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FIRST DIVISION  
May 18, 2015

No. 1-14-0382  
2015 IL App (1st) 140382-U

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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<i>In re</i> DETENTION OF EUGENE BROWN	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Cook County.
Petitioner-Appellee,	)	
	)	No. 03 CR 80004
v.	)	
	)	Honorable Vincent M. Gaughan,
Eugene Brown,	)	Judge Presiding.
Respondent-Appellant).	)	

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JUSTICE CONNORS delivered the judgment of the court.  
Presiding Justice Delort and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court properly found there was no probable cause to warrant an evidentiary hearing on whether respondent was still a sexually violent person; affirmed.

¶ 2 Following a 2011 trial, a jury determined that respondent, Eugene Brown, was a sexually violent person as defined by the Sexually Violent Persons Commitment Act (the Act) (725 ILCS 207/1 *et seq.* (West 2010)), and he was subsequently committed to the custody of the Department of Human Services (DHS). In August 2013, based on a statutorily mandated annual reexamination, the State filed a motion for a finding of no probable cause to believe that respondent was no longer a sexually violent person. Following a hearing, the court granted the

State's motion, finding there was no probable cause to warrant an evidentiary hearing on respondent's current status as a sexually violent person. On appeal, respondent contends that an evidentiary hearing was required because respondent was diagnosed with a different mental disorder in his reexamination than the mental disorder that formed the basis for his commitment. We affirm.

¶ 3 The following facts are taken from respondent's appeal from his commitment proceeding, *In re Commitment of Brown*, 2012 IL App (1st) 110732-U. In May 2003, respondent was approaching the end of his prison sentence for five counts of aggravated criminal sexual assault. The State filed a petition to involuntarily commit respondent for treatment under the Act, alleging that his mental disorders created a substantial probability that he would engage in acts of sexual violence.

¶ 4 According to the testimony at respondent's commitment trial, respondent had a history of "peeping" at women. Additionally, after respondent's discharge from the Navy in 1988, respondent committed a series of home invasions, burglaries, and aggravated criminal sexual assaults. The State's first expert witness, Dr. Jacqueline Buck, testified that based in part on the details of respondent's sexual assaults, she diagnosed him with the following mental disorders recognized by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR): (1) paraphilia not otherwise specified (paraphilia NOS), sexually attracted to nonconsenting females, exclusive type, and with sadistic traits; (2) personality disorder not otherwise specified with anti-social and narcissistic traits; and (3) voyeurism. Based on the Static-99 assessment tool, Buck concluded that respondent had a high risk of committing a future act of sexual violence. The State's other expert witness, Dr. Robert Brucker, Jr., testified that he diagnosed respondent with voyeurism and paraphilia NOS, sexually attracted to

nonconsenting adult females. Based on the Static-99 assessment tool and the revised Minnesota Sex Offender Screening Tool, Brucker found that respondent had a high risk of reoffending.

¶ 5 Respondent called his own expert to testify, clinical psychologist Erwin Baukus. Although Baukus also diagnosed respondent with paraphilia NOS, sexually attracted to nonconsenting female adults, he referred to the paraphilia NOS diagnosis as a " 'wastebasket category' " that is used when no other adequate diagnosis is available. Baukus's assessment of respondent using the Static-99 assessment placed respondent in the "moderate-to-high risk category."

¶ 6 Ultimately, the jury at the commitment trial found respondent to be a sexually violent person and respondent was remanded to DHS custody. Subsequently, respondent appealed, contending that: (1) the circuit court improperly prevented his counsel from questioning prospective jurors during *voir dire*; (2) the State improperly shifted the burden to him to prove that he was not a sexually violent person; (3) the Act was unconstitutional as applied to him; (4) the circuit court erred in permitting the State's experts to testify that they diagnosed him with paraphilia NOS because that diagnosis is not based on generally accepted scientific principles, in violation of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); (5) the circuit court erred in allowing Buck and Brucker to update their actuarial risk assessment scores immediately before or during trial; and (6) the State failed to prove beyond a reasonable doubt that respondent was a sexually violent person. None of respondent's arguments were meritorious and we affirmed the determination that respondent was a sexually violent person. *Brown*, 2012 IL App (1st) 110732-U.

¶ 7 Respondent was periodically reexamined as mandated by the Act. This appeal concerns the results of respondent's third reexamination after 30 months of commitment, which was

completed by Dr. Richard Travis. After Travis informed respondent of the purpose of the reexamination, respondent retained his right to petition for discharge. Per Travis's report, which was dated July 5, 2013, respondent had declined to consent to sex offender treatment since being admitted to a DHS facility in 2003. In 2006, respondent completed an ancillary group, called the Social Interactions Group. A non-treatment resident review dated April 17, 2013, indicated that respondent had continued to refuse treatment when asked.

¶ 8 Travis diagnosed respondent with two disorders from the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). The first was other specified paraphilic disorder, sexually attracted to nonconsenting females, nonexclusive type, in a controlled environment, which "requires recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a non-consenting person over a period of at least six months. The person must experience distress or impairment in social, occupational, or other important areas of functioning; or the satisfaction of the paraphilic interest has entailed personal harm, or risk of harm, to others." Additionally, respondent was diagnosed with voyeuristic disorder, in a controlled environment, which "requires recurrent, intense sexual arousal from observing an unsuspecting person who is naked, in the process of disrobing, or engaging in sexual activity over a period of at least six months. The person must have acted on the urges." Dr. Travis stated that both disorders "are mental disorders according to the Act" and "are congenital or acquired conditions that affect [respondent's] emotional or volitional capacity and predispose him to engage in future acts of sexual violence." Travis further noted that eight paraphilic disorders were described in the DSM-5, but that the DSM-5 also stated that these eight disorders "do not exhaust the list of possible paraphilic disorders. \*\*\* The diagnoses of the other specified and unspecified paraphilic disorders are therefore indispensable and will be

required in many cases.' " Diagnostic and Statistical Manual of Mental Disorders 685 (5th ed., 2013).

¶ 9 Travis also reported the risk that respondent would reoffend. Based on the Static-99R assessment, respondent had a moderate-high risk of being recharged or reconvicted of another sexual offense. Additionally, respondent had five additional risk factors: paraphilic interests, employment instability, violation of probation, separation from father, and attitudes tolerant of sexual crimes. Respondent's age, 48 years old at the time of the reexamination, warranted some risk reduction, but such a reduction was already accounted for in the Static-99R.

¶ 10 Overall, Travis asserted that because of respondent's mental disorders and assessed risk, "he remains substantially probable to engage in acts of sexual violence." Travis further stated that respondent's condition "*has not* changed since the most recent periodic reexamination such that he is no longer a sexually violent person." (Emphasis in original.) Travis further stated that respondent did not participate in sex-offense-specific treatment during the review period and had not made sufficient progress in treatment to be conditionally released.

¶ 11 On August 6, 2013, the State filed a motion for a finding of no probable cause to believe that respondent was no longer a sexually violent person. On September 5, 2013, respondent filed a response, contending in part that there was probable cause that respondent was no longer a sexually violent person because according to Travis's report, respondent was re-diagnosed or previously incorrectly diagnosed, and therefore no longer suffered from the mental disorder for which he was detained.

¶ 12 Subsequently, the Attorney General's office requested an addendum from Travis to address how diagnoses using the DSM-5 compare with those using the DSM-IV-TR, and to address whether or not there had been a change in respondent's condition—in other words,

whether respondent still suffered from paraphilia NOS as defined in the DSM-IV-TR. In this September 2013 addendum, Travis acknowledged that in his July 2011 and July 2012 reexaminations, he had diagnosed respondent with paraphilia NOS using criteria in the DSM-IV-TR. However, Travis stated that the criteria for paraphilia NOS in the DSM-IV-TR and the criteria for other specified paraphilic disorder in the DSM-5 "do not differ significantly." Travis further asserted that the diagnosis of paraphilia NOS, sexually attracted to nonconsenting females, non-exclusive type was substantially similar to the DSM-5 diagnosis of other specified paraphilic disorder, sexually attracted to nonconsenting females. Travis also wrote in his addendum that "[r]ather than not recognizing the previous DSM-IV-TR diagnosis of Paraphilia NOS, the DSM-5 provides the diagnosis of Other Specified Paraphilic Disorder as an addition which allows a clinician to be specific in identifying the nature of the paraphilic disorder, or to withhold specifically defining the paraphilic disorder by using a separate Unspecified Paraphilic Disorder diagnosis." According to Dr. Travis, other specified paraphilic disorder and unspecified paraphilic disorder "replace the prior DSM-IV-TR diagnosis of Paraphilia [NOS]."

¶ 13 Travis further stated that there were some differences between the diagnosis of paraphilic disorders in the DSM-5 and the diagnosis of paraphilias in the DSM-IV-TR, though these were "not significant to the referral question." Travis explained that the DSM-5 distinguishes between a paraphilia and a paraphilic disorder based partly on negative consequences, which are a characteristic of paraphilic disorders, but not necessarily of paraphilias as defined in the DSM-5. As a result, a person may have a paraphilia, but may not have a paraphilic disorder in the DSM-5. According to Travis, because respondent acted out on his paraphilia targeting nonconsenting females and caused personal harm to others, he met the criteria for a paraphilic disorder in the DSM-5.

¶ 14 Travis also concluded that based on his July 2013 reexamination, respondent still met the criteria in the DSM-IV-TR for the diagnosis of paraphilia NOS, sexually attracted to nonconsenting females. Dr. Travis stated that respondent's mental condition had not changed from the previous review period to the present review period, respondent remained "substantially probable" to engage in acts of sexual violence, and respondent's condition had not changed such that he was no longer a sexually violent person.

¶ 15 Further briefing took place between the parties. On October 9, 2013, the State filed a reply to respondent, asserting in part that Travis's addendum addressed respondent's argument that his diagnosis had changed. In his response, respondent contended in part that his initial diagnosis of paraphilia NOS was not recognized in the DSM-5. Respondent further asserted that paraphilic coercive disorder, "the exact diagnosis as [paraphilia NOS]," was rejected for inclusion in the DSM-5. According to respondent, because he no longer suffered from the mental disorder for which he was initially detained, there was probable cause that he was no longer a sexually violent person. In reply, the State contended that respondent incorrectly stated that paraphilia NOS was rejected for inclusion in the DSM-5 and asserted that coercive paraphilia is different from paraphilia NOS. Citing Travis's addendum, the State also asserted that there was no significant difference between the criteria for paraphilia NOS in the DSM-IV-TR and the criteria for other specified paraphilic disorder in the DSM-5.

¶ 16 At the probable cause hearing, the State contended there was no significant difference between paraphilia NOS and other specified paraphilic disorder and noted that Travis opined that respondent still suffered from paraphilia NOS under the DSM-IV-TR. As such, the State contended there was no probable cause to believe respondent's condition had changed. Respondent asserted that, according to *In re Detention of Stanbridge*, 2012 IL 112337, a change

in professional knowledge could provide probable cause for an evidentiary hearing, and Travis's report indicated that such a change had occurred.

¶ 17 Following arguments, the court found that there was no probable cause to warrant an evidentiary hearing on respondent's current status as a sexually violent person.

¶ 18 On appeal, respondent contends that an evidentiary hearing was required because respondent was diagnosed in his reexamination with a different mental disorder than the one that formed the basis for his commitment. Respondent argues that according to Travis's report and addendum, there was a change in the professional knowledge underlying respondent's commitment in that the science of classifying and determining psychological conditions is different from when respondent was committed, thus requiring a hearing.

¶ 19 The Act authorizes the commitment of sexually violent persons "until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2012). A sexually violent person is someone who has been convicted of a sexually violent offense and who is dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2012). "Substantially probable" means "much more likely than not." *In re Detention of Bailey*, 317 Ill. App. 3d 1072, 1086 (2000).

¶ 20 After a person has been committed, DHS must submit a written report to the court on the person's mental condition within 6 months of the initial commitment and at least once every 12 months thereafter. 725 ILCS 207/55(a) (West 2012). The purpose of the report is to determine whether the person has made sufficient progress in treatment to be conditionally released and whether the person's condition has so changed since the most recent periodic reexamination that he is no longer a sexually violent person. *Id.*; Pub. Act 97-1075 (eff. Aug. 24, 2012) (amending

725 ILCS 207/55). At the time of an examination, the Secretary of Human Services must provide the committed person with written notice of his right to petition the court for discharge.

725 ILCS 207/65(b)(1) (West 2012). If the person does not affirmatively waive his right to petition, the court must set a probable cause hearing to determine "whether facts exist that warrant a hearing on whether the person is still a sexually violent person." *Id.* If the person does not file a petition for discharge and fails to waive his right to petition, then the probable cause hearing "consists only of a review of the reexamination reports and arguments on behalf of the parties." *Id.* If the court determines at the probable cause hearing that probable cause exists to believe that the committed person is no longer a sexually violent person, then the court must set an evidentiary hearing on the issue. 725 ILCS 207/65(b)(2) (West 2012).

¶ 21 At a probable cause hearing, the 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.) *Stanbridge*, 2012 IL 112337, ¶ 62 (quoting *In re Detention of Hardin*, 238 Ill. 2d 33, 48 (2010)). To warrant an evidentiary hearing, there must be sufficient evidence that the respondent no longer has a mental disorder or is no longer dangerous to others because his mental disorder no longer creates a substantial probability that he will engage in acts of sexual violence. *Stanbridge*, 2012 IL 112337, ¶ 67-68. Further, there must be some plausible evidence that demonstrates a change in circumstances that led to the finding that the respondent has a mental disorder that makes it substantially probable that he will reoffend. *Id.* at ¶ 72. A change in circumstances could include a change in the committed person, a change in the professional knowledge and methods used to evaluate a person's mental disorder or risk of reoffending, or a

change in the legal definitions of a mental disorder or a sexually violent person, such that the trier of fact could conclude that the respondent no longer meets the requisite elements. *Id.*

¶ 22 The standard of review for a probable cause hearing is unsettled in this state. This court has stated that we review the ultimate question of whether respondent established probable cause *de novo*. *In re Detention of Lieberman*, 2011 IL App (1st) 090796, ¶ 40, *aff'd sub nom.*, *Stanbridge*, 2012 IL 112337. Further, where the evidence before a trial court consists of depositions, transcripts, or evidence otherwise documentary in nature, we may review the record *de novo*. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). Meanwhile, the Fifth and Fourth districts review trial courts' probable cause decisions for an abuse of discretion. See *In re Detention of Cain*, 341 Ill. App. 3d 480, 482 (2003); *In re Ottinger*, 333 Ill. App. 3d 114, 120 (2002). We need not resolve this issue because our result would be the same under either standard.

¶ 23 Respondent contends that probable cause existed for an evidentiary hearing because the reexamination report showed a change in professional knowledge underlying respondent's commitment. We disagree. There was not plausible evidence that respondent's diagnosis of paraphilia NOS from the DSM-IV-TR differs from his latest diagnosis of other specified paraphilic disorder from the DSM-5. Travis stated in his addendum that the two diagnoses are "substantially similar" and their criteria "do not differ significantly." According to Travis's addendum, it is not the case that the DSM-5 did not recognize paraphilia NOS. Instead, other specified paraphilic disorder and unspecified paraphilic disorder replaced paraphilia NOS. Travis explained that the diagnosis of other specified paraphilic disorder allows a clinician "to be specific in identifying the nature of the paraphilic disorder" or to withhold specifically defining the paraphilic disorder using the diagnosis of unspecified paraphilic disorder. Travis

acknowledged that there are differences between the diagnosis of paraphilic disorders in the DSM-5 and the diagnosis of paraphilias in the DSM-IV-R, but these were "not significant to the referral question" asked of him. Travis explained that in the DSM-5, because of the emphasis on negative consequences, a person can have a paraphilia but not a paraphilic disorder. Regardless, Travis stated that respondent met the criteria for a paraphilic disorder because he acted out on his paraphilia targeting nonconsenting females and caused personal harm to others.

¶ 24 Our own review of the DSM-IV-TR and DSM-5 confirms that the DSM-5 did not eliminate respondent's diagnosis and that the two diagnoses do not materially differ. The DSM-5 includes eight specific paraphilic disorders, but states that these "do not exhaust the list of possible paraphilic disorders" and that "[m]any dozens of distinct paraphilias have been identified and named, and almost any of them could, by virtue of its negative consequences for the individual or for others, rise to the level of a paraphilic disorder." Diagnostic and Statistical Manual of Mental Disorders 685 (5th ed., 2013). The DSM-5 further states that "[t]he diagnoses of the other specified and unspecified paraphilic disorders are therefore indispensable and will be required in many cases." *Id.*

¶ 25 Comparing the two diagnoses, in the DSM-IV-TR, the criteria for paraphilia NOS are:  
"recurrent, intense sexually arousing fantasies, sexual urges, or behaviors generally involving 1) nonhuman objects, 2) the suffering or humiliation of oneself or one's partner, or 3) children or other nonconsenting persons that occur over a period of at least 6 months. \*\*\* [T]he behavior, sexual urges, or fantasies cause clinically significant distress or impairment in social, occupational, or other important areas of functioning." Diagnostic and Statistical Manual of Mental Disorders 566 (4th ed., text revision, 2000).

Meanwhile, in the DSM-5, there are two criteria for a paraphilic disorder: the qualitative nature of the paraphilia and the negative consequences of the paraphilia. Diagnostic and Statistical Manual of Mental Disorders 686 (5th ed., 2013). The DSM-5 defines a paraphilia as "any intense and persistent sexual interest other than sexual interest in genital stimulation or preparatory fondling with phenotypically normal, physically mature, consenting human partners. *Id.* at 685. Additional criteria for other specified paraphilic disorder are that it has been present for at least six months and causes marked distress or impairment in social, occupational, or other important areas of functioning. *Id.* at 705. Both diagnoses contain the same elements. The change from paraphilia NOS to other specified paraphilic disorder does not suggest a change in professional knowledge, but rather a relabeling or clarification of the elements of essentially the same disorder.

¶ 26 Further, the evidence strongly suggests that respondent remains a sexually violent person. Any changes from the DSM-IV-TR to the DSM-5 aside, Travis asserted that respondent's mental condition had not changed from previous review periods and stated in his addendum that respondent met the criteria for paraphilia NOS. Further, according to the reexamination report, respondent has declined to consent to sex offender treatment since his commitment. Based on his most recent Static-99R assessment, respondent is in the moderate-high risk category for being recharged or reconvicted of another sexual offense. Travis also noted that respondent had five additional risk factors and concluded that due to his mental disorders and assessed risk, respondent remained "substantially probable" to engage in acts of sexual violence. The evidence indicates that there has not been a change in circumstances—whether because of changes in the DSM-5 raised by respondent or in respondent's condition—such that a trier of fact "could conclude that the respondent no longer meets the requisite elements" of being a sexually violent

person. See *Stanbridge*, 2012 IL 112337, ¶ 72. See also *In re Commitment of Tittelbach*, 2015 IL App (2d) 140392, ¶ 28 (rejecting the respondent's contention that revisions in the DSM-5 meant he no longer had a mental disorder and noting that the respondent had not changed "in any significant respect" since the initial judgment).

¶ 27 Lastly, we are not persuaded by respondent's contention in his reply brief that because paraphilic coercive disorder, which respondent claims without further argument is "essentially" paraphilia NOS, was rejected for the DSM-5, there has been a change in the psychological science relevant to respondent's diagnosis. As a preliminary matter, we note that the reply brief must be "confined strictly to replying to arguments presented in the brief of the appellee." Ill. S. Ct. R. 341(j) (eff. Feb. 6, 2013). That aside, respondent was not diagnosed with paraphilic coercive disorder and, as it is a different disorder than paraphilia NOS or other specified paraphilic disorder, we fail to see how an analogy to paraphilic coercive disorder is relevant here.

¶ 28 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 29 Affirmed.