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2016 IL App (4th) 150382-U

NO. 4-15-0382

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 5, 2016

Carla Bender

4th District Appellate

Court, IL

In re: the Commitment of KENNETH E.)	Appeal from
SEIDLER,)	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.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred 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)), and he was later committed to the custody of the Illinois Department of Human Services (Department) until he is no longer sexually violent. In October 2014, based on a statutorily mandated annual reexamination, the State filed a motion for a finding of no probable cause to believe respondent was no longer a sexually violent person. In March 2015, respondent moved for the appointment of an independent examiner to evaluate him. Following an April 2015 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. On appeal,

respondent contends he provided a proper basis to rebut the 66-month reexamination report, which entitled him to an independent examiner, and therefore, the trial court abused its discretion when it denied his motion for an independent examiner. We affirm.

¶ 3

I. BACKGROUND

¶ 4

This case represents respondent's fourth 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 only reiterate the facts necessary as previously provided in *In re Commitment of Seidler*, No. 4-14-0214 (Jan. 27, 2015) (unpublished order under Supreme Court Rule 23).

¶ 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 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 his "old urges" were returning. 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 the Department 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 A. Reexamination Reports Using DSM-IV

¶ 9 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 the Department's custody.

¶ 10 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 [r]ape in 1984 and he spent several years in prison for his behavior." (Emphasis in original.)

¶ 11 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 [the Department]."

¶ 12 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 [(see *Miranda v. Arizona*, 384 U.S. 436 (1966))], 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."

¶ 13 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)."

¶ 14 B. The 54-Month Reexamination Report

¶ 15 In Gaskell's 54-month reexamination report, he 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.

¶ 16 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 the Department. 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."

¶ 17 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-99R underestimated respondent's level of risk. Gaskell identified the same 10 risk factors applicable to respondent for future sexual offending.

¶ 18 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."

¶ 19 C. The 66-Month Reexamination Report

¶ 20 There are no notable differences between Gaskell's 54-month and his 66-month reexamination report. In the 66-month reexamination report, Gaskell maintained respondent met the diagnostic criteria for "other specified paraphilic disorder, sexually attracted to non-consenting persons," alcohol and cannabis abuse by history in a controlled environment, and antisocial personality disorder. Additionally, respondent's scores on the Static-99R and Static-2002R indicated his risk remained moderate-low and low-moderate, respectively.

¶ 21 Gaskell noted respondent has continued to decline participation in any sex-offense-specific treatment since being admitted to the Department and declined to participate in an interview for the reexamination. Gaskell reiterated respondent's current health status does not warrant a reduction of risk and his age was already fully taken into account by the actuarial instruments. Gaskell recommended respondent should (1) continue to be found a sexually violent person under the Act (2) remain committed at the Department, and (3) become involved in sex-offender-specific treatment so he can make the significant progress necessary to be conditionally released into the community.

¶ 22 On October 31, 2014, following the filing of Gaskell's 66-month reexamination report, the State filed a motion for a finding of no probable cause.

¶ 23 On March 16, 2015 respondent filed a motion for an independent examination under section 55(a) of the Act (725 ILCS 207/55(a) (West 2014)). Respondent argued there is a basis to rebut the report to warrant the appointment of an independent examiner because Gaskell (1) relied upon the Static 99-R and Static-2002-R to find respondent continues to be a sexually violent person, but did not use those instruments when they did not support continued detention; (2) changed respondent's diagnosis from "paraphilia not otherwise specified, sexually attracted to nonconsenting persons" to "other specified paraphilia disorder, sexually attracted to non-consenting persons" pursuant to the DSM-V; and (3) is biased against him.

¶ 24 On April 22, 2015, the trial court held a hearing on the State's motion for a finding of no probable cause and respondent's motion for an independent examiner. The trial granted the State's motion and found no probable cause shown to believe respondent was no longer a sexually violent person. The court denied respondent's motion.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On appeal, 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 2014)) because (1) he scored in the moderate-low and low-moderate risk recidivism categories on the Static-99R and the Static-2002R, respectively; (2) the report failed to account for his age; and (3) "coercive paraphilia" was rejected as a mental disorder under DSM-V. Respondent does not challenge the finding of no probable cause. The State maintains the trial court properly exercised its discretion in denying respondent's motion for an independent examiner. We agree with the State.

¶ 28 Section 55 of the Act states, "[a]t the time of a reexamination under this [s]ection, the person who has been committed may retain or, if he or she is indigent and so requests, the court *may* appoint a qualified expert or a professional person to examine him or her." (Emphasis added.) 725 ILCS 207/55(a) (West 2014). Appointment of an independent examiner is appropriate where the respondent (1) has provided a basis to rebut the reexamination report or (2) can demonstrate bias. *People v. Botruff*, 212 Ill. 2d 166, 177, 817 N.E.2d 463, 470 (2004).

¶ 29 The trial court *may* appoint an independent examiner but is not required to take such action. *In re Detention of Cain*, 341 Ill. App. 3d 480, 483, 792 N.E.2d 800, 803 (2003). Whether to appoint an independent examiner rests within the trial court's sound discretion. *Botruff*, 212 Ill. 2d 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." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000). We address each of respondent's grounds for rebuttal in turn.

¶ 30 A. Static-99R and Static-2002R

¶ 31 Respondent first argues the actuarial instruments create a possible basis to rebut Gaskell's 66-month reexamination report. Respondent received a score of 2 on the Static-99R, which placed him in the moderate-low risk category, and other offenders with the same score reoffended at a rate of 12.2% in 5 years and 19.7% in 10 years. Respondent argues Gaskell's opinion is inconsistent with the Static-99R because he was placed in the moderate-low risk category.

¶ 32 Regarding respondent's Static-99R score, Gaskell opined:

"[T]his instrument underestimated [respondent's] level of risk. Specifically, even 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-99 Manual. This, along with his high risk behavior at a park while on parole, indicates that this instrument underestimates his level of risk."

¶ 33 Respondent next argues his Static-2002R score is inconsistent with Gaskell's conclusion he remains a sexually violent person. Respondent received a score of 4 on the Static-2002R, which placed him in the low-moderate risk category. Offenders with the same score have been found to sexually reoffend at a rate of 15.5% in 5 years and 23.5% in 10 years. Respondent argues Gaskell's finding indicating he is still a sexually violent person is inconsistent with his Static-2002R score.

¶ 34 In the reexamination report, Gaskell states, "although actuarial predictions of risk are more accurate than other risk assessment methods (*e.g.*, unguided clinical judgment), they are conservative predictions that underestimate actual risk." Gaskell further noted there is a "meaningful variation" in the sexual recidivism rates based on factors not measured by the Static99-R and Static-2002R. Gaskell used an adjusted actuarial approach, where he adjusted respondent's scores in consideration of 10 imperial risk factors not taken into consideration by the Static-99R and Static2002R. *Supra* ¶ 12. Gaskell appropriately used the adjusted actuarial approach to more accurately assess respondent's level of risk and reviewed extensive documentation to reach his recommendation. Nothing in the record indicates Gaskell was

skewed or biased in reaching his opinion. Gaskell's use of the Static-99R and Static-2002R does not provide a basis for respondent to rebut the reexamination report.

¶ 35

B. Age

¶ 36

Respondent next argues the report fails to specifically address respondent's age for risk assessment, which provides a basis to rebut Gaskell's 66-month reexamination report. In Gaskell's report, he noted, "there is far from universal agreement on many aspects on how age at release impacts recidivism rates. Some age-based reduction of risk is warranted and was reflected on the actuarial instruments." Respondent raised a similar argument in a previous appeal from the denial of a previous motion for an independent examiner, in which we stated, "[t]he 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." *Seidler*, No. 4-14-0214 (Jan. 27, 2015) (unpublished order under Supreme Court Rule 23). We continue the same line of logic and conclude Gaskell's methodology in considering respondent's age does not provide a basis to rebut the reexamination report.

¶ 37

C. Coercive Paraphilia as a Mental Disorder

¶ 38

Respondent last challenges his diagnosis of "other specified paraphilic disorder, sexually attracted to non-consenting persons" as a basis to rebut Gaskell's reexamination report. Respondent contends because paraphilic coercive disorder, which is essentially rape, was rejected for the DSM-V, there has been a change in the psychological science relevant to respondent's diagnosis. Respondent was not diagnosed with paraphilic coercive disorder, and as it is a different disorder than "other specified paraphilic disorder, sexually attracted to non-consenting persons," we fail to see how any analogy to paraphilic coercive disorder is relevant here. Therefore, this argument does not provide a basis to rebut the reexamination report.

