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2018 IL App (3d) 170543-U

Order filed August 14, 2018

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

2018

In re DETENTION OF JAMES WINDHAM	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
(The People of the State of Illinois,	)	Rock Island County, Illinois.
	)	
Petitioner-Appellee,	)	Appeal No. 3-17-0543
	)	Circuit No. 00-MR-138
v.	)	
	)	
James Windham,	)	The Honorable
	)	Frank R. Fuhr
Respondent-Appellant).	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Schmidt and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court properly found no probable cause to warrant an evidentiary hearing to determine if respondent was still a sexually violent person (SVP) where he failed to show circumstances changed so that he is no longer substantially likely to commit acts of sexual violence.

¶ 2 Respondent James Windham was found by a jury to be an SVP in 2000. In 2016, he filed a petition for discharge from custody or supervision. The State filed a motion asserting that there was no probable cause to warrant an evidentiary hearing to determine if respondent was still an

SVP. The trial court granted the State’s motion, finding no probable cause to proceed to an evidentiary hearing on respondent’s request to be discharged. We affirm.

¶ 3

### FACTS

¶ 4

On May 1, 2000, the State filed a petition alleging that respondent was an SVP, pursuant to the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2016)). Following a trial, the jury found respondent to be an SVP. The court committed respondent to the Department of Human Services (DHS). Respondent appealed his adjudication and commitment. We affirmed his adjudication and remanded for a dispositional hearing on his commitment. Following a dispositional hearing, the court committed respondent to secure care in the custody of DHS at a treatment and detention facility (facility).

¶ 5

In 2009, the court granted respondent conditional release. Thereafter, respondent’s conditional release was revoked and reinstated several times. In February 2015, respondent was placed on conditional release for the fourth time.

¶ 6

In June 2016, respondent filed a petition for discharge of custody or supervision without the Secretary’s Approval. The court appointed Dr. Luis Rosell to evaluate respondent. In April 2017, the State filed a motion for a finding that no probable cause existed to warrant an evidentiary hearing on respondent’s petition for discharge. In June 2017, the State filed its seventh petition to revoke respondent’s conditional release. In July 2017, the court heard arguments from respondent and the State as to whether there was probable cause to proceed to a full evidentiary hearing on respondent’s petition for discharge. The parties also presented the court with reports prepared by Dr. Richard Travis and Dr. Luis Rosell, who examined respondent.

¶ 7 In his report, Dr. Travis reviewed respondent's criminal history. In 1979, respondent forcibly raped a female acquaintance and cut her throat with a butcher knife. He pled guilty to rape and was sentenced to eight years in prison. He was paroled in September 1984. In July 1985, while still on parole, respondent locked his girlfriend in his residence, ripped off her clothes and threatened to rape and kill her. He pled guilty to unlawful restraint and was sentenced to three years in prison. In 1987, respondent was charged with and convicted of aggravated assault and served four months in jail. In 1996, respondent and another male forcibly removed the clothing of a woman, restrained her and raped her separately and simultaneously. Respondent pled guilty to aggravated sexual abuse and was sentenced to eight years in prison.

¶ 8 Dr. Travis also reviewed respondent's SVP history. In May 2000, respondent was admitted to a DHS facility. In December 2009, he was transferred to the community on conditional release. In May 2010, his conditional release was revoked, and he was required to return to the facility after he repeatedly solicited a neighbor for sex. Respondent was next conditionally released from the facility in September 2010, but was required to return in June 2011, after he failed to report a loss of employment. Respondent was released from the facility in November 2011, but his conditional release was revoked in October 2013, after a woman reported to police that he made sexual advances on her. Respondent remained in the facility until February 2015, when he was again placed on conditional release.

¶ 9 Dr. Travis reviewed respondent's behavior and treatment since his most recent conditional release. In February 2015, respondent participated in therapy sessions with Rhonda Meacham. In July 2015, Meacham reported that respondent demonstrated a lack of honesty and transparency. Beginning in September 2015, respondent began reporting to Meacham that he believed conditional release agents were entering his home when he was not present and

“messing with” his personal property. In October 2015, respondent’s conditional release agent reported that respondent was aggressive toward him, yelling and cursing at him, when he told him he could not have R-rated movies in his home. In November 2015, respondent again expressed his belief that conditional release agents were entering his apartment and “changing things.” In February 2016, respondent failed to complete his documentation or fantasy logs, as required. In March 2016, respondent’s family members acknowledged that respondent told them that conditional release agents were entering his apartment to harm him. In May 2016, respondent exhibited hostility in a group therapy session. In August 2016, respondent was belligerent with his conditional release agent. In January 2017, respondent reported to his psychiatrist that conditional release agents were listening in on his telephone conversations.

¶ 10 Dr. Travis determined that, pursuant to the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, DSM-5 (2013), respondent met the criteria for the following disorders: (1) other specified paraphilic disorder, sexual coercion of nonconsenting females, nonexclusive type, (2) antisocial personality disorder, (3) stimulant use disorder, cocaine, in sustained remission, and (4) alcohol use disorder, in sustained remission.

¶ 11 Dr. Travis addressed the issue of risk, noting that “pure actuarial measures designed to predict sexual recidivism had the strongest predictive accuracy.” Dr. Travis used two actuarial instruments to assess respondent’s risk, the Static-99R and Static-2002R. Respondent scored a six on the Static-99, which placed him in the “Well Above Average Risk” category, the highest of five risk categories. Respondent scored a seven on the Static-2002R, which placed him in the “Well Above Average Risk” category, the highest of 5 risk categories. Dr. Travis noted that a “factor that can lower one’s risk of sexual re-offense is age” and considered respondent’s age of 56 but concluded that no additional age-based risk reduction was warranted because the Static-

99R and Static-2002R took his age into account and allotted an age-based risk reduction. Despite the age-based reduction, respondent scored in the highest risk category on both of those instruments.

¶ 12 Dr. Travis concluded:

“Due to his mental disorders and assessed risk, Mr. Windham remains substantially probable to engage in future acts of sexual violence. His condition *has not* changed since the most recent reexamination such that he is no longer a sexually violent person. \*\*\* Mr. Windham’s mental disorders and risk factors support that if he were discharged into the community without the strict monitoring of Conditional Release, he would be substantially probable to engage in acts of future sexual violence.” (Emphasis in original.)

¶ 13 In his report, Dr. Rosell disagreed with Dr. Travis’ diagnosis of “other specified paraphilic disorder, sexual coercion of nonconsenting females, nonexclusive type,” stating: “The issue of whether Other Paraphilic Disorder is a legitimate diagnosis is controversial in the field and is debated often in court, professional conferences and journals.” He further stated: “[F]rom a diagnostic standpoint rape behavior has been considered by the DSM for decades and rejected as a mental disorder.” Dr. Rosell agreed that respondent met the criteria for antisocial personality disorder, alcohol use disorder and cocaine use disorder.

¶ 14 Dr. Rosell assessed respondent’s risk to reoffend by using actuarial instruments, including the Static-99R, Static-2002R, and MATS-1. On the Static-99R, respondent scored a six, placing him “in the high range relative to other sex offenders.” He scored a seven on the Static-2002R, placing him in the “well above average” range. Respondent’s score of four on MATS-1 placed respondent in the “high” risk to reoffend category.

¶ 15 Dr. Rosell concluded: “[B]ased on my record review, interview, actuarial analysis and participation in treatment I opine to a reasonable degree of psychological certainty that Mr. Windham should be discharged from his current conditional release status as he no longer meets criteria as a sexually violent person.”

¶ 16 Immediately after the parties presented their arguments on respondent’s discharge petition, the court held a hearing on the State’s petition to revoke conditional release. Paul Valdez testified that he became respondent’s conditional release agent in February 2017. Soon thereafter, respondent began complaining to him that agents were entering his apartment and poisoning his coffee, dumping out his coffee grounds, killing his plants and “fucking with him.” Respondent also claimed that a couch given to him by another agent was “infested with insects.” Orkin inspected the couch and found no insects.

¶ 17 In May 2017, respondent underwent a medical procedure and was prescribed medication. A few days later, respondent called Valdez and claimed that an agent had diluted his medication. On May 27, 2017, respondent attended an appointment with his psychiatrist to discuss the need for medication to address his delusional thoughts. Respondent refused medication and asked to be given the opportunity to use cognitive behavioral techniques to address his mental health issues.

¶ 18 On June 23, 2017, respondent requested transportation to Walmart. While he was there, he asked Valdez for permission to purchase and be reimbursed for household items. When Valdez denied the request, respondent became argumentative and confrontational. On the same day, after taking out his garbage, respondent, without permission, walked across an alley and into an adjacent parking lot where Valdez was parked and rudely demanded quarters for his laundry.

¶ 19 Rhonda Meacham testified that she has provided treatment, including cognitive behavioral techniques, to respondent since 2015. In January 2017, respondent began to experience a decline in his mental health. He became delusional, believing insects were infesting his furniture and that agents were entering his home and tampering with his medication. He also became increasingly hostile. Respondent was referred to a psychiatrist, who recommended that he take medication to treat his delusions. He refused medication and said he would commit to cognitive behavioral techniques to address his delusions. Respondent failed to use those techniques until “very recently,” according to Meacham.

¶ 20 Respondent testified that he met with a psychiatrist in early 2017, who recommended that he take Abilify. He refused because he was worried about its side effects and concerned about taking too many medications.

¶ 21 Following the hearing, the trial court entered an order granting the State’s motion to revoke conditional release but staying the revocation pending respondent’s compliance with the recommended medication. Thereafter, the trial court entered an order granting the State’s motion for a finding of no probable cause to proceed to a full evidentiary hearing on respondent’s request to be discharged. The court rejected Dr. Rosell’s conclusion that respondent was no longer a sexually violent person, finding “no evidence in his report to support this conclusion.” The court also disagreed with Rosell’s opinion that respondent’s diagnosis is not recognized in the scientific community, citing Illinois case law. Finally, the court noted that “[t]he tests referred to in Dr. Rosell’s report used to assess risk continued to conclude that Mr. Windham is at a high risk to re-offend if discharged from conditional release.”

¶ 22 ANALYSIS

¶ 23 The Act allows the State to seek a civil commitment of an individual who has been convicted of a sexually violent offense. *In re Commitment of Wilcoxon*, 2016 IL App (3d) 140359, ¶ 31. The Act defines an SVP as “a person who has been convicted of a sexually violent offense \*\*\* 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 207/5(f) (West 2016). If the State proves beyond a reasonable doubt that an individual is an SVP, he may be indefinitely committed “until such time as the person is no longer a sexually violent person.” 725 ILCS 207/35(f), 40(a) (West 2016).

¶ 24 Following a commitment under the Act, DHS is responsible for evaluating the individual's mental condition within 6 months of the initial commitment and again thereafter at least every 12 months. 725 ILCS 207/55(a) (West 2016). The purpose of these examinations is to determine if the committed individual has made sufficient progress to be conditionally released or discharged. *Id.*

¶ 25 A committed individual has three mechanisms under which he may seek a discharge: (1) the Secretary of Human Services (Secretary) determines that the individual is no longer an SVP and authorizes the committed individual to petition the court for discharge (725 ILCS 207/65(a)(1) (West 2016)); (2) the committed individual undergoes one of the periodic examinations and does not affirmatively waive the right to petition the court for discharge (725 ILCS 207/65(b)(1) (West 2016)); and (3) the committed individual petitions for discharge at a time other than the periodic examination and without approval of the Secretary (725 ILCS 207/65(b)(1) (West 2016)).

¶ 26 In the instant case, respondent utilized the third mechanism to seek a discharge from DHS custody by filing a petition for discharge without the Secretary’s approval. Thereafter, the



court “set a probable cause hearing to determine whether facts exist to believe that \*\*\* the condition of the committed person has so changed that he or she is no longer a sexually violent person.” 725 ILCS 207/65(b)(1) (West 2016).

¶ 27 At the probable cause hearing, the trial court's role is “to determine whether the movant has established a *plausible account* on each of the required elements to assure the court that there is a substantial basis for the petition.” (Emphasis in original and internal quotation marks omitted.) *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 62 (quoting *In re Detention of Hardin*, 238 Ill. 2d 33, 48 (2010)). “If the court determines at the probable cause hearing that probable cause exists to believe that \*\*\* the condition of the committed person has so changed that he or she is no longer a sexually violent person, then the court shall set a hearing on the issue.” 725 ILCS 207/65(b)(2) (West 2016).

¶ 28 “For a defendant to receive an evidentiary hearing under section 65(b)(2) of the Act, the court must find a plausible account exists that the respondent is ‘no longer a sexually violent person.’ ” *In re Commitment of Vance*, 2017 IL App (3d) 160683, ¶ 18 (quoting 725 ILCS 207/65(b)(2) (West 2016)). A respondent is only entitled to an evidentiary hearing if plausible evidence shows that he (1) no longer suffers from a mental disorder, or (2) is no longer dangerous to others because his mental disorder no longer creates a substantial probability he will engage in acts of sexual violence. *Stanbridge*, 2012 IL 112337, ¶ 68.

¶ 29 The respondent carries the burden of producing plausible evidence at the probable cause hearing. *In re Detention of Lieberman*, 2017 IL App (1st) 160962, ¶ 29. We review *de novo* whether respondent established probable cause to warrant an evidentiary hearing. *Id.*

¶ 30 Here, the evidence before the court at the probable cause hearing consisted of the reports of Dr. Travis and Dr. Rosell. In his report, Dr. Travis concluded that respondent “remains

substantially probable to engage in acts of future sexual violence” because of his mental disorders and his assessed risk shown on the actuarial instruments. Dr. Rosell, on the other hand, concluded that respondent “no longer meets criteria as a sexually violent person” because “other specified paraphilic disorder” is not a valid mental disorder. This may appear, at first blush, to be a battle of competing experts. However, Dr. Rosell’s opinion is irrelevant to the issue of whether respondent is still an SVP because he essentially agreed with Dr. Travis’ opinion that respondent remains substantially likely to reoffend if released into the community. Without more, respondent failed to present a plausible account that he was “no longer a sexually violent person.” See *Stanbridge*, 2012 IL 112337, ¶ 81 (quoting 725 ILCS 207/65(b)(2) (West 2008)).

¶ 31 The Illinois Supreme Court addressed a scenario nearly identical to this one in *Stanbridge*. See *id.* at ¶¶ 78-82. In that case, the court-appointed expert, Dr. Ostrov, testified that the respondent suffered from paraphilia NOS-nonconsent. *Id.* ¶ 38.<sup>1</sup> Respondent’s expert, Dr. Schmidt disagreed with Dr. Ostrov’s diagnosis of paraphilia NOS-nonconsent, finding that it was not a valid mental disorder. *Stanbridge*, ¶ 27. The supreme court ruled that Dr. Schmidt’s opinion was irrelevant at respondent’s discharge proceeding because it was “not directed at the statutory relevant criteria as to whether [the respondent] is no longer a sexually violent person.” *Id.* ¶¶ 78-79.

¶ 32 The court acknowledged that there are conflicting views on the validity of a paraphilia NOS-nonconsent diagnosis but found that Dr. Schmidt’s opinion regarding the validity of the disorder “was insufficient to establish probable cause to believe that [the respondent] is no longer sexually violent” because it was based on historical facts, professional knowledge and research already debated by experts. *Id.* ¶¶ 78, 80. The court explained that “the proper issue before the

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<sup>1</sup> Paraphilia NOS is now known as “other specified paraphilic disorder.” *In re Detention of Hayes*, 2015 IL App (1st) 142424, ¶ 23.

court” was “whether there was a plausible account of changed circumstances such that [the respondent] no longer has the mental disorder” for which he was adjudicated an SVP. *Id.* ¶ 79. The court stated: “Dr. Schmidt’s repeated explanation of an acknowledged 20-year-long debate in the medical community is not evidence of changed circumstances.” *Id.* Because Dr. Schmidt did not opine that the respondent would no longer be a danger to the community, the respondent failed to present a plausible account that he was “no longer a sexually violent person” to warrant an evidentiary hearing. *Id.* ¶ 81.

¶ 33 In this case, the only evidence before the court supporting respondent’s petition for discharge was Dr. Rosell’s report, wherein he noted the ongoing debate about the validity of “other specified paraphilic disorder” and opined that it was not a valid diagnosis. This opinion was not relevant to the issue of whether circumstances had changed such that respondent was no longer substantially likely to reoffend. See *id.* ¶ 79. Dr. Rosell offered no opinion that respondent was no longer substantially likely to reoffend, and the results of the tests he administered to respondent showed otherwise, placing him in the “well above average” and “high” risk categories. Because nothing in Dr. Rosell’s report would support a plausible account that respondent was substantially unlikely to reoffend, the trial court properly granted the State’s motion to find no probable cause. See *id.* ¶ 81.

¶ 34 Respondent contends that we should rely on our recent decision of *People v. Wilcoxen*, 2016 IL App (3d) 140359, to find that he established probable cause to proceed to an evidentiary hearing. *Wilcoxen* is distinguishable. In *Wilcoxen*, we determined that the respondent presented sufficient evidence to proceed to an evidentiary hearing because (1) he meaningfully engaged in and successfully completed treatment, (2) he was “a model resident,” (3) he was 61 years old, and (4) objective testing results placed him in the moderate to low risk category.

¶ 35 By contrast, respondent in this case has refused appropriate treatment and therapy, declining medication to treat his delusions and refusing to participate in CBT as an alternative to medication. He has demonstrated hostility and dishonesty during therapy sessions and refused to complete therapy tasks, including required documentation and fantasy logs. Furthermore, respondent has been far from “a model resident.” While he has been placed on conditional discharge several times, his conditional discharge has been repeatedly revoked for misconduct. He has also demonstrated hostility and agitation toward his conditional release agent on multiple occasions. Finally, respondent’s scores of six on the Static-99R and seven on the Static-2002R show that he is much more likely to reoffend than the respondent in *Wilcoxon*, who scored a three or four on the Static-99R and a two on the Static-2002R.

¶ 36 Respondent argues that like the respondent in *Wilcoxon*, who was 61 years old, his age of 56 makes him less likely to reoffend. We are not persuaded. Dr. Travis noted that respondent’s age was accounted for in the actuarial instruments. Despite age-based reductions, respondent still scored in the highest risk category.

¶ 37 Based on the evidence presented, we cannot find that respondent demonstrated probable cause that there has been a change in circumstances such that he is no longer a sexually violent person. We affirm the trial court’s decision.

¶ 38 CONCLUSION

¶ 39 The judgment of the circuit court of Rock Island County is affirmed.

¶ 40 Affirmed.