2015 IL App (3d) 140626-U

Order filed September 1, 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, Fulton County, Illinois,
Petitioner-Appellee,	)	
v.	)	Appeal No. 3-14-0626 Circuit No. 88-CF-76
DAVID L. FALES,	)	Honorable Steven R. Bordner,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and Carter concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of respondent's application for release from adjudication as a sexually dangerous person was not against the manifest weight of the evidence where credible evidence was introduced establishing that respondent currently suffered from mental disorders coupled with criminal propensities to commit sexual offenses, demonstrated propensities toward acts of sexual assault, and if confinement were not continued, a substantial probability existed that he would engage in future sexual offenses.

¶ 2 In 1989, respondent, David L. Fales, was adjudicated a sexually dangerous person under the Sexually Dangerous Persons Act (Act). 725 ILCS 205/0.01 *et seq*. (West 2008). At that time,

he was committed to the custody of the Department of Corrections. On July 23, 2012, respondent filed an application for discharge or conditional release, alleging he had recovered and should be discharged or conditionally released from further confinement. 725 ILCS 205/9 (West 2008). Following a bench trial, respondent was found to still be sexually dangerous, and his application was denied. Respondent appeal, arguing that the trial court's denial of his application was against the manifest weight of the evidence. We affirm.

¶ 3 FACTS

¶ 4 After respondent filed his *pro se* application for discharge or conditional release from commitment, the trial court appointed a public defender and ordered the preparation of the statutorily mandated socio-psychiatric report. 725 ILCS 205/9(a) (West 2008). The report was prepared by Dr. Kristopher Clounch, a licensed evaluator under the Sex Offender Evaluation Treatment Providers Act. 225 ILCS 109/1 *et seq.* (2012). Dr. Clounch testified that his evaluation and recommendations were based upon interviews with the respondent and his treating therapist reports, prior psychiatric evaluations, treatment progress reports, a Static-99R score, and reports related to the respondent's sexual offenses. Dr. Clounch provided the following evidence.

¶ 5 Respondent reported a total of 13 sexual victims ranging in age from 9 to 35 years of age. He reported that in his mid-adolescence he was sexually assaulted and also engaged in consensual sexual contact with his adoptive brother and sister. At age 14, he was hospitalized after having consensual sexual contact with his adoptive sister. He admitted to sexually assaulting her when he was 17 years old. In 1987, respondent committed aggravated criminal sexual abuse against an 8-year-old girl, a foster child living with his adoptive family whom he would baby-sit when the parents were out of the home. There was also a report of sexual abuse

of another 8-year-old victim. In June 1988, the respondent sexually assaulted an unrelated adult female. In August 1988, he sexually assaulted another 18-year-old woman, by entering her house while she was sleeping, placing a bandana around her neck, holding a knife to her throat, and raping her. Since his incarceration in 1989, the respond sexually assaulted an 18-year-old male and exposed his genitals to a female staff person.

¶ 6 The respondent's treating therapist reported that he had not made significant progress in treatment. The evaluation covering the six-month period from January 2013 through June 2013, showed no areas rated "meets expectations" and most areas indicated "considerable need for improvement." Areas in need of significant improvement included "identifying deviant arousal patterns, recognizing when he is in a deviant cycle, and relapse intervention skills."

¶ 7 Dr. Clounch diagnosed respondent with non-exclusive pedophilic disorder. Non-exclusive meant that respondent is attracted to both minors and adults. The diagnosis was based, in part, on respondent's report that he continued to have sexual fantasies about under-age males and that he masturbated to those fantasies within the year prior to Dr. Clounch's evaluation. Dr. Clounch also diagnosed respondent with paraphilic disorder, non-consenting partner type.

¶ 8 Dr. Clounch testified that he administered the Static-99R test, a widely accepted actuarial risk assessment that is designed to predict the risk for future re-offense. Dr. Clounch reported that respondent scored as a "moderate high risk" for re-offense, which equated to a 25% chance of re-offending within 5 years and a 35% chance of re-offending within 10 years. Dr. Clounch also opined that several commonly accepted risk factors leading to likely re-offense were present in respondent: sexual preoccupation, sexual preference for minors, past instances of sexualized violence, multiple paraphilia, the lack of an emotionally appropriate intimate relationship with an adult, lifestyle impulsivity, substance abuse, serious mental illness, and inappropriate

externalized coping. Dr. Clounch provided specific details on each of these recognized risk factors, including the fact that respondent was being treated for schizoaffective disorder which required routine medication. Dr. Clounch further noted that in 2012 respondent had been non-compliant with his medication and required isolation to reduce the risk of harm to himself and others. Dr. Clounch further noted that respondent former substance abuse and schizoaffective disorder related to bipolar disorder had no bearing on respondent's current mental condition or his likelihood to commit sexual offenses if he were not confined in the future.

¶ 9 Dr. Clounch opined that respondent had not made sufficient progress in his treatment to warrant conditional release or discharge. He noted respondent continued to have sexual fantasies about raping women and he masturbated to those fantasies. Dr. Clounch also noted that respondent continued to have fantasies about have sexual contact with young males. He opined, to a reasonable degree of psychological certainty that it was substantially probable that respondent would engage in the commission of sexual offenses in the future if he were not confined, and that respondent had demonstrated propensities towards acts of sexual molestation of children.

¶ 10 Dr. Kirk Witherspoon, a licensed clinical psychologist and sex offender evaluator, testified for respondent. Dr. Witherspooon undertook his own evaluation of respondent, as well as a thorough review of Dr. Clounch's report. Dr. Witherspoon noted that sexual offenses engaged in by juveniles, such as respondent, were not generally predictive of future adult behavior. He further noted that respondent had been a substance abuser during the time he committed the sexual assaults and that he had been sober for over 20 years. Dr. Witherspoon testified that respondent did not report any sexual assault fantasies or fantasies involving sexual activity with underage males, and specifically denied making such statements to Dr. Clounch.

¶ 11 Dr. Witherspoon was critical of the predictive validity of the Static-99R test utilized by Dr. Clounch. He instead utilized the Million Clincal Multiaxial Inventory (MCMI) and the Multidimensional Inventory of Development, Sex, and Aggression Inventory (MIDSA), which he believed were more predictive of likelihood of future sexual misconduct that the Static-99R. Dr. Witherspoon reported that his testing revealed no child molestation scale levels that would suggest future pedophilic tendencies and no other indications of proclivity toward future sexual offenses. Dr. Witherspoon also administered other tests including the Static 2002R, which he believed was more accurate than the Static 99R. He reported that, while the Static 2002R test rated respondent as "moderate-high" risk to re-offend, it predicted only a one to two percent chance of re-offending in any given year. Additionally, Dr. Witherspoon observed that respondent was in all probability less likely to engage in sexual offenses in the future than the average test subject due to age and the fact that respondent was "chemically castrated" due to medications he received over the years to reduce his sex drive.

¶ 12 Dr. Witherspoon opined that respondent's past sexual offenses were most likely the result of untreated schizoaffective disorder related to bipolar disorder. He further opined that respondent had been successfully treated for those disorders and had been stable from a mental health perspective for over 10 years. Dr. Witherspoon was extremely critical of Dr. Clounch's minimalizing respondent's successfully treated mental illnesses in his opinion regarding respondent's current mental condition and his likelihood to engage in inappropriate sexual conduct in the future. Dr. Witherspoon likewise questioned Dr. Clounch's diagnosis of pedophilia disorder as being based solely on respondent's conduct as a minor. Dr. Witherspoon also disagreed with Dr. Clounch's diagnosis of non-consenting partner paraphilic disorder, observing that the diagnosis is the subject of some controversy in the psychological community.

Dr. Witherspoon concluded that respondent did not currently have a mental disorder and that he was not a significant risk to re-offend.

¶ 13 Following the close of evidence, the trial court held that respondent remained a sexually dangerous person and denied his application for discharge or conditional release.

¶ 14 ANALYSIS

¶ 15 Under section 9(a) of the Act, a respondent who has been found to be a sexually dangerous person may submit an application to the trial court setting forth facts showing that he has recovered. 725 ILCS 205/9(a) (West 2012). The court must then hold a hearing at which the State has the burden of proving by clear and convincing evidence that the respondent remains a sexually dangerous person. 725 ILCS 205/9(b) (West 2012). A person is sexually dangerous if: (1) the person suffered from a mental disorder for at least one year prior to filing the petition; (2) the mental disorder is associated with criminal propensities to the commission of sexual offenses; (3) the person demonstrated that propensity toward acts of sexual assault or acts of sexual molestation of children; and (4) there is an explicit finding that it is substantially probable that the person would engage in the commission of sex offenses in the future if not confined. 225 ILCS 205/1.01 (West 2012); *People v. Masterson*, 207 Ill. 2d 305, 312 (2003). The trial court's finding that a respondent is still sexually dangerous may not be disturbed on review, unless it is against the manifest weight of the evidence. *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 952 (2006). A decision is against the manifest weight of the evidence when the opposite conclusion is clearly apparent. *Id.*

¶ 16 On appeal, respondent contends that the State failed to prove by clear and convincing evidence that he is still sexually dangerous. Specifically, he maintains that there was no clear and convincing proof that he has a mental disorder associated with criminal propensities toward

the commission of sex offenses. Respondent points to Dr. Witherspoon's opinion that he does not suffer from a current mental disorder associated with criminal propensities to the commission of sexual offenses, and that it is not probable that he will engage in the commission of sexual offenses in the future if he is not confined. He further points to Dr. Witherspoon's several disagreements and criticisms of Dr. Clounch's opinion and methodology in reaching the contrary conclusion. In sum, the respondent recognizes that the State has provided evidence that his continued confinement is necessary in the form of Dr. Clounch's testimony, but he suggests that Dr. Witherspoon's opinions are substantially more valid and should have been given more weight than Dr. Clounch's opinions.

¶ 17 It is, of course, within the unique purview of the trial court to determine the weight of evidence, particularly the weight to be accorded competing expert opinion testimony, and to determine the credibility of witnesses. *People v. Ellis*, 74 Ill. 2d 489, 496 (1978). Here, Drs. Clounch and Witherspoon were both qualified based upon credentials and experience to render a diagnosis of respondent's current mental condition and to opine as to the probability that he would commit sexual offenses in the future if he were not confined. Both testified in detail as to the various testing methodologies used to support their diagnosis and opinions, and while Dr. Witherspoon was critical of Dr. Clounch's particular testing methodology, there was no evidence to suggest that his tests were scientifically invalid. We note particularly that one of the tests administered by Dr. Witherspoon found that respondent was rated a "moderate-high" risk to re-offend; a rating that Dr. Witherspoon recognized corresponded with Dr. Clounch's overall opinion, but which Dr. Witherspoon downplayed in his overall analysis. We further note that the trial court was called upon to resolve whether respondent told Dr. Clounch that he had current sexual fantasies involving sexual assault and sex with minors. While respondent told Dr.

Witherspoon that he had made no such statements to Dr. Clounch, it appears that the trial court credited Dr. Clounch's report. We find nothing in the record to support a conclusion that the trial court's crediting of Dr. Clounch's report was against the manifest weight of the evidence. *Ellis*, 74 Ill. 2d at 497.

¶ 18 Viewing the record as a whole, we find that the trial court's decision to deny respondent's petition for discharge or conditional release was not against the manifest weight of the evidence. Respondent's treatment records indicated that he had failed to make significant progress, particularly with the significant issues of "identifying deviant arousal patterns, recognizing when he is in a deviant cycle, and relapse intervention skills." Dr. Clounch's expert opinion that respondent continued to be sexually dangerous was supported by his interpretation of accepted testing measures. In addition, respondent's current issues with inappropriate sexual fantasies that he reported to Dr. Clounch, were predictive, at least in Dr. Clounch's expert opinion, of a probability of future sexual offenses. Even Dr. Witherspoon's observation that the Static 2002R test rated respondent as "moderate-high" risk to re-offend, while he attempted to downplay the significance of that particular result, lends some support to the trial court's finding.

¶ 19 In sum, the State presented sufficiently clear and convincing evidence to support a finding that respondent remained sexually danger and in need of continued confinement. We find nothing in the record that would require us to substitute our judgment for that of the trial court. *People v. DeLeon*, 227 Ill. App. 3d 322 (2008). Therefore, based upon the evidence presented, we hold that the trial court's decision to deny respondent's application for discharge or conditional release was not against the manifest weight of the evidence.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Fulton County is affirmed.

¶ 22 Affirmed.