2019 IL App (2d) 180747-U
No. 2-18-0747
Order filed May 8, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re COMMITMENT OF JOHN TITTELBACH	)	Appeal from the Circuit Court of Du Page County.
	)	No. 99-MR-285
(The People of the State of Illinois, Petitioner-Appellee, v. John Tittelbach, Respondent-Appellant).	)	Honorable Paul M. Fullerton, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly refused to appoint an independent evaluator to assess whether respondent was no longer a sexually violent person: no such evaluation was crucial, as respondent had refused any treatment since he was last adjudicated as still such a person.

¶ 2 Respondent, John Tittelbach, appeals a judgment granting the State's motion under section 65(b)(1) of the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/65(b)(1) (West 2016)) and holding that there was no probable cause for an evidentiary hearing on whether he remained a sexually violent person (SVP) (see *id.*). We affirm.

¶ 3 In 1980, respondent pleaded guilty to two counts of indecent liberties with a child (Ill. Rev. Stat. 1979, ch. 38, ¶ 11-4(a)) and was sentenced to four years' probation. In 1997, he was

convicted of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 1994)) and was sentenced to four years' imprisonment. On October 1, 1999, he was adjudicated an SVP and committed. At all pertinent times, the Act has defined an SVP as "a person who has been convicted of a sexually violent offense *** and who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." 725 ILCS 207/5(f) (West 1998). Respondent appealed the judgment. This court affirmed. *In re Detention of Tittelbach*, 324 Ill. App. 3d 6 (2001).

¶ 4 As pertinent here, the next proceeding was initiated on June 27, 2014. The State moved for a finding of no probable cause, based on Dr. David Suire's reexamination report of June 18, 2014. In his report, Suire opined that respondent had not made sufficient progress in treatment to be conditionally released and that his condition had not so changed since the last reexamination that he was no longer an SVP (see 725 ILCS 207/55(b) (West 2016)). On December 22, 2014, on respondent's motion, the trial court appointed Dr. Luis Rosell to examine him.

¶ 5 On March 5, 2015, the State filed Suire's reexamination report dated February 11, 2015. His diagnoses of respondent were unchanged. Respondent was in the low-risk category on the Static-99R and the moderate-risk category on the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), but these tests understated his risk by omitting several relevant factors. Suire's recommendations were the same as previously.

¶ 6 On February 16, 2016, the State moved for a finding of no probable cause, submitting Suire's report of February 10, 2016. On May 26, 2016, respondent filed Rosell's report, dated December 2, 2015. We summarize Suire's report, then Rosell's report.

¶ 7 As pertinent here, Suire's report stated as follows. Respondent had not entered sex-offender-specific treatment in the previous year. On the Static-99R, respondent scored in the

low-risk range; on the MnSOST-R, he scored in the moderate-risk range. As before, Suire stated that the actuarial tests underestimated respondent's risk of reoffending. Suire's diagnoses of respondent and his recommendations were unchanged from the most recent report.

¶ 8 Rosell's report agreed with Suire that respondent was an SVP. As to risk, Rosell stated that on the Static-99R respondent scored 0; on the Static-2002R, he also scored 0; and on another test, he scored in the medium range of risk. Rosell opined that respondent did not currently pose a serious risk of sexual violence.

¶ 9 The trial court granted the State's motion for a finding of no probable cause. On appeal, this court affirmed. *In re Commitment of Tittelbach*, 2018 IL App (2d) 170304.

¶ 10 On March 8, 2017, the State moved for a finding of no probable cause, submitting the report of Nicole Hernandez, PhD. The cause was continued numerous times and no hearing was held in 2017. On March 12, 2018, the State moved anew for a finding of no probable cause. The State relied on Hernandez's report dated February 4, 2018. In her report, Hernandez opined that respondent was still an SVP. The report noted that respondent was not currently participating in sex-offender-specific treatment and had consistently refused to do so.

¶ 11 Under "Issue of Risk," the report stated as follows. On the Static-99R, respondent scored 1, placing him in the "Average" risk category. On the Static-2002R, he scored 2, also placing him in the "Average" risk category. However, these measures likely underestimated the risk significantly, as several other empirical risk factors applied: sexual interest in children, offense-supportive attitudes, and a lack of concern for others. Moreover, respondent had offended against his victims over long periods. Of three possible protective factors, sex-offender-specific treatment did not apply, as respondent had refused any since 1999, and debilitating medical

conditions did not apply, as respondent had none. The third factor, age, did apply but was incorporated to some degree in the actuarial tests.

¶ 12 The State's motion also requested that the court refuse to provide an independent evaluator to examine defendant (see 725 ILCS 207/55(a) (West 2016)). The motion argued that respondent could not meet his burden to prove the need for an independent evaluator, as he had not participated in treatment or otherwise shown progress since the last report.

¶ 13 In response, respondent requested that the court appoint an independent evaluator. He argued that Hernandez's report had not cited any of respondent's prior independent evaluators, such as Rosell; thus, she had not considered all the available information. Respondent also disputed the actuarial tests, noting that Rosell had given him a score of 0 on the Static-99R.

¶ 14 The State replied that, because there had been no change in respondent's condition and he had resisted treatment, the court had the discretion to refuse to appoint an independent evaluator. Further, even assuming that Hernandez's failure to list any independent evaluations proved that she had not considered them, respondent had still not alleged how these reports were relevant to whether his condition had changed since 2016. Finally, the State contended, Hernandez had not erred in scoring the Static-99R, and in any event her conclusions were supported by the Static-2002R and the nonactuarial risk factors that she cited.

¶ 15 The trial court denied respondent's motion for an independent evaluator and granted the State's motion for a no-probable-cause finding. The judge explained that Hernandez had evaluated respondent in 2017 and 2018 and had also read Suire's 2016 report. Further, the judge had read Rosell's 2015 report. He stated that respondent had failed to prove that anything had changed since the last reexamination. Also, the arguments over test scoring had been litigated previously. Respondent timely appealed.

¶ 16 On appeal, respondent contends that the trial court erred in refusing to appoint an independent evaluator. He relies on section 55(a) of the Act, which, as pertinent here, reads, "At the time of a reexamination under this Section, 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." 725 ILCS 207/55(a) (West 2016).

¶ 17 Respondent concedes that whether to appoint an independent evaluator was within the trial court's discretion. See *People v. Botruff*, 212 Ill. 2d 166, 176 (2004). He also recognizes that it was his burden to prove the need for an independent evaluator. *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 33. He notes that under *Botruff* an indigent respondent is entitled to the appointment of an independent evaluator when the evaluator's services are crucial to his case. *Botruff*, 212 Ill. 2d at 177. He contends that he met this prerequisite, because Hernandez's "skewed" report was flawed by errors and omissions. The faults that respondent finds are essentially two: (1) Hernandez's report failed to cite Rosell's 2015 report; and (2) Hernandez gave respondent a score of 1 on the Static-99R, possibly (he theorizes) because she made erroneous assumptions about the status of his victims.

¶ 18 We cannot say that the trial court abused its discretion in refusing to appoint an independent evaluator. We note that in 2016, having considered both Suire's and Rosell's reports, the court found no probable cause to hold an evidentiary hearing. That judgment was affirmed on appeal. At the 2018 hearing, the trial court was bound by the most recent judgment that found that, as of the date of that judgment, respondent was an SVP and required continued treatment in a secure setting. See *Tittelbach*, 2018 IL App (2d) 170304, ¶ 31. Therefore, the sole issue was whether there was probable cause to find that respondent was no longer an SVP. But in the interim between the 2016 judgment and the 2018 hearing, respondent had continued to

refuse treatment. Essentially, there was no evidence that anything had changed in two years except that respondent had aged by that much.

¶ 19 In *In re Detention of Cain*, 341 Ill. App. 3d 480 (2003), the trial court refused to appoint an independent evaluator and granted the State's motion for a no-probable-cause finding. *Id.* at 482. The appellate court affirmed the judgment. The court agreed with the trial court that, as the respondent had resisted sex-offender treatment and there had been no change in his condition, appointing an independent evaluator would have been of no help to the court. *Id.* at 483. The situation is essentially the same here.

¶ 20 Whether Hernandez ignored Rosell's report or merely found it unpersuasive is unclear. But it is not important. An evaluation that was performed in 2015 and already considered in 2016 had no reasonable relevance to deciding what had happened between 2016 and 2018. But even if it did, the report was already available; indeed, the judge considered it. Further, although Hernandez and Rosell scored respondent differently on the Static-99R, Hernandez also relied on the Static-2002R and various other risk factors, with which respondent does not take issue. Thus, any discrepancy, even were it resolved against Hernandez, would not show prejudice. See *Kirst*, 2015 IL App (2d) 140532, ¶¶ 36-38 (possible flaws in reexamination report's use of Static-99R did not support appointing independent evaluator, given numerous other bases in report supporting conclusion that respondent was still an SVP).

¶ 21 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 22 Affirmed.