

NOTICE

Decision filed 06/27/12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2012 IL App (5th) 100578-U
NO. 5-10-0578
IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

In re DETENTION OF EARL SIDNEY DAVIS) Appeal from the Circuit Court
(The People of the State of Illinois, Petitioner-) of Madison County.
Appellee, v. Earl Sidney Davis, Respondent-)
Appellant).) No. 98-MR-414
)
) Honorable James Hackett,
) Judge, presiding.

PRESIDING JUSTICE DONOVAN delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in denying the respondent's motion to vacate the orders committing him to a secure treatment facility pursuant to the Sexually Violent Persons Commitment Act (725 ILCS 207/1 to 99 (West 2002)) and to order a new trial, as the respondent did not establish that he was deprived of effective assistance of counsel during the commitment proceedings or that he lacked the ability to make a knowing and intelligent waiver of his right to a jury trial.
- ¶ 2 The respondent, Earl S. Davis, was committed to the custody of the Department of Human Services pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 to 99 (West 2002)). Some years later, the respondent filed a *pro se* motion asking the trial court to vacate the commitment orders and to grant a new trial. The respondent alleged that his trial attorney did not provide effective representation during the commitment proceedings and that he did not knowingly and intentionally waive his right to a jury trial. The circuit court of Madison County dismissed the respondent's motion as untimely and the respondent appealed. On appeal, a panel of this court found that the circuit court erred in

dismissing the respondent's motion as untimely, and it reversed the order of dismissal and remanded the case to the circuit court with directions to conduct an inquiry into the factual basis underlying the respondent's claims. *In re Detention of Davis*, No. 5-08-0646 (June 16, 2010) (unpublished order pursuant to Supreme Court Rule 23. After a hearing, the circuit court found that the respondent failed to establish a meritorious claim of ineffective assistance of counsel and that the respondent failed to show that he had not knowingly and intelligently waived a jury trial, and it denied the respondent's motion to vacate the commitment orders. The respondent appealed. We affirm.

¶ 3 In September 1998, the People of the State of Illinois (the State) filed a petition in the circuit court of Madison County and alleged that the respondent was a sexually violent person under the Act. The State asked the court to enter an order committing the respondent to the custody of the Department of Human Services (Department) for control, care, and treatment until he is no longer a sexually violent person. The case was slated for a jury trial on April 9, 2001. When the respondent and his attorney appeared in court on April 9, 2001, the respondent's attorney announced that the respondent was waiving his right to a jury trial and his right to cross-examine the State's witnesses, and that the respondent wanted the case to be decided in a stipulated bench trial.

¶ 4 Following this announcement, the trial court turned to the respondent and asked him a series of questions. The court asked whether the respondent understood what his attorney had said. The respondent answered, "Yes." The court asked whether the respondent wanted to proceed as noted by his attorney. The respondent answered, "Yes." The court asked whether the respondent had talked with his attorney. The respondent stated that he had talked with his attorney that morning and

the previous evening. The court related to the respondent that in a stipulated bench trial, the court would decide the case rather than a jury selected by the parties. The respondent said that he understood that he was waiving a jury and that he was comfortable with the court deciding the case. The court asked the respondent whether he was under the influence of any drug or medications and whether he had any conditions that would affect his ability to understand what was happening. The respondent stated that he was taking an anti-inflammatory medication, but that he was not taking anything that would interfere with his ability to understand what was happening.

¶ 5 The State's Attorney then recounted the testimony and evidence it would have presented at trial. The respondent's attorney stipulated that if the case were tried, the State would have presented that evidence. The respondent's attorney informed the court that the respondent had no evidence to offer at this stage. Based on the stipulated evidence, the court found that the respondent was a sexually violent person. The court committed the respondent to the custody of the Department pending a dispositional hearing. The court explained to the respondent that after considering the evidence to be offered during the dispositional hearing, it would decide whether the respondent would continue to be committed to a secure facility or whether he would be released with conditions. The court again asked the respondent if he understood what had happened. The respondent said, "Yes." The court asked the respondent if he had any questions about what had happened during the day's proceeding. The respondent said, "No." The court asked the respondent if his decisions to waive a jury and to proceed by a stipulated bench trial resulted from any promises, threats, or coercion. The respondent said, "No." After the respondent signed a written waiver of his right to a jury trial and his right to cross-examine witnesses, the proceedings

were adjourned.

¶ 6 The first phase of the dispositional hearing was held on July 17, 2001. At that time, the State called a clinical psychologist, Dr. Paul Heaton, in its case. Dr. Heaton testified that he had evaluated the respondent and had investigated available treatment alternatives. Dr. Heaton stated that the respondent's primary diagnosis was pedophilia and that secondary diagnoses were alcohol dependence and antisocial personality disorder. Dr. Heaton concluded that the respondent was at a high risk to reoffend, that it was substantially probable that the respondent would engage in further acts of sexual violence, and that the respondent would be best served by being treated in a secure facility. The respondent's attorney cross-examined Dr. Heaton about his financial interests in conducting evaluations, his evaluation of the respondent, the methodology used to determine the risk of recidivism, and the bases for his opinions. The respondent's attorney concluded his cross-examination that day but notified the court that he might call Dr. Heaton in the respondent's case.

¶ 7 The dispositional hearing resumed in July 2002. The respondent's attorney called Dr. Heaton. The respondent's attorney produced an evaluation that Dr. Heaton had prepared on an unidentified resident who had been committed to the custody of the Department under the Act. The respondent's attorney highlighted a section called "Risk Factors and Potential Problems" and questioned Dr. Heaton about the extensive similarities in findings and opinions in this section as between the unidentified resident's valuation and the respondent's evaluation. When the State's Attorney inquired as to the relevance of the comparison, the respondent's attorney argued that Dr. Heaton's reports were "canned," and that the "canned" reports were kept on a computer, and they were "spit out" with the only difference being the name of the person being evaluated.

¶ 8 During the hearing, Dr. Larry Davis, a board-certified psychiatrist, was called as a witness in the respondent's case. Dr. Davis had evaluated the respondent. Dr. Davis opined that the respondent was not at a high risk for recidivism and that the risk would not justify detention in a secure facility. During cross-examination, Dr. Davis acknowledged that when he formed his opinion regarding recidivism, he was not aware of reports that the respondent had abused a 10-year-old child and that he had exposed himself to two adolescents.

¶ 9 The respondent was also called as a witness on his own behalf. The respondent acknowledged that he had been convicted of child molestation in Arizona, but took exception to the psychological evaluations that classified it as a sexual offense. The respondent testified that he never touched the genitals of the four-year-old victim. He explained that he was charged with a sexual offense at the insistence of the child's father who was a law enforcement officer and who did not want the respondent residing next door. The respondent stated that the prosecuting attorney in the Arizona case could confirm his account. The respondent also took exception to statements in the psychological evaluations indicating that he did not participate in any sex offender treatment. The respondent stated that he underwent sex offender counseling on a weekly basis at Wood River Hospital and that he had treatment records from the Wood River program that he could produce.

¶ 10 At the close of the evidence, the trial court took the case under submission. On August 2, 2002, the trial court entered an order committing the respondent to the Department for control, care, and treatment until he was no longer a sexually violent person.

¶ 11 In July 2004, the respondent filed a *pro se* motion seeking to discharge his trial attorney on grounds of ineffective assistance of counsel. The respondent alleged,

among other things, that his attorney failed to file various motions drafted by the respondent, while representing that he had filed them; that his attorney urged him to waive a jury while representing that the court would likely release him to home confinement; that his attorney failed to present witnesses requested by the respondent; and that his attorney failed to contact the Arizona prosecutor to inquire about the conviction and to confirm that the child- molestation charge was not based on a sexual offense, while representing that he had. In terms of relief, the respondent asked the court to discharge his attorney of record and to appoint new attorney. The respondent did not ask the court to vacate the orders of commitment and order a new trial.

¶ 12 The court held a hearing on the respondent's motion to discharge his attorney in August 2004. During the hearing, the respondent claimed that his attorney had not obtained records to show that he had attended a sex offender program in Wood River while on supervised release. The respondent also claimed that his attorney had not contacted the prosecutor in Arizona to confirm that the Arizona conviction was not based on a sexual offense. The respondent's attorney, who was present, told the court that he had in fact spoken with officials in Arizona, and the State's Attorney confirmed the respondent's attorney's statement. The respondent's attorney noted that some differences of opinion over strategy had arisen between he and the respondent about the time of the dispositional hearing. The court did not immediately rule on the respondent's motion. A few months later, the respondent's attorney was permitted to withdraw and a different attorney was appointed to represent the respondent.

¶ 13 On June 24, 2008, the respondent filed a *pro se* motion asking the trial court to vacate the commitment orders and grant a new trial on all issues. The respondent asserted that he had not received effective assistance of counsel during the proceedings on April 9, 2001, and during the dispositional proceedings. The

respondent also asserted that he did not make a knowing and intelligent waiver of his right to a jury trial because at or near the time of the April 9, 2001, proceedings he was suffering emotional distress which resulted from the harsh conditions he experienced while confined in the county jail, the recent deaths of three family members, and coercion by his trial attorney. In response, the State asserted, among other things, that the respondent's motion was untimely and should be dismissed. After hearing the arguments of the parties, the trial court found that the respondent's motion to vacate was not timely filed and denied it. On appeal, a panel of this court determined that the motion was timely, and so the dismissal order was reversed and the case was remanded with instructions to the trial court to conduct a sufficient inquiry into the factual basis of the respondent's claims of ineffective assistance of counsel. *In re Detention of Davis*, No. 5-08-0646 (June 16, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 14 On remand, the trial court conducted a hearing on the respondent's motion to vacate. During the hearing, the respondent related some of the grievances that he had with his attorney's representation leading up to and during the proceedings on April 9, 2001, and during the dispositional proceedings. The respondent stated that his attorney would not return phone calls; that his attorney failed to file motions that the respondent had prepared, even though he told the respondent that he would file them; that his attorney failed to contact the prosecutor in Arizona for purposes of confirming that his child-molestation conviction in that state was not based on a sexual offense against a child; that his attorney failed to contact witnesses that respondent wanted to call during the trial; that his attorney failed to adequately cross-examine Dr. Heaton, the psychologist who testified during the dispositional phase of the proceedings about false statements in his written evaluation; and that his attorney lied to him and misled

him by advising him that if he agreed to a stipulated bench trial, he would be released from the secure facility in a few months and placed on monitored home confinement. The respondent also claimed that he did not knowingly and voluntarily agree to a stipulated bench trial. He stated that at that time, he did not know the meaning of the word "stipulated." He also stated that he was diminished physically and emotionally because he had been housed in an overcrowded room at the Madison County jail in the days leading up to the trial, that he had to sleep on a cell floor for the first four days after he arrived at the jail, that he had been required to surrender his arthritis medications and his inhaler and was without those medications for a period of time, and that he learned three or four days prior to the trial date that three members of his family had passed away. The respondent claimed that because of his physical and emotional conditions, he would have agreed to just about anything. During questioning by the State's Attorney, the respondent acknowledged that his attorney had gone over a form setting out his legal rights, and that the trial judge had asked him whether he understood the proceedings both before and after the stipulated bench trial. The respondent acknowledged that he had filed several motions prior to filing his *pro se* motion to vacate, but that in those motions, he never asked the court to set aside the commitment orders. The respondent stated that he did not have access to a law library and that he did not know he could ask for that relief.

¶ 15 At the close of the hearing, the trial court informed the respondent that it would review the transcripts from the stipulated bench trial and subsequent proceedings before issuing a ruling. In its written order issued a few weeks later, the trial court denied the respondent's motion to vacate the commitment orders and grant a new trial. In its order, the court found that the respondent's claims that he was misinformed or misunderstood the proceedings were unpersuasive, that the transcripts indicate that

the respondent was adequately advised and that he neither voiced nor exhibited confusion or coercion, and that the respondent's claims he did not knowingly and intelligently waive a jury trial because of troublesome medical conditions and grief are not convincing or substantial. The court also found that the alleged misstatements in Dr. Heaton's psychological evaluation and the other psychological evaluations were minor errors that did not result in significant errors in the assessment and would not have changed the conclusions by Dr. Heaton or the court. The court also rejected the respondent's claims that he received inadequate assistance of counsel during the commitment proceedings.

¶ 16 On appeal, the respondent contends that he did not receive effective assistance of counsel during the proceedings on April 9, 2001, and during the dispositional proceedings, and that he lacked the ability to make a knowing and intelligent waiver of his right to a jury trial because of circumstances surrounding the entry of the stipulated order of April 9, 2001.

The respondent asserts that he was prejudiced because his trial attorney failed to attack misstatements and inaccuracies in Dr. Heaton's written evaluation; that he was cajoled and manipulated to give up his right to a jury trial because of his trial attorney's false assurances that he would be released from custody within a few months if he waived a jury trial and consented to a stipulated bench trial; and that his trial attorney knew he was suffering emotional distress as a result of the conditions of confinement and the recent deaths of three family members, and nevertheless permitted him to waive his right to a jury trial and his right to confront witnesses.

¶ 17 The test for evaluating counsel's performance in a criminal case is set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Strickland* test was adopted by the Illinois Supreme Court in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246

(1984). Under *Strickland*, the respondent must prove that his counsel's conduct fell below an objective standard of reasonableness and that but for the substandard performance, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 697, *Albanese*, 104 Ill. 2d at 526-27, 473 N.E.2d at 1255-56. The *Strickland* test has been held to apply in involuntary commitment cases under the Sexually Violent Persons Commitment Act. *People v. Rainey*, 325 Ill. App. 3d 573, 586, 758 N.E.2d 492, 503 (2001). Whether counsel provides ineffective assistance is a mixed question of fact and law, and on review we defer to the trial court's findings of fact, but we make an independent judgment about the ultimate legal issue. *People v. Davis*, 353 Ill. App. 3d 790, 794, 819 N.E.2d 1195, 1200 (2004).

¶ 18 Here, the record shows that the trial court conducted an adequate inquiry into the respondent's claims that he was incapable of making a knowing and intelligent waiver of his right to a jury trial, and that he was deprived of effective assistance of counsel, and that the respondent was given a full and fair opportunity to explain and to provide a factual basis for each claim. We note that the same judge has handled matters involving the respondent's commitment as a sexually violent person from the stipulated bench trial and dispositional hearing through the respondent's motion to vacate. The judge was very familiar with the respondent and his demeanor, and the performance of the respondent's attorney throughout the trial and dispositional hearing. The question of whether the respondent's claims of ineffective assistance are spurious is grounded in the specific facts of the case, and so a reviewing court will give deference to the trial court's findings on issues of fact and credibility, and we will not overturn such findings unless they are against the manifest weight of the evidence. *People v. Woodson*, 220 Ill. App. 3d 865, 877, 581 N.E.2d 320, 328 (1991).

¶ 19 The trial court found that the respondent's assertions that he was manipulated

or coerced by his attorney into waiving his right to a jury trial were not supported by the record and unpersuasive. The trial court further found that the respondent's assertions that he was incapable of making a knowing and intelligent waiver of his right to a jury trial because of grief, troublesome medical conditions, or conditions of confinement were not convincing and not supported by the record. The transcript of the proceedings on April 9, 2001, shows the trial court spoke at length with the respondent about his right to a jury trial, the procedures in a stipulated bench trial, and the manner in which the case would proceed, and that the respondent voiced his understanding that he was waiving a jury trial and that the case would be decided by the judge. The transcript shows that the trial court asked the respondent if he had taken any drugs or medications that would interfere with his ability to understand the proceedings, and the respondent said, "No." The court asked if there was anything else that would prevent the respondent from understanding the proceedings, and the respondent said, "No." The court expressly questioned the respondent about whether he had been promised or threatened to waive his right to a jury trial and to proceed to a stipulated bench trial, and the respondent stated, "No." Near the end of the proceedings, the court again asked the respondent if he had any questions about what had occurred, and respondent stated that he did not have any questions. The respondent signed a written jury waiver that day. The respondent did not mention that he was distraught because of the recent death of family members, and he did not complain about medical conditions or harsh conditions at the jail. There is nothing in the record from which to find or infer that the respondent was despondent, depressed or confused or that he was incapable of appreciating the nature of the proceedings or incapable of making decisions. There is nothing in the record from which to find or infer that the respondent was uninformed and confused about the

proceedings, that he was hesitant or acting under duress, or that he was emotionally distraught. It bears repeating that the trial court presided over the stipulated bench trial, the dispositional hearing, and the motion to vacate the commitment orders. The trial court was in a superior position to evaluate the credibility of the respondent's assertions based on its knowledge of the respondent's appearance and demeanor and counsel's actions during the proceedings. The court's findings are supported in the record and are not manifestly erroneous.

¶ 20 The respondent has also claimed that his trial attorney's representation was ineffective because he failed to adequately cross-examine Dr. Heaton about various misstatements and inconsistencies contained in his own written evaluation and in the evaluations of other psychologists referenced in his evaluation. The record shows that the respondent's attorney conducted a rigorous cross-examination of Dr. Heaton, attacked Dr. Heaton's credibility, and suggested that Dr. Heaton generated "canned" reports. The trial court reviewed the alleged misstatements and errors in Dr. Heaton's evaluation and the underlying evaluations, and it expressly found that the alleged inconsistencies were merely trivial misstatements or mistakes in case descriptions that would not result in any significant error in the assessment or alter the conclusions reached by Dr. Heaton or the court. The trial court's findings and conclusions are supported in the record, and are not manifestly erroneous.

¶ 21 In his brief, the respondent also claimed that his trial attorney's representation was ineffective because he failed to contact the prosecutor in Arizona in order to confirm the respondent's statements that the child-molestation conviction in Arizona was not a sexually-based offense. The record shows that this claim was first raised and argued during the 2004 hearing on the respondent's motion to discharge his trial attorney, and that the respondent's trial attorney advised the court that he had spoken

with officials in Arizona, and the State's Attorney confirmed that statement. Moreover, the published opinion of the Arizona appellate court reveals that the respondent was charged with and convicted of molestation of a child based upon evidence that the respondent knowingly touched the genitals of a four-year-old female. See *State v. Davis*, 672 P.2d 480 (Ariz. Ct. App. 1983). So even if the inquiry by the respondent's attorney proved to be inadequate, the respondent cannot establish that he was prejudiced by the alleged failure to conduct an adequate investigation.

¶ 22 In summary, the circuit court conducted an adequate inquiry and determined that the respondent's claims that he was incapable of making a knowing and intelligent waiver of the right to a jury trial due to coercion by counsel, grief, or conditions of confinement and his claims of ineffective assistance of counsel were not persuasive, convincing, or substantial. After reviewing the record, we conclude that the court's factual findings are supported by the record and are not manifestly erroneous, and that the court did not err in denying the respondent's motion to vacate the commitment orders and his request for a new trial.

¶ 23 Accordingly, the judgment of the circuit court is affirmed.

¶ 24 Affirmed.