2016 IL App (2d) 151011-U
No. 2-15-1011
Order filed December 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 04-MR-133
DAVID CANADAY,	)	Honorable Victoria A. Rossetti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's counsel was not ineffective for choosing not to depose the State's expert before trial; nor was defendant's counsel ineffective in his cross-examination of the State's expert. The trial court's finding that the State showed by clear and convincing evidence that defendant should remain confined was not against the manifest weight of the evidence.

¶ 2 Defendant, David Canaday (defendant), appeals the denial of his petition for conditional release pursuant to section 207/60(d) of the SVPs Commitment Act. 725 ILCS 207/60(d) (West 2014). Defendant contends that his trial counsel was ineffective for (1) failing to depose the State's expert; and (2) failing to adequately cross examine the State's expert. Additionally,

defendant contends that the trial court's denial of his petition for conditional release was against the manifest weight of the evidence because the State failed to prove by clear and convincing evidence that he remain confined. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 26, 1996, defendant pleaded guilty to one count of aggravated criminal sexual abuse for sexually abusing his then 8 year old, cancer-stricken godson. He was sentenced to 12 months in jail, 36 months of probation and 150 hours of public service. On December 9, 1999, defendant was sentenced to three years in the Illinois Department of Corrections (IDOC), after having his probation revoked for failing to attend sex offender treatment on multiple occasions, as well as contacting his victim's household. Defendant was paroled on March 23, 2000.

¶ 5 Sometime in May 2000, less than two months after having been released on parole, defendant was arrested and charged with ten counts of child pornography for having sent child pornography and sexually explicit communications to an FBI agent posing online as a 13 year old boy. Defendant pleaded guilty to one count of child pornography and was sentenced to nine years in the IDOC.

¶ 6 On February 11, 2004, the State petitioned to commit defendant to custody of the Illinois Department of Human Services (DHS) under 207/50 of the Act, as a sexually violent person (SVP). 725 ILCS 207/50 (West 2002). The petition enumerated defendant's prior convictions as well as the following mental disorders as the basis for the petition: (1) pedophilia sexually attracted to both, nonexclusive type, and (2) narcissistic personality disorder, with antisocial, histrionic, and borderline traits. On October 20, 2005, based on the parties' stipulation and agreement, the trial court entered an order adjudging defendant to be a SVP. Defendant was then

committed to the custody of DHS. He was examined and evaluated yearly while in DHS custody.

¶ 7 On July 1, 2014, defendant filed his petition for conditional release pursuant to section 207/60(d) of the Act. 725 ILCS 207/60(d) (West 2014). On that same date, the trial court appointed Dr. Eric Ostrov as defendant's expert in the field of sex offender evaluations. Dr. Dobier acted as the state's disclosed expert.

¶ 8 A hearing on defendant's petition for conditional release was held on July 23, 2015. Dobier testified on behalf of the state. She had been involved with defendant's case since August 2012, and had conducted three evaluations of him in that time. Dobier testified that the purpose of these evaluations was to determine whether defendant was still a SVP or ready for conditional release. As part of Dobier's evaluations, she reviewed defendant's treatment notes, medical notes, IDOC information, and defendant's homework file. Dobier also interviewed defendant personally as part of her evaluations. She recounted defendant's prior convictions as well as the behaviors of the defendant relevant to the evaluation that had not resulted in convictions. Specifically, defendant said that he possessed over 2,000 images of child pornography to which he pleasured himself several times per day before being imprisoned. Defendant also reported that he had victimized at least twenty-one other children in hands-on, contact offenses that had not been prosecuted. Dobier testified that defendant reported these victims ranged from five to sixteen years of age.

¶ 9 Dobier diagnosed defendant with (1) pedophilic disorder, nonexclusive type, sexually attracted to both; and (2) narcissistic personality disorder, with antisocial features. Dobier testified that pedophilic disorder occurs when a person experiences "intense sexually arousing fantasies, urges or behaviors with regard to having sexual activity with a prepubescent child."

She further reported that defendant "has acted on these urges" for "[o]ver a period of at least six months." Dobier explained that defendant meets the criteria for pedophilic disorder due to the fact that he has "reinforced those fantasies by masturbating," and "acting on those fantasies by assaulting children, the ones he has admitted to, 21 children." She went on to add that defendant is still reporting "euphoric recall" when talking to people about pornography and "reliving that experience of his own child pornography ***."

¶ 10 Dobier described her diagnosis of narcissistic personality disorder as a condition "characterized by grandiosity [and] the need for admiration" and the belief that one is "superior" to others. The antisocial features that Dobier attached to defendant's narcissistic personality disorder mean defendant "does have anti-social traits in his behaviors." Dobier also added that defendant demonstrates a lack of empathy for his victims, further cementing her diagnosis of narcissistic personality disorder, with antisocial features. Dobier opined that, to "a reasonable degree of psychological certainty based on [her] review of records, [her] interview of [defendant], her evaluations of [defendant], and *** [her] education, training and experience," defendant continues to suffer from pedophilic disorder, nonexclusive type, sexually attracted to both and narcissistic personality disorder, with antisocial features.

¶ 11 Dobier testified that defendant still had to overcome some difficulties and reach certain milestones before she could recommend him for conditional release. She described defendant's five-phase treatment program since being adjudicated a SVP. Relevant here, Dobier testified that defendant had not progressed beyond phase four of his treatment program. Phase four consists of SVPs, like defendant, journaling about problem solving, beginning to implement their relapse prevention and good lives plans, and passing a polygraph test "to insure that if there are specific issues that the team wants to ask questions about, they ask those questions at those

times." Dobier testified that defendant had refused to complete his journaling for a substantial period of time, preferring to focus on work contained in phase five of the treatment plan. Defendant had not passed the requisite polygraph test of phase four. Dobier also testified about defendant's exhibition of high-risk behaviors during evaluations in 2014-2015. Defendant reported arousal from a scene of rape on television, which triggered a violent sexual fantasy, and did not address why his plan had not worked to dispel such fantasies. Dobier also explained that defendant had a history of institutional rule violations including stealing food and making sexually inappropriate jokes.

¶ 12 Ultimately, Dobier testified that defendant was not a good candidate for conditional release because he had not yet passed beyond phase four of the treatment program. In her opinion, defendant's failure to complete the treatment means that "[h]e doesn't have the tools to manage his urges and behaviors." Dobier testified that defendant remains substantially probable to reoffend and continues to require treatment in a secure facility.

¶ 13 On cross-examination, Dobier testified that defendant had completed many parts of the five-phase treatment program. Additionally, defense counsel's cross-examination of Dobier elicited the response that defendant's certain actuarial scores indicated that he was 40% likely to reoffend within ten years.

¶ 14 Defense expert, Dr. Eric Ostrov, was then called to testify. He opined that while there remained an "appreciable chance" that defendant would reoffend if completely discharged, defendant was "ready for conditional discharge." Ostrov stated, "If [defendant] were discharged on conditional release where he would be supervised then I believe this is not a significant chance of his re-offending." Ostrov went on to testify, "I don't believe he is more likely to re-offend. Again if he is on conditional release, no, I don't believe so." Ostrov did acknowledge

that defendant is often defensive, agitated, acts immaturely, and with a sense of entitlement. Ostrov added that defendant has "problems dealing with loneliness."

¶ 15 Following Dr. Ostov's testimony and closing arguments, the trial court denied defendant's petition. The trial court ruled:

> "[T]he [defendant] has completed a number of phases and he is in Phase 4, ***. As Dr. Ostrov says, he is doing quite well and he is eligible for conditional release, but that doesn't mean he is entitled to conditional release.
>
> He is entitled to conditional release only if he has met all the treatment standards and goals, and from my determination after listening to all of the testimony *** [defendant] is *** still missing behavior anchors dealing with responsibility, maintain[ing] treatment alliances, his commitment to the treatment and cooperating with staff and rules ***.
>
> [Defendant] continues to be a high risk to re-offend. [It] is substantially probable that he will re-offend, and that he has not made sufficient progress[,] and that being placed in the community he would not receive sufficient treatment to safely be managed in the community. [T]herefore, he still meets the criteria of being a SVP in the least restrictive environment, to continue his treatment *** at the Treatment Detention Facility and, therefore, the petition for conditional release is denied at this time."

¶ 16 Defendant filed a motion to reconsider the trial court's denial of his petition for conditional release on August 20, 2015, but withdrew the motion on September 30, 2015. On October 7, 2015, defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant raises two contentions which argue that he received ineffective assistance of

counsel. First, defendant contends that his trial counsel was ineffective for failing to depose Dobier in advance of trial, although he concedes that there is no authority requiring counsel to take a deposition to be effective. Second, defendant contends he was denied effective assistance of counsel when his attorney failed to adequately cross-examine Dobier. As both contentions require the same standard of review, we will address them in turn.

¶ 19 Persons committed under the Act are entitled to effective assistance of counsel, measured by the *Strickland* standard (see *Strickland v. Washington*, 466 U.S. 668 (1984)). *In re Detention of Erbe*, 344 Ill. App. 3d 350, 362 (2003); *People v. Swanson*, 335 Ill. App. 3d 117, 126–127 (2002). To establish ineffective assistance of counsel, a defendant must first demonstrate that his counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment." *Strickland*, 466 U.S. at 687. In so doing, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence. *Id.*, at 689. Second, a defendant must demonstrate a reasonable probability that, but for defense counsel's deficient performance, the result of the proceeding would have been different. *Id.*, at 694. A defendant will prevail on a claim of ineffective assistance of counsel only if he satisfies both prongs of the *Strickland* test. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

¶ 20 Defendant argues that because the facts of his case are so complex, it was incumbent on his counsel to depose Dobier to be prepared for trial. He points to Dobier's detailed report covering over ten years of evaluations and fact-intensive analysis as factors requiring his counsel to depose her. Defendant believes that had his counsel made Dobier clarify the timing and frequency of defendant's inappropriate arousals in an effective deposition, his counsel would

have been sharper and the trial court would have been in a better position to understand the complexities of these facts. Additionally, defendant takes issue with trial counsel's lack of preparedness concerning Dobier's testimony on the timing of certain journal entries made by defendant. Defendant believes a deposition of Dobier on these issues in advance of trial would have prevented his counsel from learning of her knowledge base for the first time at trial.

¶ 21 "[M]istakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent." *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). In fact, counsel's strategic choices are virtually unchallengeable. *Id*. Further, the fact that another attorney might have pursued a different strategy is not a factor in the competency determination. *Id*. "A discovery deposition," is a strategic "technique of trial preparation, serving primarily the convenience of counsel." *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 166 (1982). "Though there may be instances in which a discovery deposition would become a necessity-as when a crucial witness died or disappeared before trial-it is difficult to say that all or even most of the depositions routinely taken in preparation for trial are necessary." *Id*.

¶ 22 The record in the present case reflects defendant's trial counsel to have been his counsel since the state first petitioned the court to adjudge defendant a SVP in February 2004. As such, defendant's counsel had been privy to yearly reports since that time. Defendant's counsel was also in possession of reports prepared by Dobier for years 2013, 2014, and 2015. It cannot be said that defendant's counsel was learning any of the information for the first time to which Dr. Dobier testified at trial. The decision not to depose Dobier in advance of trial does not fall below an objective standard of reasonableness. Thus, as defendant's contention fails the first prong of the *Strickland* test, we need not examine the second prong but, nonetheless, move on to

defendant's second claim of ineffective assistance of counsel. See *Strickland*, 466 U.S. 668 (1984).

¶ 23 Defendant next contends he was denied effective assistance because his trial counsel failed to adequately cross-examine Dobier. Specifically, defendant cites his counsel's failure to drive home the meaning of his actuarial scores, failure to ask Dobier about defendant's plethysmograph results from 2010, and failure to clarify what type of pornography triggered defendant's euphoric recall amounted to ineffective assistance. Defendant argues that these omissions fall below the objective standard of reasonableness and likely had a detrimental effect on the outcome of the trial under *Strickland*.

¶ 24 Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997) (citing *People v. Franklin*, 167 Ill.2d 1, 22 (1995)). The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court. *Id* at 326-27. Defendant can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable. *Id* at 327.

¶ 25 Here, defendant's trial counsel's cross-examination of Dobier was not objectively unreasonable. Defendant's counsel was able to establish that defendant had no more than a 40% chance of reoffending within ten years. Counsel cross-examined Dobier on how defendant's actuarial scores may not correspond to him being a high risk for reoffending. He established that defendant had successfully completed aspects of his five-phase treatment program. Counsel was able to elicit testimony from Dobier concerning her lack of familiarity with defendant's therapists at the treatment facility. While defendant may have cross-examined Dobier in a

different manner or wished that his counsel asked a different series of questions, his counsel's cross-examination of the state's expert certainly did not fall below an objective standard of reasonableness. See *People v. Smith*, 177 Ill. 2d 53, 93 (1997) ("Notwithstanding defendant's argument that cross-examination of [the witness] might have been treated differently, we cannot say that trial counsel's approach fell outside the wide range of reasonable professional assistance and, thus, defendant's trial counsel was not deficient"). As in defendant's first ineffective assistance contention, it fails the first prong of the *Strickland* test, so we need not examine the second prong. See *Strickland*, 466 U.S. 668 (1984).

¶ 26 Finally, defendant contends that the trial court's denial of his petition for conditional release was against the manifest weight of the evidence because the State failed to prove by clear and convincing evidence that he should remain confined. We disagree.

¶ 27 The State was required to prove by clear and convincing evidence that petitioner had not made sufficient progress to be conditionally released. 725 ILCS 207/60(d) (West 2014). A court must deny an SVP's petition for conditional release if the State proves, by clear and convincing evidence, that the SVP has failed to make sufficient "progress in treatment" such that he "is no longer substantially probable to engage in acts of sexual violence if on conditional release." *Id.* In making that determination, the court should consider the nature and circumstances of the acts of sexual violence underlying the SVP's commitment, his "mental history and present mental condition," and whether arrangements can be made to ensure his participation in necessary treatment on conditional release. *Id.* The question is whether petitioner has made sufficient progress to warrant release from a secure setting. *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 978 (2006).

¶ 28 The trial court's finding that the State met this burden may not be disturbed unless it is against the manifest weight of the evidence. *Id.* A judgment is not against the manifest weight of the evidence unless "the opposite conclusion is clearly evident or the [factual] finding is arbitrary, unreasonable, or not based in evidence." *Samour, Inc. v. Board of Election Commissioners of the City of Chicago*, 224 Ill. 2d 530, 544 (2007).

¶ 29 We hold that defendant has not shown that the judgment is against the manifest weight of the evidence. The trial court heard the State's expert testify to a reasonable degree of psychological certainty that defendant had not made sufficient progress in treatment that he is no longer substantially probable to engage in acts of sexual violence if on conditional release. Indeed, defendant had not completed the requisite five-phase treatment program at the time the trial court conducted a hearing on the petition. Defendant argues that Dobier's testimony was contradictory because his likelihood of reoffending is only 40% based on actuarials that Dobier found to be the most accurate predictor of future behavior. But Dobier also testified that "no actuarial instrument assesses for all known or potential risk factors" and that "the presence of each additional risk factor increase[s] risk [of reoffending]." Although defendant's expert, Dr. Ostrov, gave an opinion opposite to that of Dr. Dobier, we are not in a position to reweigh the evidence and substitute our judgment for the trial court's merely because the experts presented testimony in conflict with one another. See *Sandry*, at 979-80. The trial court's finding that the State showed by clear and convincing evidence that defendant should remain confined was not against the manifest weight of the evidence.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 32 Affirmed.