2018 IL App (4th) 170576-U

NO. 4-17-0576

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 11, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Scott County
JAMES G. HOWE,	)	No. 12CF9
Defendant-Appellant.	)	
	)	Honorable
	)	John P. Schmidt,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not abuse its discretion in (1) quashing defendant's subpoena *duces tecum* issued in a proceeding to revoke the conditional release of a sexually dangerous person, (2) denying his motion to continue the hearing, and (3) finding he failed to comply with treatment and possessed an Internet-capable device in violation of the terms of his conditional release.

¶ 2 In June 2017, the State filed a petition to revoke the conditional release of defendant, James G. Howe. Defendant filed a subpoena *duces tecum*, which was quashed, and a motion for a continuance, which was denied. Defendant proceeded to a hearing on the petition to revoke his conditional release, and the trial court found defendant in violation of his conditional release. The court revoked defendant's conditional release and remanded him to the custody of the Illinois Department of Corrections.

¶ 3 On appeal, defendant argues the trial court erred in (1) quashing his subpoena *duces tecum*, (2) denying his motion for a continuance, and (3) finding he failed to comply with treatment and possessed an Internet-capable device. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2012, defendant was charged by the State with aggravated criminal sexual assault, a Class X felony, and domestic battery, a Class 4 felony, due to a prior conviction for violation of an order of protection. In October 2012, the State filed a petition to proceed and for evaluations under the Sexually Dangerous Persons Act (725 ILCS 205/0.01 to 12 (West 2012)). In the petition, the State alleged defendant was suffering from a mental disorder that was coupled with criminal propensities to commit sexual offenses. It further alleged defendant had demonstrated propensities toward acts of sexual assault or sexual molestation of children and that he was a sexually dangerous person. The State contended defendant was a sexually dangerous person under the Sexually Dangerous Persons Act and sought evaluations to make that determination. The court ordered the evaluations in October 2012.

¶ 6 Based upon the written psychiatric evaluations submitted to the court, the State petitioned for defendant to be declared a sexually dangerous person in January 2013. Subsequent to a bench trial in October 2013, the court found defendant to be a sexually dangerous person, and he was committed to the custody of the Illinois Department of Corrections for treatment. On direct appeal, the trial court's finding that defendant was a sexually dangerous person was upheld in November 2014. See *People v. Howe*, 2014 IL App (4th) 140054, 21 N.E.3d 775.

¶ 7 Defendant filed a *pro se* petition for discharge or conditional release (recovery petition) pursuant to sections 9 and 10 of the Sexually Dangerous Persons Act (725 ILCS 205/9, 10 (West 2014)) in January 2015. The trial court appointed counsel to represent defendant in his

recovery petition and the matter proceeded to a jury trial in January 2016, wherein the jury returned a verdict finding defendant "appears to be no longer sexually dangerous" and was subject to conditional release. As a recovery proceeding under the Sexually Dangerous Persons Act is civil in nature, the State filed a motion for judgment notwithstanding the verdict, which was denied, and defendant was conditionally released in February 2016 pursuant to an order for conditional release. The order contained 36 conditions for defendant to follow in order to avoid recommitment. Attached to the order was a document entitled "Certification of Compliance with Conditions of Release," containing each of the 36 paragraphs individually initialed and signed by defendant, acknowledging his awareness of each condition and agreement to comply therewith.

¶ 8 In June 2016, four months after defendant's release, the State filed a petition to revoke his conditional release, alleging a number of violations. After a hearing in February 2017, the trial court denied the petition, finding the State failed to prove the allegations by a preponderance of the evidence. Defendant was returned to his conditional release under the same terms as previously set forth.

¶ 9 In June 2017, the State filed a petition to revoke defendant's conditional release, alleging defendant (1) failed to complete sex-offender treatment in that he was unsuccessfully discharged; (2) failed to attend a polygraph examination on May 16, 2017; (3) traveled to his parents' and grandparents' residence on 38 occasions without authorization; and (4) entered a geographical location he was forbidden to enter. On June 14, 2017, defendant filed a subpoena *duces tecum*, which requested "[a]ny and all records relating to the supervision of [defendant] from February 22, 2017, to present, and any and all correspondence (including email) between [the Corrections Senior Parole Agent] and [defendant's therapist] relating in any way to [defendant] from February 22, 2017, to present." Eight days after the original petition, the State

filed an amended petition to revoke defendant's conditional release, adding allegations that defendant (1) obtained a cell phone not reported to his parole agent, (2) accessed the Internet without authorization, (3) made many inappropriate sexual comments to female coworkers while on conditional release, and (4) refused to take a drug test on June 15, 2017. The day after filing the amended petition, a supplement to the amended petition to revoke defendant's conditional release was filed, which added allegations stating defendant began a dating relationship without prior written notice to his parole agent and was verbally, mentally, physically, and sexually abusive. Prior to the hearing on the petition to revoke his conditional release, the trial court heard arguments on the subpoena *duces tecum* and the State's subsequent motion to quash the subpoena. The court granted the motion to quash, stating, "we're here on a petition to revoke conditional release. It's been clearly laid out in the petition what the alleged violations are. This subpoena would—these records, any and all, is way over broad and quite frankly as the case law says a fishing expedition." After the hearing on the amended petition, the court found defendant failed to complete treatment, had possession of a cell phone, entered a forbidden geographical area, and refused a drug test. The court revoked the conditional release and returned defendant to the custody of the Illinois Department of Corrections.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Subpoena *Duces Tecum*

¶ 13 Defendant argues the trial court erred in quashing his subpoena *duces tecum*, claiming defendants in a conditional release revocation hearing pursuant to the Sexually Dangerous Persons Act are allowed to file a subpoena *duces tecum* in lieu of formal discovery.

¶ 14 Despite defendant's contentions, the trial court made no finding on the applicability of a subpoena *duces tecum* but instead stated the subpoena was "way over broad and quite frankly as case law says a fishing expedition." Defendant unconvincingly argues there is nothing to bar the court from granting a subpoena *duces tecum*, but that issue is not before us. As "Illinois judges have no authority to issue advisory opinions" (*Howlett v. Scott*, 69 Ill. 2d 135, 143, 370 N.E.2d 1036, 1039 (1977)), we focus instead on the issue properly brought before this court, which is whether the trial court abused its discretion in denying the subpoena.

¶ 15 A trial court's decision to quash a subpoena *duces tecum* is reviewed for an abuse of discretion. See *People v. Brummett*, 279 Ill. App. 3d 421, 425, 664 N.E.2d 1074, 1078 (1996). "An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, or unreasonable or when no reasonable person would take the same view." *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 24, 970 N.E.2d 72.

> "A subpoena *duces tecum* will be quashed if the requesting party fails to show: (1) that the material sought is evidentiary and relevant; (2) the material sought is not otherwise reasonably procurable by the exercise of due diligence in advance of trial; (3) that the requesting party cannot properly prepare for trial without such production and the failure to obtain the materials sought may tend to unreasonably delay the trial; and (4) the application is made in good faith and is not intended as a general 'fishing expedition.' " *People v. Cannon*, 127 Ill. App. 3d 663, 665, 469 N.E.2d 375, 377 (1984) (quoting *United States v. Nixon*, 418 U.S. 683, 700 (1974)).

¶ 16 In the subpoena, defendant requested "[a]ny and all records relating to the supervision of [defendant] from February 22, 2017, to present, and any and all correspondence (including email) between [the Corrections Senior Parole Agent] and [defendant's therapist] relating in any way to [defendant] from February 22, 2017, to present." The trial court asked defendant what he was seeking in the subpoena. After the court acknowledged its familiarity with the standard applicable to a motion to quash a subpoena *duces tecum*, the court ruled the subpoena was overbroad. Defendant argues this point without citation to either the record or supporting authority, relying instead on general due process claims. He thereby waives argument on this issue, and nothing within the record leads us to believe the court abused its discretion in its ruling. See *People v. Hood*, 210 Ill. App. 3d 743, 746, 569 N.E.2d 228, 230 (1991) ("mere contentions, without argument or citation of authority, do not merit consideration on appeal.").

¶ 17 However, even if the trial court ruled on the issue of whether a defendant facing revocation of a conditional release could use a subpoena *duces tecum*, the result would not change. Although the State relies on *People v. DeWitt*, 78 Ill. 2d 82, 85-87, 397 N.E. 2d 1385, 1386-87 (1979), and *In re Detention of Kish*, 395 Ill. App. 3d 546, 554, 916 N.E.2d 595, 601 (2009), in support of their claim defendant is not entitled to discovery, neither case is applicable to the factual situation before us.

¶ 18 *DeWitt* involved a defendant in a probation revocation proceeding where the court found our supreme court's criminal rules did not entitle a probationer to discovery in such proceedings. *DeWitt*, 78 Ill. 2d at 86. In *Kish*, the appellate court found discovery was not permitted in proceedings to revoke the conditional release of a sexually dangerous person. *Kish*, 395 Ill. App. 3d at 554.

¶ 19 The difference here is defendant sought through a subpoena what he was not otherwise entitled to through the formal discovery process. "A subpoena is separate from the rules of discovery [citations] and constitutionally and statutorily independent of discovery rules." *People v. Ogle*, 313 Ill. App. 3d 813, 815, 731 N.E.2d 346, 348 (2000) (citing *People v. Harris*, 91 Ill. App. 3d 1, 2-3, 413 N.E.2d 1369, 1370 (1980)). In *Harris*, this court noted, although the use of subpoenas to obtain police reports was upheld by our supreme court in *People ex rel. Fisher v. Carey*, 77 Ill. 2d 259, 396 N.E.2d 17 (1979), "the subpoena was not intended to provide a means of discovery for criminal cases, as noted in both *Fisher* and *Nixon*." *Harris*, 91 Ill. App. 3d at 3.

¶ 20 As was noted in *Kish*, since the criminal discovery rules do not apply to probation revocation proceedings, due to their civil nature, the same would be true for revocation of conditional release proceedings such as these. *Kish*, 395 Ill. App. 3d at 554. Further, the court in *Kish* also noted how the Sexually Dangerous Persons Act contained specific language indicating the proceedings were governed by the Uniform Code of Corrections rather than rules of civil procedure or relevant supreme court rules. *Kish*, 395 Ill. App. 3d at 553. The information sought by defendant here was clearly in the nature of discovery he was seeking to obtain by way of subpoena since he knew he could not do so otherwise. We decline to address the question of whether a subpoena could ever be properly issued and survive a motion to quash in proceedings such as these since that question is not before us. See *Scott*, 69 Ill. 2d at 143. We note the use of subpoenas prior to the initial probable cause hearing under the Sexually Violent Persons Commitment Act (725 ILCS 207/1 *et seq.* (West 2008)) was expressly approved by the First District in *In re Clark*, 2014 IL App (1st) 133040, 14 N.E.3d 617; however, such is not the proceeding before us. As such, the court did not abuse its discretion in quashing the subpoena.

¶ 21 B. Motion for a Continuance

¶ 22 Defendant argues the trial court erred in denying his motion for a continuance. We disagree.

¶ 23 "The granting or denial of a motion for a continuance to prepare for trial is a matter resting within the sound discretion of the trial court and its decision will not be reversed on appeal unless the record demonstrates an abuse of this discretion." *People v. Harris*, 123 Ill. 2d 113, 154, 526 N.E.2d 335, 352 (1988). The court is permitted to consider the history of the case, the diligence of the party seeking the continuance, and the nature of the prejudice if the continuance is denied. See *Harris*, 123 Ill. 2d at 154. Denial of a continuance will not be considered an abuse of discretion unless the defendant can show how he was prejudiced thereby, and it appears the refusal has prejudiced the defendant in the preparation of his defense. *People v. Griffiths*, 112 Ill. App. 3d 322, 329, 445 N.E.2d 521, 528 (1983).

¶ 24 Defendant contends the amended and supplemental petitions were filed "less than a week before trial." The new allegations included (1) obtaining a cell phone without reporting it to his parole agent; (2) accessing the Internet without authorization; (3) making many inappropriate sexual comments to female coworkers while on conditional release; (4) refusing to take a drug test on June 15, 2017; and (5) entering into a dating relationship. Most of these were similar to or contained elements of the allegations already known to defendant. Defense counsel was the same attorney who had represented defendant in his prior revocation hearing on similar allegations, where defendant prevailed, and who had been representing defendant since March 2015. The record reflects the substantial amount of pretrial preparation in which defendant's counsel engaged, including seeking and obtaining the services of an expert who examined defendant and was prepared to testify at the hearing. Further, counsel's motion was made orally

on the date of the hearing. He acknowledged having received the amended allegations the previous week, and he not only failed to indicate in what way defendant was prejudiced, but he made no claim of prejudice at all. He merely contended there was insufficient notice of the additional allegations. His only other claim was that he had not discussed the specifics of the new allegations with defendant until he appeared in court, although defendant was readily available at the local jail throughout the time leading up to the hearing.

¶ 25 The closest thing to a claim of prejudice by defendant is a general allegation the late filing of the amended allegations "deprived [defendant] of his right to due process in this matter in that it did not disclose the evidence it had against him and did not give him a meaningful opportunity to present witnesses and evidence on his own behalf." There is no proffer by defendant of what additional evidence he would have obtained or what trial preparation was hindered by the denial. He makes no factual assertions regarding the relevance of the requested evidence to the proceedings and how he was prejudiced by its absence. The record reflects an aggressive defense of the petition by defendant's counsel, extensive cross-examination of the witnesses, and presentation of witnesses for defendant, including defendant and his expert. Neither before the trial court nor this court does defendant outline what additional evidence he would have been able to present if a continuance had been granted. "When reviewing the exercise of the trial judge's discretion, an appellate court must determine whether the defendant acted diligently to obtain the evidence and whether the evidence would be material and might affect its outcome." *People v. Wilson*, 254 Ill. App. 3d 1020, 1054-55, 626 N.E.2d 1282, 1306 (1993). Absent some factual assertion regarding the manner in which defendant was prejudiced by the denial of his motion, there is nothing within the record upon which this court can find an abuse of discretion.

¶ 26 Assuming *arguendo* defendant could show how his prehearing preparation was detrimentally affected by the trial court's refusal to allow a continuance, any error in failing to do so was harmless. The court granted the State's petition on grounds contained in the original petition, which had been pending for a substantial period of time, *i.e.*, that defendant entered a geographic location he was otherwise forbidden to enter. We also note defendant conveniently failed to mention his lack of any offer to waive the 14-day window during which the petition was otherwise required to be heard. See 730 ILCS 5/5-6-4(b) (West 2016). During arguments on the motion, the State noted the short time frame in which defendant's hearing was required, since he was in custody, as an additional reason for denying a continuance. This was the most opportune time for defendant to indicate his intention to waive the 14-day requirement in order to obtain the additional time sought, if, in fact, he was truly in need of the continuance; he did not do so. For this, and the other reasons stated, the court's denial of defendant's motion for a continuance was not error.

¶ 27 C. Trial Court's Finding

¶ 28 Defendant argues the trial court erred in finding he failed to comply with treatment and he possessed an Internet-capable device. However, he does not challenge the other two grounds on which the court found he violated his conditional release, namely refusing a drug test and entering a geographical area he was forbidden from entering. As we noted before, the procedure for the revocation of a conditional release of a sexually dangerous person is addressed within the statutory provision relating to probation revocations, and as such, operates the same way. See 725 ILCS 205/10 (West 2016); see also 730 ILCS 5/5-6-4(b) (West 2016). "Compliance with the terms of probation is not discretionary, but mandatory. Failure to comply with just one term may be sufficient to revoke probation even when the defendant has

substantially complied with all other terms." *People v. Bell*, 219 Ill. App. 3d 264, 266, 579 N.E.2d 1154, 1156 (1991). As our ruling on the raised issue would have no effect on the outcome, we need not address that issue.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 31 Affirmed.