2011 IL App (3d) 100488-U

Order filed November 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

In re COMMITMENT OF DONALD RAY HOOVER	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	
	)	Appeal No. 3-10-0488
v.	)	Circuit No. 01-MR-786
DONALD RAY HOOVER,	)	Honorable Stephen D. White,
Defendant-Appellant).	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's denial of the defendant's petition for conditional release under the Sexually Violent Persons Commitment Act was not against the manifest weight of the evidence.

¶ 2 The defendant, Donald Ray Hoover, was adjudicated a sexually violent person under the Illinois Sexually Violent Persons Act (Act) (725 ILCS 207/1 *et seq.* (West 2000)) and committed to a secure Illinois Department of Human Services (DHS) facility for treatment. The defendant

subsequently filed a petition for conditional release under the Act (725 ILCS 207/60 (West 2008)), which the circuit court denied. The defendant appeals the circuit court's denial of his petition for conditional release.

¶ 3 FACTS

¶ 4 On November 1, 2001, the State filed a petition under the Act asking the circuit court of Will County to classify the defendant as a sexually violent person and to commit him to the DHS for treatment. The State's petition alleged that the petitioner had been convicted of two counts of aggravated criminal sexual assault and one count of aggravated criminal sexual abuse. The aggravated criminal sexual assault convictions arose from an incident that occurred in 1985 while the defendant was on a one-week furlough from the Juvenile Department of Corrections, where he had been committed for home invasion and attempted rape. While on furlough, the defendant forcibly placed his penis in a woman's mouth and vagina while threatening her with a pair of scissors. The defendant was convicted and sentenced to 28 years' imprisonment. In 1994, while serving this sentence, the defendant was convicted of aggravated criminal sexual abuse after he followed a psychiatric nurse into a supply room, closed the door, and groped at her breasts and groin. The State's petition also alleged that the defendant had been diagnosed with 3 mental disorders—pedophilia, paraphilia, and antisocial personality disorder. On November 28, 2001, the circuit court found probable cause to believe that the petitioner was a sexually violent person and ordered him to be detained in a secure DHS facility pending trial.

¶ 5 On October 30, 2006, the circuit court entered an agreed order finding the defendant to be a sexually violent person and continuing the matter for a dispositional hearing to determine whether the defendant should be committed to institutional care in a secure setting or placed on

conditional release. On August 30, 2007, the circuit court entered its dispositional order, committing the defendant to a secure DHS facility until further order of the court. On February 28, 2008, Dr. Kimberly Weitl, a clinical psychologist, conducted the first of several periodic re-examinations of the defendant required by section 207/55 of the Act (725 ILCS 207/55 (West 2008)).[1] After reviewing the defendant's criminal records and medical files and administering two actuarial tests, Dr. Weitl opined that the defendant should still be considered a sexually violent person and should remain committed.

¶ 6 Because the defendant did not waive his right to petition the circuit court for discharge, the State filed a motion under section 207/65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2008)) asking the circuit court to find that no facts existed which warranted a hearing on whether the defendant was still a sexually violent person. On July 9, 2008, the defendant filed a petition for conditional release pursuant to section 207/60 of the Act (725 ILCS 207/60 (West 2008)), arguing that he had made sufficient progress to be conditionally released and that it was not substantially probable that he would engage in acts of sexual violence if released. The circuit court consolidated the two proceedings. At the defendant's request, the circuit court appointed

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[1] Section 207/55(a) of the Act requires DHS to "submit a written report to the court on [the defendant's] mental condition within 6 months after an initial commitment under Section 40 and then at least once every 12 months thereafter for the purpose of determining whether the person has made sufficient progress to be conditionally released or discharged." 725 ILCS 207/55(a) (West 2008). At the time of a re-examination under section 207/55, "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." *Id.*

Dr. Kirk Witherspoon to conduct an independent evaluation of the defendant's mental condition. Prior to Dr. Witherspoon's evaluation, Dr. Weitl conducted a second statutorily-required re-evaluation of the defendant and filed an updated report on February 27, 2009. As discussed in detail below, Dr. Weitl's updated report recommended that the defendant remain committed in a secure DHS facility.

¶ 7 The record does not contain an explicit finding by the circuit court that there was probable cause to warrant an evidentiary hearing on the defendant's petition for conditional release. Nevertheless, the court conducted a full evidentiary hearing on May 12 and May 27, 2010. During the hearing, the State presented the expert testimony of Dr. Weitl, and the defendant testified and presented the expert testimony of Dr. Witherspoon. The defendant stipulated that Dr. Weitl was an expert in forensic and clinical psychology with a specialty in the area of sex offender evaluation and risk assessment. The reports of both experts were admitted into evidence without objection.

¶ 8 Dr. Weitl based her February 2009 evaluation of the defendant on her hour-long interview of him and her review of the defendant's criminal records, DHS records (including treatment plans and progress notes), and evaluations of the defendant conducted by other mental health professionals. Dr. Weitl diagnosed the defendant with two mental disorders: "paraphilia, not otherwise specified, sexually attracted to nonconsenting persons" (meaning that the defendant had acted upon intense sexual urges or fantasies involving nonconsenting individuals); and "antisocial personality disorder" (meaning a pervasive pattern of violating the rights of others). Dr. Weitl opined that both of these mental disorders affected the defendant's emotional and volitional capacity so as to predispose him to commit future acts of sexual violence. Dr.

Weitl testified that her diagnoses were supported by the defendant's long history of unlawful sexual misconduct which began at a young age and continued beyond his incarceration. Specifically, Dr. Weitl noted that, in 1983, when the defendant was 16 years old, the defendant attempted to get two 4-year-old-boys to perform oral sex on him, placing his penis in one boy's mouth. As a result, he was sentenced to 16 months in juvenile detention. A few months after the defendant was released from detention, he tried to rape a 19-year-old woman at knife point in her bedroom and was committed to the Juvenile Department of Corrections for home invasion and attempted rape. In August 1985, within a week of being paroled, the defendant raped and orally sodomized a different woman while wielding a pair of scissors. In 1994, while serving a 28-year prison sentence for that crime, the defendant sexually assaulted a psychiatric nurse. Moreover, between June 1987 and July 2000, the defendant received 10 disciplinary tickets for sexual misconduct, was reprimanded twice for making obscene phone calls, masturbated in front of female staff, and kissed a female counselor. In addition, the defendant's mother told prison authorities that the defendant had asked her to send him nude pictures of herself.

¶ 9 In assessing the risk that the defendant would commit sexual offenses in the future, Dr. Weitl used an adjusted actuarial approach in which she considered both actuarial predictions of risk and other factors not included in the actuarial measure. To obtain the actuarial prediction of the defendant's risk, Dr. Weitl used three actuarial instruments: the "Static99"," the "Static99R," and the Minnesota Sex Offender Screening Tool (MnSOST-R). Dr. Weitl opined that all three of these measures underestimate risk because their predictions are based upon collected data on rearrests or reconvictions, and many reoffenders are never caught. The defendant scored in the high-risk category on both the Static-99 and the Static-99R. The MnSOST-R placed the

defendant in the highest risk category, with a 72% chance of being arrested for a sexual offense within six years. Moreover, Dr. Weitl concluded that the defendant had additional risk factors not included in the actuarial tests that increased his risk of reoffending. For example, the defendant had been emotionally abused and neglected from an early age, had a poor relationship with his mother, and had never had an intimate relationship. In addition, the defendant had a history of unsuccessful probation supervision and rapid reoffending upon being released into the community.[2]

¶ 10 Further, Dr. Weitl concluded that various "protective factors" that can lower an individual's risk of reoffending were not present in the defendant's case. The defendant had not completed sex offender treatment, having dropped out of four different treatment programs. Moreover, Dr. Weitl noted that the defendant had never accepted responsibility for his offenses, had very little insight into his offending, and had no relapse prevention plan. In addition, although the defendant was 42 years old and had a history of Crohn's disease, Dr. Weitl concluded that the defendant was neither old nor medically infirm enough to lower his risk of reoffending. Dr. Weitl also noted that, if the defendant were released, he would have difficulty supporting himself financially because he had no employment history, limited job training, and no social support network. Moreover, Dr. Weitl was aware of no treatment facilities available in

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[2] Dr. Weitl acknowledged that the defendant had not received any disciplinary tickets since 2000. However, although she viewed this as a positive sign, she opined that it was not enough to move the defendant's risk of reoffending below "substantially probable." She explained that the absence of disciplinary tickets might simply reflect the fact that the facility does a good job of protecting its staff.

the community that would be suitable for the defendant's needs, and she noted that the defendant's history of quitting treatment made it unlikely that he would stay with such a program even if it were available.

¶ 11 Based on all of these considerations, Dr. Weitl opined that the defendant was "substantially probable to reoffend" and that the most appropriate and least restrictive place for the defendant to be treated was a secure DHS facility.

¶ 12 Dr. Witherspoon, the defendant's expert in forensic and clinical psychology, also testified at the hearing. Dr. Witherspoon based his evaluation of the defendant on his three-hour interview of the defendant, his review of the defendant's criminal record, medical records, and prior psychological evaluations, and the results of several actuarial tests that he administered. Dr. Witherspoon administered the Hare PCL-R, a test used to determine an individual's rate of reoffending that is not specific to sexually violent offenses. Dr. Witherspoon concluded that the defendant's score on this test did not denote a high risk of reoffending. He also noted that the defendant's age would decrease his chance of general recidivism. Dr. Witherspoon also administered the SVR-20, a test that considers a subject's psychosocial adjustment, pattern of sexual offenses, and the effects of age on the subject. The test indicated that the defendant was at a "moderate" risk of general sexual reoffending. Moreover, Dr. Witherspoon administered the Static-2002R test, which indicated that the defendant was at a "high" risk of reoffending, with an average risk of 33.5 percent over a five-year period. Dr. Witherspoon criticized the Static 2002R test because it was not designed to gauge sexually "violent" risk *per se*. He also noted that, in determining the defendant's risk of reoffending, it is important to consider additional "dynamic variables," such as "deviant sexual interests, distorted attitudes, socioaffective dysfunction, and

self-management difficulties." However, when Dr. Witherspoon attempted to quantify the effect of such variables in the defendant's case, he concluded that they did not lower the defendant's risk of reoffending because the defendant "exhibited ongoing difficulties in all of these measured domains." Moreover, Dr. Witherspoon conceded that the defendant's current age did not substantially reduce his risk of reoffending and that his medical condition likely reduced the risk "only slightly." He opined that the defendant's estimated risk of reoffending was in the "moderate-high" range, with a 19% risk of reoffending within a 5-year span that would reduce approximately 4 percent per year.

¶ 13 Dr. Witherspoon disagreed with Dr. Weitl's methodology and diagnoses. Specifically, he criticized Dr. Weitl for basing her risk assessment on static tests and for failing to consider other variables. He also maintained that Dr. Weitl used adjusted actuarial techniques that had been discredited by prior academic studies. In addition, Dr. Witherspoon disagreed with Dr. Weitl's diagnosis of "paraphilia, not otherwise specified, sexually attracted to nonconsenting females, nonexclusive type" because he opined that there was no such diagnosis. Instead, Dr. Witherspoon diagnosed the defendant as suffering from "chronic adjustment disorder with mixed anxiety and depression."

¶ 14 In his expert report, Dr. Witherspoon noted that the defendant's "sexual lie scale" score was very high, "suggesting marked defensiveness and probable minimization of behaviors and symptoms." In addition, although Dr. Witherspoon suggested that the antiandrogen medication that the defendant was taking was likely suppressing the defendant's experience and expression of sexual deviance, he opined that "the psychological problems which spawned and have

maintained said deviance throughout much of [the defendant's] life do not appear to have been resolved."

¶ 15 Nevertheless, Dr. Witherspoon opined that the defendant should be conditionally released. He based this opinion on several factors. First, he opined that the defendant's estimated risk of reoffending was "likely below the 'much more likely than not' standard necessary for involuntary civil commitment." In addition, Dr. Witherspoon opined that the defendant "d[id] not have a sexually violent psychopathology diagnosis" and that the treatment goals which the defendant had pursued in inpatient care could "also be sought in an outpatient setting." Moreover, during his deposition, Dr. Witherspoon noted that the defendant's demeanor and the fact that he "had not acted out in a negative sexual way" since he arrived at DHS in 2001 showed that the defendant had "laid to rest some of the primary problems that he had," such as his "displaced anger toward his mother" which had previously "fueled his sexual aggression." However, Dr. Witherspoon noted that he did not think that this anger was "completely gone," and he described the defendant's progress within DHS as "good but contentious."

¶ 16 The defendant also testified. He stated that he had completed six treatment courses addressing trauma issues, thinking errors, stress management, and problem solving. However, he admitted that he stopped attending sex offender treatment due to conflicts with his therapists. He also admitted to having anger issues but stated that he had learned in therapy that it was "ok to feel anger" but "not ok" to "take it out on other people." He claimed that, if released, he would continue counseling and seek out employment, and he noted that he had some OSHA training. He conceded that he did not have a relapse prevention plan. However, he claimed that

it would be easy to draw up such a plan because "CR agents" help set up a comprehensive plan for individuals granted conditional release.

¶ 17 After reviewing all of the evidence and hearing closing arguments, the circuit court held that the State had met its burden of proving by clear and convincing evidence that the defendant remains a sexually violent person and should not be conditionally released. The court noted that, although the defendant had "come close," the fact that he had stopped treatment weighed against release. This appeal followed.

¶ 18 ANALYSIS

¶ 19 A circuit court must grant a petition for conditional release filed by an individual committed for institutional care pursuant to the Act "unless the State proves by clear and convincing evidence that the person has not made sufficient progress to be conditionally released." 725 ILCS 207/60(d) (2008). In determining whether to grant a petition for conditional release, the court "must consider" "the nature and circumstances of the behavior" that was the basis of the State's allegations that the defendant is a sexually violent person, "the [defendant's] mental history and present mental condition," and "what arrangements are available to ensure that the [defendant] has access to and will participate in necessary treatment." *Id.* Before the court may enter an order directing conditional release to a less restrictive alternative, it must find, *inter alia*, that the defendant "will be treated by a [DHS]-approved treatment provider that "has presented a specific course of treatment and has agreed to assume responsibility for the treatment[.]"

¶ 20 We will affirm a circuit court's denial of a petition for conditional release unless the circuit court's decision is against the manifest weight of the evidence. *In re Commitment of*

Sandry, 367 Ill. App. 3d 949, 978 (2006). A decision is contrary to the manifest weight of the evidence only if the opposite conclusion is "clearly apparent." *Id.* As the trier of fact, it is the circuit court's role to resolve conflicting testimony by assessing the credibility of the witnesses and determining the weight to be accorded their testimony. *Id.* at 979; see also *In re Detention of Welsh*, 393 Ill. App. 3d 431, 457 (2009). We will not substitute our judgment for that of the circuit court on these matters. See *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 603 (2007). Where the circuit court's factual findings are based upon credibility determinations, we will "generally defer to the [circuit] court." *Sandry*, 367 Ill. App. 3d at 980; see also *Lieberman*, 379 Ill. App. 3d at 603.

¶ 21 In this case, the circuit court found that the State had proven by clear and convincing evidence that the defendant remains a sexually violent person and should not be conditionally released. That finding was not against the manifest weight of the evidence. Although the evidence suggested that the defendant has made some progress, Dr. Weitl opined that the defendant had not made sufficient progress to justify his conditional release and that he should remain committed in a secure DHS facility. Dr. Weitl based this opinion on the defendant's lengthy history of committing violent sex offenses (which had continued beyond his incarceration), her expert medical opinion that the defendant suffered from two mental disorders that predisposed him to commit future acts of sexual violence, the results of actuarial tests that put the defendant in the highest risk category for reoffending, and the fact that the defendant had not completed sex offender counseling or developed a relapse prevention plan. Although Dr. Witherspoon disagreed with some of Dr. Weitl's conclusion and questioned her diagnoses and methodology, his criticisms merely challenged the weight and credibility of Dr. Weitl's

opinions, and the circuit court was entitled to credit Dr. Weitl's opinions over Dr. Witherspoon's opinions. See, *e.g.*, *Welsh*, 393 Ill. App. 3d at 457 (holding that, although the expert witnesses disagreed as to the defendant's diagnosis, "it was the trial court's function to weigh the evidence and resolve conflicts therein"); see also *In re Detention of Cain*, 402 Ill. App. 3d 390, 397 (2010); *Lieberman*, 379 Ill. App. 3d at 603; *Sandry*, 367 Ill. App. 3d at 980. After reviewing the record, we find no compelling reasons to substitute our judgment for that of the circuit court on this matter.

¶ 22 Moreover, Dr. Witherspoon did not opine that the defendant's risk of committing violent sex crimes in the future was negligible. To the contrary, he opined that the defendant's estimated risk of reoffending was in the "moderate-high" range, and he conceded that the defendant's current age and medical condition did not substantially reduce his risk of reoffending. In addition, although Dr. Witherspoon opined that the defendant had made progress in working through the anger that fueled his sexual aggression, he conceded that the defendant's anger was not "completely gone" and opined that "the psychological problems which spawned and have maintained [the defendant's] deviance throughout much of his life do not appear to have been resolved." Moreover, Dr. Witherspoon testified that the defendant "exhibited ongoing difficulties" with "deviant sexual interests, distorted attitudes, socioaffective dysfunction, and self-management difficulties." In addition, the defendant did not present a relapse prevention plan, and he admitted that he had quit sex offender counseling due to conflicts with his therapists. Thus, based on the evidence presented, the circuit court could rationally have doubted that the defendant would "participate in necessary treatment" upon his release, as required by the Act. 725 ILCS 207/60(d) (2008).

¶ 23 In sum, although there was some evidence supporting the defendant's petition, there is ample evidence in the record to support the circuit court's denial of the petition. The opposite conclusion is not "clearly apparent." Accordingly, the circuit court's decision is not against the manifest weight of the evidence.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 26 Affirmed.