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2019 IL App (5th) 170298-U

NOTICE
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NO. 5-17-0298

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

<i>In re</i> COMMITMENT OF TERRY MADISON)	Appeal from the
)	Circuit Court of
(The People of the State of Illinois,)	Madison County.
)	
Petitioner-Appellee,)	
)	
v.)	No. 05-MR-493
)	
Terry Madison,)	Honorable
)	Jennifer L. Hightower,
Respondent-Appellant).)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

- ¶ 1 *Held:* Counsel for the respondent is granted leave to withdraw, and the judgment committing the respondent to the Department of Human Services for institutional care in a secure facility is affirmed.
- ¶ 2 This case, which involves the Sexually Violent Persons Commitment Act (SVP Act) (725 ILCS 207/1 *et seq.* (West 2018)), is before this court for the second time. In the instant appeal, Terry Madison, who is the respondent herein, appeals from a judgment committing him to the Department of Human Services (DHS) for institutional care in a secure facility. The circuit court appointed counsel to represent Madison in this appeal.

Counsel has concluded that the appeal lacks merit and has filed in this court a motion to withdraw as counsel, along with a brief in support of that motion. See *Anders v. California*, 386 U.S. 738 (1967). Counsel provided Madison with a copy of the motion and of the brief. This court provided Madison with ample opportunity to file a written response to counsel's motion, and to explain why the motion should not be granted or why the judgment should not be affirmed, but Madison has not taken advantage of that opportunity. Having examined counsel's motion and brief, as well as the entire record on appeal, this court concludes that this appeal does indeed lack merit. Accordingly, counsel's motion to withdraw is granted, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 Madison was born on August 27, 1955. In 1987, while he was on mandatory supervised release (MSR) for a prior felony, Madison raped a 21-year-old woman in July and raped a 25-year-old woman in October. In each instance, Madison employed violence and the threat of further violence; in the latter instance, he held a pistol to the victim's side. Those two incidents led to Madison's being convicted of two counts of criminal sexual assault in Madison County case numbers 87-CF-875 and 87-CF-893. In July 1988, he was sentenced on those two counts to imprisonment for concurrent terms of nine years. In February 1992, Madison finished his concurrent nine-year prison terms and entered into MSR. Later in 1992, while still on MSR, Madison sexually assaulted a 17-year-old girl in August and a 16-year-old girl in September. These two incidents resulted in Madison's being convicted of criminal sexual assault in Madison County case number 92-CF-1203 and vehicular invasion in Madison County case number 92-CF-

1403, respectively. In March 1993, he was sentenced to imprisonment for concurrent terms of 25 years for the criminal sexual assault and 6 years for the vehicular invasion.

¶ 5 In addition to the four above-described crimes, Madison's lengthy and varied criminal history included a conviction for robbery, with a 25-year prison sentence, in Madison County case number 92-CF-1162, and a conviction for unlawful delivery of a look-alike substance, with a 6-year prison sentence, in Madison County case number 92-CF-1437.

¶ 6 On September 6, 2005, the State filed a petition alleging that Madison was a sexually violent person (an SVP). See 725 ILCS 207/15(a)(1) (West 2004). The petition referenced Madison's conviction for criminal sexual assault, and his 25-year prison term, in Madison County case number 92-CF-1203, and it stated that Madison soon would enter into MSR for that offense. Also according to the petition, Madison had a mental disorder and he was dangerous to others because his mental disorder created a substantial probability that he would engage in acts of sexual violence. See *id.* § 15(b). Shortly after the State filed its petition, Madison waived a probable-cause hearing (see *id.* § 30(b)) and he was transferred to DHS's Treatment and Detention Facility (TDF) in Rushville, Illinois. The TDF is for individuals who have been civilly committed as sexually violent persons or who are in the midst of civil-commitment proceedings.

¶ 7 On March 16, 2010, after numerous delays and continuances, a trial was held. See 725 ILCS 207/35 (West 2010). In the end, the circuit court determined that Madison was indeed an SVP, and it entered judgment on that finding. *Id.* § 35(f). Then, the court stated that "under the circumstances," a separate dispositional hearing was unnecessary,

and it forthwith entered an order committing Madison to the DHS for institutional care in a secure facility until such time as he was no longer an SVP. See *id.* § 40.

¶ 8 On appeal from that judgment, this court found reversible error in the circuit court's committing Madison to a secure facility without first holding a separate dispositional hearing. This court reversed the commitment order and remanded the cause for a dispositional hearing. At the same time, this court did not find any error in the determination that Madison was an SVP or in the proceedings that resulted in that determination. See *In re Detention of Madison*, 2012 IL App (5th) 100175-U.

¶ 9 On remand, the circuit court ordered DHS to conduct a predisposition investigation. See 725 ILCS 207/40(b)(1) (West 2012). The court appointed an attorney for Madison and, over time, appointed three successive psychologists to serve as Madison's expert witness.

¶ 10 After many continuances, the court held a dispositional hearing on June 30 and July 7, 2017. Dr. Steven Gaskell, who had testified for the State at the 2010 trial that ended with a determination that Madison was an SVP, again testified for the State at the dispositional hearing. Gaskell, a licensed psychologist and a licensed sex offender evaluator, testified that he had evaluated Madison on seven different occasions over the years, most recently in September 2016. In conducting the most recent evaluation, Gaskell examined the "master file" maintained by the Department of Corrections (DOC) on Madison, a file that included police reports, court documents from Madison's various criminal cases, disciplinary reports, and mental health records. In addition, Gaskell examined records from the TDF, where Madison was being held, and where he had been

held since 2005. Gaskell also requested an interview with Madison, but Madison declined, just as he had done during Gaskell's six previous evaluations. Despite the lack of an interview with Madison, Gaskell was sure that he had enough information to diagnose and evaluate Madison for purposes of the SVP Act.

¶ 11 Gaskell diagnosed Madison, to a reasonable degree of psychological certainty, with "other specified paraphilic disorder, sexually attracted to nonconsenting persons." Gaskell explained that "the paraphilia is atypical sexual interest and a paraphilic disorder is an atypical sexual interest that is either causing the person current distress or impairment or causes harm or the potential of harm to others, and in his case he had a sexual attraction to nonconsenting persons." The phrase "other specified," Gaskell explained, indicated that Madison's particular paraphilia was not one of the paraphilias specifically named in the Diagnostic and Statistical Manual of Mental Disorders Fifth Edition (DSM-5). The reference to nonconsenting persons was Gaskell's way of specifying the focus of Madison's paraphilia, or the nature of his particular sexual deviance.

¶ 12 Gaskell also diagnosed Madison with antisocial personality disorder, though on a "provisional" basis. This latter diagnosis was supported by Madison's history of law-breaking, his reckless disregard for the safety of others, his "irritability and aggressiveness as indicated by physical fights or assaults," and his "consistent irresponsibility as evidenced by failing to maintain consistent work behavior." The diagnosis was provisional for the sole reason that Gaskell did not see any record establishing that Madison had shown signs of a conduct disorder prior to age 15, which

was necessary for a definite, nonprovisional diagnosis of antisocial personality disorder. According to Gaskell, if records revealed any evidence that Madison suffered from a conduct disorder prior to age 15—for example, if records revealed that Madison committed one of his self-reported juvenile crimes prior to age 15—his diagnosis of antisocial personality disorder would no longer carry the "provisional qualifier."

¶ 13 According to Gaskell, both of the disorders with which he diagnosed Madison were congenital or acquired conditions that affected Madison's emotional and volitional capacity and predisposed Madison to engage in acts of sexual violence. The two disorders were also "quite common" in the population of persons who have been found sexually violent. Gaskell further opined that the two disorders made it "substantially probable"—or "much more likely than not"—that Madison would commit further acts of sexual violence.

¶ 14 In order to gauge the risk that Madison would sexually reoffend if released into the community, Gaskell employed two actuarial risk-assessment instruments, the Static-99R and the Static-2002R. According to Gaskell, these two instruments were "probably the most widely used" of all actuarial risk-assessment instruments, and they were "essentially the same" in terms of effectiveness. The tests inquire about various documented facts that have been found to indicate a risk of reoffending. Gaskell scored each test with the information he gleaned from the various records in the DOC's master file. On the Static-99R, there are five "risk levels," and the "average sex offender" scores at risk level 2. Madison scored at risk level 3, indicating that he was "about 1.4 times more likely than the average sex offender to reoffend." When Gaskell compared Madison's Static-99R

score to the scores of a "high risk, high needs" population of sex offenders, he determined that there was a 16% risk that Madison would reoffend within five years after being released into the community. The Static-2002R instrument, according to Gaskell, produced similar results.

¶ 15 Gaskell also considered six "research-based risk factors" that were not covered by the Static-99R or the Static-2002R but were nevertheless helpful in assessing a sex offender's risk of reoffending. Specifically, Gaskell considered Madison's antisocial personality disorder, his "hostility," his "general self regulation problems," his prior self-reported history of substance abuse, his prior statements that he had been intoxicated at the time of his last sex crime, and his "noncompliance with supervision."

¶ 16 As to the last of these six additional risk factors—noncompliance with supervision—Gaskell noted that Madison committed some of his crimes while he was on MSR. In some detail, Gaskell testified about Madison's disciplinary records at both the DOC and the TDF, records that Gaskell described as important indicators of Madison's ability to follow rules in a structured setting. During his years in the DOC, Madison accumulated "34 major and 60 minor" disciplinary tickets, including tickets for intimidation and fighting. During Madison's first days at the TDF, in 2005, a "shakedown" found Madison in possession of a collection of newspaper clippings, some of which concerned murders or sex crimes. Some clippings were about different women and had hand-written notes such as "Find her." In the 12 months immediately preceding the dispositional hearing, Madison accumulated "one major and five minor rule

violations" at the TDF, which Gaskell characterized as an unusually high number of violations for a resident of the TDF.

¶ 17 Gaskell testified that, in light of the six additional risk factors, he thought that the risk of Madison's reoffending within five years was "likely much greater than the 16 percent" indicated by the actuarial instruments. However, he did not have any way of calculating what that percentage risk might be.

¶ 18 As for the appropriate placement for Madison, Gaskell testified, again to a reasonable degree of psychological certainty, that in light of Madison's treatment needs and the public's need to be protected, the least restrictive placement would be the TDF in Rushville, where Madison had been since 2005. Gaskell explained that this recommendation was due to Madison's "dangerous combination" of deviant sexual interest, antisocial personality disorder, substance abuse, intoxication at the time of his most recent offenses, and his committing his four most recent sex or sex-related crimes while on MSR. Gaskell added that his recommendation was further supported by Madison's history of violating rules in the DOC and in the TDF.

¶ 19 Gaskell seemed to question whether Madison would even participate in community-based treatment if he were conditionally released. He noted that Madison had been in the TDF for 12 years and never had consented to participate in the TDF's "sex offense specific treatment" or in possibly helpful "treatment groups" such as the substance-abuse group or the anger-management group.

¶ 20 Margaret Jones, a sister of Madison, testified on his behalf at the dispositional hearing. She testified that she hoped to see Madison placed on conditional release, and

that if he were placed on conditional release, everyone in their "very close" family would be willing to help him in any way possible.

¶ 21 Dr. Luis Rosell, a forensic psychologist in private practice in Iowa, who was qualified to perform sexually-violent-persons evaluations in Illinois, testified on behalf of Madison. Rosell diagnosed Madison with only one mental disorder, antisocial personality disorder. Rosell strongly disagreed with Gaskell's diagnosis of paraphilia not otherwise specified nonconsent, because that diagnosis was "not specifically delineated in the DSM-5." When the DSM-5 was being prepared, Rosell testified, something akin to paraphilia not otherwise specified nonconsent—something termed "paraphilic coercive disorder"—was considered for inclusion but was ultimately rejected. To give a diagnosis of paraphilia not otherwise specified nonconsent, as Gaskell had done with Madison, was to disregard that history, Rosell testified.

¶ 22 In assessing Madison's risk of sexually reoffending, Rosell obtained information from Dr. Gaskell's written report, which included Madison's criminal history, and the TDF's records on Madison, plus a December 2016 interview that Rosell conducted with Madison. During that interview, Madison denied committing most of the crimes of which he had been convicted. Rosell testified that he was not disturbed by Madison's denials of criminal conduct because "the research that [Rosell had] looked into" indicated that sex offenders who denied committing their crimes did not have a higher risk of reoffending, upon release, than sex offenders who admitted their crimes. Rosell acknowledged that Madison had not been in treatment, but that fact, too, did not disturb him. Rosell testified that although treatment helps some sex offenders, research indicates

that sex offenders who have not received treatment are no more likely to reoffend, once released, than those who have received treatment. For Rosell, the most significant fact in assessing Madison's risk of reoffending was Madison's age—nearly 62 years, at the time of the dispositional hearing. Rosell testified that research has revealed that sex offenders who reach the age of 60 years rarely reoffend. Such research was the reason that both the Static-99R and the Static-2002R deducted points for sex offenders who have attained the age of 60. Rosell briefly discussed "the most recent study," performed in Florida, which found only one recidivist out of more than 90 sex offenders aged 60 or older.

¶ 23 Like Gaskell, Rosell employed the Static-99R and the Static-2002R. He calculated the same scores for Madison that Gaskell had calculated. Unlike Gaskell, Rosell did not compare Madison's scores to the scores of a "high risk, high needs" population of sex offenders; instead, Rosell compared them to the scores of a "routine correctional" population of sex offenders. Rosell took this approach largely because the "routine correctional" population was much larger than the "high risk, high needs" population—4370 versus 850—and "the larger number you have in a group the more confidence you can have about the result." Using this approach, Madison's scores indicated a 6% to 10% risk that Madison would reoffend during the 5 to 8 years after his release, placing Madison "well below substantial probability that he is going to recidivate." Rosell noted that even under Gaskell's approach, Madison's scores indicated a 16% probability of reoffending, a probability that Rosell considered "low."

¶ 24 Also unlike Gaskell, Rosell did not look beyond the actuarial instruments in assessing Madison's risk of reoffending. That is, Rosell did not consider any risk factors

other than those included in the actuarials. He did not consider such additional factors, he explained, because there was no established method of incorporating those factors into a calculation of the percentage risk of reoffending. Furthermore, Rosell testified, the additional factors that Gaskell considered "have a very high false positive rate," *i.e.*, those factors are present in many sex offenders who do not reoffend.

¶ 25 Based upon the records and his own interview with Madison, Rosell opined, to a reasonable degree of psychological certainty, that Madison should be conditionally released. Rosell noted that conditional release has many conditions and restrictions, and that a sex offender's violation of any rule can result in his being sent to the TDF.

¶ 26 At the end of the dispositional hearing, the court found that conditional release was not appropriate for Madison, given his mental disorder, his refusal to participate in treatment specifically for sex offenders, and his history of rule-breaking at the TDF. The court entered a written order committing Madison 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 2016). The commitment order specified institutional care in a secure facility. See *id.* § 40(b)(2).

¶ 27 Madison perfected the instant appeal from the commitment order. The circuit court appointed appellate counsel for him.

¶ 28 ANALYSIS

¶ 29 In March 2010, the circuit court determined that Madison is an SVP. That is, the court determined that Madison had been convicted of a sexually violent offense and that he is dangerous because he suffers from a mental disorder that makes it substantially

probable that he will engage in acts of sexual violence. See 725 ILCS 207/5(f) (West 2004) (defining "sexually violent person"). The SVP determination was affirmed by this court in Madison's prior appeal. See *In re Detention of Madison*, 2012 IL App (5th) 100175-U. In July 2017, after a dispositional hearing, the circuit court determined that Madison's commitment will be for institutional care in a secure facility, the TDF. This appeal is from that commitment order. As mentioned *supra*, Madison's court-appointed appellate attorney has concluded that this appeal lacks merit, and he has filed an *Anders* motion to withdraw as counsel. In his *Anders* brief, appellate counsel discusses a potential issue on appeal, namely, whether the circuit court erred in committing Madison to institutional care in a secure facility, instead of placing him on conditional release. This court has concluded that the potential issue does not have merit, and that the commitment order is not erroneous.

¶ 30 Under section 40(b)(2) of the SVP Act, the circuit court, in determining whether an SVP's commitment shall be for institutional care in a secure facility or for conditional release, must consider the "nature and circumstances" of the SVP's sexually violent offense, the SVP's "mental history and present mental condition," and "what arrangements are available to ensure that the [SVP] has access to and will participate in necessary treatment." 725 ILCS 207/40(b)(2) (West 2016). On appeal, an order committing an SVP to institutional care in a secure facility is reviewed for an abuse of discretion. *In re Commitment of Trulock*, 2012 IL App (3d) 110550, ¶ 52. An abuse of discretion occurs only where the decision is arbitrary, fanciful, or unreasonable. *Id.*

¶ 31 In the instant case, the circuit court was aware of, and seriously considered, the factors set forth in section 40(b)(2). The court's knowledge and diligence were reflected in questions that the court directed to witnesses and attorneys at the dispositional hearing, especially Dr. Gaskell and Madison's attorney. Toward the end of the dispositional hearing, the court quoted from section 40(b)(2) and discussed the factors listed therein. For the circuit court, a key fact in this case was that Madison, during the 12 years that he had been confined at the TDF, never had agreed to participate in sex-offender-specific treatment. Another key fact for the circuit court was that Madison's disciplinary record at the TDF, including his very recent record, was notably bad. In light of those glaring facts, the court asked Madison's attorney to explain how it could possibly find that Madison had changed significantly since his days of committing egregious and violent sex crimes, or how it could possibly find that Madison would participate in sex-offender-specific treatment if he were conditionally released.

¶ 32 The circuit court's questions to Madison's attorney were on point. Given Madison's history, including his recent history at the TDF, the honest and obvious answers to those questions are follows: There is no firm indication that Madison has changed significantly since his days of committing egregious and violent sex crimes, and there is no firm indication that Madison would participate in sex-offender-specific treatment if he were conditionally released.

¶ 33 Madison's age—nearly 62 years at the time of the dispositional hearing—is the only fact about Madison that even suggests that he might not reoffend if conditionally released. (At the dispositional hearing, both expert witnesses indicated that sexual

offenders who are 60 years of age or older, in general, reoffend far less frequently than sexual offenders who have not yet attained the age of 60 years.) However, even this fact diminishes in importance in the face of Madison's recent history of rule-breaking at the TDF. Apparently, his tendency toward misbehavior has not abated. Dr. Gaskell testified that a sex offender's refusal to participate in treatment while in custody is an indication that the offender has not begun the recovery process. An offender's failure to begin the recovery process can reasonably lead to the conclusion that his release into the community would pose too great a threat to others. *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 45. Given Madison's criminal history, his history of misbehavior at the TDF, and his total lack of desire for treatment, the circuit court's commitment order makes perfect sense. The order certainly does not represent an abuse of discretion.

¶ 34

CONCLUSION

¶ 35 Any argument that the circuit court abused its discretion in committing Madison to a secure facility would be without merit. The commitment order was amply supported by the evidence adduced at the dispositional hearing. Therefore, appellate counsel is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 36 Motion granted; judgment affirmed.