2016 IL App (5th) 150169-U

NO. 5-15-0169

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Wayne County.
	)	
v.	)	No. 96-CF-47
	)	
CHARLES T. TANNAHILL,	)	Honorable
	)	Michael J. Molt,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court correctly denied the defendant's application showing recovery after finding that the State met its burden of proving by clear and convincing evidence that the defendant was still a sexually dangerous person in need of confinement.

¶ 2 Charles T. Tannahill, the defendant, has been in civil confinement as a sexually dangerous person (see 725 ILCS 205/8 (West 2014)) since August of 1996. In February 2006, the defendant filed a first amended application showing recovery requesting that the court grant him a discharge from commitment, or alternatively, a conditional release from commitment. See 725 ILCS 205/9(a) (West 2014). After a hearing on April 30, 2015, the circuit court of Wayne County denied the defendant's application showing

recovery upon finding that the State had met its burden of proving, by clear and convincing evidence, that the defendant was still a sexually dangerous person as defined under the Sexually Dangerous Persons Act (Act) (725 ILCS 205/0.01 *et seq.* (West 2014)). The defendant appeals contending that the court's denial of his application showing recovery was against the manifest weight of the evidence because the State did not establish a *prima facie* case, the examination did not conform to the requirements of the Act, and the examination did not comply with the order of the court. He further finds fault with the court's denial of his motion for a jury trial and of his motion to continue. We affirm.

¶ 3 The defendant has been housed as a sexually dangerous person since 1996. His tendencies toward pedophilia have constituted the core basis of his continued involuntary commitment. The defendant, believing he has recovered through self-analysis, filed a first amended application showing recovery seeking discharge from commitment or conditional release. After a lengthy procedural history, followed by a hearing, the defendant was again found to be a sexually dangerous person in need of commitment. In reviewing a trial court's determination regarding whether a petitioner remains a sexually dangerous person, we, as the reviewing court, will consider all of the evidence in the light most favorable to the State, and then determine whether any rational trier of fact could have found the essential elements to be proven by clear and convincing evidence. See *People v. Trainor*, 337 Ill. App. 3d 788, 793, 785 N.E.2d 568, 573 (2003).

¶ 4 In response to the defendant's application showing recovery, the State had to prove that the defendant suffers, and has suffered for a year or longer, from a mental disorder;

that the mental disorder is accompanied by criminal propensities to the commission of sex offenses; and that the defendant has demonstrated propensities towards acts of sexual assault or acts of sexual molestation of children. 725 ILCS 205/1.01 (West 2012). See also *People v. Hancock*, 2014 IL App (4th) 131069, ¶ 140, 18 N.E.3d 941. A "mental disorder" is considered to be a "congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in the commission of sex offenses and results in serious difficulty controlling sexual behavior." *People v. Masterson*, 207 Ill. 2d 305, 329, 798 N.E.2d 735, 749 (2003); 725 ILCS 205/4.03 (West 2014). One suffers from criminal propensities to the commission of sex offenses if it is "substantially probable" that the person will engage in the commission of sex offenses in the future, if not confined. *Masterson*, 207 Ill. 2d at 330, 798 N.E.2d at 749. In this instance, the State met its burden of proof.

¶ 5 Dr. Kristopher Clounch, licensed as a sex offender evaluator and clinical psychologist, examined the defendant on October 17, 2013, as a result of the defendant's application showing recovery. In his report, completed December 12, 2013, Dr. Clounch concluded that the defendant suffered from pedophilic disorder, sexually attracted to females, nonexclusive. This conclusion was based upon prior reports and psychiatric evaluations, treatment reports, interviews with treatment staff, and an interview with the defendant himself. Key factors Dr. Clounch relied upon in making his determination included the defendant's criminal history, spanning some 30 years from 1965 to 1996, and his convictions for sex offenses, including indecent liberties with a child and aggravated criminal sexual abuse. He also noted that the defendant minimized the nature

and extent of his offenses, thereby showing a level of dishonesty, and further presented inconsistency across all of his evaluations regarding relationships, as well as his education and work history. Additionally, the defendant's history included numerous inmate violations, some of which were committed as recently as January of 2012, ranging from possessing contraband, theft, and insolence, to violation of rules and disobeying direct orders. More importantly, his participation in treatment programs had been inconsistent since 1996. He was often absent from group sessions, and ultimately was suspended from treatment. As of the end of 2012, the defendant had not progressed beyond the first phase of the treatment programs, and had been rated "unsatisfactory" in all program evaluation criteria. In fact, the defendant had not been enrolled in any treatment program since January of 2013. Dr. Clounch opined that sex offenders do not make progress, or reduce their risk, if they are not participating in treatment programs. Dr. Clounch further noted that the defendant had yet to fully identify, understand, and resolve the issues related to his sexually inappropriate behavior. While the defendant had some understanding of treatment concepts and skills, according to Dr. Clounch, the defendant had yet to demonstrate full integration and consistent application of those skills. Dr. Clounch therefore concluded that, to a reasonable degree of psychological certainty, the defendant remained a sexually dangerous person as defined in the Act, based on past diagnoses, the risk level posed to the community, and the overall lack of progress in treatment.

¶ 6 The defendant claims that the State failed to prove that he had criminal propensities to the commission of sex offenses. Criminal propensities to the commission

of sex offenses means that it is substantially probable that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future, if not confined. 725 ILCS 205/4.05 (West 2014). Substantially probable means much more likely than not. *In re Detention of Hayes*, 321 Ill. App. 3d 178, 188, 747 N.E.2d 444, 453 (2001); 725 ILCS 205/4.05 (West 2014). It should also be noted that a defendant's prior demonstrated propensities are adequate to prove a propensity to commit acts in pursuit of his or her sexual urges when that defendant is presently incarcerated. *People v. Hancock*, 329 Ill. App. 3d 367, 379, 771 N.E.2d 459, 468 (2002). While Dr. Clounch admitted that the defendant's rating on the actuarial risk assessment used to predict an offender's risk for future sex offenses was low/moderate, with no particular risk for reoffense, based partly on the defendant's age, Dr. Clounch was also definitive in his assessment that the actuarial test score underrepresented the defendant's actual risk level for committing future sex offenses upon release. Dr. Clounch noted the defendant's established preference for pubescent and prepubescent children, which included several convictions for inappropriate sexual contact, his pattern of poor self-control, his demonstrated impulsiveness in his numerous institutional violations, and his concerning level of callousness and indifference toward others. Specifically noted was the defendant's long history of meeting his needs at the expense of others. Dr. Clounch concluded that, "considering his significant criminal background, frequent dishonesty and history of non-compliance, [the defendant] is at increased risk for future difficulties on conditional release." The defendant asserts that there is no evidence that he still demonstrates propensities towards acts of sexual assault or sexual molestation of children. The

defendant's denials of sexual impulses are not credible, however, given his lack of treatment progress or meaningful insight. Proof of manifestation or exhibition is, of course, impossible to prove in the closed environment in which the defendant presently resides. It is for this reason that the Act requires that the State demonstrate a continuing likelihood that the individual will reoffend. We agree that the State met its burden of proof in this instance.

¶ 7 The defendant points out, however, that in addition to establishing the elements of a *prima facie* case, the examination of a defendant by an expert must be in compliance with the Act. Section 4.04 defines "examination" as an examination conducted in conformance with the standards developed under the Sex Offender Management Board Act (725 ILCS 205/4.04 (West 2014)). The defendant contends the State's expert, Dr. Clounch, did not consider 5 of the 23 factors to be considered in making recommendations regarding a sex offender's risk to reoffend and amenability to treatment. Since the required recommendations were not made, the defendant argues the State failed to sustain its burden of proof by clear and convincing evidence that the defendant was still a sexually dangerous person under the Act. Additionally, the defendant believes the State failed to follow the order of the court that the examination report be prepared by a social worker and psychologist under the supervision of a licensed psychiatrist.

¶ 8 The Sex Offender Management Board Act (20 ILCS 4026/1 *et seq.* (West 2014)) requires conformance with the standards of the Sex Offender Management Board, codified at 20 Ill. Adm. Code 1905.10 (Code). The stated purpose of the Code provisions

is to "establish[ ] standards for conducting evaluations of, and providing treatment to, adult sex offenders in all circumstances in which conformance with Board standards is required." 20 Ill. Adm. Code 1905.10. The Code establishes regulations for qualifying experts to conduct sex offender evaluations, general standards for the conducting of those evaluations, and evaluator recommendations. The contents of the Code, therefore, are standards promulgated to regulate professional responsibilities and are not, independently, elements of proof of a defendant's future dangerousness. While noncompliance with any one of the evaluation factors may bear upon the credibility of the expert's testimony, such noncompliance does not automatically result in a finding that the State's proof was inadequate. The evaluator in a recovery application under the Act is not required to develop treatment plans or detail alternatives. Rather, they are required to make an assessment of the state of a defendant's current sexual dangerousness. Therefore noncompliance is irrelevant. More importantly, the State complied with the necessary statutory obligations. We further note that the court's order required the filing of a socio-psychiatric report prior to November 15, 2013. The record reveals a socio-psychiatric evaluation was prepared on October 5, 2010, and was filed on February 11, 2013. Consequently, a report was filed prior to November 15, 2013. The court's order does not state that it was ordering an updated report, or any modification of the report filed in February of 2013. The statutory provision does not require that the report be filed at any time except after a defendant has filed an application showing recovery. 725 ILCS 205/9 (West 2014). There is no statute stating that a report expires at any point. A court, in the exercise of its discretion, may order the preparation of new report if there is concern that

the antiquity of a report might compromise a hearing on the application, but there is no such concern voiced by the court on the record here. Accordingly, the February 11, 2013, filing satisfied both the court's order and the relevant statute. We also note that the defendant himself caused, or acquiesced to, the majority of the delay between the filing of the reports and his hearing.

¶ 9 In conclusion, under these circumstances, we agree with the State that the court's finding that the defendant remained a sexually dangerous person was not against the manifest weight of the evidence. Again, the defendant has been housed as a sexually dangerous person since 1996 based on his tendencies toward pedophilia. The defendant has failed to address his pedophilic impulses through any kind of treatment or counseling, remaining in the initial stage of treatment for nearly 20 years. Even in his most recent interview with Dr. Clounch, the defendant continued to misrepresent his sexual history, as well as his relationships with others. The clinical diagnosis formulated by Dr. Clounch based upon the defendant's history of sexual misbehavior and lack of treatment progress was firmly established by the evidence.

¶ 10 The State recognizes that in *People v. Masterson*, 207 Ill. 2d 305, 798 N.E.2d 735 (2003), our supreme court held that a finding of sexual dangerousness premised upon the elements of section 1.01 of the Act (725 ILCS 205/1.01 (West 2000)) must be accompanied by an explicit finding that it is " 'substantially probable' the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." *Masterson*, 207 Ill. 2d at 330, 798 N.E.2d at 749. The court further rejected the argument that a reviewing court can overlook the trial court's failure

to make this explicit finding based on the presumption the court knows and correctly applies the law even if the evidence clearly established that there was a substantial probability of reoffending. See *People v. Bingham*, 2014 IL 115964, ¶¶ 34-35, 10 N.E.3d 881. Both cases dealt with initial petitions to declare a person as sexually dangerous rather than applications showing recovery. We believe, however, that the elements needed to be proven by the State are still the same in either situation. See *People v. Bailey*, 2015 IL App (3d) 140497, ¶ 14, 40 N.E.3d 839. But, as the State also points out, the legislature codified the *Masterson* requirement in 2013. Section 4.05 of the Act states: "For the purposes of this Act, 'criminal propensities to the commission of sex offenses' means that it is substantially probable that the person subject to the commitment proceeding will engage in the commission of sex offenses in the future if not confined." 725 ILCS 205/4.05 (West 2014). Therefore, the court's finding that a person is, or continues to be, sexually dangerous necessarily encompasses a determination of a defendant's criminal propensity, which itself encompasses the required finding of a substantial probability to the future commission of sex offenses. In other words, the post-*Masterson* amendment addressed the necessity of a finding of substantial probability by defining the element of propensity precisely in those terms. An explicit finding of substantial probability would therefore be redundant if the court finds that the State proved the defendant's continued sexual dangerousness.

¶ 11 The defendant next argues on appeal that the court erred in denying his motion for a jury trial. In February 2006, the defendant requested that a jury trial be held, and that he be found to no longer be a sexually dangerous person, thereby allowing him to be

discharged from commitment. On April 4, 2006, the defendant filed with the court his first written waiver of jury trial. The court found in open court that the defendant's waiver of jury trial was knowingly and voluntarily made. After a lengthy procedural journey encompassing numerous motions and delays, on November 5, 2012, the defendant filed another written waiver of jury trial. This waiver, too, was found to be knowingly and voluntarily made. On March 12, 2015, the defendant *pro se* moved to withdraw his waiver of jury trial. He moved again to withdraw his waiver of jury trial on April 30, 2015. The court ruled the defendant's waiver of his right to jury trial was binding until the entire proceeding was concluded.

¶ 12 While the Act is civil in nature, persons subject to confinement under the Act are entitled to certain due process protections also afforded to criminal defendants because involuntary commitment entails the loss of liberty. See *People v. Allen*, 107 Ill. 2d 91, 100-02, 481 N.E.2d 690, 694-95 (1985), *aff'd*, 478 U.S. 364, 373 (1986). Section 5 of the Act specifically provides that in any proceeding under the Act, the defendant has the right to demand a trial by jury. 725 ILCS 205/5 (West 2014). The defendant correctly notes that a written jury waiver, standing alone, is insufficient to prove a valid waiver of the right to trial by jury. It is also necessary for the defendant to acknowledge in open court his knowing and understanding waiver of the right to trial by jury. See *People v. Lindsey*, 201 Ill. 2d 45, 56, 772 N.E.2d 1268, 1276 (2002); *People v. Scott*, 186 Ill. 2d 283, 285, 710 N.E.2d 833, 834 (1999). Here, the defendant executed a jury waiver on April 4, 2006, in open court, and personally acknowledged that he was understandingly waiving his right to a jury trial. Any claim of error with respect to the redundant 2012 jury waiver

is, therefore, of no import. The decision whether to allow a defendant to withdraw a jury waiver is within the trial court's sound discretion. *People v. Hall*, 114 Ill. 2d 376, 414, 499 N.E.2d 1335, 1351 (1986).

¶ 13 The defendant did not have an absolute right to withdraw his jury waiver, and he supplied no reason or rationale that would have prompted the court to allow his motion for withdrawal of the jury waiver. He never expressed any misunderstanding as to the difference between a jury and a bench trial. He did not refer to any manifest injustice that would result if his request for withdrawal was not granted, whereas granting the withdrawal would have delayed the hearing yet again, and inconvenienced the State's witness. Under the circumstances presented, the court's refusal to deny the defendant's request was not an abuse of discretion. See *People v. Peacock*, 324 Ill. App. 3d 749, 754, 756 N.E.2d 261, 267 (2001); *People v. Chapple*, 291 Ill. App. 3d 574, 579, 683 N.E.2d 1001, 1004 (1997). Therefore, we find no error in the court's ruling.

¶ 14 For the defendant's final point on appeal, he argues that he was denied his right to counsel. On March 12, 2015, the defendant appeared in court with his appointed attorney. The special prosecutor and defense counsel announced they were ready for the hearing. The defendant, however, requested that the appointment of counsel to represent him be vacated. The court recessed the matter, and on March 24, relying upon *People v. Cook*, 279 Ill. App. 3d 718, 665 N.E.2d 299 (1995), denied the defendant's request to substitute counsel. The court then reset the bench trial date for April 30, 2015.

¶ 15 An indigent defendant has the right to appointed counsel, but not to counsel only of defendant's choosing. *Cook*, 279 Ill. App. 3d at 725, 665 N.E.2d at 303. The

defendant does not have the right to pick and choose amongst appointed counsel. An indigent defendant has the right to substitute appointed counsel only to the extent that he can establish good cause for such substitution. *People v. Ogurek*, 356 Ill. App. 3d 429, 433, 826 N.E.2d 605, 609 (2005). The defendant here presented no good cause or any evidence of prejudice. Most of his complaints with his appointed counsel related to actions undertaken by the attorney which were within the purview of his duties as appointed counsel. We therefore conclude that the defendant was not denied his right to counsel.

¶ 16 On April 30, 2015, the defendant and counsel appeared for the defendant's bench trial, as previously set by the court. The defendant asked again to vacate the order of appointment of defense counsel so he could represent himself. The court admonished the defendant of the dangers of representing himself. The defendant indicated he was willing to accept the risks. Accordingly, the court granted the defendant's motion to represent himself. The defendant then stated that he had two motions he wanted to file, one requesting he be provided substitute counsel, and the other to withdraw his jury waiver. He further requested a continuance, maintaining he was going to proceed *pro se* until he could hire new counsel. The court denied his second motion to substitute counsel, as the defendant was representing himself. The court also denied his motion to withdraw waiver of jury trial, since it was binding for these proceedings until concluded, and further denied his request for continuance. We initially note that the court does not abuse its discretion in denying a continuance to obtain substitute counsel where new counsel is unidentified, or not standing ready to make his or her entry of appearance on the

defendant's behalf. *People v. Jackson*, 216 Ill. App. 3d 1, 6, 574 N.E.2d 719, 723 (1991). Furthermore, we acknowledge that the decision whether to grant or deny a continuance rests in the sound discretion of the court. We, as a reviewing court, will not interfere with that decision absent evidence of a clear abuse of that discretion. *People v. Walker*, 232 Ill. 2d 113, 125, 902 N.E.2d 691, 697 (2009). The defendant contends he only requested an order vacating the appointment of defense counsel and to allow him to represent himself until an appropriate attorney could be hired for him. The defendant's hearing on his application showing recovery had already been delayed numerous times over the course of many years. There was no need to delay the proceedings any further. Therefore, we find no such abuse of discretion in this instance.

¶ 17 For the aforementioned reasons, we affirm the judgment of the circuit court of Wayne County denying the defendant's application showing recovery.

¶ 18 Affirmed.