2015 IL App (4th) 140834-U

NO. 4-14-0834

FILED
June 25, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the Commitment of PHILIP R. WOLFF, a Sexually Violent Person,	)	Appeal from Circuit Court of
THE PEOPLE OF THE STATE OF ILLINOIS,	)	McLean County
Petitioner-Appellee,	)	No. 03MR112
v.	)	
PHILIP R. WOLFF,	)	Honorable
Respondent-Appellant.	)	Paul G. Lawrence,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of respondent's appointed counsel to withdraw as counsel on appeal under *Anders v. California*, 386 U.S. 738 (1967), and as extended to civil matters by *In re Keller*, 138 Ill. App. 3d 746, 486 N.E.2d 291 (1985), on the ground no meritorious issues can be raised in this case. For the following reasons, we grant counsel's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In June 2003, the State filed its petition to have respondent committed as a sexually violent person pursuant to the Sexually Violent Persons Commitment Act (Act) (725

ILCS 207/1 *et seq.* (West 2002)). In March 2004, the trial court adjudicated defendant a sexually violent person and committed him to the Department of Human Services (DHS) for treatment in a secured institutional facility.

¶ 5 Section 55(a) of the Act provides for the periodic reexamination of a committed sexually violent person to determine if (a) sufficient progress has been made in treatment to allow conditional release or (b) the person's condition has so changed since the previous reexamination that he or she is no longer a sexually violent person. These reexaminations occur six months after the initial adjudication and annually thereafter. 725 ILCS 207/55(a) (West 2012). At the time of each reexamination, the committed person receives written notice of the right to petition the trial court for discharge. 725 ILCS 207/65(b)(1) (West 2012). The notice must contain a waiver of rights. 725 ILCS 207/65(b)(1) (West 2012). If the committed person does not waive the right to petition for discharge, the court conducts a probable-cause hearing to determine if facts exist to warrant a hearing on the issue of whether the committed person remains a sexually violent person. 725 ILCS 207/65(b)(1) (West 2012).

¶ 6 Here, pursuant to section 55 of the Act, reexaminations were conducted six months after the adjudication and annually thereafter. Each time, respondent refused to sign the waiver of right to petition for discharge form. After each reexamination, the trial court granted the State's motion for a finding of no probable cause to warrant an evidentiary hearing on the issue of whether respondent was still a sexually violent person and ordered respondent's continued commitment in the secure custody of DHS.

¶ 7 In November 2013, Joseph Proctor, Psy.D., conducted the 114-month reexamination at issue in this appeal pursuant to section 55(a) of the Act (725 ILCS 207/55(a)

(West 2012)). Respondent refused to be interviewed by Proctor and refused to sign the waiver of right to petition for discharge form. The report noted respondent was 34 years old, and this was his ninth reexamination. In preparing the report, Proctor reviewed more than 13 documents and conferred with David Suire, Ph.D. The report set forth respondent's relevant history, including his criminal, sexual, and treatment history. The report noted respondent had not participated in sex-offender-specific treatment since February 24, 2006.

¶ 8 Proctor opined, to a reasonable degree of psychological certainty, respondent suffered from the following mental disorders: (1) pedophilic disorder, nonexclusive type, sexually attracted to both; (2) alcohol use disorder, in sustained remission, in a controlled environment; (3) cannabis use disorder, in sustained remission, in a controlled environment; (4) persistent depressive disorder (dysthymia), early onset, severe; and (5) antisocial personality disorder. Proctor explained his reasoning for those diagnoses.

¶ 9 As to the issue of respondent's dangerousness, Proctor used the Static-99R and Minnesota Sex Offender Screening Tool (MnSOST-R) risk assessments. Respondent placed in the "high risk category" on the Static-99R and the "highest category" on the MnSOST-R. Proctor also noted respondent had the following "factors empirically associated with recidivism": paraphilic interests (exhibitionism), penile plethysmograph arousal to children/deviant preference, early onset of sexual offending, childhood criminality, general social problems, global problems with intimacy, noncompliant with supervision, antisocial personality disorder/antisocial lifestyle, identification with children, sexual abuse, physical/emotional abuse, negative relationship with mother, separation from parents, substance abuse, impulsiveness/recklessness, and sexual preoccupation. Respondent had no protective factors

which could reduce the risk of reoffending, such as being of a more advanced age, having an adverse medical condition, or having made progress in sex-offender-specific treatment. Proctor found, based on respondent's mental disorders and assessed risk, he was substantially probable to engage in future acts of sexual violence. Proctor also opined respondent had not made sufficient progress in his treatment to be conditionally released and remained in need of institutional care in a secure facility.

¶ 10 On December 12, 2013, the State filed a motion for periodic reexamination and a finding of no probable cause based upon Proctor's 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)) required the trial court to hold a probable-cause hearing consisting "only of a review of the reexamination reports and arguments on behalf of the parties." The State also pointed out no independent evaluation was necessary since respondent had not affirmatively opted to petition for discharge and had not made sufficient progress in sex-offender-specific treatment such that appointment of an evaluator was warranted, citing *People v. Botruff*, 212 Ill. 2d 166, 177-78, 817 N.E.2d 463, 470 (2004) ("It is rational not to appoint an independent evaluator when a respondent has shown no need for one, especially during perfunctory reexamination proceedings where the respondent has not affirmatively opted to petition for discharge.").

¶ 11 On March 28, 2014, the trial court held the probable-cause hearing. At the beginning of the hearing, respondent's counsel made an oral motion for the appointment of an independent expert to examine respondent. Respondent's counsel argued:

"Your Honor, I think all you get from *Botruff* is it might not

> be error to not appoint in certain circumstances. It's not required by the process in all circumstances, rather it is discretionary with the [c]ourt. In this case, historically, it does not figure to be a waste of time. It's not something that has been some repeated process that's been insistent [*sic*] upon, and it would not be unreasonable nor prejudicial to the State's position if the [c]ourt goes to the modest expense, relatively speaking, when measured against the situation that a committed person is in to appoint an expert to do an independent exam."

¶ 12 The State pointed out the burden would be on respondent to show substantial progress in treatment in order to be conditionally released or there was a change in his condition from the past periodic reexamination such that it would warrant discharge. The State argued (1) respondent had not been in treatment, (2) respondent had not done anything in the last reexamination period, (3) *Botruff* provided the trial court discretion on appointing an independent evaluator, and (4) such appointment was not warranted in this case.

¶ 13 The trial court denied the request for appointment of an independent evaluator based upon the fact respondent was not in treatment. Thereafter, the court found no probable cause warranting an evidentiary hearing on the issue of whether respondent was currently a sexually violent person in need of treatment in a secure setting and granted the State's motion. That same day, the court entered the written order.

¶ 14 On April 28, 2014, respondent filed a motion to reconsider. After an August 22, 2014, hearing, the trial court denied the motion.

¶ 15 On September 22, 2014, defendant filed a timely notice of appeal in compliance with Illinois Supreme Court Rule 303 (eff. May 30, 2008), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb.1, 1994). See 725 ILCS 207/20 (West 2012) (noting the proceedings under the Act are civil in nature). In October 2014, the court appointed Alan Novick to represent respondent on appeal.

¶ 16 In February 2015, appointed counsel moved to withdraw, attaching to his motion a brief in conformity with the requirements of *Anders*. The record shows service of the motion on respondent. On its own motion, this court granted respondent leave to file additional points and authorities by March 12, 2015, but respondent has not done so. After examining the record and executing our duties in accordance with *Anders*, we grant counsel's motion and affirm the trial court's judgment.

¶ 17 II. ANALYSIS

¶ 18 Appointed counsel contends the record shows no meritorious issues can be raised on appeal. Counsel noted the following potential issues for which he could find no merit:

¶ 19 A. Constitutional Challenge

¶ 20 As counsel correctly noted, the question of the constitutionality of the Act has been decided. In *In re Detention of Samuelson*, 189 Ill. 2d 548, 727 N.E.2d 228 (2000), the supreme court found the Act constitutional, as the Act did not violate the double-jeopardy clause, the *ex post facto* clause, the right to trial by jury, the equal-protection clause, or the due-process clause as it relates to the postcommitment discharge procedures. Therefore, a constitutional challenge would have no merit.

¶ 21 B. Inappropriate-Penalty Challenge

¶ 22 Counsel noted by not allowing an independent evaluation of respondent, the court was left with a mere paper review of the State's report, which could subsequently result in respondent having a "steeper hill to climb" if he were to file a subsequent petition for discharge pursuant to the provisions of section 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2012)), which provides a sexually violent person may file a petition for discharge without the approval of the Secretary of DHS. If the trial court finds such petition is frivolous or the person is still a sexually violent person, the court shall deny any subsequent petition for discharge without a hearing unless the petition contains facts upon which the court could reasonably find the condition of the person has so changed that a hearing is warranted.

¶ 23 Here, respondent did not file a petition for discharge. As appointed counsel noted, even if respondent had filed a petition for discharge without the Secretary's approval, he would not be precluded from filing a subsequent petition. He would, however, have to show his condition had so changed that a hearing was warranted. At this point, respondent would be hard-pressed to show such a change since he has not participated in any sex-offender-specific treatment since February 2006. Therefore, no meritorious argument could be made on the ground he was being inappropriately penalized.

¶ 24 C. Other Protective Factors Negate the Need for Sex-Offender-Specific Treatment

¶ 25 In Proctor's reexamination report, he noted several protective factors, *i.e.*, age, medical condition, and progress in sex-offender-specific treatment, which could reduce the risk of reoffending. Appointed counsel notes if any of those protective factors applied to respondent, they could favor discharge or conditional release. Respondent does not meet any of the criteria for the protective factors. He was only 34 years old at the time of the reexamination. His health

or physical condition had not changed since the previous reexamination. He had not participated in any sex-offender-specific treatment since 2006 and, therefore, had not made any progress in sex-offender treatment. Consequently, no argument could be made respondent was ready for conditional release or discharge based upon any protective factors indicating a lowered risk of reoffending.

¶ 26 D. First Request for an Independent Evaluator

¶ 27 Appointed counsel noted this was the first time respondent had requested the appointment of an independent evaluator and, therefore, the trial court may have abused its discretion by denying the request. In *Botruff*, the supreme court found, under section 55(a) of the Act, the appointment of an independent evaluator is at the discretion of the trial court. *Botruff*, 212 Ill. 2d at 176, 817 N.E.2d at 469. The court further stated, "It is rational not to appoint an independent evaluator when a respondent has shown no need for one, especially during perfunctory reexamination proceedings where the respondent has not affirmatively opted to petition for discharge." *Id.* at 177-78, 817 N.E.2d at 470.

¶ 28 Here, respondent did not petition for discharge. Further, when requesting appointment of the independent evaluator, respondent simply argued it would not be "a waste of time" and "it would not be unreasonable nor prejudicial to the State's position if the [c]ourt goes to the modest expense" of such an appointment. In his motion for reconsideration, respondent argued a paper review of the State's report, absent a waiver of his right to petition for discharge or filing for discharge, would potentially penalize him in the future. The motion also argued the trial court erroneously found no probable cause by implicitly finding respondent a sexually violent person based on insufficient and untested evidence. Notably, respondent made no

argument he had made satisfactory progress in treatment or his condition had changed since the prior reexamination. Respondent showed no need for the appointment of an independent evaluator, and, therefore, the trial court did not abuse its discretion in denying such a request. Therefore, no meritorious argument to that effect can be made on appeal.

¶ 29 III. CONCLUSION

¶ 30 After reviewing the record pursuant to *Anders*, we agree with appointed counsel no meritorious issues can be raised on appeal, and we grant counsel's motion to withdraw as counsel for respondent and affirm the trial court's judgment.

¶ 31 Affirmed.