

NOTICE
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2018 IL App (4th) 170874-U

NO. 4-17-0874

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 31, 2018

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
BRIAN A. TAPP,)	No. 97CF401
Defendant-Appellant.)	
)	Honorable
)	Peter C. Cavanagh,
)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Defendant failed to show he was denied effective assistance of counsel during the proceedings on his application for recovery.

¶ 2 Defendant, Brian A. Tapp, a person committed under the Sexually Dangerous Persons Commitment Act (Act) (725 ILCS 205/0.01 *et seq.* (West 2014)), appeals the Sangamon County circuit court’s November 2, 2017, order, in which the court found defendant remained a sexually dangerous person and should not be granted conditional discharge. On appeal, defendant argues (1) the circuit court erred by admitting the report of Melissa Weldon-Padera and (2) he was denied effective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In May 1997, the State charged defendant by information with two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 1996)) for his alleged actions

between June 1 and August 25, 1996, and on January 26, 2007. That same month, the State filed a petition to proceed under the Act. In September 1997, defendant stipulated to the contents of two psychiatric evaluations, and the circuit court found defendant was a sexually dangerous person. The court entered an order, appointing the director of the Department of Corrections (DOC) as defendant's guardian and committing defendant to his custody. Defendant remained in the custody of the director of DOC until August 2, 2002, when the circuit court entered an order for defendant's conditional discharge pursuant to section 10 of the Act (725 ILCS 205/10 (West 2002)).

¶ 5 In October 2007, the State filed a petition to revoke defendant's conditional discharge. After a June 15, 2010, hearing, the circuit court revoked defendant's conditional discharge because defendant violated his conditional discharge in July 2007 by committing the offense of indecent solicitation of a child (*People v. Tapp*, No. 07-CF-2979 (Cir. Ct. DuPage Co.)). Defendant appealed the revocation, and this court originally dismissed the appeal due to lack of jurisdiction. *People v. Tapp*, 2012 IL App (4th) 100664. In denying leave to appeal, the Illinois Supreme Court exercised its supervisory authority, vacating our dismissal and ordering us to decide the case on the merits. *People v. Tapp*, No. 114105 (Ill. Sept. 26, 2012) (supervisory order on denial of petition for leave to appeal). This court did so and affirmed the circuit court's revocation of defendant's conditional discharge. *People v. Tapp*, 2013 IL App (4th) 100664-UB.

¶ 6 In August 2015, defendant filed *pro se* an application to show recovery, asserting he no longer suffers from a mental disorder and/or no longer has criminal propensities to the commission of sexual offenses. With his application, defendant sought the appointment of counsel, and the circuit court appointed counsel to represent defendant on his application.

¶ 7 On February 1, 2016, Deborah Nicolai, director of the Sexually Violent Persons and Sexually Dangerous Persons program, submitted the socio-psychiatric report for defendant prepared by Weldon-Padera in January 2016. In preparing the report, Weldon-Padera interviewed defendant on January 5, 2016; talked with Jessica Stover, defendant's primary therapist; and reviewed approximately 10 documents. The report set forth defendant's relevant history, including his criminal, sexual, and treatment histories. Weldon-Padera diagnosed defendant with the following mental disorders: (1) pedophilic disorder, nonexclusive type, sexually attracted to females; (2) other specified paraphilic disorder, sexually aroused by nonconsenting females, in a controlled environment; and (3) antisocial personality disorder. She explained her reasoning for those diagnoses. Weldon-Padera then described her risk assessment of defendant. She used the Static-99R and the STABLE-2007 risk assessments. Defendant placed in the moderate-high risk category on the former assessment and the moderate risk category on the latter assessment. Weldon-Padera also noted defendant's sexualized violence and Machiavellianism increased his risk of committing a sexual offense. She did not find any protective factors applied to defendant. Weldon-Padera also explained defendant's progress in his treatment. She found defendant had advanced and worked hard in treatment but still had some more work to do. Weldon-Padera found defendant continued to be a substantial risk for sexual offense recidivism. Thus, she opined to a reasonable degree of psychological certainty defendant remained a sexually dangerous person.

¶ 8 In June 2016, defendant's counsel filed a motion for an independent examination, which the circuit court granted in December 2016. We note defendant was unable to attend a hearing on his motion in September 2016 due to an unforeseen medical reason that resulted in an almost two-month delay in the hearing. Lesley Kane conducted the independent examination of

defendant and completed her evaluation report in May 2017. She interviewed defendant in March 2017 and spoke with Stover in April 2017. She too reviewed numerous documents related to defendant. Kane diagnosed defendant with other specified paraphilic disorder, sexually attracted to nonconsenting females, and antisocial personality disorder. Kane found defendant scored a four on the Static-99R and a six on the Static-2002R, both of which put him in the above-average risk category. She found defendant also demonstrated the following risk factors: (1) antisocial personality disorder, (2) early onset of sexual offending, (3) history of sexual victimization and physical abuse, (4) sexualized violence, and (5) noncooperation with supervision. Kane found defendant had developed healthy coping skills to combat negative emotions and had a number of interventions he could rely upon to prevent a potential relapse. Thus, she opined it was not substantially probable defendant would commit a sex offense in the future if not confined.

¶ 9 The circuit court commenced a bench trial on defendant's application to show recovery on September 28, 2017, which was not completed that day and was continued to November 2, 2017. A brief description of the evidence at the trial follows. The State presented the testimony of Weldon-Padera and the semi-annual program evaluations beginning with the report for the period of July 2015 to December 2015 and ending with the report for January 2017 to June 2017. Weldon-Padera explained how she conducted her January 2016 evaluation of defendant. Since authoring her report, she had reviewed defendant's most recent treatment plans, his semi-annual program evaluations, and group notes. She then discussed some of the facts contained in those documents. Weldon-Padera continued to opine defendant was still a sexually dangerous person. On cross-examination, defendant's counsel wanted to ask questions about Weldon-Padera's January 2016 evaluation report and asked if it was okay if the circuit court had a copy

of it. The State did not object and then moved to admit the report if defense counsel had no objection to it. Defense counsel did not object, and the court admitted the report. Additionally, defense counsel stipulated defendant had a mental disorder that qualified under the Act. Defense counsel explained the only issue was whether defendant was substantially probable to reoffend.

¶ 10 Defendant presented Kane's testimony and the following exhibits: (1) defendant's semi-annual program evaluation for the period of July 2015 to December 2015, (2) a December 2016 DOC memorandum discussing new semi-annual program evaluation forms, (3) a violent offender treatment intervention and progress scale, (4) the slides for a PowerPoint presentation discussing the sex offender treatment intervention and progress scale, (5) Kane's curriculum vitae, (6) Kane's evaluation report, and (7) proposed conditions of release. Kane opined there was not a substantial probability defendant would commit a sex offense if not confined but did believe he needed to be monitored on conditional release.

¶ 11 At the conclusion of the bench trial, the circuit court found defendant continued to be a sexually dangerous person. On November 9, 2017, defendant filed a posttrial motion, asserting only the State's evidence was insufficient to prove he remained a sexually dangerous person. After a November 28, 2017, hearing, the court denied defendant's posttrial motion.

¶ 12 On November 29, 2017, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). See 725 ILCS 205/3.01 (West 2014) (noting the proceedings under the Act are civil in nature).

¶ 13 **II. ANALYSIS**

¶ 14 On appeal, defendant challenges the circuit court's admission of Weldon-Padera's January 2016 evaluation report, contending the report was too remote to address defendant's pre-

sent mental condition. As the State notes, defendant's counsel did not object to the report's admission in the circuit court. The State asserts defendant has forfeited his challenge to the admission of Weldon-Padera's report, and defendant did not file a reply brief responding to the State's assertion of forfeiture. A party's failure to object to the evidence at trial forfeits the issue on appeal. *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1132, 738 N.E.2d 542, 552 (2000). Thus, we find defendant has forfeited the issue for review.

¶ 15 However, in his brief, defendant also argued he was denied effective assistance of counsel because counsel failed to challenge the admission of Weldon-Padera's report. "Where a defendant in a proceeding under the Sexually Dangerous Persons Act contends that he was denied effective assistance of counsel at trial, he may raise that issue on direct appeal from the circuit court's judgment." *People v. Lawton*, 212 Ill. 2d 285, 295, 818 N.E.2d 326, 333 (2004). Accordingly, we will address defendant's ineffective assistance of counsel claim.

¶ 16 Whether a defendant has received effective assistance of counsel in a proceeding under the Act is judged according to the same standards used in criminal cases. *Lawton*, 212 Ill. 2d at 295, 818 N.E.2d at 333. This court analyzes ineffective assistance of counsel claims in criminal cases under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the de-

defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64.

¶ 17 Defendant filed an application for recovery pursuant to section 9 of the Act (725 ILCS 205/9 (West 2014)). Section 9(a) of the Act (725 ILCS 205/9(a) (West 2014)) requires the clerk of the circuit court to send a copy of the application to the director of DOC. It then mandates the director have "a socio-psychiatric report concerning the applicant" prepared and sent to the circuit court. 725 ILCS 205/9(a) (West 2014). Section 9(a) further states the following: "The court shall set a date for the hearing upon the application and shall consider the report so prepared under the direction of the Director of the Department of Corrections and any other relevant information submitted by or on behalf of the applicant." 725 ILCS 205/9(a) (West 2014).

¶ 18 In this case, on February 1, 2016, DOC submitted the required socio-psychiatric report, which was prepared by Weldon-Padera on January 19, 2016. Thus, under section 9(a) of the Act, the circuit court had to consider Weldon-Padera's report at the hearing on defendant's application for recovery. Any attempt by defense counsel to have the report stricken or found inadmissible based on its remoteness would have been denied based on section 9(a) of the Act. The age of the report went to the weight of the evidence, not its admissibility. See *People v. Pitts*, 299 Ill. App. 3d 469, 476, 701 N.E.2d 198, 204 (1998) (noting the issue of remoteness of a prior crime goes to the weight of the evidence rather than the admissibility of the prior crime). Counsel did not commit an error. Accordingly, defendant cannot establish both prongs of the *Strickland* test.

III. CONCLUSION

¶ 19

¶ 20

For the reasons stated, we affirm the Sangamon County circuit court's judgment.

¶ 21

Affirmed.