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2015 IL App (4th) 140214-U

NO. 4-14-0214

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 27, 2015

Carla Bender

4th District Appellate

Court, IL

In re: the Commitment of KENNETH E.)	Appeal from
SEIDLER, a Sexually Violent Person,)	Circuit Court of
THE PEOPLE OF THE STATE OF ILLINOIS,)	Sangamon County
Petitioner-Appellee,)	No. 06MR145
v.)	
KENNETH E. SEIDLER,)	Honorable
Respondent-Appellant.)	John W. Belz,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Turner concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion when it denied respondent's motion for the appointment of an independent examiner.
- ¶ 2 Following a September 2008 trial, a jury determined respondent, Kenneth E. Seidler, was a sexually violent person as defined by the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 2008)). In May 2009, the trial court committed respondent to the care, custody, and control of the Illinois Department of Human Services (IDHS) until he is no longer sexually violent. In December 2013, the State filed a motion for a finding of no probable cause based on a statutorily mandated medical-reexamination report. The State's motion requested the trial court enter an order finding no probable cause to believe respondent was no longer a sexually violent person, which would have precluded a further evidentiary hearing on the issue. Respondent moved for the appointment of an independent

examiner to evaluate him. Following a March 2014 hearing, the trial court denied respondent's motion for an independent examiner and granted the State's motion for a finding of no probable cause. Respondent appeals, arguing the trial court erred by denying his motion for the appointment of an independent examiner. We affirm.

¶ 3

I. BACKGROUND

¶ 4 This case represents respondent's third appeal before this court on issues governed by the Act. Due to the history of this case and the parties' familiarity with the issues presented, we outline only the facts necessary to provide the proper context.

¶ 5 In 1984, respondent was convicted of rape for a 1983 offense involving an 8-year-old girl, her 14-year-old sister, and their mother. Respondent entered the basement of the victims' home and grabbed the youngest daughter. He instructed the girl to call for her mother. The victim called for her mother but her older sister appeared instead. Respondent told the older sibling to call for her mother. After the mother descended to the basement, respondent blindfolded and tied up all three victims. Respondent then raped the mother and attempted to rape the oldest daughter. One of the girls reported respondent was armed with a pocketknife.

¶ 6 Following his conviction, the trial court sentenced respondent to 40 years' imprisonment, with 3 years' mandatory supervised release (MSR). While on MSR, respondent was electronically monitored and authorized to travel between his home and his job. In July 2005, authorities discovered respondent engaged in unauthorized movement when he was found at a wildlife sanctuary. The officers who located respondent searched him and found a knife and rope in his pockets. Respondent admitted to the officers he was getting his "old urges" back. Respondent's MSR was revoked and he returned to prison.

¶ 7 In March 2006, the State filed a petition to have respondent committed as a sexually violent person. In September 2008, a jury determined respondent was sexually violent, and the trial court ordered IDHS to take custody and care of respondent for treatment. Respondent appealed, and this court affirmed respondent's commitment. *People v. Seidler*, No. 4-09-0464 (Oct. 7, 2010) (unpublished order under Supreme Court Rule 23).

¶ 8 Over the years, Dr. Steven Gaskell, a clinical and forensic psychologist, submitted periodic reexamination reports on respondent's mental condition pursuant to section 55 of the Act. 725 ILCS 207/55 (West 2008) (requiring reevaluation after the first six months of commitment, followed by yearly reevaluations for as long as the respondent remains committed). Gaskell's reexamination reports sought to determine whether respondent had made sufficient progress to be conditionally released or discharged from IDHS's custody. In preparing the reports, Gaskell reviewed more than 25 documents, including reports from two other psychologists. The reports set forth respondent's relevant history, including his criminal, sexual, and treatment history. In his 6-, 18-, 30-, and 42-month reexamination reports, Gaskell diagnosed respondent with (1) paraphilia not otherwise specified (paraphilia NOS), (2) alcohol and cannabis abuse by history in a controlled environment, and (3) antisocial personality disorder. Gaskell relied on the Diagnostic and Statistical Manual of Mental Disorders (4th ed., text rev. 2000) (DSM-IV-TR) and provided the following required criteria for respondent's paraphilia-disorder diagnosis:

"[I]ntense, recurrent sexually arousing fantasies, sexual urges or behaviors generally involving nonhuman objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting person that have existed for at least six months.

Additionally, the individual must have acted on these urges or the urges themselves caused interpersonal difficulties."

Gaskell further noted paraphilia NOS "is used for coding paraphilias that do not meet the criteria for any of the specific paraphilias." In support of diagnosing respondent with paraphilia NOS, Gaskell explained:

"[Respondent] has repeatedly been accused of using physical force to coerce non-consenting individuals into engaging in sexual behavior with him. He was charged [with] sexually assaulting or attempted [*sic*] to sexually assault at least 3 females while in possession of a knife, and acknowledged having his '*old urges*' to a Sheriff's Deputy when questioned regarding an incident on July 21, 2005[,] that ended up resulting in a parole violation (where he was found in a park with two pieces of rope). He was convicted of Rape in 1984 and he spent several years in prison for his behavior." (Emphasis in original.)

¶ 9 Gaskell further summarized respondent's treatment progress as "limited" and noted "he has not participated in any sex offense specific treatment since his admission to [IDHS]."

¶ 10 As to the issue of respondent's propensity to engage in future acts of sexual violence, Gaskell used an "adjusted actuarial" approach to determine respondent's level of risk. The "[a]djusted actuarial assessment begins with actuarial instruments, which may then be adjusted based upon additional potentially important factors like stated intent to re-offend, debilitating health problems, and deviant sexual arousal." For the 6-, 18-, and 30-month

reevaluations, respondent scored in the moderate-high risk category on the STATIC-99R and the highest risk category on the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). For the 42-month reevaluation, respondent scored in the moderate-low risk category on the STATIC-99R and the low-moderate risk category on the STATIC-2002R. In each of Gaskell's reports, he opined the STATIC-99R instrument underestimated respondent's level of risk. He explained:

"[E]ven though [respondent] was held, given his Miranda rights, questioned by police, participated in a live line-up at the jail, and had left his motorcycle with the police for evidence, he was not arrested, thus, he did not qualify for a prior sex offense according to the Static-99R Manual. This, along with his high risk behavior at a park while on parole, indicates that this instrument underestimates his level of risk."

¶ 11 Since the actuarial scores are a starting point, Gaskell adjusted respondent's risk for future sexual offending based on certain risk factors. In the 6-, 18-, 30-, and 42-month reexamination reports, Gaskell identified the following risk factors applicable to respondent: (1) his penile-plethysmography assessment showed deviant sexual preferences; (2) any deviant sexual interest; (3) impulsiveness, recklessness; (4) any substance abuse; (5) noncompliant with supervision; (6) sexual interests in children; (7) antisocial personality disorder; (8) employment instability; (9) intoxicated during offense; and (10) "PCL-R (31 [Act] Evaluation)."

¶ 12 Gaskell's reports also considered whether protective factors such as treatment progress, age, and health status applied to respondent. Treatment progress did not apply as a protective factor because respondent had not participated in sex-offense-specific treatment while at IDHS. Similarly, the "health" factor did not apply because respondent did not have any

medical condition that would reduce the risk of reoffending. However, Gaskell found "[s]ome age-based reduction of risk is warranted and was reflected on the actuarial instruments."

Gaskell concluded "to a reasonable degree of psychological certainty that it [was] substantially probable that [respondent] will engage in future acts of sexual violence."

¶ 13 At issue in this appeal is Gaskell's 54-month reexamination report, which he prepared in October 2013. As with prior reexaminations, respondent refused to be interviewed. The report noted respondent was 61 years old and this was his fifth reexamination. Unlike previous reexamination reports, Gaskell used the Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) (DSM-V) to diagnose respondent. Gaskell noted the DSM-V is the latest edition of the standard reference for clinical practice in the mental-health field and offers the best available description of how mental disorders are expressed. Consistent with previous reexamination reports, Gaskell diagnosed respondent with alcohol and cannabis abuse by history in a controlled environment, antisocial personality disorder, and "Other Specified Paraphillic Disorder, Sexually Attracted to Non-Consenting Persons." Gaskell explained "Other Specified Paraphillic Disorder, Sexually Attracted to Non-Consenting Persons," was formerly called "Paraphilia Not Otherwise Specified" under the DSM-IV-TR, but there was no change in the diagnostic criteria.

¶ 14 As to the issue of respondent's propensity to engage in future acts of sexual violence, respondent again scored in the moderate-low risk category on the STATIC-99R and the low-moderate risk category on the STATIC-2002R. However, as Gaskell explained in prior reports, the STATIC 99-R underestimated respondent's level of risk. Gaskell identified the same 10 risk factors applicable to respondent for future sexual offending.

¶ 15 Gaskell again determined one protective factor applied to respondent—his age. Gaskell's report stated, "[s]ome age-based reduction of risk is warranted and was reflected on the actuarial instruments." Gaskell concluded it was substantially probable respondent will engage in future acts of sexual violence and it was "crucial that he remain civilly committed as a Sexually Violent Person in a secure setting to guarantee the security and treatment involvement necessary to reduce his level of risk."

¶ 16 In December 2013, the State filed a motion for a finding of no probable cause based upon Gaskell's 54-month reexamination report. In its motion, the State noted respondent had not affirmatively waived his right to petition the court for discharge, and thus section 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2012) (text of section effective until Jan. 1, 2014)) required the trial court to hold a probable-cause hearing. On January 30, 2014, respondent filed a motion for the appointment of an independent examiner to examine him.

¶ 17 On March 5, 2014, the trial court held a hearing on respondent's motion for an independent examiner and the State's motion for a finding of no probable cause. The trial court denied respondent's motion, noting there was insufficient evidence to show bias on behalf of Gaskell. Thereafter, the attorneys made brief arguments, and the court found no probable cause shown to believe respondent was no longer a sexually violent person.

¶ 18 This appeal followed.

¶ 19 **II. ANALYSIS**

¶ 20 Respondent asserts the trial court erred by denying his request for the appointment of an independent examiner pursuant to section 55(a) of the Act (725 ILCS 207/55(a) (West 2012)). The State responds this court lacks jurisdiction to reach the merits of respondent's argument because he does not challenge the trial court's finding of no probable cause and thus,

no justiciable issue is presented on appeal. Alternatively, the State contends the trial court properly exercised its discretion in denying respondent's motion for an independent examiner.

¶ 21 A. Justiciable Issue

¶ 22 The State argues this court lacks jurisdiction because respondent does not challenge the trial court's finding of no probable cause and any ruling on the merits would constitute an advisory opinion because the result of this case (*i.e.*, the trial court's finding of no probable cause) would not be affected. (Respondent did not file a reply brief addressing the State's jurisdictional claim.) We disagree with the State.

¶ 23 "It is axiomatic that the appellate court must first consider its jurisdiction to hear an appeal before reaching the merits." *In re Estate of Gagliardo*, 391 Ill. App. 3d 343, 349, 908 N.E.2d 1056, 1061 (2009). "[A] basic tenet of justiciability holds that '[r]eviewing courts will not decide moot or abstract questions or render advisory opinions.'" *People ex rel. Sklodowski v. State of Illinois*, 162 Ill. 2d 117, 130, 642 N.E.2d 1180, 1185 (1994) (quoting *Barth v. Reagan*, 139 Ill. 2d 399, 419, 564 N.E.2d 1196, 1205 (1990)). A decision is advisory if it cannot result in appropriate relief to the prevailing party. *People v. Campa*, 217 Ill. 2d 243, 269-70, 840 N.E.2d 1157, 1173 (2005). A court of review "also ordinarily will not consider issues where they are not essential to the disposition of the cause or where the result will not be affected regardless of how the issues are decided." *Barth*, 139 Ill. 2d at 419, 564 N.E.2d at 1205. However, where a decision "could have a direct impact on the rights and duties of the parties," there is life in the appeal. *People ex rel. Bernardi v. City of Highland Park*, 121 Ill. 2d 1, 6-7, 520 N.E.2d 316, 318 (1988); *Balmoral Racing Club, Inc. v. Illinois Racing Board*, 151 Ill. 2d 367, 387, 603 N.E.2d 489, 496-97 (1992) (where a decision has important consequences for the parties, it is proper to entertain the appeal).

¶ 24 Here, the resolution of whether an independent examiner should be appointed affects the rights of respondent. As with all probable-cause hearings under the Act, the trial court's role is to review the reexamination reports and hear the parties' arguments. 725 ILCS 207/65(b)(1) (West 2012). A report prepared by an independent examiner may change the result in this case (*i.e.*, the trial court may find probable cause to believe respondent is no longer a sexually violent person and order an evidentiary hearing). Moreover, we may grant effectual relief in this case by vacating the trial court's March 5, 2014, order, directing the court to appoint an independent examiner, and remanding for a new hearing on the State's motion for a finding of no probable cause. The State cites no authority, and we have found none, which holds a respondent must directly challenge the trial court's finding of no probable cause.

¶ 25 Even if such a requirement were to exist, it is evident the relief respondent seeks is the appointment of an independent examiner, and, inferentially, a vacatur of the no-probable-cause judgment. See *Illinois Bell Telephone Co. v. Purex Corp., Ltd.*, 90 Ill. App. 3d 690, 693, 413 N.E.2d 106, 108-09 (1980) (inferring plaintiff was seeking a new trial and, inferentially, a vacatur of the prior judgment, since a new trial could not be granted unless the final judgment was also set aside). Moreover, "the failure to include a prayer for relief in a notice of appeal is an error of form not substance and, absent prejudice to the appellee, does not deprive the appellate court of jurisdiction." *Maywood-Proviso State Bank v. Village of Lisle*, 234 Ill. App. 3d 206, 215, 599 N.E.2d 481, 488 (1992). The State has pointed to no prejudice, nor do we perceive any under these circumstances. Consequently, respondent's failure to specify he seeks to vacate the no-probable-cause finding contained within the March 5, 2014, order is not fatal and does not deprive us of jurisdiction to consider respondent's appeal.

¶ 26 B. Independent Examiner

¶ 27 Respondent argues the trial court erred by denying his motion for appointment of an independent examiner. More specifically, he challenges Gaskell's diagnosis and asserts Gaskell failed to account for his age and low actuarial scores. The State contends the trial court properly exercised its discretion because respondent failed to demonstrate the need for an independent examiner and failed to provide a basis to rebut Gaskell's reexamination report. We agree with the State.

¶ 28 "While the Act allows for the appointment of an expert for an indigent person, it certainly does not require a court to take such action." *In re Detention of Cain*, 341 Ill. App. 3d 480, 483, 792 N.E.2d 800, 803 (2003); 725 ILCS 207/55(a) (West 2012) ("At the time of a reexamination ***, the court may appoint a qualified expert ***."). Appointment of an independent examiner is appropriate where the respondent provides a basis to rebut IDHS's reexamination report or demonstrates bias. *People v. Botruff*, 212 Ill. 2d 166, 177, 817 N.E.2d 463, 470 (2004). Whether to appoint an independent examiner rests within the trial court's sound discretion. *Id.* at 176, 817 N.E.2d at 469. Thus, we review the matter for an abuse of discretion. *Id.* " 'An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *In re Detention of Erbe*, 344 Ill. App. 3d 350, 374, 800 N.E.2d 137, 157 (2003) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)).

¶ 29 Respondent first contends the change in his diagnosis from paraphilia NOS to "other specified paraphillic disorder" is a basis to rebut Gaskell's report because "[a]nother examiner may or may not reach the same conclusion." We are not persuaded. As Gaskell explained in his report, the DSM-V simply renamed the disorder and no change was made in the diagnostic criteria from the DSM-IV-TR to the DSM-V. See American Psychiatric Association,

DSM-V, 685 (5th ed. 2013). Moreover, the fact an independent examiner "may or may not" reach the same diagnosis is pure speculation, and such conjecture is insufficient to show a need for an independent examiner. Because Gaskell consistently diagnosed respondent with paraphilia, we reject respondent's assertion the DSM-V's relabeling of his disorder represents a basis to rebut Gaskell's report.

¶ 30 Respondent next asserts Gaskell's report failed to account for his age. This argument is belied by the record. The report notes respondent's age warranted a reduction of risk and such reduction was reflected in the actuarial measurements. Thus, respondent's age is not a basis to rebut the report.

¶ 31 Respondent finally argues Gaskell's opinion is inconsistent with the results of the STATIC-99R and STATIC-2002R, which placed respondent in the moderate-low and low-moderate risk categories. However, this does not show Gaskell was skewed or biased. Nothing in the record shows Gaskell skewed or misrepresented respondent's actuarial scores. Moreover, our review of the record shows Gaskell did not rely solely upon the actuarial assessments in rendering his opinion. Rather, pursuant to the "adjusted actuarial" approach, Gaskell adjusted respondent's risk assessment based upon 10 empirical risk factors. Additionally, Gaskell reviewed extensive records regarding respondent, conducted evaluations and assessments of respondent, and formed his opinion based upon all of the information. We do not agree with respondent's claim Gaskell is biased or prejudiced because the validity of his diagnosis is called into question by the actuarial scores.

¶ 32 Nothing in the record demonstrates respondent's case was prejudiced or the trial court would have found differently had an independent examiner been provided. The probable-cause proceeding in this case was a perfunctory reexamination and respondent's counsel did not

provide a possible basis to refute the report or show Gaskell was biased against respondent. Nor did respondent's counsel provide a reason for respondent's refusal to comply with the State's examiner, and his counsel did not point out any specific facts that could have affected Gaskell's report. By filing his January 2014 motion for appointment of an independent examiner, respondent had the burden to provide a possible basis to rebut Gaskell's report or show bias. *Botruff*, 212 Ill. 2d at 177, 817 N.E.2d at 470. Respondent has failed to do so. Accordingly, we reject his claim the trial court erred by denying his motion for the appointment of an independent examiner.

¶ 33

III. CONCLUSION

¶ 34

For the reasons stated, we affirm the trial court's judgment.

¶ 35

Affirmed.