2024 IL App (2d) 240163-U
No. 2-24-0163
Order filed December 27, 2024

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re COMMITMENT OF JOHN L. BIRCH	)	Appeal from the Circuit Court of DeKalb County.
	)	No. 05-MR-152
(The People of the State of Illinois, Petitioner-Appellee, v. John L. Birch, Respondent-Appellant).	)	Honorable Marcy L. Buick Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court erred in holding that no probable cause existed as to warrant a full evidentiary hearing to determine whether respondent was no longer a sexually violent person and entitled to discharge; (2) the trial court erred in denying respondent's motion to appoint an independent examiner, (3) the term of conditional release prohibiting respondent from having any direct or indirect internet access was overbroad and unreasonable, and (4) respondent was not denied effective assistance of counsel; The orders of the trial court are reversed and the case is remanded for further proceedings.

¶ 2 In these proceedings under the Sexually Violent Persons Commitment Act (Act) (725 ILCS 207/1 *et seq.* (West 2022)), respondent, John Birch, appeals from the trial court's orders: (1) denying his motion for an independent examiner as part of his periodic reexamination under

the Act; and (2) ruling that no probable cause existed to warrant an evidentiary hearing on the issue of whether he remained a sexually violent person (SVP). Respondent further appeals the trial court's denial of his motion to modify the terms of his conditional release (CR) and asserts he was denied effective assistance of counsel. For the following reasons, we reverse and remand.

¶ 3 I. BACKGROUND

¶ 4 In 1991 respondent was convicted of attempted aggravated criminal sexual assault, aggravated criminal sexual abuse, unlawful restraint, and resisting a peace office. Respondent was sentenced to 30 years in prison. In 1993 respondent pled guilty to home invasion and was sentenced to 15 years in prison to run currently with his earlier sentence.

¶ 5 In 2005, the day prior to his scheduled release from prison, the State petitioned to commit respondent as a sexually violent person (SVP) pursuant to the Act (725 ILCS 207/1 *et seq.* (West 2022)). In December 2005, after a hearing, the trial court found probable cause that respondent was an SVP and ordered him to be detained at a facility approved by Illinois Department of Human Services (IDHS) and to undergo and cooperate with an evaluation by IDHS to determine whether he was a sexually violent person as set forth in section 207/5(f) of the Act (725 ILCS 207/5(f) (West 2004)). The case was continued for years before it went to trial in 2013.

¶ 6 In November 2013, a jury found respondent to be a SVP. Respondent appealed and we affirmed. *In re Commitment of Birch*, 2016 IL App (2d) 140984-U. Specifically, we held that a rational trier of fact could find beyond a reasonable doubt the elements required to prove that respondent was a sexually violent person, the trial court did not abuse its discretion when it allowed the testimony of multiple experts, and the trial court did not abuse its discretion in committing respondent to a secure facility. *Id.* ¶¶ 54, 63, 69.

¶ 7 A. Conditional Release

¶ 8 While there is no record of respondent participating in sex-offense specific psychological treatments while incarcerated, the record is replete with examples of respondent participating in treatment while under the control of IDHS since 2005. His progress was tracked by the statutorily required annual psychological re-examinations. See 725 ILCS 207/55(a) (West 2022). By 2020, respondent had progressed to the fifth phase of a five-phase treatment program at the Treatment and Detention Facility (TDF). The trial court found respondent appropriate for Conditional Release (CR) on August 13, 2020. Respondent reviewed the terms of the conditional release plan, initialed each, and was conditionally released on October 15, 2020.

¶ 9 When respondent was re-examined in 2021, the State filed a motion for the court to review the annual psychological re-examination and find no probable cause for an evidentiary hearing. Respondent countered with a petition for discharge and a motion to appoint an independent evaluator. The court heard arguments on the motion on the evaluator and denied it in January 2022. Respondent withdrew his petition for discharge in May 2022. Over respondent's objections, the trial court found no probable cause to warrant an evidentiary hearing as to whether respondent was still an SVP on May 3, 2022.

¶ 10 Respondent filed a motion to modify the terms of his conditional release in October 2022. He also filed a petition for discharge based on the most recent psychological evaluation and filed a second motion to appoint an evaluator. Citing concerns over his passive suicidal ideation, the State returned respondent to the IDHS-TDF facility in Rushville in November 2022. The State filed a petition to revoke the CR on the same day. The parties filed a variety of motions, responses, and replies over the next few months while respondent was under the care of the IDHS-TDF. Respondent was returned to conditional release in October 2023.

¶ 11 B. Psychological Re-Examination by Dr. Travis

¶ 12 Dr. Richard Travis completed his annual psychological re-evaluation of respondent in July 2023. Dr. Travis reviewed respondent's lengthy record, including examinations he had personally conducted with respondent going back more than a decade. The first third of his 57-page report included detailed information on respondent's childhood environment, education, relationship history, mental health and treatment history, past substance abuse, criminal history, treatment during his incarceration at the Illinois Department of Corrections, and his treatment during his time at the IDHS-TDF. The second third covered respondent's adjustment and treatment during his initial CR, including admonishments from his case management team for rule violations, and his return to IDHS-TDF in November 2022.

¶ 13 The final third of Dr. Travis's annual re-examination contained detailed diagnoses of mental disorders and assessment of sexual recidivism risk. Dr. Travis concluded that respondent's paraphilic disorder, voyeuristic disorder, and antisocial personality disorder may all be remitting, "but that cannot be assessed until he has had a few years of unrestricted movement in the community." For assessment, Dr. Travis noted that "[n]o single actuarial measure has been consistently superior across samples" and chose to use several specialized tools to assess respondent's risk of committing sexual violence. Using Stable-2007, Dr. Travis scored respondent 15 out of 24 points, an increase from the previous score of 11 in 2022, but noted that the increase was not related to sex drive/sex preoccupation and resulted from issues of self-regulation and cooperation with supervision. This higher score prompted Dr. Travis to consider respondent as a high risk/high needs offender under Static-99R, resulting in respondent receiving a score (five) which places him in "the second highest of five risk categories." And finally, Dr. Travis scored respondent a three under the Static-2002R tool, categorizing him as a "Level III" risk out of five. While he acknowledged the risk of sexual recidivism decreases with age, particularly over 60, Dr.

Travis concluded that respondent's age was already considered in the Static instruments and "[n]o additional age-based risk reduction is warranted."

¶ 14 In conclusion, Dr. Travis found respondent met the DSM-5-TR criteria for "Other Specified Paraphilic Disorder, Sexually Attracted to Nonconsenting Females, Nonexclusive Type; Voyeuristic Disorder; Antisocial Personality Disorder; Narcissistic Personality Disorder" and Bipolar I Disorder in partial remission. He noted respondent's risk of recidivism had declined due to treatment progress, but that "he presents significant dynamic risks and unmet criminogenic treatment needs". Dr. Travis concluded that respondent's condition had not changed since the most recent annual examination and that he remains "substantially probable to engage in acts of sexual violence." Conceding that respondent "appears to be addressing sexual self-regulation needs", Dr. Travis concluded he had made "sufficient progress in treatment to be monitored and treated on Conditional Release." Finally, Dr. Travis recommended respondent's placement on CR be immediately re-evaluated in the future if he fails to comply with treatment or remains uncooperative with supervision.

¶ 15 C. Motion to Modify CR Hearing

¶ 16 The trial court heard arguments relating to respondent's second motion to modify the terms of the CR on November 16, 2023. Respondent testified that he was 63 years old and would be turning 64 in February 2024. He described the terms of his CR as "overly restrictive and burdensome" because they prevented him from working and he had been on home confinement almost continuously since October 2020. He had been employed but was only allowed to work for one or two days. Respondent testified he had not been able to find employment again because of the restrictions on his use of the Internet and his home confinement.

¶ 17 On cross-examination, respondent admitted he had violated rules against smoking and leaving his apartment without permission, purportedly to dispose of trash. These violations led to him being confined within his apartment and that resulted in him losing his job.

¶ 18 Following respondent's testimony, his counsel argued that 5 of the 67 rules of his conditional release were unconstitutionally vague, overbroad, and not reasonably related to either his rehabilitation or the safety of the community. The State countered that the rules were proper for respondent and reasonable but did suggest adding language to the prohibition against Internet use to allow exceptions with the prior approval of the Case Management Team (CMT).

¶ 19 D. Probable Cause Hearing

¶ 20 On December 6, 2023, respondent filed an argument in support of finding probable cause to holding an evidentiary hearing to determine whether he was still an SVP. Respondent's counsel asserted that there were many factors supporting a finding of probable cause. Although the annual psychiatric examination with Dr. Travis concluded respondent was still an SVP, respondent's counsel focused on several areas that may have shown significant change since 2005. Such factors included respondent's age, his scores on polygraphs and plethysmographs, his low scores on potential recidivism, and the fact that his alleged issues with self-regulation were unrelated to sexual offenses.

¶ 21 On January 31, 2024, the trial court ruled on the several pending motions and petitions in this case. First, the court granted the State's motion to find no probable cause to warrant an evidentiary hearing on whether respondent remained an SVP. The trial court modified Rule 33 of the CR to include language that any "deviation or exception to the prohibited [Internet] items and activities *** are subject to approval by the CMT", but denied respondent's second motion to

modify the terms of the CR. Finally, the trial court denied respondent's third motion to appoint an evaluator. This timely appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Civil commitment is only constitutionally permissible when there has been a showing that an individual has serious difficulty controlling sexually violent behavior. *Kansas v. Crane*, 534 U.S. 407, 413 (2002). The Act allows the State to extend the incarceration of a criminal defendant beyond the time he or she would otherwise be released if the defendant is found to be sexually violent. 725 ILCS 207/1 *et seq.*; *In re Detention of Samuelson*, 189 Ill. 2d 548, 552 (2000); *In re Detention of Hardin*, 391 Ill.App.3d 211, 216 (2009). Under the Act, a person may be deemed to be a sexually violent person if he has been convicted of a sexually violent offense and is dangerous because he suffers from a mental disorder that makes it substantially probable that he will engage in acts of sexual violence. 725 ILCS 207/5(f) (West 2022). Involuntary commitment of a sexually violent person is authorized "for control, care and treatment until such time as the person is no longer a sexually violent person." 725 ILCS 207/40(a) (West 2022). While individuals committed under the Act are afforded some of the same procedural safeguards as in criminal prosecutions, proceedings under the Act are civil in nature, not criminal. 725 ILCS 207/20 (West 2022); *Samuelson*, 189 Ill.2d at 553.

¶ 24 The Act serves the dual purposes of treatment for those found to be sexually violent and the protection of the public. *In re Detention of Lieberman*, 201 Ill.2d 300, 319 (2002); *In re Detention of Trevino*, 317 Ill.App.3d 324, 334 (2000). The State has interest in both protecting its citizens from violent sexual offenders and treating the mental disorders of sexually violent persons. *In re Commitment of Weekly*, 2011 IL App (1st) 102276, ¶ 54. Therefore, the Act reflects the legislature's intent that sexually violent persons are committed for treatment until they are no

longer considered sexually dangerous, and then discharged. See *Kansas v. Hendricks*, 521 U.S. 346, 363-64 (1997). Under CR, the SVP remains under the custody and control of the Illinois Department of Human Services (IDHS) and may be required to "attend and fully participate in assessment, treatment, and behavior monitoring including, but not limited to, medical, psychological or psychiatric treatment specific to sexual offending ***". 725 ILCS 207/40(b)(5)(F) (West 2022).

¶ 25 On appeal, respondent raises four distinct arguments: 1) the trial court erred in finding no probable cause to hold an evidentiary hearing to determine if he remained an SVP; 2) the trial court abused its discretion in denying his motions to appoint an independent evaluator; 3) several terms of his CR are unconstitutional; and 4) he received ineffective assistance of counsel.

¶ 26 A. Probable Cause for Evidentiary Hearing

¶ 27 Pursuant to commitment under the Act, the IDHS must reevaluate the individual's mental condition after six months and then annually to determine whether the committed individual has made sufficient progress to be conditionally released or whether the individual's condition has so changed that he or she is no longer an SVP. See 725 ILCS 207/55(a) (West 2022); *People v. Botruff*, 212 Ill. 2d 166, 171 (2004). During each examination, the committed individual must receive notice of the right to petition for discharge and if he or she does not affirmatively waive that right, the trial 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 2022). During the probable cause hearing, the trial court reviews reexamination reports and hears arguments from the parties. *Id.*; *In re Commitment of Kirst*, 2015 IL App (2d) 140532, ¶ 49. If the trial court finds probable cause, it must set an evidentiary hearing and the State must prove,

by clear and convincing evidence, that the committed person is still an SVP. 725 ILSC 207/65(b)(2) (West 2022).

¶ 28 Whether respondent has met the probable-cause threshold is an issue of law that we review *de novo*. *In re Detention of Stanbridge*, 2012 IL 112337, ¶ 56; *In re Commitment of Wilcoxen*, 2016 IL App (3d) 140539, ¶ 28; *In re Commitment of Tittelbach*, 2018 IL App (2d) 170304, ¶ 28. During a post-commitment probable-cause hearing, the trial court must determine whether facts exist to warrant a hearing on whether the respondent is no longer an SVP. 725 ILCS 207/65(b)(1) (West 2022); *Stanbridge*, 2012 IL 112337, ¶ 51. The hearing is preliminary in nature and the trial court should be looking for "plausible" evidence, not engage in an in-depth evaluation of an expert's credibility. *Stanbridge*, 2012 IL 112337, ¶¶ 58, 59; *In re Commitment of Rendon*, 2017 IL App (1st) 153201, ¶ 29. "The court must consider the reasonable inferences that can be drawn from the evidence, but it must not choose between conflicting facts or inferences or engage in a full and independent evaluation of an expert's credibility and methodology." *In re Commitment of Smego*, 2017 IL App (2d) 160335, ¶ 23. Our review, therefore, is whether respondent met this threshold. *Tittelbach*, 2018 IL App. (2d) 170304, ¶ 28; *In re Commitment of Vance*, 2017 IL App (3d) 160683, ¶ 17. The respondent is not required to show "plausible expert opinion" and the conclusion of an expert "drawn from the facts in his report does not preclude our determination that respondent has presented a plausible account that he is no longer an SVP." *Rendon*, 2017 IL App (1st) 153201, ¶ 37. We note that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law." *Crane*, 534 U.S. at 413 (citing *Kansas v. Hendricks*, 521 U.S. 346, 359 (1997)).

¶ 29 It should be noted that the original order committing the individual as an SVP is *not* at issue and the petitioner "must present some plausible evidence of a change in the circumstances that led to the original finding. *Smego*, 2017 IL App (2d) 160335, ¶ 28 (citing *Stanbridge*, 2012 IL 112337, ¶ 72). The change in circumstances "could include a change in the committed person, a change in the professional knowledge and methods used to evaluate a person's mental disorder or risk of reoffending, or even a change in the legal definitions of a mental disorder or a sexually violent person, such that a trier of fact could conclude that the person no longer meets the requisite elements." *Stanbridge*, 2012 IL 112337, ¶ 24. Due process only allows an individual to be held "as long as he or she is both mentally ill and dangerous, but not longer." *In re Detention of Lieberman*, 2017 IL App (1st) 160962, ¶ 24 (citing *Stanbridge*, 2012 IL 112337, ¶ 85).

¶ 30 Respondent argues that the trial court erred in relying exclusively on Dr. Travis' reexamination and not considering points raised by his trial counsel. Respondent noted the most-recent plethysmograph examination "did not demonstrate significant sexual arousal" and the polygraph examination showed "no response of deception" when he denied unauthorized phone use, going anywhere without authorization, or having sexual contact with anyone. While under the care of the IDHS-TDF, respondent had progressed to the fifth stage of the five-stage treatment plan and continued with both group and individual therapy during his conditional release. These facts, argues respondent, were sufficient to meet the production threshold for the probable cause hearing.

¶ 31 Respondent's trial counsel also referred to several similar cases during the probable cause hearing which cite emerging scientific evidence that the risk of sexually violent recidivism decreases with age. See, *e.g.*, *In re Detention of Kelley*, 2019 IL App (1st) 162184, ¶¶ 62-63 (SVP met his "very low burden" to show probable cause based on expert report citing "psychological

changes associated with aging" and his physical health). In *Wilcoxen*, the 61-year-old respondent met the production burden even though he was in the second phase of the five-phase treatment and exhibited arousal on some of the segments of the PPG. *Wilcoxen*, 2016 IL App (3d) 140359, ¶¶ 38-49. Similarly, the 68-year-old respondent in *Rendon* was found to have established probable cause for an evidentiary hearing based on his age, compliance with therapy, and "behavioral methods for handling his mental disorder". *Rendon*, 2017 IL App (1st) 153201, ¶ 32.

¶ 32 The State counters that Dr. Travis concluded in his 2023 reexamination that respondent still suffers from the mental disorders with which he was originally diagnosed and statements that he "may have remitted is insufficient to provide probable cause to believe he suffers from no mental disorder." Respondent was returned to IDHS-TDF care after two years "largely" because of lack of compliance with CR rules and supervision. The State also argues that the denial of the evidentiary hearing was proper because of respondent's behavior. Such problematic behavior included skipping medication, failing to turn in sexuality logs, picking up metal pipes for unknown purposes, and the fact that he made some of his neighbors uncomfortable during his CR. The State may be correct that respondent was less than an ideal neighbor. But the right to an evidentiary hearing is not a popularity contest.

¶ 33 Since he was admitted to the IDHS-TDF in 2005, respondent has completed treatment through 20 different treatment groups, from substance abuse and anger management to arousal management and healthy relationships. The TDF treatment program includes five treatment phases: Assessment, Accepting Responsibility, Self-Application, Incorporation, and Transition. Respondent was in the fifth and final phase, Transition, when he was conditionally released. During his CR, respondent continued with group and individual therapy. And when he returned to IDHS-TDF in late 2022, respondent complied with treatment and was again recommended for

CR in October 2023. Respondent is now a 64-year-old man who has been a willing and active participant in IDHS treatments for the past 19 years. While the record does show missteps along his path, respondent appears to have changed significantly since 2005.

¶ 34 We note, as in *Wilcoxen* and *Rendon*, that an evidentiary hearing may not necessarily lead to the conclusion that respondent is no longer a sexually violent person. See *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 53; *Rendon*, 2017 IL App (1st) 153201, ¶ 32. But respondent's burden at the probable cause hearing was one of production, not proof, and the trial court must determine if he presented sufficient evidence to warrant an evidentiary hearing. *Wilcoxen*, 2016 IL App (3d) 140359, ¶ 52; *Stanbridge*, 2012 IL 112337, ¶¶ 58-64. Based upon our *de novo* review, we determine that respondent met the burden of production, and the trial court erred by determining the evidence necessary for an evidentiary hearing was insufficient.

¶ 35 B. Appointment of Evaluator

¶ 36 Respondent next argues that the trial court erred in denying his motion for the appointment of an independent examiner. The Act does allow for the appointment of an expert for an indigent person, but this allowance does not equate to a requirement that the court must take this action. *Kirst*, 2015 IL App. (2d) 140532, ¶ 33. A respondent may be entitled to funds to hire an expert witness, but only where such expert testimony is "crucial" to a proper defense. *People v. Botruff*, 212 Ill. 2d 166, 177 (2004). "This is established when the defendant shows that the expert services are 'crucial' to 'build a defense' and the defendant's financial inability to obtain his own expert will prejudice his case." *Id.* citing *People v. Lawson*, 163 Ill.2d 187, 220-22 (1994). We review a trial court's decision not to appoint an independent evaluator under the abuse of discretion standard. *In re Commitment of Rutherford*, 2019 IL App (2d) 180211, ¶ 12 (citing *Botruff*, 212 Ill. 2d 166, 176); *In re Commitment of Butler*, 2022 IL App (1st) 201107, ¶ 32. A court abuses its

discretion where its decision is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 37 Respondent asserts that the trial court's denial of his motion for an independent evaluator was a paradoxical "Catch 22."[1] In other words, he needs proof that an independent evaluator would be crucial to his defense, but he cannot produce this proof without an independent evaluator. While this is an imprecise analogy of a "Catch 22," we do appreciate the literary reference. Unlike Captain Yossarian, respondent was faced with a challenging, but not impossible, task.

¶ 38 Respondent notes his trial counsel presented several reasons to support his claim that an independent examiner was critical to his defense, especially with regards to the more recent evaluation of respondent by Dr. Travis. As discussed above, Dr. Travis scored respondent at a higher risk of sexually violent recidivism, but none of the reasons related directly to "sex drive/sex preoccupation." Respondent received a higher score than the previous two years due to "general self-regulation, intimacy deficits, and cooperation with supervision." Dr. Travis also failed to give meaningful weight to his PPG assessment, polygraph results, and did not add any additional weight to respondent's age, asserts respondent. Respondent's trial counsel conceded respondent had broken some of the rules of his CR and been reprimanded for these infractions. However, he avers Dr. Travis built his evaluation on this foundation of broken incidental rules rather than anything related to sex or public safety.

¶ 39 The State counters that respondent failed to show that an expert would be crucial to his defense. It is not enough to allege that a "specific expert" who would testify to the predictive value of actuarial instruments, notes the State. *Butler*, 2022 IL App (1st) 201107, ¶ 35. "Generic

[1]Joseph Heller, Catch-22 (50th Anniversary Ed. 2011).

representations" that an expert would provide a fuller account for a respondent's progress is also not "crucial." *Id.* at ¶ 36.

¶ 40 Our review of the record reveals that the appointment of an independent evaluator would be crucial to respondent's defense during the evidentiary hearing. Dr. Travis' conclusions rest upon his application of highly technical actuarial instruments to predict respondent's possible risk of sexual recidivism. The weight he gave to respondent's breaking of relatively minor rules led, in part, to the conclusion that respondent was likely to commit sexually violent crimes because he smoked cigarettes and took out the trash without permission. This is an over-simplification of Dr. Travis' 57-page report, but it does highlight the challenge respondent would face in rebutting such an expert. Dr. Travis applied limited weight to respondent's age, ignored his PPG assessment and polygraph examination, and his conclusions were based upon questionably correlative facts. A second, independent examiner may draw different conclusions on the risk of *sexual* recidivism based on these facts. Based upon the record, we find it was an abuse of discretion for the trial court to deny the motion for an independent evaluator.

¶ 41 C. Terms of Conditional Release

¶ 42 Respondent further argues that several of the rules of his conditional release were unreasonable, vague, overbroad, or unrelated to the purpose of the conditional release. A trial court's decision on the terms of the conditional release of a sexually violent person is reviewed for an abuse of discretion. *In re Commitment of Holt*, 2022 IL App (1st) 210402, ¶ 89. Of the 67 rules of the CR, respondent moved to modify five of the rules before the trial court. We will address these claims in the numeric order of the rule.

¶ 43 1. Rule 33: Internet Access

¶ 44 Rule 33 states that respondent agrees to not "possess any computer or tablet and shall not have any direct or indirect internet access through any TV, any type of phone, computer, watch, tablet, video gaming device or any electronic device capable of accessing the internet" and goes on to prohibit his use of the internet at places of employment, libraries, and anywhere else internet access might be available. Respondent avers this rule is overbroad and unconstitutionally impairs his rights under the First Amendment. U.S. Const., amend. I; see also *Packingham v. North Carolina*, 582 U.S. 98, 107-108 (2017) (holding blanket prohibition against registered sex offenders from accessing social media was a violation of the First Amendment). The State counters that the rule was already modified to allow exceptions "subject to approval" and respondent agreed to these changes, thus waiving any objection.

¶ 45 During the motion hearing, respondent's trial counsel objected to the proposed modification to rule 33. He conceded that "we do understand that there should be some restriction" to Internet access, but that it gave the department "unfettered discretion" to arbitrarily limit his right to access the Internet. We disagree with the State's position that respondent waived his objection. See *Holt*, 2022 IL App (1st) 210402, ¶ 96 (holding the ultimate agreement to a conditional release plan is not a waiver of objections to certain conditions).

¶ 46 Citing *Holt*, respondent avers rule 33 is an unconstitutional restriction on his rights under the first amendment. U.S. Const., amend. I. Examining a virtually identical rule of conditional release, the *Holt* court found the condition so broad that it "sweeps up whole categories of innocent conduct" and it is at odds with the Act's stated purpose of arranging for the care and treatment of SVPs "in the least restrictive manner". *Holt*, 2022 IL App (1st) 210402, ¶ 96 (quoting 725 ILCS 207/40 (West 2022)). Noting that we live in an age of online connectedness, the court wrote that "[b]arring someone completely from the Internet effectively condemns him or her to a shadow

existence in our present society. *Id.* The court went on to note multiple options for protecting the public while granting limited access to the Internet:

> "Contrary to the State's insistence at oral argument, Internet use need not result in 'instant access' to victims or to content that might interfere with Mr. Holt's treatment. The State certainly has the ability to limit Mr. Holt to 'user only' privileges on preapproved devices and to thereby prevent him from installing or removing software or deleting or altering his browsing history. His access to the Internet could also be quite restricted, at least at first, with access to certain blacklisted websites denied outright and approved sites added only on a case-by-case basis to a curated whitelist." *Id.* ¶ 98.

¶ 47 While the Act allows the trial court to impose conditions in addition to those explicitly enumerated (725 ILCS 207/40(b)(5) (West 2022)), such conditions "should be drafted such that respondent may understand exactly what conduct the conditional release plan may prohibit, restrict, or require and should be narrowly tailored to the 'desired goal' ". *Butler*, 2024 IL App (1st) 230567, ¶ 34 (internal citations omitted). In the immediate matter, the revision to rule 33 was a step in the right direction but fell short of compliance with *Holt*. Merely adding a line to the rule allowing for possible exceptions under the unilateral approval of the CMT is insufficient in a rule that implicates first amendment rights. *Holt*, 2022 IL App (1st) 210402, ¶ 98. We conclude the trial court abused its discretion in approving rule 33 in respondent's conditional release plan. On remand, IDHS should draft rule 33 in a manner consistent with this disposition.

¶ 48 2. Rule 40: Contact with Minors

¶ 49 Respondent asserts that rule 40 is too vague because it requires him to immediately report contact of any type with any minor or anyone who appears to be under 18 years of age. The State counters that the Act was passed to protect vulnerable populations, especially children, from sexual

violence. Specifically, the State correctly notes that the Act mandates several rules for conditional release regardless of whether SVP has been diagnosed with pedophilia. See, *e.g.*, 725 ILCS 207/40(b)(5)(I), (Q), (V), (Z) (West 2022). The State argues that if respondent is unsure of the age of someone, he can avoid contact, discuss potential contact with his case management team, or report unanticipated contact. See *Holt*, 2022 IL App (1st) 210402, ¶ 103. We disagree. This rule is unduly cumbersome. Respondent is encouraged to find employment and could be "in contact" with minor employees or customers every day he works. As written, the rule is so vague that respondent would be constantly reporting "contact of any type" to the case management team. We find the trial court did abuse its discretion in approving this rule. On remand, IDHS should draft rule 40 in a manner consistent with this disposition.

¶ 50 3. Rule 44: Potential Weapons

¶ 51 Similarly, respondent claims that rule 44 is too vague because it prohibits the use or possession of items that could be used in the commission of a crime. He specifically notes that "duct tape" is identified as a potential weapon. While it may seem an odd item to describe as a potential weapon, respondent previously used duct tape to bind a victim's hands and cover her eyes as he sexually assaulted her. Respondent's self-described "rape kit" included items which would aid his assaults but not raise suspicion if he were questioned by the police. Rule 44 appears to have been written with great specificity to address respondent's known patterns of behavior. It was not an abuse of discretion for the trial court to require respondent to not use or possess items that could be used in the commission of a crime.

¶ 52 4. Rule 53: Purchasing Restrictions

¶ 53 In many ways, the respondent's positions on rule 53 parallel those made for rule 44. Respondent argues it is unreasonable for him to be prohibited from purchasing items without prior

permission from the case management team. The State counters that respondent has a history of using everyday items as weapons and the safety of the community requires that the CMT closely monitors respondent's spending of public funds given to him. As with rule 44, the trial court did not abuse its discretion in approving this rule and declining to modify it.

¶ 54 5. Rule 60: Smoking

¶ 55 Finally, rule 60 prohibits respondent from smoking tobacco. Respondent notes that smoking is unrelated to his criminal acts and asserts this "seems more like a punishment than treatment." Respondent has mentioned to his therapists that he finds smoking comforting and helps him cope with the stress of his conditional release. The State counters that smoking is a *maladaptive* coping mechanism and not consistent with his treatment or rehabilitation.

¶ 56 There can be little doubt regarding respondent's desire to smoke tobacco. Similarly, it is equally clear that respondent's repeated violation of this rule led to significant consequences. He received admonishment for picking up cigarette butts and bringing them home to smoke in a pipe. He was observed smoking while waiting at a bus stop and lost his employment and movement privileges in April 2022. These rule violations and his lack of employment were both cited as factors considered by Dr. Travis in assessing his risk of sexual recidivism. Respondent has paid a heavy price for this habit.

¶ 57 The State presents no legal argument or authority to support its position that respondent's smoking while on conditional release is a maladaptive coping mechanism and must be restricted. Respondent's declaration that smoking is "coping for me" is not dispositive, but also not refuted. The record presently does not contain evidence that establishes the medicinal or therapeutic value of prohibiting the respondent from smoking while on conditional release. On remand, IDHS should redraft rule 60 in a manner consistent with this disposition for review by the trial court or

the state must establish a sufficient basis to establish a substantial correlation between smoking and recidivism as an SVP.

¶ 58 D. Ineffective Assistance of Counsel

¶ 59 Finally, respondent argues he was denied effective assistance of counsel because his trial counsel failed to object to the rules of his conditional release without "greater force than he did." He avers his trial counsel was ineffective for not objecting to all 67 rules of his CR and for not presenting the objections he did make more "vociferously."

¶ 60 The right to counsel is, in effect, the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *People v. Rogers*, 2021 IL 126163, ¶ 23. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed in his claim, defendant must show two things: that the performance of his counsel was deficient and that he was prejudiced by such deficiency. *Id.* at 694. In *People v. Albanese*, our supreme court adopted *Strickland* and noted specifically that a court can dispose of a claim of ineffective assistance of counsel for a lack of sufficient prejudice without determining if such counsel was deficient. *Albanese*, 104 Ill. 2d 504, 527 (1984). Even if a trial strategy did not result in an outcome favorable to the defendant, we "must make every effort to eliminate 'the distorting effects of hindsight.' " *People v. Peterson*, 2017 IL 120331, ¶ 88 (quoting *Strickland*, 466 U.S. at 689). "There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004) (citing *People v. Smith*, 195 Ill. 2d 179, 188 (2000)). To make a claim of ineffective assistance of counsel under the Act, a respondent "must show that counsel's performance fell below an objective standard of

reasonableness and that there is a reasonable probability that the outcome of the proceedings would have been different but for counsel's unprofessional error." *In re Commitment of Walker*, 2014 IL App (2d) 130372, ¶ 50; see also *In re Commitment of Anderson*, 2014 IL App (3d) 121049, ¶ 31.

¶ 61 Here, respondent fails to establish prejudice. During the October 15, 2020, hearing, respondent and his trial counsel had an opportunity to raise objections to the proposed conditional release plan. While his trial counsel alerted the court to several of the rules that he viewed vague as written, both he and respondent made it clear that respondent had reviewed each rule, initialed his acceptance, and verbally confirmed he had ample time to review the rules multiple times before agreeing to them. As part of his strategy, respondent's counsel filed separate motions to modify the rules of the conditional release in 2022 and 2023. Respondent testified on his own behalf during the arguments for the second motion in November 2023. Respondent's counsel presented objections to five rules as part of his strategy to ensure respondent was on the best path towards a dismissal of his SVP status. While respondent may have wished his trial counsel had made many more points "vociferously" and embarked upon a quixotic campaign against all 67 of the rules he had previously agreed to, we do not find that this alleged ineffectiveness would have changed the outcome of the hearing. Our review of the record demonstrates that the alleged errors of the defendant's trial counsel would not have altered the result in this case. See *Albanese*, 104 Ill. 2d 504, 527.

¶ 62 III. CONCLUSION

¶ 63 For the reasons stated, we reverse the orders of the circuit court of DeKalb County and remand the case for further proceedings consistent with this disposition.

¶ 64 Reversed and remanded.