SIXTH DIVISION
September 18, 2018

No. 1-17-2235

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

JOHN DOE, JOHN N. DOE, JOHN K. DOE, JOHN K. DOE (2), JOHN X. DOE, JOHN JW. DOE, JOHN D. DOE 19,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	Nos. 2013 L 009901
	)	2014 L 008226
THE ARCHDIOCESE OF CHICAGO and THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,	)	2015 L 010802
	)	2016 L 003069
	)	2016 L 009951
	)	2016 L 011270
Defendants-Appellees,	)	
(Daniel McCormack,	)	Honorable Clare E. McWilliams,
Contemnor-Appellant.)	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court
Presiding Justice Delort and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's order denying McCormack's motion to quash subpoenas is affirmed where his refusal to appear for a discovery deposition is not supported by his statutory right to remain silent, or by the prohibition against the disclosure of confidential communication. However, we vacate the order of contempt against McCormack and the $100 fine since his refusal stemmed from a good-faith effort to seek review of the underlying deposition order rather than from disobedience to the court.

¶ 2 Contemnor-Appellant, Daniel McCormack, appeals the order of the circuit court holding him in indirect civil contempt for failing to appear for a discovery deposition pursuant to the subpoenas of defendants, the Archdiocese of Chicago (Archdiocese) and the Catholic Bishop of Chicago (Catholic Bishop). On appeal, McCormack contends the court should have granted his motion to quash the subpoenas where (1) he has a statutory right to remain silent while he is the subject of a Sexually Violent Persons Commitment Act (SVP Act) petition; and (2) appearing for a deposition would violate the Mental Health and Developmental Disabilities Confidentiality Act (Confidentiality Act), which he argues precludes any disclosure indicating that he is a recipient of mental health services, and prevents any contact with him by those he does not wish to have contact with while in the custody of the Department of Human Services (DHS). For the following reasons, we affirm the court's denial of McCormack's motion to quash the subpoenas, but vacate the order of contempt and the $100 fine.

¶ 3 JURISDICTION

¶ 4 The trial court held McCormack in contempt on August 15, 2017, based on the parties' stipulation, and imposed a $100 fine. Therefore, this court has jurisdiction over the appeal pursuant to Illinois Supreme Court Rule 304(b)(5) (eff. Mar. 8, 2016), allowing appeals of an order finding a person in contempt of court which imposes a monetary penalty.

¶ 5 BACKGROUND

¶ 6 McCormack pled guilty to five counts of aggravated criminal sexual abuse, and upon his release from imprisonment in 2009, the State detained him pursuant to the SVP Act, 725 ILCS 207/1 *et seq*. McCormack is presently in the custody of DHS.

¶ 7 Plaintiffs filed suit alleging that McCormack engaged in acts of sexual abuse against children. They sought damages from defendant the Catholic Bishop based on a theory of

negligent hiring, retention, or supervision. Although five of the cases have been dismissed, case number 2013 L 009901 remains active. In that case, the plaintiff also alleged a claim of battery against McCormack. The Catholic Bishop subpoenaed McCormack for a discovery deposition to take place at the DHS facility in Rushville, Illinois.

¶ 8 McCormack moved to quash the subpoena, based on his rights and privileges under the SVP Act and the Confidentiality Act. The trial court denied the motion, finding that the law requires McCormack to sit for the discovery deposition, but he has a right to assert any privilege he would like. "But he has to sit and assert it. He can't do it from [*sic*] via counsel or through these proceedings." The trial court suggested that plaintiff's counsel and counsel for the Archdiocese submit proposed questions in writing so that "the Court can take a look at it." The court also suggested that counsel for McCormack could "coordinate with [him] to find a place where he appears, whether it's [in] front of a video camera or not, in a secure place that's convenient for him and all of the lawyers can go to him, and the Court can review the questions ahead of time and we [will] go through objections."

¶ 9 The parties subsequently entered a stipulation that McCormack would not appear for the discovery deposition, and the purpose of his failure to comply was to seek appellate review of the order denying his motion to quash pursuant to Rule 304(b)(5). As such, his noncompliance represents a good-faith effort to secure an interpretation of an issue of first impression rather than disrespect for the court. Based on the stipulation, the trial court held McCormack "in direct civil contempt for his failure to comply with the subpoenas," and he was fined $100. McCormack filed this timely appeal.

¶ 10 ANALYSIS

¶ 11 McCormack challenges the propriety of the trial court's order that he appear for a discovery deposition. Ordinarily, discovery orders are not final and appealable orders. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001). However, the propriety of a discovery order may be tested through contempt proceedings, because a finding of contempt is final and appealable. *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 54 (2002). Where a party appeals contempt sanctions imposed for discovery violations, the underlying discovery order is subject to review. *Norskog*, 192 Ill. 2d at 69. Since the discovery order here involves issues of statutory privilege, we apply a *de novo* standard of review. *Reda*, 199 Ill. 2d at 54.

¶ 12 McCormack argues that the trial court's order compelling him to submit to a deposition violates his right to remain silent under the SVP Act. The SVP Act allows the State to extend the detention of criminal defendants who are found to be "sexually violent." 725 ILCS 201/5(f) (West 2016). As the date for release from custody nears, the Attorney General or State's Attorney can file a petition alleging that defendant is a sexually violent person. 725 ILCS 207/15 (West 2016). After the trial, if the State proves the allegations beyond a reasonable doubt, the court enters an order that defendant be committed to the custody of DHS "for control, care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2016). Proceedings under the SVP Act are civil in nature. *People v. Allen*, 107 Ill. 2d 91, 99 (1985). However, "[s]ince the [SVP Act] provides for involuntary confinement, although it be for the treatment of the defendant rather than punishment for a crime," some safeguards applicable to a criminal proceeding also apply to proceedings under the SVP Act. *Id*. McCormack's argument centers on section 25(c)(2) of the statute, which provides that "at any

hearing conducted under this Act, the person who is the subject of the petition has the right *** [t]o remain silent." 725 ILCS 207/25(c)(2) (West 2016).

¶ 13 McCormack invokes this right in response to a subpoena to take his deposition in connection with plaintiffs' negligence action. However, the mere fact that McCormack is in DHS custody pursuant to the SVP Act does not mean he may broadly assert the statute's right to remain silent in order to avoid being deposed in a separate case. The clear and unambiguous language of section 25(c)(2) states that the right to remain silent pertains to "any *hearing* conducted under this Act." (Emphasis added.) 725 ILCS 207/25(c)(2) (West 2016). Thus, courts have found that this statutory right applies only to hearings held pursuant to the SVP Act. See *In re Tiney-Bey*, 302 Ill. App. 3d 396, 401-402 (1999) (right applies only to hearings under the SVP Act); *In re Anders*, 304 Ill. App. 3d 117, 121 (1999) (right to remain silent only applies to hearings held after the filing of a petition under the SVP Act); and *In re Detention of Traynoff*, 358 Ill. App. 3d 430, 442-43 (2005) (right only applies to hearings and does not apply to evaluations conducted by DHS pursuant to the SVP Act).

¶ 14 McCormack acknowledges these holdings, but contends they are wrongly decided and urges this court not to follow their interpretation of the SVP Act. We respectfully decline his request. Our primary objective when construing a statute is to give effect to legislative intent, and the most reliable indicator of that intent is the statutory language itself, given its plain and ordinary meaning. *Blum v. Koster*, 235 Ill. 2d 21, 29 (2009). We agree with *Tiney-Bey*, *Anders*, and *Traynoff* that the legislature's use of the phrase "at any hearing conducted under this Act" was meant to limit the scope of this protection to hearings under the SVP Act. 725 ILCS 207/25(c)(2) (West 2016).

¶ 15 McCormack further argues that "the right to remain silent under the SVP Act would be rendered meaningless if [he] could be compelled to give testimony in any other forum where the answers might be used against him in a future SVP Act proceeding." McCormack likens this right to his fifth amendment right to remain silent, which can be invoked "in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984). He contends that the right to remain silent under the SVP Act should be broadly construed, since any evidence of his mental state, whether criminal or non-criminal in nature, could be used by psychologists to form their opinions in future SVP Act proceedings. He does not, however, cite to any cases holding that a person may refuse to submit themselves to a deposition on fifth amendment grounds because he may be asked questions that might elicit incriminating answers.

¶ 16 McCormack's argument conflates two separate issues: his obligation to appear for a deposition pursuant to a subpoena, and his right to refrain from answering questions that might incriminate him in future proceedings. The right to remain silent does not limit a "general obligation to appear and answer questions truthfully," nor does it "forbid the asking of criminative questions." (Internal quotation marks omitted.) *Id.* at 427-28. "[T]he mere assertion of constitutional privilege does not automatically insulate a party from the usual duty to comply with discovery." *People ex rel. Mathis v. Brown*, 44 Ill. App. 3d 783, 787 (1976). The fifth amendment instead "'speaks of compulsion'" – that no person should be compelled to make incriminating statements against him or herself. *Id.* quoting *United States v. Monia*, 317 U.S. 424,427 (1943). Therefore, a person can be required to submit to a discovery deposition but cannot be compelled to give incriminating answers. An answer is compelled, in violation of the

fifth amendment, where a person is required to answer over a valid claim of his right to remain silent. *Id*. at 427.

¶ 17 Other safeguards are available to protect McCormack's fifth amendment rights during a discovery deposition. The trial court, on its own or upon a motion by any party, may issue a protective order limiting the scope of discovery. *Doe 1 by Doe v. Board of Education of City of Chicago*, 2017 IL App (1st) 150109, ¶ 16. The court may exclude the defendant's compelled testimony from use in subsequent proceedings. *Allen*, 107 Ill. 2d at 103-04. As the trial court below stated, McCormack can assert his fifth amendment right "[b]ut he has to sit [for the deposition] and assert it." The trial court suggested that plaintiffs' counsel and counsel for the Archdiocese submit their written questions for the court and McCormack's counsel to review prior to the deposition in order to "go through objections." We find the court's suggestion to be a reasonable method of recognizing and protecting McCormack's fifth amendment right in this situation. See *Mathis*, 44 Ill. App. 3d at 787 (finding that "the trial court should have scrutinized each disputed question and clearly ruled on the reasonableness of defendant's refusal to answer" in addressing his claims of self-incrimination).

¶ 18 We next consider McCormack's argument that compelling him to appear for a deposition violates the Confidentiality Act because it "would necessarily disclose a confidential communication" that he is a recipient of mental health services, and obligate him to have contact with persons he does not wish to have contact with while in DHS custody. This issue requires us to construe provisions of the Confidentiality Act. The primary goal of statutory construction is to ascertain and give effect to legislative intent, as expressed by the plain language of the statute. *Metzger v. DaRosa*, 209 Ill. 2d 30, 34-35 (2004). The interpretation of a statute is a question of law we review *de novo*. *Id*. at 34.

¶ 19 Section 3(a) of the Confidentiality Act provides that "[a]ll records and communications shall be confidential and shall not be disclosed except as provided in the Act." 740 ILCS 110/3(a) (West 2016). This statute represents "a strong statement by the General Assembly about the importance of keeping mental-health records confidential." *Reda v. Advocate Health Care*, 199 Ill. 2d 47, 60 (2002). Not only does confidentiality motivate someone to seek needed treatment, "by encouraging complete candor between patient and therapist, confidentiality is essential to the treatment process itself." *Id*. "Exceptions to the Act are narrowly crafted" and in each case, "the legislature has been careful to restrict disclosure to that which is necessary to accomplish a particular purpose." *Norskog*, 197 Ill. 2d at 71.

¶ 20 McCormack relies on the statute's definition of "confidential communication," which is "any communication made by a recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health *** services to a recipient. Communication includes information which indicates that a person is a recipient." 740 ILCS 110/2 (West 2016). "Recipient" is "a person who is receiving or has received mental health *** services." *Id*. McCormack argues that requiring him to appear for a deposition at the DHS facility where he resides would "necessarily disclose" confidential communication that he is a recipient of services, which would violate the Confidentiality Act.

¶ 21 The fact that McCormack is in DHS custody certainly provides information that he is or has been a recipient of mental health services. As the Catholic Bishop points out, however, McCormack's detention is a matter of public record and his commitment proceedings have been covered by the media. The Catholic Bishop, the party requesting that McCormack sit for a deposition, knows he is in DHS custody. McCormack's act of sitting for a deposition while in DHS custody reveals no more information than what is publicly known. In this case, prohibiting

plaintiffs and the Catholic Bishop from deposing McCormack does nothing to further the purposes of the Confidentiality Act. We reiterate that McCormack maintains his right to exert all applicable privileges and rights while being deposed.

¶ 22 McCormack also argues that section 2-113(c) of the Mental Health and Developmental Disabilities Code (Code) (405 ILCS 5/2-113(c) (West 2016)), "privileges him from having contact with anyone whom he does not wish to have contact while he remains in the custody of DHS." Section 2-113 addresses inquiries made about a recipient's admission to a mental health facility. Section 2-113(b) states that "[a]ny person may request information from a *** mental health facility relating to whether an adult recipient or minor recipient admitted pursuant to Section 3-501 has been admitted to the facility." 405 ILCS 5/2-113(b) (West 2016). Section 2-113(c) provides that "[t]he facility shall respond to the inquiry within 2 working days. If the recipient is located at the facility, the facility director shall inform the recipient of the request and shall advise the recipient that disclosure of his presence at the facility will not obligate the recipient to have contact with the inquirer." 405 ILCS 5/2-113(c) (West 2016).

¶ 23 We note that this section of the Code generally concerns the involuntary admission to mental health facilities of adults who suffer from mental illness. McCormack, however, is in DHS custody pursuant to the SVP Act which requires "far more specific criteria" to qualify as a sexually violent person. *In re Detention of Samuelson*, 189 Ill. 2d 548, 563 (2000). As a result, there are substantial differences between commitment proceedings under the SVP Act and proceedings under the Code. *Id*. Our legislature recognized this distinction. Section 50 of the SVP Act, titled "Secure facility for sexually violent persons," mandates that the Department of Corrections "shall operate the facility *** and shall provide by rule for the nature of the facility, the level of care to be provided in the facility, and the custody and discipline of persons placed in

the facility." 725 ILCS 207/50(b) (West 2016). Section 50(b) explicitly states that "[t]he facility operated under this Section shall not be subject to the provisions of the Mental Health and Developmental Disabilities Code." *Id*. Our primary goal in statutory construction is to ascertain legislative intent as evidenced by the language of the statute, given its plain and ordinary meaning. *Land v. Board of Education of City of Chicago*, 202 Ill. 2d 414, 421 (2002). According to the plain and clear language of section 50(b), section 2-113 of the Code does not apply here.

¶ 24 Finally, McCormack asks this court to vacate the contempt order and resulting $100 fine. McCormack was found in contempt as a result of a stipulation by the parties that he failed to comply with the court's order so that he could seek appellate review of the underlying order denying his motion to quash. They agreed that his noncompliance represented a good-faith effort to secure an interpretation of an issue of first impression rather than disrespect for the court, and the Catholic Bishop on appeal does not dispute McCormack's argument. Where the parties agree that McCormack's failure to comply with the court's order was done in good faith, vacating the contempt citation and fine is appropriate on appeal. *BorgWarner, Inc. v. Kuhlman Electric Corp.*, 2014 IL App (1st) 131824, ¶ 35. Therefore, although we find the trial court's order denying McCormack's motion to quash proper, we vacate the finding of contempt and the $100 fine.

¶ 25 For the foregoing reasons, we affirm the trial court's July 20, 2017 order denying McCormack's motion to quash subpoenas, and vacate the order finding McCormack in civil contempt as well as imposition of the $100 fine. As this case is scheduled for jury trial on October 1, 2018, we order that the mandate on this order issue *instanter*.

¶ 26 Affirmed in part; vacated in part. Mandate issued *instanter*.