing that the State failed to prove, by clear and convincing evidence, that he met the criteria of a sexually dangerous person at the time of the court's decision. We affirm.

FACTS

¶ 3

¶ 4 Petitioner was declared a sexually dangerous person (SDP) on May 31, 2007. Petitioner filed his first application for recovery on July 17, 2008. Following a two-day jury trial, petitioner was found to still be a sexually dangerous person. On July 24, 2012, petitioner filed a second application for recovery or discharge. A bench trial on that application proceeded on September 26 and 27, 2013.

¶ 5 The evidence admitted at trial included the testimony of three experts for the State, Dale Spitler, Dr. Nageswararao Vallabhaneni (Dr. Rao), and Dr. Kristopher Clouch, as well as an expert for petitioner, Dr. Kirk Witherspoon. The court also took notice, without objection, of a November 27, 2012, SDP evaluation (November evaluation).

¶ 6 The November evaluation, compiled and signed by the State's three witnesses, considered numerous sources of information, including two psychological evaluations completed by Dr. Witherspoon in 2007 and 2010, a 2007 forensic psychiatric evaluation completed by Dr. Terry Killiam, and a 2007 evaluation for an SDP completed by Joseph Bohlen. More recently, the evaluation considered an SDP treatment program semiannual evaluation (for the period from July through December 2011), staffing with SDP therapists on September 27, 2012, and an interview with petitioner completed on September 27, 2012, lasting approximately 2 hours and 15 minutes.

¶ 7 The November evaluation detailed the offenses that led to petitioner originally being declared an SDP. These offenses included the 2004 predatory criminal sexual assault of a nine-year-old and the 2007 predatory criminal sexual assault of a five-year-old.

¶ 8 The November evaluation also included petitioner's disciplinary history since the completion of his last SDP evaluation in April of 2009. This section showed three violations for

possession of pornography, occurring twice in 2010 and once in 2011, and two violations for theft in 2011 and 2012. The evaluation noted that the pornography that petitioner had been in possession of had titles, such as *Barely Legal*, that indicated "an emphasis on models who give the appearance of being young." Treatment staff also reported that petitioner admitted to watching "television shows that specifically feature[d] young girls, such as *Dance Moms*."

¶ 9 The semiannual program evaluation indicated that petitioner met expectations in two areas, showed minimal need for improvement in two areas, showed some need for improvement in five areas, showed a considerable need for improvement in nine areas, and was unsatisfactory in five areas. The five areas in which petitioner was deemed unsatisfactory were: relationship issues, regulation of arousal, recognizing when he was in a deviant cycle, ability to use relapse prevention skills to intervene in his cycle, and decreased self-centeredness and exploitation. The evaluation noted that "[t]here have also been issues concerning stalking female staff members."

¶ 10 In the September 27, 2012, interview, petitioner stated that he did not feel he was at risk to reoffend. Though he indicated he had not completed a victim empathy group, petitioner also stated that "I try to keep in my head the pain I put [the victims] through." Petitioner described his high-risk situations as "schools, day care, or any type of activity that involve[d] kids." Petitioner was unable to identify his offending cycle for the interviewers. Petitioner also indicated that if released, he would live with his mother. However, he also noted that his sister lived with his mother, and that his sister had two children. Petitioner's diagnoses in the evaluation included pedophilia, antisocial personality disorder, and history of a head injury.

¶ 11 The November evaluation also detailed the results of petitioner's Static-99R. The Static-99R was described as "an instrument designed to assist in the assessment of sexual offense recidivism for sexual offenders." The instrument takes into account 10 static—*i.e.*, fixed or

unchangeable—factors and assigns an offender a score ranging from negative three to twelve. The score serves as an estimate of the offender's likelihood of recidivism. The evaluation specifically cautioned that "the offender's risk may be higher or lower than the probabilities estimated in the Static-99R depending on other risk factors not measured by the instrument." Petitioner was initially given a score of 3 on the Static-99R, placing him in the "[l]ow-[m]oderate category" for recidivism.¹

¶ 12 The November evaluation identified seven "dynamic risk factors" that would increase petitioner's risk of a sexual offense. According to the evaluation, these risk factors "can also be seen as long term vulnerabilities, that is, issues with which [petitioner] will have to contend indefinitely to manage his risk in the community and issues that ultimately define his treatment needs." Petitioner's dynamic risk factors were: sexual preoccupation, sexual preference for children, offense-supportive attitudes, lack of an emotionally intimate relationship with an adult, lifestyle impulsivity, poor cognitive problem-solving, and resistance to rules and supervision.

¶ 13 Under the heading of "Protective Factors," the evaluation considered petitioner's progress in the sex offender treatment program. Specifically, it was noted that petitioner had not completed the program and was not fully participating. Further, the evaluation stated that petitioner "appears minimally motivated to reduce his risk of reoffense and has made very little progress." Under the heading of "Case Specific Factors," the evaluation detailed the negative effects of petitioner's prior brain injury, as well as petitioner's tendency toward sexualized coping.

¶ 14 Citing the aforementioned data and observations, the evaluators concluded that petitioner remained an SDP.

¹ As discussed *infra*, petitioner's Static-99R score was later adjusted to a 4.

¶ 15 Spitler was the first witness to testify for the State. The court found Spitler qualified as an expert in the area of treatment and assessment of SDPs, and found him qualified to testify to the risk of reoffending, as well as to the issue of whether or not one suffers from a mental disorder.

¶ 16 Spitler confirmed that in evaluating petitioner, he relied on the sources of information listed at the outset of the November evaluation, including taking part in the interview of petitioner. He testified that he considered petitioner's criminal history—mainly his two predatory criminal sexual assaults—in reaching his conclusions. Spitler also relayed the concerns of the treatment staff regarding petitioner's viewing of *Dance Moms*, a television show in which "the girls range from *** approximately five years to 12 years of age." Spitler reiterated that petitioner had been found in possession of pornography entitled "*Barely Legal*," in which "the models are 18 years of age or older but *** physically they appear to be much younger."

¶ 17 Spitler testified that petitioner was in the second phase of a four-phase relapse prevention program, and indicated that petitioner was "quite a ways" from completing his treatment. Spitler then discussed the areas in which petitioner had made unsatisfactory progress. He also noted that in the interview, petitioner could not identify his treatment cycle and did not understand what triggered his behavior. In Spitler's opinion, petitioner met all of the criteria for being sexually dangerous.

¶ 18 On cross-examination, Spitler testified that with treatment, an offender's risk of reoffending could be reduced, though the score on the Static-99R would remain the same. "Completing the treatment program reduce[d] risk," Spitler testified. "If they haven't completed a treatment program, then the risk remain[ed] the same."

¶ 19 Dr. Rao was qualified as an expert in the field of psychiatry and in the assessment of sex offenders. He relied on the same sources of information listed in the evaluation and by Spitler. Dr. Rao also participated in interviewing petitioner. Dr. Rao diagnosed petitioner with pedophilia, antisocial personality disorder, and a history of a brain injury. Dr. Rao relied upon the Diagnostic and Statistical Manual Fourth Edition, Text Revision (DSM IV-TR), in arriving with the diagnosis of pedophilia. Dr. Rao testified that petitioner met the criteria for being considered an SDP.

¶ 20 On cross-examination, Dr. Rao admitted that the diagnosis of petitioner with antisocial personality disorder was not strictly based on the criteria for that disorder set forth in the DSM IV-TR. Rather, the diagnosis stemmed from Dr. Rao's observations of the type of behavior petitioner was presenting.

¶ 21 Dr. Rao testified that, in forming his opinion as to petitioner's risk for reoffending, he relied on the interview with petitioner, clinical records, and the staffing report. Dr. Rao also relied on the results of Dr. Clouch's administration of the Static-99R as well as Dr. Clouch's conclusions regarding additional risk factors. Citing petitioner's lack of success in the treatment program, Dr. Rao again opined that petitioner was "still at high risk." The adjustment of petitioner's Static-99R score from a three to a four would not change Dr. Rao's opinion.

¶ 22 On the second day of trial, the State called its final witness, Dr. Clouch. Dr. Clouch was qualified as an expert in the assessment, diagnosis, and treatment of sex offenders. In preparing the November evaluation, Dr. Clouch utilized, *inter alia*, petitioner's prior recovery evaluations, criminal history, and the interview with petitioner. He completed the risk assessment section of the evaluation, the Static-99R, the dynamic risk factors, and the summary conclusions.

¶ 23 Dr. Clouch testified that he initially scored petitioner a three on the Static-99R. However, while preparing for trial, he recognized that he had mistakenly failed to score a previous conviction for violation of an order of protection. This correction resulted in an adjustment to a score of four for petitioner.

¶ 24 A score of four represents a "moderate to high level to re-offend when compared to other sex offenders." For petitioner, this translated to a 20.1% chance of recidivism over the next five years and a 29.6% chance of recidivism over the next 10 years. Dr. Clouch testified that offenders with a score of 4 on the Static-99R have been shown to reoffend at 1.94 times the rate of the average sex offender.

¶ 25 Dr. Clouch also considered dynamic risk factors in his evaluation of petitioner. Those risk factors are referred to as dynamic because they can be addressed in treatment, and the risk may be reduced. Dr. Clouch derived these dynamic risk factors from a 2010 Mann, Hanson, and Thornton article. Nine dynamic risk factors were present for petitioner. These factors were the seven listed in the evaluation as dynamic risk factors, serious mental illness, and sexualized coping. Dr. Clouch also considered protective factors and found that none were currently present for petitioner. Specifically, he noted that petitioner had not made sufficient progress in treatment, so treatment completion was not a protective factor. Dr. Clouch pointed out that petitioner was only in phase two of the program, and, in the interview, could not detail his deviant cycle or offense cycle. In Dr. Clouch's opinion, petitioner met the statutory criteria to be considered an SDP.

¶ 26 On cross-examination, Dr. Clouch admitted that of the dynamic risk factors detailed in the Mann, Hanson, and Thornton article, none individually had a "strong correlation" with sexual recidivism. Dr. Clouch explained that each risk factor was assigned a "D value." A D value of

.15 indicated a 5% difference in recidivism, and a D value of .20 indicated a 10% difference in recidivism. The D value for sexual preoccupation was .39. Dr. Clouch testified that application of these factors can increase the predictive accuracy of the Static-99R, but could not cite a specific peer-reviewed article to support that assertion.

¶ 27 Petitioner's lone witness was Dr. Witherspoon, who was qualified as an expert in the evaluation, assessment, and diagnosis of sex offenders. Dr. Witherspoon testified that petitioner's predatory criminal sexual assaults were the result of petitioner using children as a proxy for an adult partner, rather than for "pedophilic motives." Dr. Witherspoon considered petitioner's disciplinary infractions, including the possession of pornography, and found them to be "very frivolous, very trivial."

¶ 28 Dr. Witherspoon applied the Static-2002R, which he claimed was more accurate than the Static-99R. According to this instrument, petitioner showed only a 4.6% chance of sexual recidivism over five years. Dr. Witherspoon also applied the MATS-1 test, asserting that it was even more accurate than the Static-2002R. Petitioner was scored as low risk on this test. Dr. Witherspoon also testified that it was unreliable to utilize dynamic risk factors to increase the risk of recidivism shown by the score of the Static-99R. It was Dr. Witherspoon's opinion that petitioner did not suffer from a mental disorder and that it was not substantially probable that petitioner would reoffend in the future if not confined.

¶ 29 Following closing arguments, the court found that petitioner remained an SDP. The court found that the State had met its burden in showing that petitioner "still suffers from a mental disorder." The court noted that a point made by the State in closing had been particularly compelling:

"[C]ertainly if you have been in custody for a period of years, then you don't have the opportunity to re-offend, then arguably you are in remission, but I don't know that that is the only element we can look at because otherwise anybody that is in custody as a sexually dangerous person or a sexually violent person[,] because they don't have the chance to re-offend, well then we have to release them because there is no more evidence of their mental disorder."

¶ 30 The court also found that petitioner "does have a serious difficulty in controlling his sexual behavior." The court found it significant that petitioner had been in possession of pornography that featured people "that don't look like adults." The court also noted that while watching a television show such as *Dance Moms* would ordinarily be innocuous, "it picks up a different meaning *** when it is a child molester."

¶ 31 The court found that it was substantially probable that petitioner, if not committed, would engage in the commission of sex offenses in the future. The court noted that Dr. Clouch recognized the Static-99R to not be "the end all be all." The court stated that the dynamic risk factors should be considered, adding "[o]ne has to rely upon their clinical judgment, their clinical experience." The court also commented on the extensive experience of Spitler and Dr. Clouch in the assessment and treatment of sex offenders, finding their experience to be "not only more extensive than Dr. Witherspoon's but more broad based with regard to treatment and what treatment does for sex offenders." To this point, the court expressed doubt about Dr. Witherspoon's "proxy" explanation for petitioner's predatory criminal sexual assaults, also noting that Dr. Witherspoon tended to minimize those offenses and petitioner's pornography possession. The court also relied on the fact that petitioner was unsatisfactory or in considerable need for improvement in several treatment factors.

¶ 32 Petitioner appeals, arguing that the court's decision was contrary to the manifest weight of the evidence. Specifically, petitioner contends that the State failed to show by clear and convincing evidence that he *presently* suffers from a mental condition or that he *presently* has serious difficulty controlling his sexual behavior. Petitioner also argues that the State failed to demonstrate, by clear and convincing evidence, a substantial probability that he would reoffend if released. We affirm.

¶ 33 ANALYSIS

¶ 34 In reviewing a trial court's determination that a petitioner remains a sexually dangerous person (SDP), the reviewing court will consider all of the evidence in the light most favorable to the State. See *People v. Bingham*, 2014 IL 115964. Because the trier of fact, in this case the trial court, is "in the best position to weigh evidence and assess the credibility of the testimony and evidence presented at trial[.]" it is not this court's purpose to retry petitioner. *In re Commitment of Fields*, 2012 IL App (1st) 112191. Instead, our objective is to determine whether any rational trier of fact could have found the essential elements proven by clear and convincing evidence. *People v. Trainor*, 337 Ill. App. 3d 788 (2003); see also 725 ILCS 205/9(b) (West 2012) (setting the State's burden in recovery hearings at "clear and convincing evidence").

¶ 35 I. Petitioner's "Present" Status

¶ 36 The Sexually Dangerous Persons Act (Act) defines a "sexually dangerous person" as:

"All persons suffering from a mental disorder, which mental disorder has existed for a period of not less than one year, immediately prior to the filing of the petition hereinafter provided for, coupled with criminal propensities to the commission of sex offenses, and who have demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children." 725 ILCS 205/1.01 (West 2012).

The term mental disorder has been construed to include "serious difficulty controlling sexual behavior." *People v. Masterson*, 207 Ill. 2d 305, 329 (2003); *People v. Bingham*, 2013 IL App (4th) 120414, *aff'd*, 2014 IL 115964 (applying "serious difficulty" requirements after amendments to the Act). Numerous courts have held that the elements of SDP under the Act refer to present mental conditions, rather than conditions that may have existed in the past. See, e.g., *People v. Bailey*, 265 Ill. App. 3d 758 (1994).

¶ 37 In *Bailey*, 265 Ill. App. 3d 758, a case relied upon extensively by petitioner, we found that the Act requires the trial court to make its finding of sexual dangerousness as of the day of its decision. In finding the respondent to be an SDP, the trial court in *Bailey*, 265 Ill. App. 3d 758, relied primarily on the reports of two court-appointed psychiatrists. At the time of the court's decision, those reports were more than 2½ years old. *Id.* The respondent was free on bond during that time period, and the appellate court also pointed out that the record showed no evidence of any sexual misconduct while the petition was pending. *Id.* We held that

"the passage of time while a petition remains pending, the respondent's behavior during that time, and the remoteness in time of the psychiatrist's report are all important factors to be considered by the trial court when it determines beyond a reasonable doubt whether a person is sexually dangerous under the Act." *Id.* at 763.

Based on the facts of the case, we found that defense counsel's opposition to the State's motion for reexamination constituted ineffective assistance. *Bailey*, 265 Ill. App. 3d 758.

¶ 38 Citing *Bailey*, petitioner argues that the State failed to meet its burden to show that he suffered from a mental disorder at the time of trial or that petitioner had serious difficulty controlling his sexual behavior at the time of trial. Specifically, petitioner contends that the semi-annual program evaluation covering the period between July and December 2011, which

was relied upon in compiling the November 2012 evaluation, constituted "stale data."

¶ 39 *Bailey*, however, is distinguishable from the case at hand on a number of grounds. First, the evaluation in this case, compiled by three different experts, was completed less than a year removed from commencement of the recovery hearing. The recency of the evaluation is thus significantly less of a concern than in *Bailey*. Second, petitioner here, unlike the respondent in *Bailey*, was incarcerated during the pendency of petition. In determining petitioner's present mental status, as the trial court pointed out in delivering its ruling, petitioner surely cannot be credited for not committing a sex offense while incarcerated. Finally, it should be noted that because the *Bailey* decision was one of ineffective assistance of counsel, its logic is not *directly* applicable here. Indeed, while we held in *Bailey* that the more recent expert reports should be considered in determining sexual dangerousness, we did not hold that a 2½ year delay would automatically warrant a reversal of such a finding by the trial court.

¶ 40 Petitioner's argument that the evaluation was partially based upon stale information—namely, the semiannual program evaluation covering the period between July and December 2011—is unconvincing. A more recent evaluation would undoubtedly be the most ideal evidence of petitioner's sexual dangerousness. However, that is not to say that the older program evaluation is completely without relevance in determining petitioner's present mental state. More importantly, the evaluators also relied on other more recent information, such as the September 2012 staffing report and the actual interview with petitioner. In fact, information taken from that interview—such as petitioner's failure to identify his offending cycle, his deviant cycle, or triggers of his behavior, as well as his failure to complete an empathy group—corroborated the lack of treatment progress indicated in the semiannual program evaluation covering the period between July and December 2011. Given all of this information, the trial

court could rationally find, by clear and convincing evidence, that petitioner suffered from a mental disorder, including serious difficulty controlling sexual behavior, as of the date of the court's decision.

¶ 41

II. Substantial Probability

¶ 42

Under the Act, one suffers from "[c]riminal propensities to the commission of sex offenses" if "it is substantially probable that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." Pub. Act 98-88 (eff. July 15, 2013) (adding 725 ILCS 205/4.05 (West Supp. 2013)). "Substantially probable" means "much more likely than not." *In re Detention of Hayes*, 321 Ill. App. 3d 178, 188 (2001). Petitioner argues that the State failed to prove by clear and convincing evidence that his risk of sexual recidivism was substantially probable.

¶ 43

The results of the Static-99R indicated only a 20.1% and 29.6% percent risk of petitioner reoffending in the next 5 and 10 years, respectively. Dr. Clouch, however, testified that application of dynamic risk factors could increase predictive accuracy of the Static-99R. In petitioner's case, application of those factors increased the possibility petitioner would reoffend, apparently to the point where reoffending became a substantial probability. Spitler, qualified as an expert in assessing the risk of reoffending, testified that petitioner met all of the criteria for being considered an SDP. Dr. Witherspoon, however, disagreed with Dr. Clouch's method of utilizing dynamic risk factors to adjust the risk indicated by the Static-99R. Dr. Witherspoon also applied two tests—which he asserted to be more accurate than the Static-99R—and found that petitioner was at a low risk for reoffending.

¶ 44

Initially, the finagling with the Static-99R score is cause for concern. Although a 29.6% chance of recidivism over 10 years is not insignificant, it correlates with a 70.4% chance that

petitioner will not reoffend, and it certainly does not rise to the level of a "substantial probability" or "much more likely than not," both of which would seem to be over 50%. In *In re Commitment of Simons*, 213 Ill. 2d 523 (2004), our supreme court held that certain actuarial risk assessment tools, such as the Static-99R, were admissible. In finding that such tools were generally accepted in the scientific community, the court cited to a number of academic articles that extolled the reliability of such tests. *Id.* It is, therefore, troubling that when the results do not comport with the experts' own assessments, they find ways to vary or deviate from those results. Because the results of these tests can be adjusted so significantly by the clinical assessment of dynamic risk factors, it raises doubts about relying on the predictive accuracy of the Static-99R itself in the first place.

¶ 45 Despite our concerns regarding the significant deviation from the Static-99R in terms of risk assessment, petitioner's score was not so low as to render a finding of substantial probability to be irrational. Indeed, this court has affirmed findings of sexual dangerousness where the offender's score on the Static-99 was even lower. See *People v. Donath*, 2013 IL App (3d) 120251 (respondent scored in moderate to low risk category for sexual recidivism).

¶ 46 Further, it is not our objective here to retry petitioner. The trial court explicitly stated that it found Dr. Clouch to be a more experienced expert than Dr. Witherspoon, and specifically endorsed Dr. Clouch's use of clinical judgment. As the trier of fact, the trial court was in a better position to make those determinations than are we. Given this reliance on Dr. Clouch, along with the lengthy list of dynamic risk factors present in petitioner's case, the trial court could rationally find, by clear and convincing evidence, that petitioner was substantially probable to reoffend.

¶ 47

CONCLUSION

¶ 48 The judgment of the circuit court of Whiteside County is affirmed.

¶ 49 Affirmed.