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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

<i>In re</i> COMMITMENT OF DAVID J. BROWN,)	Appeal from the Circuit Court
)	of Winnebago County.
)	
)	No. 99-MR-245
)	
(The People of the State of Illinois, Petitioner-)	Honorable
Appellee, v. David J. Brown, Respondent-)	Rosemary Collins,
Appellant).)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly found that no probable cause existed to warrant an evidentiary hearing, as there was overwhelming evidence that respondent continued to be a sexually violent person. Respondent did not receive ineffective assistance of counsel. Respondent forfeited any argument regarding the trial court's denial of his motion to participate in a hearing remotely by telephone or video. Affirm.

¶ 2 In 2007, the trial court committed respondent, David J. Brown, to the care, custody, and control of the Department of Human Services (IDHS) as a sexually violent person (SVP) under the Sexually Violent Persons Commitment Act (SVP Act) (see 725 ILCS 207/1 *et seq.* (West 2014)). Respondent has received periodic reexaminations by an expert as required by section 55(a) of the SVP Act (725 ILCS 55(a) (West 2014)). In 2015, the State successfully moved for

a finding that there was no probable cause to believe that respondent is no longer an SVP. Respondent appeals from that order, contending (1) the trial court erred in granting the State's motion; (2) he received ineffective assistance of counsel; and (3) the trial court abused its discretion in denying his request to participate remotely in a hearing. We affirm.

¶ 3

I. BACKGROUND

¶ 4 Pursuant to section 55(a) of the SVP Act, respondent has been reexamined periodically since his initial commitment. Each time, the psychologist opined that respondent remained substantially probable to engage in future acts of sexual violence and that he had not made sufficient progress to be conditionally released. Based on these examinations, the State filed a motion for a finding of no probable cause to believe that respondent was no longer an SVP, and the trial court granted each of these motions.

¶ 5 Pertinent to this appeal is the motion for periodic reexamination and finding of no probable cause filed by the State on September 30, 2015, based on a reexamination report prepared by Dr. Diana Dobier on September 25, 2015. The reexamination report contained the following relevant information. Dr. Dobier diagnosed respondent with pedophilic disorder and other specified personality disorder, with borderline traits. Dr. Dobier noted that respondent had not progressed beyond the second phase of the five-phase treatment program. Although respondent's recent commitment to treatment had been good, he had historically vacillated in his openness to change, and admitted to engaging in a variety of inappropriate sexual encounters while confined in IDHS. Respondent recognized that his stubbornness and desire to be in control remained a barrier to his treatment progress. Additionally, respondent conceded that he had masturbated to deviant fantasies involving "an adult male, with small genitalia, like that of a teenager going through puberty" four times in June 2015. Dr. Dobier scored respondent on two

actuarial risk assessment instruments and determined that he fell in the moderate or high category in terms of risk of reoffense. Dr. Dobier concluded that several risk factors, including respondent's personality disorders and his view that there was little or no risk that he would recidivate, increased respondent's risk of reoffense and that respondent had not made sufficient progress in treatment for it to constitute a protective factor that would lower his risk of reoffense. Dr. Dobier opined that respondent's condition had not changed, that he remained substantially probable to engage in future acts of sexual violence, and that he had not made sufficient progress in treatment to be conditionally released.

¶ 6 The trial court appointed attorney Patrick Braun to represent respondent in connection with the State's motion. Respondent filed a motion to terminate that appointment, claiming that Braun previously had represented him and placed too many restrictions on their communications. Respondent requested that one of his prior appointed attorneys with whom he had a good relationship, be appointed. Respondent also filed a motion requesting that he be allowed to participate in a hearing on his motion to terminate Braun by telephone or video, citing his "tennis elbow," which would make it uncomfortable for him to be transported to court in shackles.

¶ 7 The trial court denied both motions at a hearing in which Braun represented respondent, who was not present. The court noted that Braun held the contract with the court to handle cases like respondent's, that respondent's preferred counsel had resigned from that same contract for health reasons, and that the court had observed Braun "for many, many years" and knew him to be "an excellent lawyer" who would not behave in the manner that respondent had alleged. As to the motion to participate in the hearing remotely, the court stated that it was not technologically feasible.

¶ 8 Braun informed respondent by letter of the denial of his motions and requested a response on the issue of whether respondent intended to follow through on his vow to represent himself rather than accept Braun's representation. Respondent did not respond and refused transport to the scheduled January 2016 probable cause hearing.

¶ 9 Following the probable cause hearing, the trial court granted the State's motion for a finding of no probable cause to believe that respondent is no longer an SVP on January 29, 2016. Respondent timely appeals.

¶ 10 II. ANALYSIS

¶ 11 A. Probable Cause

¶ 12 Respondent first argues that the trial court erred in finding that there was no probable cause to warrant an evidentiary hearing. Illinois law requires that, if a person has been committed under the SVP Act and not discharged, IDHS shall evaluate the individual's mental condition at least once every 12 months after an initial commitment. 725 ILCS 207/55 (West 2014). The purpose of these periodic reexaminations is to determine whether: (1) the person has made sufficient progress in treatment to be conditionally released; and (2) the person's condition has so changed since the most recent periodic examination (or initial commitment, if no reexamination has been made) that he or she is no longer an SVP. 725 ILCS 207/55(a) (West 2014). At the time of reexamination, the committed person receives written notice of the right to petition the court for discharge. 725 ILCS 207/65(b)(1) (West 2014). The notice must contain a waiver of rights. *Id.* If the committed person does not waive the right to petition for discharge, the court conducts a probable-cause hearing to determine if facts exist to warrant a further hearing on the issue of whether the person remains an SVP. *Id.*

¶ 13 In the present case, respondent did not waive the right to petition for discharge or file a petition for discharge. Illinois law specifically provides that, if a person committed under the SVP Act does not file a petition for discharge, yet fails to waive the right to petition, the probable-cause hearing consists only of a review of the reexamination report and the parties' arguments. 725 ILCS 207/65(b)(1) (West 2014). The existence of probable cause is a question of law and becomes a question of fact only if the operative facts are in dispute. *Poris v. Lake Holiday Property Owners Ass'n*, 2013 IL 113907, ¶ 63. Where no testimony is heard and the trial court is simply reviewing documentary evidence, we apply a *de novo* review. *In re commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 49.

¶ 14 Respondent argues that he need meet only a "very low burden" to obtain a full hearing on whether he remains an SVP. See *In re Commitment of Wilcoxon*, 2016 IL App (3d) 140359, ¶ 30. We have recognized that "the plain language of the statute requires a respondent seeking such a hearing to show that facts exist to believe that since the most recent periodic examination the condition of the committed person has so changed that he or she is no longer a sexually violent person." *Kirst*, 2015 IL App (2d) 140532, ¶ 53.

¶ 15 Respondent selects "snippets" from Dr. Dobier's reexamination report showing increased participation in treatment. However, the doctor's ultimate opinion is that respondent's condition had not changed such that he was no longer an SVP. As pointed out by the State, although respondent may be "clear and concise in answering the questions asked" and "receptive and open to feedback," this is not negated by respondent's admission that his treatment progress had been hindered by his stubbornness and desire to be in control. It does not negate that respondent had admitted to engaging in a variety of inappropriate sexual encounters while confined with IDHS, including masturbating to deviant fantasies involving pubescent genitalia of

a prior victim as recently as June 2015. Given the unequivocal opinion of Dr. Dobier that respondent continues to suffer from a mental disorder and remains substantially likely to reoffend, we agree that respondent's measured progress in treatment does not create probable cause to believe that he is no longer an SVP. Accordingly, the trial court properly found that no probable cause existed to warrant an evidentiary hearing, as there was overwhelming evidence that respondent continued to be an SVP.

¶ 16

B. Ineffective Assistance

¶ 17 Respondent next contends that he received ineffective assistance of counsel because his attorney was absent from court on a couple of occasions, failed to contact him before the probable cause hearing, and failed to prepare for the hearing on the probable cause motion. The State responds that respondent's claims are belied by the record and therefore, respondent "cannot establish either that counsel's performance was deficient or that his defense was prejudiced as required to establish ineffective of assistance counsel." See *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *In re Commitment of Bushong*, 351 Ill. App. 3d 807, 817 (2004). We agree with the State.

¶ 18 Specifically, respondent maintains that his counsel was not present in court for hearings on November 20, 2015, and January 29, 2016. The record shows that counsel was present and made arguments on respondent's behalf at both of these hearings.

¶ 19 Respondent claims that there is nothing in the record to show that respondent had any contact with his counsel from the date of counsel's appointment until the time of "the Probable Cause hearing." Again, the record shows that counsel had contacted respondent and told him about the status of the proceedings. Counsel also asked respondent how he would like to proceed, but respondent ignored counsel. Counsel also arranged for respondent to be

transported to two hearings where respondent and counsel would have had the opportunity to meet and discuss the case, but respondent refused to be transported both times.

¶ 20 Respondent also asserts that there is no evidence to show that counsel was prepared or fully knowledgeable for the probable cause hearing. Yet again, the record reflects that counsel was both prepared and knowledgeable. Counsel argued that the doctor's reexamination report "understated" the extent of respondent's treatment progress and "overstated" respondent's risk of reoffending.

¶ 21 Finally, respondent does not demonstrate prejudice. Rather, he merely speculates that counsel could have developed new arguments against a finding of probable cause if they had discussed the report together. Respondent does not state what those arguments would have been or how they would have offset Dr. Dobier's unequivocal conclusion that respondent remained an SVP and was substantially likely to reoffend. Accordingly, respondent fails to establish that his counsel provided ineffective assistance.

¶ 22 C. Right to be Participate Remotely

¶ 23 In the list of issues presented in his appellant's brief for review, respondent includes the issue that the trial court violated his due process rights when it did not allow him to appear at court hearings remotely by video or telephone. However, respondent's argument section of his appellate brief does not include this issue; it is thoroughly undeveloped. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires that an appellant present a fully developed argument with adequate legal and factual support (*Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1040 (2009)), cite to the record for all factual assertions made, and cite to legal authority for the arguments advocated (*Soter v. Christoforacos*, 53 Ill. App. 2d 133, 137 (1964)). Moreover, Rule 341 states that points not argued are waived and shall not be raised in the reply

brief, in oral argument, or on petition for rehearing. Respondent's brief fails to comply with Rule 341(h)(7) and therefore, his argument that the trial court violated his due process rights when it did not allow him to appear at court hearings remotely by video or telephone is forfeited.

¶ 24

III. CONCLUSION

¶ 25 For the preceding reasons, we affirm the judgment of the Circuit Court of Winnebago County.

¶ 26 Affirmed.