2018 IL App (4th) 170463-U

NO. 4-17-0463

FILED
May 23, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re the DETENTION OF RAYMOND RAINEY, a Sexually Violent Person	)	Appeal from the Circuit Court of Morgan County
(The People of the State of Illinois, Petitioner-Appellee, v. Raymond Rainey, Respondent-Appellant).	)	No. 98MR41 Honorable Christopher E. Reif, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by finding no probable cause shown to warrant an evidentiary hearing where respondent still suffered from mental disorders, still had numerous risk factors for reoffending, and made very little progress in his treatment plan since the last reexamination period.

¶ 2 Respondent, Raymond Rainey, a person committed under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2016)), appeals the Morgan County circuit court's June 6, 2017, order, in which the court found no probable cause to warrant an evidentiary hearing on whether respondent was still a sexually violent person. On appeal, respondent argues the circuit court erred by finding no probable cause. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 1998, the State filed its petition to have respondent committed as a sexually violent person pursuant to the Act. At a February 2000 hearing, respondent admitted he

was a sexually violent person. The circuit court accepted respondent's admission, adjudicated him a sexually violent person, and committed him to the Department of Human Services (Department). After a May 2000 dispositional hearing, the court ordered respondent placed in a secured institutional facility. In October 2001, this court affirmed respondent's adjudication as a sexually violent person and his commitment to a secured facility. *People v. Rainey*, 325 Ill. App. 3d 573, 758 N.E.2d 492 (2001).

¶ 5 In July 2003, respondent filed a *pro se* postjudgment motion challenging the constitutionality of the Act, which the circuit court dismissed. In June 2006, this court affirmed the circuit court's dismissal. *People v. Rainey*, No. 4-03-0854 (Mar. 30, 2006) (unpublished order under Supreme Court Rule 23). Over the years, respondent has received numerous reexaminations and remains committed to a secured facility. The reexamination preceding the one at issue in this appeal was conduct by Diane Dobier and took place in April 2016. In June 2016, the circuit court found no probable cause was shown to believe respondent was no longer a sexually violent person. Respondent appealed, and on January 24, 2017, this court affirmed the circuit court's judgment. *In re Detention of Rainey*, 2017 IL App (4th) 160496-U.

¶ 6 In March 2017, Deborah Nicolai, Psy.D, a licensed clinical psychologist, conducted respondent's yearly reexamination, which is the one at issue in this appeal. Nicolai's April 15, 2017, report noted respondent was 61 years old and had been admitted into the Department in 1998. In preparing the report, Nicolai interviewed respondent and reviewed approximately 11 documents. The report set forth respondent's relevant history, including his criminal, sexual, and treatment histories. Nicolai also explained the Department had a five-phase treatment program. The five phases, in order, were the following: (1) assessment, (2) accepting responsibility, (3) self-application, (4) incorporation, and (5) transition. Respondent had been in

phase two since 2006 and had only completed anger management in January 2012 and communications in February 2016. Respondent had attended but quit the following programs: (1) mindfulness skills, (2) dialectical behavioral therapy, and (3) distress tolerance. Additionally, he had been removed from the decision-making model and thinking errors programs due to excessive unexcused absences. Respondent had three absences in February 2017 for the good lives exploration group, but Nicolai did not know if respondent was removed from the group or continued to attend. Respondent had yet to participate in the disclosure group. For the year under review, respondent had attended all of his treatment foundations group sessions, except for an absence in both December 2016 and January 2017. His contacts with his primary therapist were appropriate. Respondent completed five recreational groups and was removed from two due to unexcused absences. Moreover, respondent had eight referrals to the behavior committee and was found guilty of seven minor rule violations.

¶ 7 Nicolai's report noted respondent continues to deny responsibility for his sexual offenses. In her opinion, respondent needed to continue to work through his resentments and begin to focus on his inner dynamics that led him to commit the sexual offenses against female children. Specifically, he needs to recognize and restructure the cognitive distortions he holds that allow him to feel justified in his behaviors, honestly disclose his sexual offense history, and construct his sexual offense cycle to reduce risk of reoffending. Nicolai opined "[i]t is essential for [respondent] to recognize his risk of sexual recidivism and his related internal and external triggers. He currently fails to understand how protecting his sexual offending behaviors, leaves the behaviors un-changed." She also noted respondent needed to "take an honest inventory of his attitude toward the treatment process and examine the behaviors that result in rule viola-

tions." He had made some progress in that area, as he had not received a major rule violation since August 2015.

¶ 8 Additionally, Nicolai opined 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; and (3) antisocial personality disorder. She explained her reasoning for those diagnoses. As to the issue of respondent's dangerousness, she used the Static-99R and the Static-2002R risk assessments. Respondent placed in the above average risk category on both assessments. Nicolai also noted respondent had the following empirical risk factors for future sexual offending: (1) deviant sexual interest, (2) offense-supportive attitudes, (3) intimacy deficits, (4) general lifestyle impulsivity, (5) poor cognitive problem solving, (6) hostility, (7) resistance to rules or supervision, (8) antisocial personality disorder, and (9) substance abuse. Nicolai opined respondent had no protective factors such as age, medical condition, or sex-offender treatment. In finding age was not a protective factor, she noted age was incorporated into the risk assessments. To a reasonable degree of psychological certainty, Nicola opined that, based on his mental disorders and assessed risk, respondent remained substantially probable to engage in acts of sexual violence. She also opined respondent (1) had not changed since his last examination, (2) had not made sufficient progress in his treatment to be conditionally released, and (3) remained in need of institutional care in a secure facility.

¶ 9 On April 21, 2017, the State filed a motion for a finding of no probable cause based upon Nicolai's yearly reevaluation 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 2016)) required the circuit court to hold a probable-cause hearing.

¶ 10 On June 6, 2017, the circuit court held the probable-cause hearing. After the attorneys made their arguments on probable cause, the court found no probable cause was shown to believe respondent was no longer a sexually violent person. That same day, the court entered its written order.

¶ 11 On June 20, 2017, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). See 725 ILCS 207/20 (West 2016) (noting the proceedings under the Act are civil in nature).

¶ 12 II. ANALYSIS

¶ 13 Respondent's sole contention on appeal is the circuit court erred by finding no probable cause was shown to warrant an evidentiary hearing to determine whether respondent was still a sexually violent person. The State disagrees, arguing the circuit court's decision was correct.

¶ 14 At the time of each reexamination under the Act, the committed person receives notice of the right to petition the circuit court for discharge. 725 ILCS 207/65(b)(1) (West 2016). If the committed person does not affirmatively waive that right, like respondent in this case, the court must "set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic reexamination ***, the condition of the committed person has so changed that he or she is no longer a sexually violent person." 725 ILCS 207/65(b)(1) (West 2016). At such a probable-cause hearing, the court only reviews the reexamination reports and hears the parties' arguments. 725 ILCS 207/65(b)(1) (West 2016). If the court finds probable

cause does exist, then it must set an evidentiary hearing on the issue. 725 ILCS 207/65(b)(2) (West 2016). Since the circuit court only considered Nicolai's reexamination report and the facts contained in that report are not in dispute, our review of the court's finding of no probable cause is *de novo*. See *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 50, 40 N.E.3d 1215.

¶ 15 With all probable-cause hearings under the Act, the circuit court's role is "to determine whether the movant has established a *plausible account* on each of the required elements to assure the court that there is a substantial basis for the petition." (Emphasis in original.) (Internal quotation marks omitted.) *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 62, 980 N.E.2d 598 (quoting *In re Detention of Hardin*, 238 Ill. 2d 33, 48, 932 N.E.2d 1016, 1024 (2010)). For a respondent to receive an evidentiary hearing under section 65(b)(2) of the Act, the court must find a plausible account exists that the respondent is " 'no longer a sexually violent person.' " (Emphasis omitted.) *Stanbridge*, 2012 IL 112337, ¶ 67 (quoting 725 ILCS 207/65(b)(2) (West 2008)). Thus, a respondent is only entitled to an evidentiary hearing if plausible evidence shows the respondent (1) no longer suffers from a mental disorder or (2) is no longer dangerous to others because his or her mental disorder no longer creates a substantial probability he or she will engage in acts of sexual violence. *Stanbridge*, 2012 IL 112337, ¶ 68 (quoting 725 ILCS 207/5(f), 15 (West 2008)). Under the Act, "substantially probable" means "much more likely than not." (Internal quotation marks omitted.) *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 37, 972 N.E.2d 351; see also *In re Detention of Hayes*, 321 Ill. App. 3d 178, 188, 747 N.E.2d 444, 453 (2001).

¶ 16 In this case, Nicolai found respondent still suffered from (1) pedophilic disorder, nonexclusive type, sexually attracted to both; (2) alcohol use disorder, in sustained remission, in a controlled environment; and (3) antisocial personality disorder. Both risk assessments placed

respondent in the above average risk category for reoffending, and Nicolai found nine empirical risk factors increased respondent's risk to reoffend. Moreover, Nicolai found no protective factors applied to respondent. The aforementioned evidence indicates respondent still suffered from mental disorders and was dangerous to others because his mental disorders created a substantial probability he would engage in acts of sexual violence.

¶ 17 Respondent questions Nicolai's calculation of the Static-2002R risk assessment and finding nine empirical risk factors applied to respondent. He argues the "age at release" in the Static-2002R means respondent's age if he was released now, which would mean a score of negative two for age. That change would lead to an overall score of two instead of four and place respondent in the low risk range. The State contends "age of release" means age when released into the community following confinement for the person's most recent sex offense. The expert's reexamination reports support the State's definition. On page 20 of her report, Nicolai discusses "age of release" and notes respondent was "41 years old when he was released into the community on parole from his index offense." Dobier's 2016 reexamination report also discussed "age of release" and stated respondent was 41 years when he was released from parole. Thus, we disagree with respondent Nicolai miscalculated respondent's Static-2002R score.

¶ 18 As to the empirical factors, respondent argues Nicolai does not explain why each factor applies to respondent. A full reading of the report provides support for all of the factors she found. Moreover, the factors are similar to the ones found in prior reexamination reports. Regarding sexual deviant interest, respondent notes his most recent penile plethysmograph showed significant arousal for a "[f]emale adult persuasive," which was considered normal. However, he has a long history of sex offenses against young girls. Thus, we do not find her conclusion respondent had a deviant sexual interest was incorrect. As to the antisocial personali-

ty disorder, Nicolai's report explains how his pedophilic disorder when combined with antisocial personality disorder increases his predisposition to engage in acts of sexual violence. Moreover, the fact respondent is diagnosed with an alcohol use disorder after having been denied access to alcohol for 18 years shows his past usage still matters in assessing risk of recidivism. Accordingly, we disagree with respondent major flaws exist in Nicolai's reliance on the empirical risk factors.

¶ 19 Respondent claims he has made progress in treatment. However, he failed to even start the disclosure group and had been removed from three programs and possibly a fourth one due to unexcused absences. Respondent was still in phase two, which he had been in since 2006, and had only completed the communications group during the reevaluation period. While he was more engaged in his treatment than in the past, he was still not even close to completing phase two after a decade in that phase. Moreover, while respondent claimed he is less likely to offend due to his age, Nicolai did not find any further reduction in risk was warranted based on respondent's age, as the Static-2002R takes age into account. Thus, we disagree with respondent the facts contained in Nicolai's report show respondent had made sufficient progress in his treatment to warrant an evidentiary hearing.

¶ 20 Last, in support of his argument, respondent cites the case of *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140359, ¶ 1, 48 N.E.3d 277, where the reviewing court reversed the circuit court's order finding no probable cause existed to warrant an evidentiary hearing to determine if the respondent was still sexually dangerous. We need not address whether the case properly applied the standards for determining whether an evidentiary hearing is warranted, as the facts are distinguishable from the case before us. In *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 39, while the 61-year-old respondent was still in phase two, he attended five group sessions

three days per week and had successfully completed "mindfulness, maintaining healthy interpersonal relationships, thinking errors, decision-making, and confronting his personal history and his history of offending." The facts showed the respondent's commitment to his treatment program, which was a change in his attitude from his initial refusal to engage in treatment. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 43. The reviewing court also noted the data provided by the independent examiner showing sexual behaviors are reduced in men over their lifespan and sexual arousal reduces with age, thus making older males less likely to reoffend with age. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 45. Last, the State's examiner rated respondent as moderate to high risk on the Static-99R and low risk on the Static-2002R, and the independent examiner rated the respondent as a moderate risk on the Static-99R. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 47. The reviewing court concluded the evidence set forth a plausible account that both the respondent and the professional understanding of pedophilia had changed such that a substantial probability no longer existed that respondent was a sexually violent person and likely to reoffend. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 49.

¶ 21 Unlike the respondent in *Wilcoxen*, respondent had only completed two of the phase two programs, had been removed from several programs due to unexcused absences, and had not even started one of the programs. Moreover, respondent had been in phase two for more than a decade. Further, the risk assessments placed respondent in the above average category, and respondent exhibited nine empirical risk factors for reoffending. Additionally, Nicolai declined to find respondent's risk should be reduced further based on his age because age is reflected in the actuarial risk assessment instruments she used.

¶ 22 Accordingly, we find the circuit court did not err by finding probable cause was not shown to warrant an evidentiary hearing.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the Morgan County circuit court's judgment.

¶ 25 Affirmed.