

NOTICE
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2018 IL App (5th) 160208-U

NO. 5-16-0208

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

<i>In re</i> COMMITMENT OF DAVID L. MACKEL)	Appeal from the
)	Circuit Court of
(The People of the State of Illinois,)	Madison County.
)	
Petitioner-Appellee,)	
)	
v.)	No. 00-MR-154
)	
David L. Mackel,)	Honorable
)	Jennifer L. Hightower,
Respondent-Appellant).)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Overstreet concurred in the judgment.

ORDER

- ¶ 1 *Held:* Respondent's appellate attorney is granted leave to withdraw, and the order denying respondent's motion for a new trial is affirmed.
- ¶ 2 This appeal stems from an action brought pursuant to the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1 *et seq.* (West 2016)). Respondent, David L. Mackel, appeals from the circuit court's order denying his "motion for a new trial or a Frye hearing." See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) (setting a standard for the admissibility of scientific evidence). Appointed counsel represents respondent in this appeal. However, counsel has filed a motion to withdraw as counsel

on the ground that this appeal does not present any issue of arguable merit, along with a brief in support of the motion. See *Anders v. California*, 386 U.S. 738 (1967); *In re McQueen*, 145 Ill. App. 3d 148, 149 (1986) (*Anders* procedure applicable in appeals from orders of involuntary commitment to mental institution). Counsel served respondent with copies of the motion and the brief. This court granted respondent ample opportunity to respond to counsel's motion and to explain why the circuit court's judgment should not be affirmed, but respondent has not filed any response with this court. This court has examined counsel's motion and brief, as well as the entire record on appeal. For the reasons that follow, this court grants appellate counsel's motion to withdraw and affirms the circuit court's order dismissing respondent's "motion for a new trial or a Frye hearing."

¶ 3

BACKGROUND

¶ 4 In October 1997, in Madison County case number 97-CF-1841, respondent pleaded guilty to aggravated criminal sexual abuse and was sentenced to imprisonment in the Illinois Department of Corrections (DOC) for five years. On March 30, 2000, just three days before respondent's scheduled release from prison, the State filed in the circuit court of Madison County an SVP Act petition alleging that respondent was a sexually violent person. See 725 ILCS 207/15 (West 2000). The petition alleged, *inter alia*, that respondent had two mental disorders, including "paraphilia not otherwise specified, sexually attracted to males and females." Also on March 30, 2000, the circuit court entered an order for detention, finding that respondent was eligible for commitment under the SVP Act and directing DOC to detain respondent and to transfer him to a detention

facility approved by the Illinois Department of Human Services (DHS). See 725 ILCS 207/30(a) (West 2000). In April 2000, after a hearing, the court found probable cause to believe that respondent was a sexually violent person, and it directed DHS to evaluate respondent as to whether he was a sexually violent person. See 725 ILCS 207/30(b), (c) (West 2016).

¶ 5 On September 28, 2005, and March 29, 2006, after many delays and continuances, the circuit court conducted a two-day trial on the State's petition, *i.e.*, a trial to determine whether respondent was a sexually violent person. See 725 ILCS 207/35 (West 2004). Trial was by the court alone, as nobody had requested a trial by jury. See 725 ILCS 207/25(d) (West 2004). Respondent was represented by appointed counsel. See 725 ILCS 207/25(c)(1) (West 2004). The State called two witnesses, each of whom was a licensed clinical psychologist. One of these witnesses testified that he had utilized the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, DSM-IV (1994)) in diagnosing respondent with "paraphilia, not otherwise specified, sexually attracted to adolescent males and females," and one other mental disorder. The other witness for the State testified that he had utilized the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition, Text Revision (American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, DSM-IV-TR (2000)) in diagnosing respondent with "paraphilia not otherwise specified nonconsenting victims," pedophilia, and two other mental disorders. Respondent's sole witness, a forensic psychiatrist, opined that respondent did not have

any mental disorder that predisposed him to engage in acts of sexual violence or qualified him for commitment as a sexually violent person. At the end of the trial, the court took the matter under advisement.

¶ 6 At some point, respondent submitted to the circuit clerk a *pro se* petition for writ of *habeas corpus*. This *habeas* petition does not bear a file stamp, and nothing in the record indicates the date that the circuit clerk received it. However, an affidavit signed by respondent was attached to the *habeas* petition, and this affidavit was dated April 30, 2006, approximately one month after the March 29, 2006, conclusion of the trial on the issue of whether respondent was a sexually violent person. In the *habeas* petition, respondent attacked the detention order that the circuit court had issued on March 30, 2000. He alleged that he was still being detained pursuant to the detention order, that the detention order was based upon a mental-health evaluation that was outdated, thus rendering the detention order void, and that he was entitled to discharge on that basis. Apparently, no hearing was ever held on this *habeas* petition.

¶ 7 On November 28, 2006, approximately eight months after the conclusion of the trial on the State's petition, the circuit court entered an order finding that respondent was a sexually violent person, and it entered judgment on that finding. 725 ILCS 207/35(f) (West 2006). In this order, the court committed respondent to the custody of DHS for control, care, and treatment until such time as he was no longer a sexually violent person (see 725 ILCS 207/40(a) (West 2006)), but the court did not specify whether the commitment would be for institutional care in a secure facility or for conditional release.

Instead, the court ordered DHS to conduct a predisposition investigation and a supplementary mental examination. See 725 ILCS 207/40(b)(1) (West 2006).

¶ 8 On January 17, 2008, and April 23, 2008, the court held a dispositional hearing, *i.e.*, a hearing on the issue of whether respondent's commitment should be for institutional care in a secure facility or for conditional release. See 725 ILCS 207/40(b)(1) (West 2008). Appointed counsel continued to represent respondent. Both parties presented evidence. The State argued in favor of institutional care in a secure facility, while respondent recommended conditional release. On April 23, 2008, the court entered a written dispositional order committing respondent for institutional care in a secure facility. See 725 ILCS 207/40(b)(2) (West 2008).

¶ 9 In the decade since the dispositional order was entered, respondent has been periodically reexamined, and the circuit court has been provided with written reports of those examinations, all as required by statute. See 725 ILCS 207/55 (West 2016). The circuit court has held probable-cause hearings and has found that there was no probable cause to believe that respondent's condition had so changed that he was no longer a sexually violent person. See 725 ILCS 207/65(b)(1) (West 2016). The record on appeal does not contain any indication that respondent ever has petitioned the circuit court for conditional release (see 725 ILCS 207/60 (West 2016)) or for discharge from custody (see 725 ILCS 207/65 (West 2016)). Apparently, respondent has remained committed for institutional care in a secure facility ever since the dispositional order of April 23, 2008.

¶ 10 On November 5, 2015, respondent filed, by appointed counsel, a "motion for a new trial or a Frye hearing." He prayed that the court would enter an order vacating its

original finding that he was a sexually violent person and either (A) release him *instanter* or (B) schedule a new hearing on whether he qualified as a sexually violent person and conduct a *Frye* hearing on the validity of a diagnosis of "Paraphilia NOS, sexually attracted to adolescent males."

¶ 11 On November 19, 2015, the State filed a response to respondent's motion for a new trial or a *Frye* hearing. The State argued, *inter alia*, that respondent's motion for a new trial needed to be dismissed as untimely, given that it had been filed more than 30 days after the court entered the dispositional order.

¶ 12 In February 2016, the court held a hearing on respondent's motion for a new trial or a *Frye* hearing. Both parties presented arguments. Respondent's attorney argued that fairness required a new trial where "the original diagnosis" of paraphilia, not otherwise specified, sexually attracted to adolescent males and females, "no longer exists," *i.e.*, where the diagnosis does not appear in the latest edition of the DSM, namely, the Diagnostic and Statistical Manual, 5th Edition (American Psychiatric Association, Diagnostic and Statistical Manual, Fifth Edition, DSM-5 (2013)). The State argued, *inter alia*, that respondent's new-trial motion was untimely, and that the appropriate course for respondent was to file for discharge. The court took the matter under advisement.

¶ 13 On April 19, 2016, the court entered a written order denying the motion for a new trial or for a *Frye* hearing. In regard to the motion for a new trial, the court denied it on the ground that respondent had failed to set forth any allegation of an error committed at trial. In regard to the motion for a *Frye* hearing, the court did not specify its rationale for

denial. However, the court made clear that the proper avenue for respondent to seek relief would be the filing of a petition for discharge.

¶ 14 On May 16, 2016, respondent filed a notice of appeal, thus perfecting the instant appeal. The circuit court appointed counsel to represent respondent in this appeal.

¶ 15 ANALYSIS

¶ 16 This appeal is from an order denying a motion for a new trial on the State's SVP Act petition. This court may affirm for any reason warranted by the record on appeal. See, e.g., *People v. Nash*, 173 Ill. 2d 423, 432 (1996) (reviewing court may affirm a judgment for any reason warranted by the record, regardless of the reasoning that the circuit court employed). As previously noted, appointed appellate counsel has filed a motion to withdraw on the ground that this appeal lacks merit. This court has carefully and independently examined the entire record on appeal and has concluded that counsel's assessment is correct. The record does not reveal any significant errors in the handling of this case.

¶ 17 The purpose of the SVP Act "is to identify sexually dangerous persons and force them into treatment for their own good and for the safety of society." *In re Commitment of Gavin*, 2014 IL App (1st) 122918, ¶ 75. Under section 15 of the Act, proceedings under the Act begin when the State files in the circuit court a petition alleging that a particular person has been convicted of a sexually violent offense, has a mental disorder, and is dangerous to others because the mental disorder creates a substantial probability that the person will engage in acts of sexual violence. 725 ILCS 207/15 (West 2016). Section 20 of the Act explicitly states that proceedings under the Act are civil in nature

and that the provisions of the Civil Practice Law apply to those proceedings "except as otherwise provided" in the Act. 725 ILCS 207/20 (West 2016). The Civil Practice Law is article II of the Code of Civil Procedure. 735 ILCS 5/1-101(b) (West 2016).

¶ 18 Section 30(a) of the Act requires that the circuit court review the State's petition and, if the court finds cause to believe that the person is eligible for commitment under the Act, must issue an order for detention of the person. 725 ILCS 207/30(a) (West 2016). A person subject to an SVP Act petition has a right to be present at all hearings, a right to be represented by counsel, and, if indigent, a right to appointed counsel. See 725 ILCS 207/25(c)(1) (West 2016). Sections 30(b) and 30(c) of the Act mandate that the court hold a hearing to determine whether there is probable cause to believe that the person is a sexually violent person, and if the court determines that probable cause exists, it must order that the person be taken into custody, if he or she is not already in custody. 725 ILCS 207/30(b), (c) (West 2016). Under section 35 of the Act, the cause proceeds to a trial, whether by the court or by a jury, with the State having the burden of proving beyond a reasonable doubt the allegations in the petition, and if the court or jury determines that the person is a sexually violent person, the court must enter judgment on that finding. 725 ILCS 207/35 (West 2016). At that point, under section 40 of the Act, the court must order that the person be committed to the custody of DHS until such time as he or she is no longer a sexually violent person, and the court must hold a hearing in order to determine whether the commitment should be for institutional care in a secure facility or for conditional release. 725 ILCS 207/40 (West 2016).

¶ 19 Pursuant to section 55 of the Act, DHS must periodically reexamine the committed person and furnish the court with a written report on his or her mental condition. 725 ILCS 207/55 (West 2016). Under certain circumstances specified in section 60 of the Act, a person committed for institutional care in a secure facility may petition the court to modify the commitment order by authorizing conditional release. 725 ILCS 207/60 (West 2016).

¶ 20 Pursuant to section 65 of the Act, a committed person may also petition the court for discharge from custody or supervision; at a trial on the discharge petition, the State has the burden of proving by clear and convincing evidence that the person remains sexually violent. 725 ILCS 207/65 (West 2016). If the person does not file a petition for discharge, but does not affirmatively waive the right to file such a petition at the time of a periodic reexamination, the court must review the latest reexamination report and must hold a hearing to determine whether there is probable cause to believe that the person has so changed that he or she is no longer a sexually violent person. 725 ILCS 207/65(b)(1) (West 2016). If the court finds probable cause to believe that the person has so changed that he or she is no longer sexually violent, the court must set a hearing on the issue, at which the State has the burden of proving by clear and convincing evidence that the person remains sexually violent. 725 ILCS 207/65(b)(2) (West 2016).

¶ 21 This court's careful and independent examination of the record has not revealed any significant errors in the handling of this case. The State and the circuit court apparently have complied with all applicable provisions of the SVP Act. No aspect of

respondent's decade-long commitment to the custody of DHS appears to run afoul of the SVP Act.

¶ 22 In his motion to withdraw as counsel in this appeal, appointed appellate counsel raises the potential issue of whether the circuit court erred in denying respondent's motion for a new trial on the issue of whether respondent is a sexually violent person. Generally, in civil cases tried without a jury, a party has only 30 days after entry of a final judgment or final order in which to file a motion for rehearing, retrial, or vacatur of the judgment. 735 ILCS 5/2-1203(a) (West 2016) (motions after judgment in non-jury cases); *Wilk v. Wilmorite, Inc.*, 349 Ill. App. 3d 880, 883 (2004); *Harchut v. Oce/Bruning, Inc.*, 289 Ill. App. 3d 790, 793 (1997) (a section 2-1203 motion applies to "final orders" as well as to "judgments").

¶ 23 As noted above, the trial on whether respondent was a sexually violent person was held in September 2005 and March 2006. Approximately eight months after the trial's conclusion, the circuit court entered on November 28, 2006, its order finding that respondent was indeed a sexually violent person, and it entered judgment on that finding. The court's dispositional order, which committed respondent for institutional care in a secure facility, was entered 17 months later, on April 23, 2008. The dispositional order was the final order in this case; it terminated the litigation between the parties, fixed the rights of the parties, and, if affirmed, left the circuit court with nothing to do except to proceed with the execution of the order. See *In re Detention of Hardin*, 238 Ill. 2d 33, 42-43 (2010) (three criteria for determining whether an order is final). Respondent did not file his new-trial motion until November 5, 2015, 7½ years after the final order was

entered. Given the untimeliness of respondent's motion, the circuit court had lost jurisdiction to grant a new trial (see *Wilk*, 349 Ill. App. 3d at 883), and it surely did not err in denying respondent's motion.

¶ 24 In his motion to withdraw, appellate counsel posits that respondent's *pro se* petition for *habeas corpus* relief (described *supra*) could be viewed as a timely motion for a new trial. The purpose of a motion for new trial is to give the trial court an opportunity to correct any errors it made during the trial. *Gersch v. Kelso-Burnett Co.*, 272 Ill. App. 3d 907, 908 (1995). Respondent's *habeas* petition focused exclusively on the detention order that the circuit court had issued on March 30, 2000, years prior to the trial. The *habeas* petition did not include even a passing reference to the trial, to any ruling made at the trial, or to any issue relating to the trial. For this reason, the *habeas* petition cannot reasonably be viewed as a motion for new trial.

¶ 25 Appellate counsel's motion to withdraw also raises the potential issue of whether the circuit court erred in denying respondent's request for a *Frye* hearing. The purpose of a *Frye* hearing is to determine whether novel scientific evidence has become "generally accepted" in the relevant scientific community and is therefore admissible at a future trial. See, e.g., *People v. McKown*, 226 Ill. 2d 245, 256 (2007) (circuit court erred in admitting HGN test results at DUI trial without first holding a *Frye* hearing to determine whether the HGN test has been generally accepted as a reliable indicator of alcohol impairment). *Frye* hearings are not held in a vacuum; they anticipate a future trial. Here, respondent's request for a *Frye* hearing went hand-in-hand with his request for a new trial. Both requests were included in a single written motion, and the desired *Frye*

hearing anticipated the desired new trial. Having denied respondent's request for a new trial, the circuit court had no real choice but to deny the request for the *Frye* hearing that was to be the trial's prelude.

¶ 26 Respondent may request a *Frye* hearing if he ever petitions the court for discharge from custody on the ground that he is no longer sexually violent. See 725 ILCS 207/65 (West 2016). A *Frye* hearing, if warranted, would be held prior to a hearing on the discharge petition, as a preliminary thereto. If the respondent wishes to end his commitment to DHS, which was the apparent purpose of his years-late motion for new trial, he needs to file a petition for discharge.

¶ 27 CONCLUSION

¶ 28 The circuit court did not err in denying respondent's motion for a new trial, and any argument to the contrary would lack merit. Accordingly, respondent's appointed appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 29 Motion granted; judgment affirmed.