2019 IL App (4th) 190058-U

NO. 4-19-0058

FILED
September 13, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re DETENTION OF RAYMOND RAINEY	)	Appeal from the
	)	Circuit Court of
(The People of the State of Illinois,	)	Morgan County
Petitioner-Appellee,	)	No. 98MR41
v.	)	
Raymond Rainey,	)	Honorable
Respondent-Appellant).	)	Christopher E. Reif,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err by finding no probable cause shown to warrant an evidentiary hearing where respondent still suffered from mental disorders, still had numerous risk factors for reoffending, and made little progress in his treatment plan since the last reexamination period.

¶ 2 Respondent, Raymond Rainey, a person committed under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2018)), appeals the Morgan County circuit court's January 16, 2019, order, in which the court found no probable cause to warrant an evidentiary hearing on whether respondent was still a sexually violent person. On appeal, respondent argues the circuit court erred by finding no probable cause. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 1998, the State filed its petition to have respondent committed as a sexually violent person pursuant to the Act. At a February 2000 hearing, respondent admitted he

was a sexually violent person. The circuit court accepted respondent's admission, adjudicated him a sexually violent person, and committed him to the Department of Human Services (Department). After a May 2000 dispositional hearing, the court ordered respondent placed in a secured institutional facility. In October 2001, this court affirmed respondent's adjudication as a sexually violent person and his commitment to a secured facility. *People v. Rainey*, 325 Ill. App. 3d 573, 758 N.E.2d 492 (2001).

¶ 5 In July 2003, respondent filed a *pro se* postjudgment motion challenging the constitutionality of the Act, which the circuit court dismissed. In June 2006, this court affirmed the circuit court's dismissal. *In re Detention of Rainey*, 363 Ill. App. 3d 1225, 917 N.E.2d 648 (2006) (table) (unpublished order under Supreme Court Rule 23). Over the years, respondent has received numerous reexaminations and remains committed to a secured facility. The reexamination preceding the one at issue in this appeal was conducted by Deborah Nicolai, Psy.D, a licensed clinical psychologist, and took place in March 2017. In June 2017, the circuit court found no probable cause was shown to believe respondent was no longer a sexually violent person. Respondent appealed, and on May 23, 2018, this court affirmed the circuit court's judgment. *In re Detention of Rainey*, 2018 IL App (4th) 170463-U.

¶ 6 In March 2018, Nicolai conducted respondent's yearly reexamination, which is the one at issue in this appeal. Nicolai's April 14, 2018, report noted respondent was 62 years old and had been admitted into the Department in 1998. In preparing the report, Nicolai interviewed respondent and reviewed approximately 14 documents. The report set forth respondent's relevant history, including his criminal, sexual, and treatment histories. Nicolai also explained the Department had a five-phase treatment program. The five phases, in order, were the following: (1) assessment, (2) accepting responsibility, (3) self-application, (4) incorporation, and

(5) transition. Respondent had been in phase two since 2006. The report noted respondent's entry to treatment evaluation remained incomplete because respondent had continued to refuse to take an objective sexual interest inventory. Moreover, in phase two, defendant had only participated in treatment foundations group and had yet to participate in the disclosure group. Respondent had only completed the following programs: (1) "Dialectical Behavior Therapy (DBT): Emotional Regulation" in September 2011, (2) anger management in January 2012, (3) communications in February 2016, (4) introduction to thinking errors in February 2018, and (5) decision-making model in February 2018. Respondent had attended but quit the other following programs: (1) mindfulness skills (three times), (2) distress tolerance, (3) problem solving, and (4) good lives exploration group (two times).

¶ 7 Respondent's November 2017 master treatment plan indicated he participated intermittently in the treatment foundation group, which was designed to prepare an individual for successful participation in the disclosure group. Respondent's attendance was sporadic due to his behavioral issues that impeded his ability to attend and became the focus of the group when he did attend. He was frequently referred for other treatment groups, which respondent quit or was removed. The plan stated the following: " '[Respondent]'s primary focus appears to be securing a rooming situation with someone he is sexually attracted to, so he may sexually act out.' " Respondent tended to "disengage" from treatment when he did not receive the rooming arrangement he desired. Respondent had been known to become verbally aggressive with his assigned primary therapist and received frequent referrals to the behavioral committee. In January 2018, respondent threatened to kill his therapist when the therapist denied him an emergency telephone call. During the evaluation period, respondent had two minor rule violations, two ma-

jor rule violations, and two warnings. Respondent had yet to reduce the number of times a year he received a referral to the behavior committee for rule violations.

¶ 8 In Nicolai's opinion, respondent needed to continue to work through his resentments and begin to focus on his inner dynamics that led him to commit the sexual offenses against female children. Specifically, he needed to recognize and restructure the cognitive distortions he holds that allow him to feel justified in his behaviors, honestly disclose his sexual offense history, and construct his sexual offense cycle to reduce risk of reoffending. Nicolai again opined "[i]t is essential for [respondent] to recognize his risk of sexual recidivism and his related internal and external triggers. He currently fails to understand how protecting his sexual offending behaviors, leaves the behaviors un-changed."

¶ 9 Additionally, Nicolai opined respondent suffered from the following mental disorders: (1) pedophilic disorder, nonexclusive type, sexually attracted to both; (2) alcohol use disorder, in sustained remission, in a controlled environment; and (3) antisocial personality disorder. She explained her reasoning for those diagnoses. As to the issue of respondent's dangerousness, she used the Static-99R and the Static-2002R risk assessments. Respondent placed in the above average risk category on both assessments. Nicolai also noted respondent had the following empirical risk factors for future sexual offending: (1) deviant sexual interest, (2) offense-supportive attitudes, (3) intimacy deficits, (4) general lifestyle impulsivity, (5) poor cognitive problem solving, (6) hostility, (7) resistance to rules or supervision, (8) antisocial personality disorder, and (9) substance abuse. Nicolai opined respondent had no protective factors such as age, medical condition, or sex-offender treatment. In finding age was not a protective factor, she noted age was incorporated into the risk assessments. To a reasonable degree of psychological certainty, Nicolai opined that, based on his mental disorders and assessed risk, respondent re-

mained substantially probable to engage in acts of sexual violence. She also opined respondent (1) had not changed since his last examination, (2) had not made sufficient progress in his treatment to be conditionally released, and (3) remained in need of institutional care in a secure facility.

¶ 10 In May 2018, the State filed a motion for a finding of no probable cause based upon Nicolai's yearly reevaluation report. In its motion, the State noted respondent had not affirmatively waived his right to petition the court for discharge, and thus section 65(b)(1) of the Act (725 ILCS 207/65(b)(1) (West 2018)) required the circuit court to hold a probable-cause hearing.

¶ 11 In July 2018, the circuit court held the probable-cause hearing. After the attorneys made their arguments on probable cause, the court found no probable cause was shown to believe respondent was no longer a sexually violent person. The court directed the State to prepare a written order. On January 16, 2019, the circuit court entered the written order finding no probable cause existed to warrant an evidentiary hearing to determine whether respondent was still a sexually violent person.

¶ 12 On January 22, 2019, respondent filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 303 (eff. July 1, 2017), and thus this court has jurisdiction under Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994). See 725 ILCS 207/20 (West 2018) (noting the proceedings under the Act are civil in nature).

¶ 13 II. ANALYSIS

¶ 14 Respondent's sole contention on appeal is the circuit court erred by finding no probable cause was shown to warrant an evidentiary hearing to determine whether respondent

was still a sexually violent person. The State disagrees, arguing the circuit court's decision was correct.

¶ 15 At the time of each reexamination under the Act, the committed person receives notice of the right to petition the circuit court for discharge. 725 ILCS 207/65(b)(1) (West 2018). If the committed person does not affirmatively waive that right, like respondent in this case, the court must "set a probable cause hearing to determine whether facts exist to believe that since the most recent periodic reexamination ***, 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 2018). At such a probable-cause hearing, the court only reviews the reexamination reports and hears the parties' arguments. 725 ILCS 207/65(b)(1) (West 2018). If the court finds probable cause does exist, then it must set an evidentiary hearing on the issue. 725 ILCS 207/65(b)(2) (West 2018). Since the circuit court only considered Nicolai's reexamination report and the facts contained in that report are not in dispute, our review of the court's finding of no probable cause is *de novo*. See *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 50, 40 N.E.3d 1215.

¶ 16 With all probable-cause hearings under the Act, the circuit 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, 980 N.E.2d 598 (quoting *In re Detention of Hardin*, 238 Ill. 2d 33, 48, 932 N.E.2d 1016, 1024 (2010)). For a respondent 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.' " (Emphasis omitted.) *Stanbridge*, 2012 IL 112337, ¶ 67 (quoting 725 ILCS 207/65(b)(2) (West 2008)). Thus, a respondent is only entitled to an evidentiary hearing if plau-

sible evidence shows the respondent (1) no longer suffers from a mental disorder or (2) is no longer dangerous to others because his or her mental disorder no longer creates a substantial probability he or she will engage in acts of sexual violence. *Stanbridge*, 2012 IL 112337, ¶ 68 (quoting 725 ILCS 207/5(f), 15 (West 2008)). Under the Act, "substantially probable" means "much more likely than not." (Internal quotation marks omitted.) *In re Commitment of Curtner*, 2012 IL App (4th) 110820, ¶ 37, 972 N.E.2d 351; see also *In re Detention of Hayes*, 321 Ill. App. 3d 178, 188, 747 N.E.2d 444, 453 (2001).

¶ 17 In this case, Nicolai found respondent still suffered from (1) pedophilic disorder, nonexclusive type, sexually attracted to both; (2) alcohol use disorder, in sustained remission, in a controlled environment; and (3) antisocial personality disorder. Both risk assessments placed respondent in the above average risk category for reoffending, and Nicolai found nine empirical risk factors increased respondent's risk to reoffend. Moreover, Nicolai found no protective factors applied to respondent. The aforementioned evidence indicates respondent still suffered from mental disorders and was dangerous to others because his mental disorders created a substantial probability he would engage in acts of sexual violence.

¶ 18 Respondent questions Nicolai's actuarial approach to determining risk of reoffending. He notes the actuarial instruments only consider static factors that will never change. However, as respondent notes, Nicolai recognizes the limitations on the instruments in her report. Thus, Nicolai also looked at "other empirical risk factors." As to the empirical factors, respondent argues Nicolai did not explain why each factor applies to respondent. A full reading of the report provides support for all of the factors she found. Moreover, the factors are similar to the ones found in prior reexamination reports. Regarding sexual deviant interest, respondent notes his most recent penile plethysmograph showed significant arousal for a "[f]emale

adult persuasive," which was considered normal. However, he has a long history of sex offenses against young girls. Thus, we do not find her conclusion respondent had a deviant sexual interest was incorrect. As to the antisocial personality disorder, Nicolai's report explains how his pedophilic disorder when combined with antisocial personality disorder increases his predisposition to engage in acts of sexual violence. Moreover, respondent challenges the substance abuse factor because he has been in custody for 18 years without access to alcohol or drugs. We note the fact respondent is still diagnosed with an alcohol use disorder shows his past usage still matters in assessing risk of recidivism. Accordingly, we disagree with respondent major flaws exist in Nicolai's reliance on the empirical risk factors.

¶ 19 Respondent also claims his age is a protective factor. Nicolai notes respondent's age is taken into consideration in the actuarial instruments and thus does not need to be considered separately in analyzing respondent's risk of recidivism. We also note her report indicates respondent was still trying to manipulate the rooming assignments to allow him to sexually act out. Thus, we disagree with respondent Nicolai erred by not finding his age was a protective factor.

¶ 20 Moreover, respondent notes the progress he made in treatment. While respondent did complete two groups during the evaluation period, he had been in phase two since 2006 and had failed to even start the disclosure group portion of phase two. In other words, respondent was still not even close to completing phase two after more than a decade in that phase. As previously noted, respondent was also still trying to manipulate rooming assignments that would allow him to sexually act out and had four rule violations during the evaluation period. He was also verbally aggressive with his primary therapist and threatened to kill the therapist when not allowed to make an emergency telephone call. Here, the report showed respondent was incon-

sistent in participating in his treatment plan during the evaluation period and had made little progress.

¶ 21 Last, in support of his argument, respondent cites the case of *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140359, ¶ 1, 48 N.E.3d 277, where the reviewing court reversed the circuit court's order finding no probable cause existed to warrant an evidentiary hearing to determine if the respondent was still sexually dangerous. We need not address whether the case properly applied the standards for determining whether an evidentiary hearing is warranted, as the facts are distinguishable from the case before us. In *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 39, while the 61-year-old respondent was still in phase two, he attended five group sessions three days per week and had successfully completed "mindfulness, maintaining healthy interpersonal relationships, thinking errors, decision-making, and confronting his personal history and his history of offending." The facts showed the respondent's commitment to his treatment program, which was a change in his attitude from his initial refusal to engage in treatment. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 43. The reviewing court also noted the data provided by the independent examiner showing sexual behaviors are reduced in men over their lifespan and sexual arousal reduces with age, thus making older males less likely to reoffend with age. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 45. Last, the State's examiner rated respondent as moderate to high risk on the Static-99R and low risk on the Static-2002R, and the independent examiner rated the respondent as a moderate risk on the Static-99R. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 47. The reviewing court concluded the evidence set forth a plausible account that both the respondent and the professional understanding of pedophilia had changed such that a substantial probability no longer existed that respondent was a sexually violent person and likely to reoffend. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 49.

¶ 22 Unlike the respondent in *Wilcoxen*, respondent had been in phase two for more than a decade and still had not begun the disclosure group. Respondent also had significant behavioral issues during the evaluation period and some attendance issues. He only intermittently participated in the treatment foundations group which is a preparation group for the disclosure group. Further, the risk assessments placed respondent in the above average category, and respondent exhibited nine empirical risk factors for reoffending. Additionally, Nicolai declined to find respondent's risk should be reduced further based on his age because age is reflected in the actuarial risk assessment instruments she used.

¶ 23 Accordingly, we find the circuit court did not err by finding there was no probable cause to warrant an evidentiary hearing.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Morgan County circuit court's judgment.

¶ 26 Affirmed.