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2016 IL App (3d) 150136-U

Order filed April 4, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2016

<i>In re</i> COMMITMENT OF)	Appeal from the Circuit Court
BRIAN C. ANDERSON)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois,
(The People of the State of Illinois)	
)	
Petitioner-Appellee,)	Appeal No. 3-15-0136
)	Circuit No. 10-MR-6
v.)	
)	
Brian C. Anderson,)	
)	Honorable John L. Hauptman,
Respondent-Appellant).)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and McDade concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in: (1) finding that there was no probable cause to warrant an evidentiary hearing; and (2) denying respondent's third amended motion to reconsider.
- ¶ 2 Respondent, Brian C. Anderson, appeals from the trial court's denial of his third amended motion to reconsider the court's probable cause ruling. On appeal, respondent argues that the court erred when it granted the State's motion for a finding of no probable cause and denied

respondent's statutory right to privately retain an independent examination. We affirm.

¶ 3

FACTS

¶ 4

In February 2008, respondent pled guilty to two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2006)) and the court sentenced him to four years' imprisonment. Prior to respondent's release from prison, the State filed a petition under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2010)) to commit respondent to the custody of the Department of Human Services (DHS). In November 2011, a jury found respondent to be a sexually violent person (SVP). After a December 2012 dispositional hearing, the court ordered respondent committed to DHS custody for treatment in a secure facility. On appeal, we affirmed the jury's SVP finding and respondent's commitment. *In re Commitment of Anderson*, 2014 IL App (3d) 121049.

¶ 5

On December 18, 2013, the court noted that DHS had not filed a reexamination report as required by section 55 of the Act and ordered that the report be filed within 30 days. See 725 ILCS 207/55 (West 2012). The court also appointed the public defender to represent respondent.

¶ 6

On January 7, 2014, the State filed a motion for periodic reexamination and a finding of no probable cause based on its review of the reexamination report. The motion was supported by the November 16, 2013, reexamination report that was prepared by Dr. Richard Travis and an October 2013 document showing both that respondent declined to speak with Travis and did not waive his right to petition for discharge.

¶ 7

In his report, Travis stated that respondent declined to be interviewed for the reexamination. Travis documented that respondent had infrequent contact with his treatment team and had refused treatment. While in DHS custody, respondent was found to have violated several DHS rules including trafficking and trading, unauthorized movement, horseplay, and

sexual misconduct. Travis diagnosed respondent with other specified paraphilic disorder, aroused by sexual coercion of males. Travis explained that this diagnosis involved recurrent, intense sexually arousing fantasies, urges or behaviors involving sexual activity with nonconsenting males over a period of at least six months.

¶ 8 Travis used two assessments—the Static-99R and Static-2002R—to evaluate respondent's probability of reoffending. Respondent scored a five on the Static-99R, which placed him in the moderate-high risk category for being charged or convicted of another sexual offense. Respondent scored an eight on the Static-2002R, which also placed him in the moderate-high risk category for reoffending. In addition to these assessments, Travis highlighted several other factors that suggested a higher likelihood of reoffense. These factors included: respondent's prior adolescent sex offenses, and respondent's subsequent sex offense which occurred 10 years after he had completed treatment.

¶ 9 Travis said that, due to respondent's mental disorder and the risk assessments, respondent remained substantially probable to engage in acts of sexual violence. Travis also noted that respondent's condition had not changed since his prior evaluation, and respondent had not engaged in sex offense specific treatment. Travis concluded that respondent had not made sufficient progress to be conditionally released.

¶ 10 On February 13, 2014, the court heard arguments on the State's motion. Respondent was not present for the hearing, but he was represented by public defender Mark Holldorf. During the hearing, the State argued, based on Travis's report, that there was no probable cause to warrant an evidentiary hearing. Holldorf countered that respondent had completed an orientation group and had some difficulty in adjusting to his medication, which potentially delayed some of his treatment. Holldorf argued that respondent was entitled to an evidentiary hearing and the

appointment of an independent evaluator. The court stated that it had read and considered the reexamination report and concluded there was no probable cause for an evidentiary hearing or an independent examination. The court granted the State's motion.

¶ 11 On March 13, 2014, Holldorf filed a motion to reconsider the court's ruling. On October 16, 2014, private attorney Allison Fagerman entered an appearance on behalf of respondent. Fagerman filed several amended motions to reconsider the court's probable cause ruling. In her third amended motion to reconsider, Fagerman argued that: (1) respondent's due process right to be present at the annual review hearing was violated and his absence deprived him of the opportunity to advise the court that he intended to privately retain an expert; (2) respondent was denied his statutory and due process right to the appointment of an expert; and (3) Travis's probability of reoffense findings should be reconsidered in light of psychological studies conducted by several other experts. Fagerman supported the last contention with psychological studies that examined the use of the Static-99R and Static-2002R assessments. The court later struck the studies as hearsay.

¶ 12 On February 13, 2015, the cause was called for a hearing on respondent's third amended motion. Fagerman called Lori Weaver to testify first. Weaver said that she was respondent's mother. In February 2014, Weaver spoke with Fagerman about representing respondent. On that date, Weaver also inquired about hiring an independent expert to examine respondent. Approximately one week later, Weaver learned that respondent's annual review had already occurred, and Weaver notified respondent.

¶ 13 Fagerman next called respondent to testify. Respondent said that prior to the February 2014 review hearing, respondent had made numerous attempts to contact his public defender. After several unsuccessful attempts, respondent asked Fagerman, who had previously

represented respondent, to contact the public defender's office. Respondent also asked Fagerman about privately retaining an independent expert in preparation for the annual review proceedings. Respondent said that he received no notice of his annual review hearing, and he only learned of the hearing after Fagerman informed Weaver that it had already occurred.

¶ 14 Respondent intended to discuss the contents of Travis's report with his public defender. If he had been able to contact Holldorf, respondent would have told him that he was not participating in treatment because his appeal of the court's commitment order was still pending. Respondent said that the report contained several other errors regarding his identification number, marital status, his trading and trafficking citation, which, according to respondent, involved the exchange of approved movies. Respondent intended to clarify these and other errors if he had the opportunity to meet with his attorney before the hearing.

¶ 15 On cross-examination, respondent said that he was unaware that the court appointed Holldorf in December 2013. Respondent learned of Holldorf's appointment after the annual review hearing was completed. Respondent also said that when Travis came to evaluate him in October 2013, he did not know why he was being evaluated. On redirect examination, respondent explained that he did not know who his attorney was and he did not receive any correspondence from the public defender's office before the February 2014 hearing.

¶ 16 At the conclusion of the hearing, the court denied respondent's motion to reconsider. Respondent appeals.

¶ 17 ANALYSIS

¶ 18 I. Statutory Right to an Independent Examination

¶ 19 Respondent argues that the court abused its discretion when it denied his third amended motion to reconsider because he was allegedly deprived of his statutory right to hire an expert for

the annual review proceedings.¹ Upon review, we find that respondent forfeited this argument as he did not seek an independent evaluation at the time of the reexamination.

¶ 20 Initially, we note that SVP proceedings are creatures of statute. See 725 ILCS 207/1 *et seq.* (West 2012). As such, our review of the SVP proceedings at issue is bounded by the language of the statute. Respondent's first argument requires that we review section 55(a), which has been characterized as the "gateway" to an SVP discharge proceeding. *Botruff*, 212 Ill. 2d at 175. Section 55(a) creates a committed individual's statutory right to an independent examination. 725 ILCS 207/55(a) (West 2012). The plain language and operation of section 55(a) limits the time in which a committed individual may seek an independent evaluation. *Id.* Section 55(a) states that "[a]t the time of a reexamination" respondent may retain a qualified expert or professional person to examine him. (Emphases added.) *Id.* This reexamination period terminates when the matter advances to a discharge proceeding. Notably, neither sections 55 nor 65 include a provision to temporarily reverse the proceeding to allow a committed individual to obtain an independent examination that would otherwise be late. 725 ILCS 207/55, 65 (West 2012).

¶ 21 In this case, the matter proceeded to a discharge proceeding that was governed by section 65(b)(1). 725 ILCS 207/65(b)(1) (West 2012). This section limited the court's review to the already filed reexamination reports and arguments on behalf of the parties. *Id.*

¶ 22 The first annual reexamination proceeding was initiated in October 2013. 725 ILCS 207/55(a) (West 2012). At that time, Dr. Richard Travis asked respondent to participate in the DHS annual reexamination. Respondent declined to participate and did not sign a waiver of his

¹We review the court's denial of an independent examiner for an abuse of discretion. *People v. Botruff*, 212 Ill. 2d 166, 178 (2004).

right to petition the court for discharge. See 725 ILCS 207/65(b)(1) (West 2012). The plain language of section 55(a) provided respondent with the right to privately retain a qualified expert or professional person to examine him "[a]t the time of [the] reexamination." 725 ILCS 207/55(a) (West 2012). However, according to the testimonies of Weaver and respondent, respondent did not pursue this right until February 2014. At that time, nearly five months had passed since Travis's reexamination request, and the section 55(a) proceedings had ended with the start of the section 65(b)(1) probable cause hearing. See 725 ILCS 207/65(b)(1) (West 2012). Because the record indicates that respondent was aware of his statutory right to retain an independent examination, but he failed to exercise this right during the statutorily prescribed time period, respondent forfeited the use of an independent examination for this first probable cause hearing. Although forfeiture was not the basis for the trial court's denial of respondent's motion to reconsider, we affirm the court's ruling on this ground as we may affirm for any reason supported by the record. *People v. Reed*, 361 Ill. App. 3d 995, 1000 (2005).

¶ 23

II. Probable Cause Hearing

¶ 24

Respondent next argues that the court erred in granting the State's motion for a finding of no probable cause.² After reviewing Travis's report and the arguments of counsel, we conclude that respondent did not establish probable cause to warrant an evidentiary hearing, and the court did not err.

¶ 25

This case advanced to a discharge proceeding after respondent elected not to waive his right to petition for discharge. 725 ILCS 207/65(b)(1) (West 2012). After the filing of the State's motion for a finding of no probable cause, which was accompanied by Travis's

²We review the court's finding of no probable cause *de novo*. *In re Commitment of Wilcoxon*, 2016 IL App (3d) 140359, ¶ 28.

reexamination report, the court set the matter for a probable cause hearing. Because respondent did not actively petition for a discharge, the probable cause hearing consisted only of a review of the reexamination report and arguments on behalf of the parties. *Id.*

¶ 26 At the hearing, respondent bore the burden to present sufficient evidence to warrant an evidentiary hearing to determine whether he is " 'still a sexually violent person.' " (Emphasis in original.) *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 67 (quoting 725 ILCS 207/65(b)(1) (West 2012)). To satisfy this standard, respondent was required to present evidence that he no longer meets the elements for commitment in that he: (1) no longer has a mental disorder; or (2) is no longer dangerous to others because his mental disorder no longer creates a substantial probability that he will engage in acts of sexual violence. 725 ILCS 207/5(f), 15 (West 2012).

¶ 27 In this case, respondent did not satisfy his burden. The evidence at the probable cause hearing consisted only of the report provided by the State's evaluator, Travis. Travis's report diagnosed respondent with other specified paraphilic disorder. This diagnosis was based on Travis's review of respondent's records which indicated that respondent suffered from recurrent intense sexually arousing fantasies, urges or behaviors that involved sexual activity with nonconsenting males. Travis documented that respondent was at a moderate-high risk of reoffending. Travis's report also stated that respondent had not participated in DHS treatment—a fact that was corroborated by respondent's testimony at the hearing on the motion to reconsider. This evidence readily established that respondent continued to suffer from a mental disorder and that his mental disorder continued to create a substantial probability that he will engage in acts of sexual violence. 725 ILCS 207/5(f), 15 (West 2012). Therefore, the court did not err in granting the State's motion for a finding of no probable cause to warrant an evidentiary hearing.

¶ 28

CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 30 Affirmed.