2017 IL App (1st) 161321-U

No. 1-16-1321

Fifth Division
August 4, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

In re COMMITMENT OF JAKE SIMMONS	)	
	)	Appeal from the Circuit Court
(The People of the State of Illinois,	)	of Cook County.
Petitioner-Appellee,	)	No. 05 CR 80007
v.	)	The Honorable
	)	Alfredo Maldonado,
Jake Simmons,	)	Judge Presiding.
Respondent-Appellant).	)	

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly found that respondent was not entitled to an evidentiary hearing when he failed to show probable cause that circumstances had changed since his previous reexamination such that he was no longer a sexually violent person.

¶ 2 Respondent Jake Simmons has been involuntarily civilly committed under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2014)) since 2011, when a jury found that respondent was a sexually violent person under the Act. After

respondent received a periodic reexamination pursuant to section 55 of the Act (725 ILCS 207/55 (West 2014)) in 2015, the trial court found that there was no probable cause that respondent's condition had so changed such that he was no longer a sexually violent person under the Act. Respondent appeals, arguing that there was probable cause sufficient to entitle him to an evidentiary hearing on the issue of whether he remains a sexually violent person. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 We previously considered the propriety of respondent's commitment under the Act in *In re Commitment of Simmons*, 2012 IL App (1st) 112375-U, and to the extent the facts are relevant to the instant appeal, we provide them herein.

¶ 5 Respondent is a 46-year-old man who is currently confined to a wheelchair due to a spinal cord injury that occurred in 1998. On July 25, 2005, the State filed a petition to commit respondent as a sexually violent person pursuant to the Act based on (1) two convictions for sexually violent offenses that occurred in 1992 and 2001, (2) several mental disorders that it claimed predisposed him to commit future acts of sexual violence, and (3) a report prepared by a clinical psychologist that was based on the psychologist's evaluation of respondent. The report included a discussion of several sexual offenses that had not resulted in convictions, as well as respondent's disciplinary record while incarcerated with the Illinois Department of Corrections (IDOC).

¶ 6 After a jury trial, on May 11, 2011, the jury found respondent to be a sexually violent person and the trial court entered judgment on the verdict and ordered respondent detained at a Department of Human Services (DHS) treatment and detention facility. Respondent appealed his commitment, and we affirmed. *Simmons*, 2012 IL App (1st) 112375-U, ¶ 2.

¶ 7 Since his commitment, respondent has received annual examinations as required under the Act, which have been conducted by Dr. Kimberly Weitl, Psy.D. Each of the reports prepared by Dr. Weitl as a result of her evaluation was filed with the circuit court by the State, along with a motion requesting that the court find that there was no probable cause to warrant an evidentiary hearing on the issue of whether respondent remained a sexually violent person. The State's 2015 motion is at issue in the instant appeal.

¶ 8 On December 7, 2015, the State filed a "Motion for Periodic Re-examination and Finding of No Probable Cause Based on November 2015 Re-examination Report," in which it requested the trial court to find, *inter alia*, that there was no probable cause to warrant an evidentiary hearing on the issue of whether respondent remained a sexually violent person. Attached to the motion was a nine-page report prepared by Dr. Weitl on November 7, 2015. The report indicated that respondent was offered an opportunity to interview with Dr. Weitl, and was informed of the nature and purpose of the evaluation, but "politely refused" to participate in the interview. The report indicated that, due to this decision, "it is impossible to determine what impact, if any, that information would have on the conclusions and opinions of this examiner. There is published research that indicates interviews done in these types of evaluations do not increase the validity of the examiner's opinion." The report stated that the sources of information for the report came from (1) the May 11, 2011, order of commitment; (2) a June 24, 2005, evaluation conducted by Dr. Craig Shifrin, Psy.D.; (3) various official policy and court documents regarding respondent's criminal history; (4) respondent's IDOC master file; (5) a March 1, 2002, IDOC mental health evaluation discharge report; (6) respondent's DHS treatment and detention facility (DHS-TDF) master treatment plan from July 22, 2010, and updated January 27, 2011; (7) a July 31, 2015 "DHS-TDF Non-Treatment

Plan Review"; (8) a December 3, 2007, psychological examination conducted by Dr. Weitl; (9) an amended psychological examination conducted by Dr. Weitl, updated August 28, 2009; (10) psychological reexaminations conducted by Dr. Weitl on November 11, 2011, November 10, 2010, November 9, 2013, and November 8, 2014; (11) a June 15, 2008, evaluation conducted by Dr. Lesley Kane, Psy.D.; (12) an amended evaluation conducted on November 12, 2010, by Dr. Vasiliki Tsoflias, Psy.D.; (13) a "Static-99" scored by Dr. Weitl; (15) a "Static 99 Revised" (Static-99R) scored by Dr. Weitl; and (16) peer consultation with Dr. Steven Gaskell, Psy.D.

¶ 9 The report provided an overview of respondent's history, including a discussion of his prior criminal history, which included two convictions for sexually-based offenses: (1) a conviction for aggravated criminal sexual abuse in 1991 involving an 11-year-old girl, and (2) a conviction for aggravated criminal sexual abuse in 2001 involving a 10-year-old mentally disabled boy. There were additional sexually-based offenses that were dismissed, both involving 13-year-old boys, and a 2001 conviction for failure to register as a sex offender. The report stated that while in the IDOC, respondent received 26 disciplinary tickets since 2002, with two of those being for sexual misconduct. The report then related respondent's treatment while admitted to the DHS-TDF, noting that his July 31, 2015, treatment plan review indicated that "he had not signed a consent to participate in sex offender treatment, but that he had met with a clinical member of his team during the period of review. He was not participating in any organized recreational groups." The treatment plan review further indicated that he "did not report experiencing any stressors during the period under review. He was described as 'typically' presenting with an 'agitated mood.' It was noted that he had 'limited contact with the treatment [t]eam.' "

¶ 10 Dr. Weitl's report identified three "mental disorders," as defined by the Act, that applied to respondent: "Pedophilic Disorder," "Alcohol Use Disorder in a Controlled Environment," and "Other Specified Personality Disorder with Antisocial Features." The report then discussed the issue of risk, noting that the most commonly relied upon approach to sexual offense risk assessment is an actuarial assessment that is adjusted to include the unique risk factors of the offender being evaluated. The report stated that Dr. Weitl used two actuarial instruments to assess respondent's risk. First, respondent's Static-99R score of four "placed him in the Moderate High Risk Category and in the 79.6 percentile. His score is associated with a 1.94 times higher likelihood of sexually reoffending when compared to the typical sexual offender (score of 2)." Additionally, respondent's Static-99 score of five "placed him in the Moderate High Risk Category and in the 83.7 to 91.0 percentile when compared to other offenders in the normative samples." The report also identified the following risk factors which "further increase his already high risk": (1) lack of treatment motivation; (2) noncompliance with conditional release; (3) lack of empathy/blaming the victim; (4) early onset of sexual offending; (5) any personality disorder; (6) antisocial lifestyle; (7) substance abuse; (8) deviant sexual interests; and (9) intimacy deficits.

¶ 11 The report also discussed any "Protective Factors" that would decrease respondent's risk. The report noted that successful completion of sexual offense-specific treatment can, in some cases, with some offenders, reduce risk to sexually reoffend, but respondent "has not participated in sex offender specific treatment; therefore, this is not a protective factor for him at this time." The report also noted that the degree of decrease in risk based on age can be affected by several variables and that respondent's "age was accounted for, to varying degrees, on all three [*sic*] actuarial instruments. No additional reduction in risk based on age

is warranted at this time." Finally, the report stated that "[i]t seems reasonable to assume a relationship between health and risk, and that risk decreases as health deteriorates into disability. [Respondent] has no identified medical condition to warrant a reduction in his risk to sexually reoffend."

¶ 12 The report stated that, to a reasonable degree of psychological certainty, Dr. Weitl concluded that: (1) "[respondent] has been convicted of, been adjudicated delinquent for or been found not guilty by reason of insanity of a sexually violent offense. He was convicted of Aggravated Criminal Sexual Abuse on two separate occasions"; (2) "[respondent] suffers from one or more mental disorders, which are congenital or acquired conditions, affecting his emotional or volitional capacity and predisposing him to engage in acts of sexual violence. [Respondent] meets the criteria for Pedophilic Disorder; Alcohol Use Disorder; and Other Specified Personality Disorder with Antisocial Features"; and (3) "[d]ue to his mental disorders it is substantially probable that he will engage in acts of sexual violence. He scored in the Moderate High and Highest risk categories on actuarial instruments and had nine additional risk factors further increasing that risk. He is not participating in sex offender treatment and has no other protective factors at this time."

¶ 13 In the report, Dr. Weitl stated that, "[b]ased upon [respondent's] offense history and information available through his Master file, police reports, disciplinary history, mental health and psychological evaluations; it is the professional opinion of this examiner that to a reasonable degree of psychological certainty," Dr. Weitl recommended that (1) "[respondent's] condition has not changed since his last examination and he should continue to be found a Sexually Violent Person under the Illinois Sexually Violent Persons Commitment Act" and (2) "[respondent] has not made sufficient progress in treatment to be

conditionally released and he should remain committed to the Illinois Department of Human Services-Treatment and Detention Facility for further secure care and sexual offense specific treatment."

¶ 14 Respondent did not request an independent evaluation or submit an independent evaluation in response to the State's motion. Thus, the only evidence submitted by the parties was Dr. Weitl's report.

¶ 15 On March 21, 2016, the trial court entered an order granting the State's motion and finding that, based on Dr. Weitl's report, there was no probable cause to warrant an evidentiary hearing to determine whether respondent was still a sexually violent person under the Act. This appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, respondent argues that the trial court erred in finding that there was no probable cause to warrant an evidentiary hearing because (1) he was entitled to an evidentiary hearing under section 65 of the Act and (2) the due process clause of the fourteenth amendment required him to receive an evidentiary hearing.

¶ 18 I. The Act

¶ 19 The Act "authorizes the involuntary civil commitment of 'sexually violent persons' for 'control, care, and treatment.' " *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 48 (citing 725 ILCS 207/40(a) (West 2008)). Under the Act, a sexually violent person is "an individual '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.' " *Stanbridge*, 2012 IL 112337, ¶ 48 (citing 725 ILCS 207/5(f) (West 2008)). In other words, the respondent's mental disorder makes it

substantially probable that he will be a repeat offender. "If the State proves beyond a reasonable doubt that an individual is a sexually violent person, that individual may be indefinitely committed 'until such time as the person is no longer a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 48 (citing 725 ILCS 207/35(f), 40(a) (West 2008)). After the initial commitment, DHS is responsible for reevaluating the individual's mental condition after six months, and then again on an annual basis to determine "whether the person has made sufficient progress to be conditionally released or discharged." *Stanbridge*, 2012 IL 112337, ¶ 49 (citing 725 ILCS 207/55 (West 2008)).

¶ 20 There are three mechanisms by which the committed person may petition for discharge. The first mechanism occurs at any time if the Secretary of Human Services authorizes the committed individual to petition the court for discharge because the Secretary believes that the person is no longer a sexually violent person. *Stanbridge*, 2012 IL 112337, ¶ 50 (citing 725 ILCS 207/65(a)(1) (West 2008)). The Secretary made no such authorization here.

¶ 21 The second mechanism, and the one relevant to the case at bar, is triggered after the individual undergoes one of his periodic examinations. *Stanbridge*, 2012 IL 112337, ¶ 51 (citing 725 ILCS 207/65(b)(1) (West 2008)). Once the individual undergoes the examination, he must be given written notice of his right to petition for discharge over the Secretary of Human Services' objection. *Stanbridge*, 2012 IL 112337, ¶ 51 (citing 725 ILCS 207/65(b)(1) (West 2008)). "If the committed individual does not affirmatively waive that right, the court must set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the defendant is 'still a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 51 (citing 725 ILCS 207/65(b)(1) (West 2008)). "If a person does not file a petition for discharge, yet fails to waive the right to petition under this Section, then the probable cause

hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." 725 ILCS 207/65(b)(1) (West 2014). "If the court finds that there is probable cause to believe that the committed individual 'is no longer a sexually violent person,' it must set a hearing on the issue and the State has the burden of proving by clear and convincing evidence that the committed individual is 'still a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 52 (citing 725 ILCS 207/65(b)(2) (West 2008)). In the case at bar, the trial court made a finding that there was no probable cause that respondent was no longer a sexually violent person.

¶ 22 The third mechanism permits the committed person to petition for discharge at times other than the periodic reexamination, which he may do without the approval of the Secretary. *Stanbridge*, 2012 IL 112337, ¶ 53 (citing 725 ILCS 207/70 (West 2008)). However, under an important limitation to this right, if the respondent previously filed a petition for discharge and the trial court determined that the petition was frivolous or that the respondent was still a sexually violent person, then the trial court is required to dismiss the new petition without a hearing unless the petition contains facts that would support a finding that the respondent has so changed that a hearing is warranted. *Stanbridge*, 2012 IL 112337, ¶ 53; 725 ILCS 207/65(b)(1) (West 2014).

¶ 23 In the case at bar, respondent did not file a petition for discharge and did not affirmatively waive that right. Thus, the trial court set a probable cause hearing to determine whether facts existed that warranted a hearing on whether respondent was still a sexually violent person. It is this finding of no probable cause that is at issue on this appeal.

¶ 24 II. Burden of Proof

¶ 25 We first consider respondent's arguments concerning which party bears the initial burden of proof during a probable cause hearing under the Act. In the case at bar, the trial court determined in respondent's 2015 periodic reexamination proceeding that, based on Dr. Weitl's report, there was no probable cause to believe that respondent's condition had so changed since his last periodic reexamination that he was no longer a sexually violent person. Respondent argues that the State bears the burden of showing the lack of probable cause and that the State failed to meet this burden. The State, by contrast, argues that respondent bears the initial burden of proof to affirmatively demonstrate probable cause. Thus, we must first determine which party bears the initial burden of proof.

¶ 26 As noted, under the Act, one mechanism for discharge from commitment is automatically triggered when the respondent undergoes a periodic examination required by section 55 of the statute. *Stanbridge*, 2012 IL 112337, ¶ 51. Once the individual undergoes the examination, he must be given written notice of his right to petition for discharge over the Secretary of Human Services' objection. *Stanbridge*, 2012 IL 112337, ¶ 51. "If the committed individual does not affirmatively waive that right, the court must set a probable cause hearing to determine whether facts exist that warrant a hearing on whether the defendant is 'still a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 51. "If a person does not file a petition for discharge, yet fails to waive the right to petition under this Section, then the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." 725 ILCS 207/65(b)(1) (West 2014).

¶ 27 Respondent argues that at such a hearing, the State bears the burden of establishing a lack of probable cause. However, we agree with the State that under the Act, the respondent bears

the burden at the probable cause hearing of proving that facts exist to show that his condition has so changed, such that he is no longer a sexually violent person. In reaching this conclusion, we find instructive our supreme court's decision in *Stanbridge*, as well as the recent First District opinion of *In re Commitment of Rendon*, 2017 IL App (1st) 153201. In *Stanbridge*, unlike the case at bar, both respondents filed petitions for discharge. *Stanbridge*, 2012 IL 112337, ¶ 8. The *Stanbridge* court held, "[t]o support a finding of probable cause on a petition for discharge under section 65(b)(1) or on a first petition for discharge under section 70, the movant bears the burden to show sufficient evidence to warrant a hearing on whether the person is 'still a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 67. "If the court finds that there is probable cause to believe that the committed individual 'is no longer a sexually violent person,' it must set a hearing on the issues and the State has the burden of proving by clear and convincing evidence that the committed individual is 'still a sexually violent person.' " *Stanbridge*, 2012 IL 112337, ¶ 52.

¶ 28 More recently, the *Rendon* court held that the committed individual bore the initial burden of proof during the postcomittment probable cause stage, even if he does not file a petition for discharge. *In re Commitment of Rendon*, 2017 IL App (1st) 153201, ¶¶ 33-34. As in the present case, *Rendon* involved a respondent who argued that because he did not affirmatively file a petition for discharge, he should not bear the burden at the probable cause hearing. *Rendon*, 2017 IL App (1st) 153201, ¶ 33. The committed person in *Rendon* similarly had a history of sexual violence, and after being civilly committed for approximately 13 years, underwent an annual reexamination to determine if he was still a sexually violent person in 2015. *Rendon*, 2017 IL App (1st) 153201, ¶ 9. After reviewing the evaluator's latest annual report, the trial court determined that there was no probable cause to find the

respondent had made sufficient progress in his treatment to believe that he was no longer a sexually violent person. *Rendon*, 2017 IL App (1st) 153201, ¶ 2. We note that, in the case at bar, unlike the *Rendon* respondent, respondent in the instant case refused treatment and thus the issue of sufficient progress in his treatment does not exist.

¶ 29 The *Rendon* court rejected the respondent's argument concerning the initial burden of proof, citing *Stanbridge*, which had made no distinction between a discharge petition that occurs automatically under the statute whenever a reexamination occurs, and one that a committed person affirmatively files. *Rendon*, 2017 IL App (1st) 153201, ¶ 34 (citing *Stanbridge*, 2012 IL 112337, ¶ 67). The *Rendon* court noted that the *Stanbridge* court held that the committed person bears the burden in both situations to prove there is enough evidence to warrant a hearing to determine if the person is still sexually violent. *Rendon*, 2017 IL App (1st) 153201, ¶ 34 (citing *Stanbridge*, 2012 IL 112337, ¶ 67). We note that in *Rendon*, as in the case at bar, the respondent did not submit an independent evaluation to prove he is not sexually violent. However, in *Rendon*, the respondent used the submitted evaluator's report as evidence in support of a probable cause finding, in contrast to respondent in the instant case, who did not submit any evidence to prove he is not sexually violent but simply attacked the credibility of Dr. Weitl's expert opinion.

¶ 30 The *Rendon* court ultimately reversed the trial court's decision and found that the respondent had satisfied the " 'very low burden' " to show probable cause to advance to an evidentiary hearing. *Rendon*, 2017 IL App (1st) 153201, ¶ 29 (quoting *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140539, ¶ 30). However, with regard to the issue of which party bears the burden at the probable cause hearing, it is clear based on *Rendon* and *Stanbridge*

that the committed person always has that burden, even if a low one. Accordingly, we find that respondent bore the burden of demonstrating probable cause.

¶ 31 Respondent attempts to distinguish his case from *Rendon* on the facts based on the sufficiency of the report submitted after the annual reexamination. We will address the contents of the report later in our analysis; however, we note that respondent's argument has no basis in the language of the Act. Respondent argues that in *Rendon*, the amount of detail in the report allowed the committed person to fully evaluate the report, and to point to deficiencies in it, so the court could fully consider the arguments concerning probable cause. Thus, respondent argues that the State must first meet some initial burden of production by providing a sufficiently detailed report to enable a meaningful review of the expert's opinions. However, *Rendon* does not hold that the State must meet an initial burden of production by producing a highly detailed report. It merely addresses whether, upon reviewing the report submitted to the court, the court could find that that the respondent showed probable cause that he "had made sufficient progress in treatment such that he was no longer a sexually violent person." *Rendon*, 2017 IL App (1st) 153201, ¶ 2.

¶ 32 Furthermore, we note that numerous appellate courts have also placed the burden on the respondent to establish probable cause in such a situation. See, *e.g.*, *In re Commitment of Galba*, 2017 IL App (3d) 150613, ¶¶ 11-12 (finding that the respondent was required to present evidence that he was no longer a sexually violent person); *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140359, ¶ 52 (noting that the respondent had a burden to produce evidence sufficient to warrant an evidentiary hearing); *In re Detention of Hayes*, 2015 IL App (1st) 142424, ¶ 33 (in affirming the trial court's finding of no probable cause, finding that the respondent failed to establish a plausible account to necessitate an

evidentiary hearing). Thus, even leaving aside *Rendon*, respondent's argument is contrary to the weight of authority.

¶ 33 We also find unpersuasive respondent's claim that the State is the movant and thus bears the initial burden of proof. The fact that the State filed a motion in the present case is not dispositive as to which party bears the initial burden of proof. As a practical matter, the State's motion in this case merely served as a mechanism to notify the court of the contents of the annual reexamination report, so that a mandatory probable cause hearing could be held.[1] Additionally, as the State claims, it would be nonsensical for the initial burden of proof to be determined based on which party alerted the court, when the statute dictates that there should always be a probable cause hearing after a periodic reexamination. See 725 ILCS 207/65(b)(1) (West 2014). Since a probable cause hearing automatically follows a periodic reexamination pursuant to statute, respondent's argument that it is unjust to place the burden on the individual who did not file a petition for discharge is not persuasive. See 725 ILCS 207/65(b)(1) (West 2014).

¶ 34 We also find unpersuasive respondent's reliance on the supreme court's analysis of the Sexually Dangerous Persons Act (725 ILCS 205/0.01 *et seq.* (West 2014)), a statute that is distinct from the statute at issue in the present case. See *People v. Trainor*, 196 Ill. 2d 318 (2001). Under that statute, the State has the burden of proving beyond a reasonable doubt that a person is sexually dangerous at both the commitment proceeding and the recovery proceeding. *Trainor*, 196 Ill. 2d at 333-35.[2] Additionally, our supreme court has found that

[1] Although the State often files motions for a finding of no probable cause, there is no such requirement expressly found in section 65(b)(1) and no court has mandated the State to file such a motion. See, e.g., *In re Detention of Hayes*, 2015 IL App (1st) 142424, ¶ 7; *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140359, ¶ 5.

[2] A "commitment proceeding" is when a person is initially committed and determined to be sexually dangerous. *Trainor*, 196 Ill. 2d at 326. A "recovery proceeding" occurs after the court

under both the Act and the Sexually Dangerous Persons Act, the State bears the burden at the discharge or recovery proceeding. *Trainor*, 196 Ill. 2d at 337 (analogizing the Sexually Dangerous Persons Act with the Act and treating the discharge and recovery hearings as the same). Under the Act, the State has the burden at the discharge hearing. 725 ILCS 207/65(b)(2) (West 2014). However, the Act has an intermediary step that the Sexually Dangerous Persons Act does not have. The Act mandates a "probable cause" hearing to determine if a discharge hearing is to be held. 725 ILCS 207/65(b)(1) (West 2014). Additionally, the Sexually Dangerous Persons Act does not have an automatic reexamination process as the Act does. See 725 ILCS 205/9(a) (West 2014). Under the Sexually Dangerous Persons Act, recovery hearings are triggered by application. 725 ILCS 205/9(a) (West 2014). Therefore, while the holding in *Trainor* may apply to the Act's discharge hearing, it does not apply to the probable cause stage of the Act. Thus, *Stanbridge* and *Rendon* are instructive in the present case, while *Trainor* is not.

¶ 35 We also find unpersuasive respondent's claim that placing the burden on respondent would be inconsistent with the United States Supreme Court's decision in *Shaffer v. Weast*, 546 U.S. 49, 58 (2005), in which the Supreme Court followed the general rule that the initial burden of proof lies with the party seeking relief when the statute is silent as to who bears the initial burden of proof. Respondent argues that under the Sexually Dangerous Persons Act, when the committed individual applies for recovery, this automatically triggers a recovery hearing in which the State is considered the petitioner and bears the initial burden of proof. *Trainor*, 196 Ill. 2d at 335. Respondent argues that because the State becomes the petitioner under the Sexually Dangerous Persons Act at the recovery hearing seeking to continue the

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determines a person is sexually dangerous and that person files, at any time, an application demonstrating that he has recovered. *Trainor*, 196 Ill. 2d at 330.

committed person's incarceration, it is also the party seeking relief under the Act; therefore, using the rule from *Weast*, the State should bear the initial burden of proof. However, in the case at bar, the State is not actually seeking relief. The probable cause hearing is statutorily mandated, independent of either party filing a motion or applying for a recovery hearing. *Stanbridge*, 2012 IL 112337, ¶ 51. Therefore, under the Sexually Dangerous Persons Act, where the committed individual is required to file an application triggering the recovery hearing, the State becomes the petitioner. However, under the Act when the committed person does nothing at all after his periodic reexamination, all he is entitled to is a determination as to whether there is probable cause. In other words, the determination of probable cause is a hurdle he has to clear in order to be entitled to a discharge, or evidentiary, hearing, the equivalent of the recovery hearing under the Sexually Dangerous Persons Act. Thus, the State is not the party seeking relief, and does not have the initial burden of proof under *Weast*.

¶ 36 Finally, for the reasons stated in the previous paragraph we also find unpersuasive respondent's claim that placing the burden on the nonmoving party would lead to an absurd result. Relying on *Trainor*, respondent argues that placing the initial burden of proof on the committed person who did not file a petition for discharge would be absurd and unjust. As previously stated, the Sexually Dangerous Persons Act is distinct from the Act, and the State is not the party seeking relief because the determination of probable cause is statutorily mandated following a medical examination. Accordingly, we find that respondent bore the burden of establishing that probable cause existed in order to be entitled to an evidentiary hearing and, as we explain below, since respondent offered no evidence whatsoever, the trial

court did not err in finding based on Dr. Weitl's report that respondent was not entitled to an evidentiary hearing.

¶ 37 III. Section 65 of the Act

¶ 38 Respondent argues that, even if we find that he bears the initial burden of proof, the trial court nevertheless erred because there was probable cause to find that respondent was no longer a sexually violent person and was entitled to an evidentiary hearing on the issue. As noted, under section 65 of the Act, "[i]f the court determines at the probable cause hearing *** that probable cause exists 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, then the court shall set a hearing on the issue." 725 ILCS 207/65(b)(2) (West 2014). Respondent argues that there was sufficient evidence to entitle him to such a hearing.

¶ 39 In a situation such as in the case at bar, where the respondent does not file a petition for discharge and does not waive such a right, "the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." 725 ILCS 207/65(b)(1) (West 2014). An appeal from a trial court's finding of no probable cause presents a question of law, which we review *de novo*. *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140359, ¶ 28; *Galba*, 2017 IL App (3d) 150613, ¶ 10. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 40 To support a finding of probable cause, "the movant bears the burden to show sufficient evidence to warrant a hearing on whether the person is '*still* a sexually violent person.' [Citation.] To make that determination, the court must find that there is a plausible account

that 'the committed person is *no longer* a sexually violent person.' [Citation.] " (Emphases in original.) *Stanbridge*, 2012 IL 112337, ¶ 67. "Given the statutory definition of a 'sexually violent person,' it follows that in a discharge proceeding, the committed individual must present sufficient evidence that he no longer meets the elements for commitment: (1) he *no longer* 'has a mental disorder'; or (2) he is *no longer* 'dangerous to others because the person's mental disorder [*no longer*] creates a substantial probability that he *** will engage in acts of sexual violence.' " (Emphases in original.) *Stanbridge*, 2012 IL 112337, ¶ 68 (quoting 725 ILCS 207/5(f), 15 (West 2008)). Thus, "respondent, as the moving party, bore the burden to produce 'plausible evidence' that demonstrated a change in circumstances that led to his sexually violent person finding." *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 36 (citing *Stanbridge*, 2012 IL 112337, ¶ 72). "Under the relevant statutory scheme, 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 even a change in the legal definitions of a mental disorder or a sexually violent person, such that a trier of fact could conclude that the person no longer meets the requisite elements." *Stanbridge*, 2012 IL 112337, ¶ 72. But see *In re Detention of Lieberman*, 2017 IL App (1st) 160962, ¶ 32 (finding that a change in the respondent's diagnosis does not necessarily rise to the level of being a "change in circumstances" that leads to a finding of probable cause).

¶ 41 In the case at bar, respondent claims that there is probable cause to believe that he is no longer a sexually violent person, relying on changes to himself and changes in professional knowledge. However, we do not find respondent's arguments persuasive. First, respondent draws an analogy between his situation and that present in *Wilcoxen*, a case in which the appellate court reversed the trial court's finding of no probable cause. Respondent claims that

the facts that were present in *Wilcoxen* are similar to the facts present in the instant case and further claims that unlike the respondent in *Wilcoxen*, he had engaged in zero sexual misconduct since entering DHS, demonstrated a better attitude, and scored similarly on the Static-99R. However, respondent's argument overlooks the significantly different facts present in *Wilcoxen*.

¶ 42 For instance, the respondent in *Wilcoxen* had begun treatment and services in early 2011, and as of December 2013, was in "stage two" of his treatment, attending five group sessions three days per week. *Wilcoxen*, 2016 IL App (3d) 140369, ¶ 39. According to DHS reports, the *Wilcoxen* respondent "had not only attended all treatment groups that he had been recommended to take, but he had also completed assignments, been prepared for group sessions, and participated appropriately. He was an active and willing participant in his treatment. He had identified and taken ownership of his sexual offenses, acknowledged that he had wronged and hurt his victims, and had expressed remorse." *Wilcoxen*, 2016 IL App (3d) 140369, ¶ 41. The appellate court found that "[r]espondent's commitment to his treatment plan and ownership of his single incident of misconduct demonstrated a clear change in respondent's attitude from the time of his commitment—when he refused to participate in treatment—to the more recent reports that documented respondent's successful completion of numerous treatment programs." *Wilcoxen*, 2016 IL App (3d) 140369, ¶ 43. By contrast, respondent in the instant case has never participated in sex offender treatment or services other than three days of sex offender treatment in 2002. In fact, he has refused treatment. According to Dr. Weitl's report, respondent has also shown a lack of remorse for his criminal history, which included sexual offenses against children. Thus, it is clear that

respondent's progress is entirely unlike the progress of the respondent in *Wilcoxen*; respondent in the instant case has shown no such progress.

¶ 43 These facts also illustrate the flaws in respondent's claim that changes in his behavior and attitude demonstrate that he no longer has difficulty controlling his sexual behavior. While respondent argues that treatment is not required for a committed person to be discharged, treatment is an indication that the respondent is taking his past behavior seriously and wishes to change his behavior in the future, and a lack of participation in treatment by a respondent who is capable of participating in such treatment is certainly a relevant consideration in determining whether the respondent has changed such that he is no longer a sexually violent person. Respondent also points to the fact that he has not received any sexual misconduct tickets since being committed, and that Dr. Weitl's report indicates that respondent had met with a primary therapist "regularly" with whom he acted "polite and appropriate" during interactions. However, these facts come from Dr. Weitl's review of a July 22, 2010, treatment plan. According to her report, a more recent review from July 31, 2015, indicates that respondent "had not signed a consent to participate in sex offender treatment, but that he had met with a clinical member of his team during the period of review. He was not participating in any organized recreational groups." The 2015 report further stated that respondent "was described as 'typically' presenting with an 'agitated mood.' It was noted that he had 'limited contact with the treatment team.' " Under the Act, the purpose of the probable cause hearing is 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." (Emphasis added.) 725 ILCS 207/65(b)(1) (West 2014). Thus, the statements from the 2015 treatment plan review are

more relevant in determining any changes in behavior or attitude, and those statements do not reveal any positive shift in respondent's behavior or attitude.

¶ 44 We are also not persuaded by respondent's arguments that his age results in a decrease in his risk to reoffend. First, Dr. Weitl's report expressly states that his age was accounted for by the actuarial instruments that she used and that she did not believe that any additional reduction in risk based on age was warranted. Respondent makes much of the fact that Dr. Weitl referenced "three" actuarial instruments while only applying two, which respondent concludes, without any evidence, means that "Dr. Weitl has reproduced this statement verbatim from her prior reports without any *current* analysis or individualized assessment of [respondent] and the effect of his age on his risk to reoffend." (Emphasis in original.) Even if respondent is correct and Dr. Weitl used a prior report as a template for her current one, that does not mean that she did not engage in a current analysis. In preparing documents, people may use earlier versions as templates for newer ones. If the language remains accurate, there is no harm in repeating something that has been said before. However, repeating language in no way leads to the inference that there has been no analysis, as respondent concludes without an evidentiary basis. Dr. Weitl's report indicates that she concluded that "no additional reduction in risk based on age is warranted at this time," and in the absence of any evidence to the contrary, we will not presume that she reached this conclusion without actually considering respondent's individual situation. Furthermore, according to Dr. Weitl's report, there is statistical evidence that "offenders who molest children frequently continue offending well past the age of 50." At the time of the examination, respondent had just turned 45 years old.

¶ 45 Finally, we find unpersuasive respondent's argument that changes to professional knowledge demonstrate that respondent's risk to reoffend is much less than previously thought. First, respondent claims that "[w]hile Dr. Weitl used the Static-99 in addition to the Static-99R, the Static-99 was no longer recommended for use by its authors by the time of the annual review motion hearing." Respondent points to two affidavits by the authors of the Static-99 standards posted on the Static-99 website that are dated January 15, 2016, which is between the date of Dr. Weitl's report and the date of the probable cause hearing.[3] We first note that respondent did not bring these affidavits to the trial court's attention at or prior to the probable cause hearing. Thus, respondent is asking us to consider documents that were not before the trial court which we cannot do. While we are engaging in a *de novo* review of the evidence, it is nevertheless a *de novo* review of the evidence on the issue of probable cause. Moreover, as to the Static-99 portion of the affidavits, which are identical, both authors simply state that "[i]nstead of using Static-99, we recommend that evaluations are based on the revised version of Static-99 (Static-99R) because it is applicable to older offenders as well as younger ones, and now has better norms than are available for Static-99 ***." This does not suggest that Dr. Weitl improperly used the Static-99. Furthermore, Dr. Weitl did exactly as the authors suggested—she also used the Static-99R. Thus, we see no merit to respondent's arguments concerning the use of the Static-99. See *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 56 (finding that, even if the evaluator erred in calculating the respondent's risk under the Static-99R, ample other evidence supported the evaluator's conclusion, including "seven additional empirical risk factors that applied to respondent").

[3] These affidavits are available on the Static-99 website. See Affidavits of Dr. Thornton and Dr. Hanson, http://static99.org/pdfdocs/Legal-Thorton-Hanson_Affidavits(2016).pdf (last viewed June 19, 2017).

¶ 46 Respondent's remaining arguments as to "changes in professional knowledge" are actually not arguments concerning changes in professional knowledge at all, but are only arguments concerning the interpretation of Dr. Weitl's expert opinions. For instance, respondent argues that respondent's Static-99R score on the 2015 evaluation was a four, which placed him in the "moderate high risk category." He states that this represents a decrease from his 2011 evaluation, in which he scored a five, placing him in the "high risk" category. First, it is not clear that the 2011 evaluation applied the Static-99R, as respondent claims. Instead, it appears to have applied the Static-99. This Static-99 score is identical to the score of five that respondent received on the Static-99 in the 2015 evaluation. Furthermore, even if Dr. Weitl applied the Static-99R instead of the Static-99, a change in respondent's score does not represent a "change in professional knowledge." Instead, it could represent a change in respondent himself, which, as noted, could be sufficient to show probable cause that he had changed. However, as noted above, the rest of respondent's attitude and behavior demonstrate no such change and all of these factors resulted in Dr. Weitl's opinion which respondent has not refuted. As noted, respondent offered no evidence that there has been any substantial change, only arguments.

¶ 47 Similarly, respondent challenges Dr. Weitl's expert opinions that respondent had a number of additional risk factors, noting that she did not identify any research articles to support this statement. However, the risk factors identified by Dr. Weitl are the same risk factors she has consistently identified, even in his first reevaluation in 2011. To the extent that respondent challenges the lack of research articles, some of the earlier evaluations contain such citations. Respondent also argues that some of these risk factors are simply describing the same thing in different ways or that Dr. Weitl improperly considered them to

be risk factors. However, again, respondent cites several articles that were not raised before the trial court. Furthermore, respondent does not explain why the fact that certain risk factors contain overlapping facts necessarily makes it improper to count both risk factors. See *Kirst*, 2015 IL App (2d) 140532, ¶ 57 (finding that, as to the respondent's claim that the evaluator had "double-counted" certain risk factors, "respondent does not provide any support for the proposition that both listing these factors as empirical risk factors and using these factors to support the diagnoses of respondent's mental disorders was improper"). Here, especially given that these risk factors have consistently been present throughout respondent's commitment, we do not find persuasive respondent's challenges to Dr. Weitl's expert opinions without any evidence to the contrary.

¶ 48 As a final matter, we again note that respondent did not provide any competing evaluation or other evidence in support of his argument that he had established the initial probable cause. As noted, in a situation such as this one, where the respondent does not affirmatively file a petition for discharge but does not waive such a right, "the probable cause hearing consists only of a review of the reexamination reports and arguments on behalf of the parties." 725 ILCS 207/65(b)(1) (West 2014). Respondent argues that a competing evaluation is not necessary because the supreme court has found that a committed person is not entitled to such an evaluation at a probable cause hearing. However, this argument relies on a misinterpretation of our supreme court's decision in *People v. Botruff*, 212 Ill. 2d 166 (2004). Under section 55 of the Act, at the time of a periodic reexamination, "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 2014). Our supreme court in *Botruff* found that the trial court is not required

to appoint an evaluator under this section but has the discretion to do so. *Botruff*, 212 Ill. 2d at 176. In considering the respondent's equal protection challenge to the statute, the supreme court found that a respondent was not denied equal protection by the failure of the court to appoint an independent evaluator, finding:

> "In the case at bar, nothing in the record demonstrates that respondent's case was prejudiced or that the court would have found differently had an independent examiner been provided. At the hearing, the judge reviewed the State's tendered reevaluation report. The court then invited '[a]ny comments with reference to the report.' Counsel for respondent offered no comments, objections, or questions. The only position taken by respondent was to request an independent evaluator to 'rebut the findings [in the tendered report].' Respondent's counsel provided the court with no reason or suggestion as a possible basis to rebut the report. It is rational not to appoint an independent evaluator when a respondent has shown no need for one, especially during perfunctory reexamination proceedings where the respondent has not affirmatively opted to petition for discharge. [Citation.] Without more, the court did not abuse its discretion by denying respondent's request for an independent evaluation." *Botruff*, 212 Ill. 2d at 177-78.

¶ 49 In the case at bar, respondent makes a number of arguments that arguably could have been strengthened had they been supported by evidence or an expert opining that they were substantial enough to constitute a change in respondent such that he was no longer a sexually violent person. While we take no position on the State's argument that such an expert opinion is required, we note that in *Wilcoxen*, the case that respondent argued above was factually analogous, the appellate court relied on the fact that the respondent had provided an expert

opinion contradicting several of the conclusions in the evaluator's report, especially with respect to the court's analysis of changes in professional understanding and interpretation of testing results. See *Wilcoxen*, 2016 IL App (3d) 140369, ¶¶ 44-49. Certainly, in a situation in which the evidence is limited to an expert's report, having a competing report or other evidence can be needed when the evidence offered by the State shows no substantial change in circumstances. In the case at bar, with only Dr. Weitl's report and expert opinion before us, we cannot find that respondent demonstrated probable cause that there had been a change in circumstances such that he was no longer a sexually violent person and therefore affirm the trial court's finding of no probable cause.

¶ 50 IV. Due Process

¶ 51 Finally, respondent claims that denying him an evidentiary hearing denies him his due process rights under the fourteenth amendment. "[D]ue process permits an individual to be held as long as he or she is both mentally ill and dangerous, but no longer." *Stanbridge*, 2012 IL 112337, ¶ 85. In the case at bar, Dr. Weitl opined, to a reasonable degree of psychological certainty, that respondent continued to have a mental disorder and that he continued to be dangerous. Respondent advances no additional arguments in support of his due process claim beyond those which we have already considered and offered no evidence to support any of his arguments. Accordingly, we find no basis to conclude that respondent's due process rights have been violated by denying him an evidentiary hearing. See *Stanbridge*, 2012 IL 112337, ¶ 85 (finding the respondent's due process challenge without merit where "[t]he State's expert[']s opinion was that [the respondent] continues to have a mental disorder and that he continued to be dangerous").

¶ 52 CONCLUSION

¶ 53 For the reasons set forth above, respondent failed to establish that there was probable cause to believe that he was no longer a sexually violent person such that he was entitled to an evidentiary hearing on the issue.

¶ 54 Affirmed.