2015 IL App (3d) 140240-U

Order filed March 9, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 9th Judicial Circuit,
	)	Knox County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0240
v.	)	Circuit No. 12-CF-434
	)	
JOSEPH D. TROESCH,	)	Honorable
	)	Scott Shipplett,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant received effective assistance of counsel in sexually dangerous person proceedings. (2) State proved beyond a reasonable doubt that defendant was a sexually dangerous person.

¶ 2 Following a bench trial, defendant, Joseph D. Troesch, was found to be a sexually dangerous person (SDP) under the Sexually Dangerous Persons Act (Act) (725 ILCS 205/0.01 *et seq.* (West 2012)). Defendant appeals, arguing that he received ineffective assistance of counsel. Defendant also contends that the State failed to prove beyond a reasonable doubt that he was an

SDP. We affirm.

¶ 3 FACTS

¶ 4 On September 18, 2012, defendant was charged by information with unlawful failure to register computer information in violation of section 3(a) of the Sex Offender Registration Act (730 ILCS 150/3(a) (West 2012)). The court appointed Knox County Public Defender James Harrell to represent defendant. On December 12, 2012, the State filed a petition to proceed under the Act (725 ILCS 205/0.01 *et seq.* (West 2012)).

¶ 5 At the initial court date following the State's petition, the court admonished defendant of his rights in SDP proceedings. The court asked the State for its recommendations for appointment of psychiatrists. The State recommended Dr. Angeline Stanislaus and Dr. Jagannathan Srinivasaraghavan. When asked by the court whether there was any objection to the State's recommended doctors, Harrell replied: "Judge, I don't think I have grounds to object to the appointment. Once we receive the reports, I might be able to argue the weight." The court subsequently appointed Stanislaus and Srinivasaraghavan to evaluate defendant.

¶ 6 On February 6, 2013, following a discussion with defendant, Harrell made the court aware of a possible conflict of interest. Harrell explained that following a 2000 conviction, in which defendant was represented by an attorney from Harrell's office, defendant had been incorrectly sent to the Illinois Department of Corrections (DOC), when his term should have been served in county jail. Defendant explained that legal action was subsequently taken against Harrell's office, and the matter was settled. Harrell stated that he recalled that case and suggested that defendant could decide if he wanted Harrell to represent him. The court then asked defendant, "[a]re you okay with having Mr. Harrell represent you?" Defendant replied in the affirmative, and indicated that he just "wanted to make sure that everything was on the table."

¶ 7 The potential conflict was discussed again at a pretrial conference on July 17, 2013. The court summarized the details of the potential conflict; defendant informed the court that he received remuneration from the mistake in 2002. Harrell stated that the employee in question was no longer with his office. The court again asked defendant, "are you okay with Mr. Harrell representing you on this case?" Defendant replied, "Yeah." The court then stated: "I actually don't see a conflict there. *** I don't even think it is a problem, plus he's agreed to have you continue."

¶ 8 On October 18, 2013, the potential conflict was brought up for a third time. The court explained:

> "Mr. Harrell at the pre-trial conference, which was on the electronic record, but perhaps not more formally done in court, Mr. Harrell indicated that his client had tendered to him a list of, I don't know, four or five other witnesses that [defendant] thought would be important and relevant for purposes of trial.
>
> However, Mr. Harrell indicated that the substance of their testimony was not given to him by [defendant] because [defendant] does not trust or feel comfortable with Mr. Harrell. Owing to the fact [of the previously discussed potential conflict].
>
> * * *
>
> [Defendant] requested a different attorney—somebody other than Mr. Harrell—and the best I got out of that was that he felt that Mr. Harrell didn't communicate with him well; that he didn't visit him often enough; and that he was uncomfortable since he's the department head that—for the same office that was sued 12 years earlier."

Harrell confirmed that defendant had told him that "he doesn't feel like he can trust me to talk with me about his case" because of the situation with Harrell's previous employee.

¶ 9 The court advised defendant that he could not "pick and choose" who his attorney would be. The court opined that the 12-year-old dispute was "removed from us in time and space" and ruled that defendant would proceed with Harrell as his attorney. In response, defendant inquired: "If it's not a conflict, then why is it every criminal case up to this one that I've had in Knox County I was assigned Tom Pepmeyer?" The court replied that it was only responsible for the present case, adding. In this case, you get Mr. Harrell."

¶ 10 The matter proceeded to a bench trial on February 11, 2014. The State first called Srinivasaraghavan, whom the court admitted as an expert in the fields of psychiatry and forensic psychiatry. He testified that he met with defendant and evaluated him. The evaluation took place on February 2, 2013. Following the evaluation, he diagnosed defendant with Axis I pedophilia. Srinivasaraghavan noted that under the Diagnostic and Statistical Manual, fifth edition—released by the American Psychiatric Association after the evaluation but before the trial—the diagnosis would be called pedophilic disorder. This did not change the substance of his opinion. Srinivasaraghavan described pedophilic disorder as follows:

> "This is over the past six months period somebody has the current urges, fantasies of having sex with a prepubescent child, usually less than 13 years old and the person who is doing this is at least 18 years of age, at least five years older than the child, and this causes significant distress or discomfort for the person and this is not due to any other medical condition whatever."

¶ 11 In reaching the opinion that defendant had pedophilic disorder, Srinivasaraghavan considered a 2004 incident for which defendant was convicted of predatory criminal sexual

assault of a child (720 ILCS 5/12-14.1 (West 2004)). In that case, defendant's six-year-old niece had stated that she had witnessed defendant masturbating, and that he had touched her through her clothing. He also testified that he read a report that indicated there had been skin-to-skin contact with the victim's vagina. Defendant had denied these claims.

¶ 12 Srinivasaraghavan testified that, following defendant's 2009 release after that conviction, defendant was to attend sex offender therapy as a condition of probation, but struggled to make payments for the therapy, and was eventually kicked out. As this resulted in a violation of his probation, defendant returned to the DOC from August of 2010 through August of 2012.

¶ 13 In making his diagnosis, Srinivasaraghavan also considered that defendant had been found to have child pornography on his computer at the time of his 2004 arrest. He also found that defendant "is pretty much preoccupied with sexual issues and urgencies." On cross-examination, he testified that, in reaching his diagnosis, he considered close to 300 pages of health records from different correctional facilities, as well as police reports and his personal interview with defendant. He also relied upon the fact of defendant's pattern of repeated transgressions, including his failure to register a Facebook account—under a false name—that gave rise to the present criminal charge. In the police report, defendant admitted to creating the Facebook account.

¶ 14 Srinivasaraghavan said that the pedophilic disorder had existed since at least the 2004 incident. Pedophilic disorder is a mental disorder as defined by the Act, and, "[g]iven the pattern of [defendant's] behaviors, there is a very, very high probability that he would reoffend." He thought that defendant was an SDP.

¶ 15 Harrell moved for a mistrial, arguing that he had not received any of the reports from the DOC or other police agencies that Srinivasaraghavan had referenced. The trial court reserved a

ruling on the motion. Following closing arguments, the court denied the motion.

¶ 16 The State next called Stanislaus, who was admitted as an expert in the fields of psychiatry and forensic psychiatry. In general, Stanislaus' testimony followed that of Srinivasaraghavan. Stanislaus also administered the Static-99, an actuarial risk instrument that predicts future sexual recidivism. Defendant scored a seven on the test, which, according to Stanislaus, "places him in the high risk category for sexual reoffense." Defendant's high risk of sexual reoffense was also suggested by a number of dynamic factors, such as his tendency to blame others—defendant suggested his mother had framed him by putting child pornography on his computer—and his repeated violations of parole or conditional discharge.

¶ 17 Following her evaluation, Stanislaus diagnosed defendant with pedophilia and paraphilia. In diagnosing pedophilia, Stanislaus put great weight on the 2004 predatory criminal sexual assault of a child conviction and the large number of child pornography images found on defendant's computer. She said that defendant continued to engage in "high risk behaviors," such as creating social media accounts and staying with his girlfriend while three of her children visited her. She stated that defendant had not completed treatment, and his failure to "follow the rules" after his release, tended to indicate that he did not benefit from the sex offender treatment that he did receive. Her paraphilia diagnosis stemmed from defendant's multiple sexual acts with 14-year-olds. She testified that both of these diagnoses are mental disorders under the Act. Stanislaus opined that these diagnoses had existed in defendant for more than a year and that he was an SDP.

¶ 18 The court found that the State had met its burden in proving defendant to be an SDP.

¶ 19 ANALYSIS

¶ 20 I. Ineffective Assistance of Counsel

¶ 21 Defendant argues that appointed counsel was ineffective. Specifically, defendant contends that counsel was ineffective because he was unfamiliar with relevant law and because he failed to obtain necessary discovery. Defendant maintains that a conflict of interest existed between himself and counsel, and that the trial court failed to make a proper inquiry into this conflict.

¶ 22 Although proceedings under the Act are civil in nature, "the potential loss of liberty entitles a defendant named in a petition under the Act to the essential protections available in a criminal trial," including the right to effective assistance of counsel. *People v. Johnson*, 322 Ill. App. 3d 117, 121 (2001). In determining whether counsel has been ineffective, the standard applied in SDP proceedings is the same as that applied in criminal proceedings. *People v. Bailey*, 265 Ill. App. 3d 758 (1994). To succeed upon a claim that counsel provided ineffective assistance, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) but for counsel's poor performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). Where it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, a court need not consider whether counsel's performance was deficient. *Id.*

¶ 23 A. Conflict of Interest

¶ 24 Where a constitutional right to counsel exists, there is a correlative right to representation free from conflicts of interest. *Johnson*, 322 Ill. App. 3d 117, 121 (citing *Wood v. Georgia*, 450 U.S. 261 (1981)). A *per se* conflict of interest warrants reversal even without a showing of actual prejudice, and will be found when "there is a showing that a defense counsel's past or

present commitment to others raises the possibility of an unwillingness or inability to represent a defendant effectively." *Johnson*, 322 Ill. App. 3d at 121.

¶ 25 Relying on *People v. Massa*, 271 Ill. App. 3d 75 (1995), defendant argues that a trial court addressing a claim of conflict of interest must either appoint new counsel or "inquire whether there is an actual conflict." (*Massa*, 271 Ill. App. 3d at 83)).

¶ 26 In *Massa*, the defendant, unhappy with defense counsel, filed a federal lawsuit against him. *Massa*, 271 Ill. App. 3d 75. Later, in the trial court, Massa indicated that he was satisfied with counsel's performance and wished to plead guilty while still being represented by the same attorney. The court accepted the guilty plea. Massa appealed, arguing that he was denied the effective assistance of counsel at his plea proceedings due to a *per se* conflict. The court found that the federal lawsuit did not give rise to a *per se* conflict, finding that the trial court had taken adequate measures in inquiring into the potential conflict.

¶ 27 Here, the issue of the potential conflict was raised to the trial court three times. On each occasion, the trial court was appraised of the situation, stemming from a 12-year-old incident involving an attorney who no longer with the Knox County public defender's office. The first two times, defendant indicated that he was comfortable proceeding with Harrell as his attorney. The third time defendant stated that he did not want Harrell to represent him. The court found that there was no conflict.

¶ 28 Though defendant maintains that a trial court is required to have a colloquy directly with defendant, this assertion finds no support in *Massa*. The record belies defendant's argument showing defendant addressed the trial court regarding the matter on multiple occasions. The trial court took adequate steps to determine whether there was an actual conflict of interest.

¶ 29 B. Counsel's Knowledge of Relevant Law

¶ 30 Under the Act, the trial court must appoint two qualified psychiatrists to examine the defendant and make reports to the court. 725 ILCS 205/4 (West 2012). A defendant does not have a right to have his own experts perform the psychiatric examination. *People v. McVeay*, 302 Ill. App. 3d 960 (1999). The doctors appointed by the trial court are presumed to be impartial and independent. *Id*. "If, however, a defendant can demonstrate that she or he was prejudiced by such an appointment, that defendant should not be precluded from bringing a motion to substitute the court-appointed psychiatrist." *Id*. at 964-65.

¶ 31 Defendant contends that he received ineffective assistance of counsel in that his attorney was unfamiliar with relevant law. See *People v. Hall*, 217 Ill. 2d 324 (2005). In particular, defendant asserts that Harrell was unfamiliar with the provisions of the Act relating to the appointment of independent experts, citing Harrell's failure to object to the State's suggested experts. Defendant suggests that counsel "had an absolute right to object to the State's proposed experts" and "a right to suggest other experts to the court."

¶ 32 However, section 4 of the Act, concerning the appointment of independent experts states:

> "After the filing of the petition, the court shall appoint two qualified psychiatrists to make a personal examination of such alleged sexually dangerous person, to ascertain whether such person is sexually dangerous, and the psychiatrists shall file with the court a report in writing of the result of their examination, a copy of which shall be delivered to the respondent." 725 ILCS 205/4 (West 2012).

Though *McVeay* found that a defendant may object to such appointments, an objection must be grounded in an allegation of prejudice. *McVeay*, 302 Ill. App. 3d 960. None are alleged by defendant.

¶ 33 Furthermore, defendant misinterprets Harrell's comments about the appointment of the experts. When asked by the trial court whether he objected to either of the court's appointments, Harrell replied, "Judge, I don't think I have grounds to object to the appointment. Once we receive the reports, I might be able to argue the weight." Harrell's belief that he had no reason to object, that is, no reason to believe that the experts would be prejudiced, not a belief that he had no right to object.

¶ 34 Finally, defendant has made no showing of any prejudice. Defendant suggests that if Harrell had suggested his own experts, that different experts would be appointed and a different result would have been reached by those experts, and the outcome of the trial would have been different. However, these assertions are speculations unsupported by the evidence. As defendant has failed to satisfy either prong of the *Strickland* test, we find that counsel was not ineffective for failure to object to the court's appointed experts.

¶ 35 C. Counsel's Failure to Obtain Discovery

¶ 36 Defendant also contends that counsel was rendered ineffective assistance when he failed to procure the documents utilized by Srinivasaraghavan and Stanislaus. Defendant does not appeal the trial court's denial of counsel's motion for a mistrial, only that counsel "could have prepared a more effective cross-examination" if he had reviewed the documents relied upon by the experts.

¶ 37 Again, defendant's argument he suffered prejudice is highly speculative. See, *e.g.*, *People v. Scott*, 2011 IL App (1st) 100122 (finding prejudice argument insufficient where it relies on speculation). Defendant asserts that if Harrell were able to do this, it is "probable" that a different result would have been reached. But defendant does not refer to the substance of the missing reports, nor does he suggest how the reports would have allowed Harrell to question the

accuracy of the expert opinions. Defendant has failed to demonstrate prejudice. Accordingly, he did not receive ineffective assistance of counsel.

¶ 38 II. Sufficiency of the Evidence

¶ 39 To classify a defendant as an SDP under the Act, the State must prove the defendant has (1) a mental disorder existing for at least one year prior to the filing of the petition; (2) criminal propensities to the commission of sex offenses; and (3) demonstrated propensities toward acts of sexual assault or acts of sexual molestation of children. *People v. Bingham*, 2014 IL 115964 (citing 725 ILCS 205/1.01 *et seq.* (West 2010)). In challenging the sufficiency of the State's evidence, defendant takes exception to the first requirement. Defendant points out that the court-appointed experts, each of whom diagnosed defendant with pedophilia or pedophilic disorder, relied primarily on defendant's conduct that gave rise to his 2004 conviction for predatory criminal sexual assault of a child. Because there is no evidence that he engaged in any inappropriate or illegal sexual activity since that time, defendant maintains, the State failed to prove beyond a reasonable doubt that that mental disorder existed in the year immediately prior to the filing of the SDP petition.

¶ 40 Though SDP proceedings are civil in nature, the burden of proof required to find a defendant sexually dangerous is proof beyond a reasonable doubt. 725 ILCS 205/3.01 (West 2012). When examining a trial court's determination that a defendant is an SDP, "the reviewing court must consider all of the evidence introduced at trial in the light most favorable to the State and then determine whether any rational trier of fact could have found the essential elements to be proven beyond a reasonable doubt." *Bingham*, 2014 IL 115964, ¶ 30 (quoting *People v. Bailey*, 405 Ill. App. 3d 154, 171 (2010). "The reviewing court will not substitute its judgment for that of the trial court or jury on the factual issues that have been raised in the petition, unless

the evidence is so improbable as to raise a reasonable doubt that the defendant is a sexually dangerous person." *Bailey*, 405 Ill. App. 3d at 171.

¶ 41 The doctors testified that the 2004 conviction was the earliest manifestation and primary indicator of defendant's pedophilia or pedophilic disorder. Both testified, however, that defendant was an SDP under the Act, with knowledge of the implications of such an opinion. They met with and evaluated defendant prior to trial, and each testified to facts that would indicate the pedophilia or pedophilic disorder was ongoing.

¶ 42 Both doctors noted that defendant had not completed sex offender treatment. They noted that defendant had exhibited a pattern of repeated transgressions since his 2004 conviction, though none of these had involved sexual contact. Stanislaus referred to these as "high-risk behaviors." After evaluating defendant, Srinivasaraghavan posited that defendant "is pretty much preoccupied with sexual issues and urgencies."

¶ 43 Considering this evidence in the light most favorable to the State, we conclude that a reasonable trier of fact could have found that defendant had a mental disorder existing for at least one year prior to the filing of the petition beyond a reasonable doubt.

¶ 44 CONCLUSION

¶ 45 The judgment of the circuit court of Knox County is affirmed.

¶ 46 Affirmed.