2018 IL App (1st) 172256-U

FOURTH DIVISION
December 13, 2018

Nos. 1-17-2256 & 1-17-2258 (cons.)

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re THE COMMITMENT OF DONALD PODKULSKI (The People of the State of Illinois, Petitioner-Appellee, v. Donald Podkulski, Respondent-Appellant.)	)))))))))	Appeal from the Circuit Court of Cook County No. 07 CR 80013 Honorable Steven G. Watkins, Judge Presiding.
In re THE COMMITMENT OF JOHNNY BUTLER (The People of the State of Illinois, Petitioner-Appellee, v. Johnny Butler, Respondent-Appellant.)	)))))))))	Appeal from the Circuit Court of Cook County No. 08 CR 80007 Honorable Steven G. Watkins, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Affirming orders entered by the circuit court of Cook County pursuant to the Sexually Violent Persons Commitment Act where respondents lacked standing to challenge the orders on appeal.

¶ 2 Respondents Donald Podkulski (Podkulski) and Johnny Butler (Butler) were each

adjudicated a "sexually violent person" (SVP) pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1, *et seq.* (West 2010))[1] and committed to the Illinois Department of Human Services (Department) for institutional care in a secure facility. Each respondent appeals from an order entered by the circuit court of Cook County on August 1, 2017, following a probable cause hearing under section 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2016)). In each of the challenged orders, the circuit court (i) found that there was no probable cause to believe that respondent's condition had so changed since his last annual review that he was no longer an SVP and (ii) ordered that his commitment in a secure treatment facility was continued until further court order. On appeal, each respondent contends that the circuit court erred in holding the probable cause hearing and entering an order where respondent had affirmatively waived his right to petition for discharge under the Act. The State argues that the circuit court had authority to grant its motions for a finding of no probable cause, and, even if the circuit court erred in making its findings, respondents were not prejudiced by such error. For the reasons discussed below, we conclude that respondents lack standing to pursue the instant appeals and thus affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Donald Podkulski

¶ 5 Between 1985 and 1995, Podkulski pleaded guilty to, and was convicted of, eight separate sexually violent offenses against eight minors; he received prison terms ranging from 6 to 25 years. The State filed a petition in 2007 seeking to have him declared an SVP and to have him committed under the Act (725 ILCS 207/40 (West 2008)). The petition alleged that

[1] The Act defines an SVP as "a person who has been convicted of a sexually violent offense, has been adjudicated delinquent for a sexually violent offense, or has been found not guilty of a sexually violent offense by reason of insanity 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." 725 ILCS 205/5(f) (West 2016).

Podkulski had been diagnosed with pedophilia and paraphilia and was dangerous, as his mental disorders made it substantially probable that he would engage in future acts of sexual violence. After finding probable cause to conduct further proceedings, the circuit court adjudicated him an SVP following a bench trial. Following a dispositional hearing, the circuit court ordered Podkulski committed to a secure facility. On appeal, we held that the circuit court did not abuse its discretion in finding that institutional care in a secure facility was the appropriate placement. *In re Commitment of Podkulski*, 2011 IL App (1st) 103649-U, ¶ 19.

¶ 6 Section 55 of the Act requires the Department to submit a written report to the circuit court on the committed person's mental condition at least once every 12 months after his initial commitment for the purpose of determining 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 reexamination that he is no longer an SVP. See 725 ILCS 207/55 (West 2016). At the time of such reexamination, the Secretary of Human Services (Secretary) is required to provide the committed person with a written notice of the person's right to petition the court for discharge over the Secretary's objection; the notice must contain a waiver of rights. See 725 ILCS 207/65(b)(1) (West 2016). Podkulski's appeal relates to the probable cause hearing following his reexamination reports submitted in 2015, 2016, and 2017, described below.

¶ 7 A licensed clinical psychologist met with Podkulski in late 2014. In a report dated January 9, 2015, the examiner recommended that he should continue to be found an SVP under the Act and continue to be committed to a Department facility for secure care and treatment. On March 6, 2015, the State filed a motion for a finding of no probable cause based on the reexamination report, arguing there was no probable cause to warrant an evidentiary hearing on the issue of whether Podkulski was then an SVP in need of treatment on a secure basis.

¶ 8 Podkulski objected to the State's motion. He asserted that the particular pedophilia and paraphilia diagnoses offered by the examiner during the reexamination were essentially a diagnosis of "hebephilia," which he argued was not generally accepted under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and could not be used to justify his continued commitment under the Act. He contended that, absent a *Frye* hearing and a finding that hebephilia is generally accepted within the relevant psychological and psychiatric community, the motion for a finding of no probable cause relied on problematic diagnoses and should be denied.

¶ 9 A licensed clinical psychologist met with Podkulski in late 2015 and in late 2016 as part of the annual reexamination process. In reexamination reports dated January 8, 2016, and January 2, 2017, the examiners recommended that Podkulski should continue to be found an SVP under the Act and continue to be committed to a secure facility. The State filed motions on February 22, 2016, and January 30, 2017, each attaching the most recent reexamination report and requesting a finding that there was no probable cause to warrant an evidentiary hearing.

¶ 10 As of early 2017, the State's three motions seeking findings of no probable cause (2015, 2016, and 2017) had not been ruled upon. Podkulski has represented that these annual review motions remained pending during the litigation on the *Frye* issue, as well as another challenge advanced by him and other committed individuals alleging that certain sex offender treatment was provided to them by unlicensed individuals, in violation of the Sex Offender Evaluation and Treatment Provider Act (225 ILCS 109/1, *et seq.* (West 2014)).

¶ 11 Podkulski signed a waiver of his right to petition for discharge, which was filed with the circuit court on July 6, 2017.[2] During a hearing on July 12, 2017, his counsel asserted that the

[2] During each of the reexaminations which were the subject of the 2015, 2016 and 2017 motions, Podkulski indicated that he was retaining his right to petition for discharge. He subsequently executed a waiver during an attorney-client visit on June 27, 2017. Butler also retained his right to petition for discharge during the reexamination which was the subject of his February 2017 report; he subsequently

matter should be taken off call because he had waived his right to petition for discharge and there was no pending matter requiring resolution under Section 65 of the Act.

¶ 12 The State argued that because the relevant inquiry under the Act is whether "something has changed" since the most recent periodic examination, "[i]f you don't make that finding we don't have a period of time to consider and it could potentially go all the way back to commitment." Podkulski's counsel countered that the statute provides that a hearing on a motion for no probable cause only occurs if the respondent does not affirmatively waive his right to petition for discharge or he files a petition for discharge. The circuit court concluded that Podkulski's waiver did not deprive the circuit court of jurisdiction, as his counsel contended, or preclude the court from making a finding of no probable cause. The circuit court continued the matter to review the reexamination report.

¶ 13 During a hearing on August 1, 2017, regarding both Podkulski and Butler – who are represented by the same counsel – the circuit court concluded that it needed to make a finding to keep respondents in custody, based on its reading of section 65 of the Act. In a written order entered on the same date, the circuit court found that Podkulski waived in writing his right to a discharge hearing and found no probable cause to believe that Podkulski's condition had so changed since his last annual review that he was no longer an SVP, based on a review of the 2017 reexamination report. The circuit court ordered that Podkulski's commitment status in a secure treatment facility be continued until further court order. Podkulski filed a timely appeal, assigned case number 1-17-2256.

¶ 14 Johnny Butler

¶ 15 On June 9, 2008, the State filed a petition pursuant to the Act seeking to have Butler adjudicated an SVP and committed to the care and custody of the Department. Butler was

executed a waiver during an attorney-client visit on July 17, 2017.

previously convicted of three separate sexually violent offenses; he had received a 15-year prison sentence and two 22-year sentences for various convictions, including attempted rape, rape, deviate sexual assault and attempted aggravated criminal sexual assault. The petition alleged that Butler had been evaluated by a clinical psychologist, who diagnosed him with "Paraphilia Not Otherwise Specified, Non-consenting Persons" and "Personality Disorder Not Otherwise Specified, with Antisocial Features." The examiner recommended that Butler be found to be an SVP and also recommended commitment. A jury ultimately found Butler to be an SVP, and the circuit court committed him to a secure facility of the Department. We affirmed the judgment. *In re Commitment of Butler*, 2013 IL App (1st) 113606, ¶ 72.

¶ 16 Butler's instant appeal relates to the probable cause hearing following his reexamination report submitted to the circuit court in 2017. In the report dated February 22, 2017, the examiner concluded, in part, that Butler's condition had not so changed since the most recent periodic examination that he was no longer an SVP. The State filed a motion on February 27, 2017, seeking a finding that there was no probable cause to warrant an evidentiary hearing on the issue of whether Butler was then an SVP in need of treatment on a secure basis, based on the appended reexamination report.

¶ 17 On July 17, 2017, Butler filed a waiver of the right to petition for discharge, which was essentially the same as the waiver executed by Podkulski. On August 1, 2017, the circuit court entered an order finding that Butler waived in writing his right to a discharge hearing, and that based on a review of the February 2017 reexamination report, there was no probable cause to believe that Butler's condition had so changed since his last annual review such that he was no longer an SVP. The circuit court ordered his commitment status in a secure treatment facility continued until further order. Butler filed a timely appeal, assigned case number 1-17-2258.

Although this Court initially denied a motion to consolidate the appeals filed by Podkulski and Butler, we subsequently consolidated the appeals after the completion of briefing. We now consider the consolidated appeals.

¶ 18 ANALYSIS

¶ 19 Podkulski and Butler do not argue that the circuit court erred in granting the State's motions for a finding of no probable cause. Rather, respondents contend that the circuit court should not have held the probable cause hearings in the first place – or entered the orders on August 1, 2017 – because respondents affirmatively waived their right to petition for discharge, thus rendering any issue moot. Respondents ask this Court to vacate the circuit court's findings of no probable cause and judgments thereon.

¶ 20 Section 65(b) of the Act provides that at the time of each reexamination, the committed person receives written notice of the right to petition the circuit court for discharge over the Secretary's objection. 725 ILCS 207/65(b)(1) (West 2016); *In re Commitment of Vance*, 2017 IL App (3d) 160683, ¶ 17. If the committed person does not affirmatively waive that right, the court must set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic examination the committed person's condition has so changed that he is no longer an SVP. 725 ILCS 207/65(b)(1) (West 2016); *Commitment of Vance*, 2017 IL App (3d) 160683, ¶ 17. If a person does not file a petition for discharge, yet fails to waive the right to petition for discharge, 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 2016). The Act does not expressly address what happens if the committed person affirmatively waives his right to petition the court for discharge.

¶ 21 The parties interpret the statutory silence differently. Respondents argue that section

65(b) of the Act does not *permit* the circuit court to conduct a probable cause hearing if the committed person has waived his right to petition for discharge. The State contends that, even if a committed person executes such a waiver, section 65(b) does not *preclude* the circuit court from holding a probable cause hearing and entering an order thereon. The State further contends that, even if the hearing was erroneously held, neither respondent can claim any prejudice because he "was afforded too much process." According to the State, a probable cause hearing "can only work to his potential benefit: if the trial court finds probable cause to believe that respondent is no longer an SVP, respondent gets the benefit of a hearing before a jury where the [State] must prove by clear and convincing evidence that respondent remains an SVP." See 725 ILCS 207/65(b)(2) (West 2016). Both respondents and the State frame the issue on appeal as a purely legal issue, subject to *de novo* review. See *In re Commitment of Rendon*, 2017 IL App (1st) 153201, ¶ 19 (providing that the question of whether there is probable cause to believe a respondent is no longer an SVP so as to warrant a full evidentiary hearing is subject to *de novo* review). See also *In re Commitment of Fields*, 2014 IL 115542, ¶ 32 (noting that the construction of a statute is a question of law which is reviewed *de novo*).

¶ 22 Based on our review of the record and arguments, however, we are concerned with a threshold issue: respondents' standing to pursue the instant appeals. As discussed below, we conclude that respondents lack standing to challenge the circuit court orders at this time.

¶ 23 The purpose of the standing doctrine is to ensure that courts are deciding actual, specific controversies, and not moot issues or abstract questions. *In re M.I.*, 2013 IL 113776, ¶ 32. The doctrine precludes courts from rendering advisory opinions, ruling on mere abstract propositions of law, or giving legal advice as to future events. *In re C.C.*, 2015 IL App (1st) 142306, ¶ 13. Only parties with a real interest in the outcome of the controversy may raise issues. *Carr v.*

Koch, 2012 IL 113414, ¶ 28. See *Martini v. Netsch*, 272 Ill. App. 3d 693, 695 (1995) (stating that the "doctrine of standing, along with the doctrines of mootness, ripeness, and justiciability, is one of the methods by which courts preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision"). Standing must be defined on a case-by-case basis. *M.I.*, 2013 IL 113776, ¶ 32.

¶ 24 "Standing requires some injury-in-fact to a legally cognizable interest." *Maglio v. Advocate Health & Hospitals Corp.*, 2015 IL App (2d) 140782, ¶ 22. The claimed injury must be: (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be redressed or prevented by the grant of the requested relief. *Carr*, 2012 IL 113414, ¶ 28. As respondents have not sustained, or are not in immediate danger of sustaining, a direct injury, they do not have standing to pursue the challenges raised in the instant appeals. See *In re A.C.*, 2016 IL App (1st) 153047, ¶ 24.

¶ 25 We find *C.C.*, 2015 IL App (1st) 142306, to be instructive. In *C.C.*, the respondent was convicted of first degree murder for a shooting he committed at age 14; he was sentenced to imprisonment in the juvenile justice department until age 21 and also given a mandatory minimum 45-year adult criminal sentence. *Id.* ¶ 1. Under the extended jurisdiction juvenile statute, the adult portion of his sentence was stayed, and if respondent completed his juvenile sentence without committing a new offense or violating the conditions of his juvenile sentence, the adult sentence would be vacated upon his completion of the juvenile sentence. *Id.* The respondent appealed, arguing that his 45-year mandatory minimum adult-stayed sentence violated the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 2. On appeal, the State challenged the respondent's standing. *Id.* ¶ 12. The appellate court held that "because the stay on his adult sentence has not

been revoked and it is currently in no jeopardy of being revoked, respondent lacks standing *at this time* to challenge the severity of his sentence." (Emphasis in original.) *Id.* ¶ 24.

¶ 26 As in *C.C.*, the instant appeals are based on speculation regarding matters that have not yet affected respondents and may never affect them. Respondents contend that the State urged the circuit court that "a finding of no probable cause is necessary to establish that the facts of the preceding year do not rise to the level of probable cause for discharge." According to respondents, "[i]nterpreting the statute this way, the State would be able to preclude a Respondent from relying upon historical facts in future discharge proceedings by pointing to the prior findings and judgments as evidence that those historical facts are not sufficient to establish probable cause." Respondents frame the "essential issue" in these appeals as whether the annual reexamination proceedings under the Act may be used by the State as a "sword to impair a committed person from obtaining release in the future."

¶ 27 Respondents' conjecture regarding the potential effect of the circuit court's rulings on hypothetical future proceedings is insufficient to confer standing herein. We cannot predict whether future reexamination reports prepared by examiners will recommend that respondents continue to be found to be SVPs in need of secure care. We also cannot know what arguments will be advanced in any future probable cause hearings. Irrespective of the State's contentions below, we stated in *Commitment of Rendon*, 2017 IL App (1st) 153201, ¶ 23, that "review of a reexamination report does not preclude consideration of a respondent's full mental health and sexual history or relevant historical facts."

¶ 28 If either respondent sustains a distinct and palpable injury due to a circuit court ruling in a future proceeding which is inconsistent with the Act or related jurisprudence, he may have standing to challenge such ruling. *Cf., Maglio*, 2015 IL App (2d) 140782, ¶ 24 (finding that the

adverse consequences to the appellants were purely speculative where computers stolen from a medical administrative building contained their patient information but no identity theft had actually occurred); *Illinois Ass'n of Realtors v. Stermer*, 2014 IL App (4th) 130079, ¶ 38 (concluding that a generalized failure to regulate the real estate profession was not a distinct and palpable injury sufficient to confer standing). At this time, however, respondents' purported injuries are speculative and remote, and their challenges on appeal are premature. Compare *A.C.*, 2016 IL App (1st) 153047, ¶ 24 (finding that the respondent lacked standing to challenge the penalty provision of the Sex Offender Registration Act (SORA) where there was no allegation that respondent failed to comply with the SORA registration requirements and therefore he was not suffering or in immediate danger of suffering a direct injury as a result of enforcement of the provision), and *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 33 (finding that the defendant had standing to raise constitutional challenge to various restrictions applicable to sex offenders where "there is no contingency that needs to occur before these laws apply to defendant: he will be subject to them, for the rest of his life, no matter what occurs").

¶ 29 This decision should not be construed as limiting respondents' ability to raise future challenges where appropriate, *i.e.*, we express no opinion concerning the merits of their arguments regarding the construction of section 65(b). See *e.g.*, *C.C.*, 2015 IL App (1st) 142306, ¶ 24. We simply hold that respondents currently lack standing to raise the challenges asserted in the instant appeals.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, we affirm the judgments of the circuit court.

¶ 32 Appeal No. 1-17-2256: Affirmed.

¶ 33 Appeal No. 1-17-2258: Affirmed.