

NOT DESIGNATED FOR PUBLICATION

No. 124,832

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Care and Treatment of
WILLIE SMITH.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; CONSTANCE M. ALVEY, judge. Opinion filed May 5, 2023. Affirmed.

Dwight D. Alexander II, of The Alexander Law Firm, LLC, of Kansas City, for appellant.

Kurtis K. Wiard, assistant solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before HURST, P.J., MALONE and BRUNS, JJ.

PER CURIAM: Willie Smith was committed to Larned State Hospital as a sexually violent predator in 2007. In conjunction with his 2021 annual examination, Smith sought the appointment of an independent examiner and further petitioned the district court for transitional release. After an initial hearing, the district court denied Smith's request for an independent examiner and found that Smith had failed to meet his burden of proof to establish the requisite probable cause and, therefore, denied his petition for transitional release. On appeal, Smith fails to show that the district court abused its discretion in denying Smith's request for an independent examiner and did not err in denying his request for transitional release. The decision of the district court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1988, Smith was convicted of two counts of attempted rape. Despite several attempts, Smith was unable to complete the Sex Offender Treatment Program while incarcerated. In 2007, before the end of his prison sentence, Smith stipulated in Wyandotte County District Court that there was sufficient evidence upon which a jury could find that he was a sexually violent predator under the Kansas Sexually Violent Predator Act (KSVPA). See K.S.A. 2021 Supp. 59-29a01 et seq. As a result, the court committed Smith to the custody of the Secretary of Social and Rehabilitation Services (now known as the Secretary of the Department for Aging and Disability Services) for treatment in the Sexual Predator Treatment Program (SPTP) at Larned State Hospital. See *Smith v. State*, No. 104,487, 2011 WL 3891923, at *1 (Kan. App. 2011) (unpublished opinion) (affirming the dismissal of Smith's K.S.A. 60-1507 motion as improperly used by someone civilly committed rather than imprisoned).

Smith has remained civilly committed pursuant to the KSVPA since 2007. Pursuant to K.S.A. 2021 Supp. 59-29a08(a), psychologists from the SPTP evaluated Smith's progress in the SPTP from June 2020 to July 2021, and submitted the report on July 28, 2021 (Report). According to the Report, Smith remains on the lowest level of the program (Tier one) with the lowest level of privileges (gray). "The goal of Tier One," according to the Report, "is the acquisition of skills necessary to allow him to safely function in more challenging, open society environments, as well as encouraging him to address the individual issues which contributed to his placement at SPTP." On the gray level, Smith is at the lowest privilege level, which affords him access to the basic level of privileges available to residents first admitted to the program.

The Report further explains that Smith continues to suffer from: (1) encounter for mental health services for perpetrator of nonspousal adult abuse (sexual); (2) intermittent explosive disorder; (3) major depressive disorder, recurrent episode, severe; (4)

posttraumatic stress disorder; (5) intellectual disability (intellectual development disorder), mild; (6) alcohol use disorder, in a controlled environment, moderate; and (7) other specified personality disorder with antisocial, borderline, and paranoid features. The Report states that Smith refuses to take his prescribed psychiatric medications on schedule. More than four pages of the Report are used to list Smith's approximately 70 documented incidents of misbehavior and rule-breaking that occurred from June 2020 to July 2021 (Evaluation Period).

As part of the SPTP evaluation, two risk assessments were performed: a Static-99R-2003 and an ACUTE-2007. The Static-99R-2003 is an actuarial instrument used to estimate the probability that a convicted adult male offender will reoffend against a child or nonconsenting adult. Smith scored a "+5" on the Static-99R-2003, placing him in the "Above Average Risk" category. The ACUTE-2007 is a risk assessment instrument that measures dynamic factors that may change rapidly over a period of weeks or days. Smith's total score on the ACUTE-2007 was nine, categorizing him as a high priority for general recidivism risk. His sexual violence score on the ACUTE-2007 was six, categorizing him as a high priority for sex and violence risk. The combined results of both risk assessments categorized Smith in a high risk/need category.

According to the Report, Smith participated in 12 of the 13 individual sessions he was offered and attended 78 percent of his elective leisure sessions and 31 open leisure sessions. Due to the COVID-19 pandemic, the amount of elective and open leisure sessions offered was significantly reduced. During the Evaluation Period, Smith did not enroll in any psycho-educational classes. Moreover, Smith failed to regularly submit his rational self-analysis (RSA) exercises and fantasy logs. Smith's participation in his assigned therapy groups was variable, with some very low attendance. The Report noted that "[a]t times [Smith's] participation during groups tends to be very negative."

The examiners attempted to interview Smith as part of the examination, but Smith declined the interview and examination process. Accordingly, the Report contains no information pertaining to Smith's perception and understanding of his treatment progress or current sexual behavior or his opinion regarding his sexual fantasies or coping mechanisms. The examinees concluded in the Report that "Smith remains a 'sexually violent predator'" and that he "suffers from a mental abnormality or personality disorder which makes it likely that he will engage in repeated acts of sexual violence." The Report states that the risk associated with Smith's mental abnormality or personality disorder has not so significantly changed that it would be safe for Smith to be placed in transitional release because it is likely he may engage in acts of sexual violence.

On August 9, 2021, Smith petitioned the district court for release over the objection of the Secretary of the Department for Aging and Disability Services and requested the appointment of an independent examiner. On September 16, 2021, the district court held a hearing at which both the State and Smith's attorney presented argument. The district court found "that the patient's progress does not support the cost of an independent evaluation" and, therefore, the court denied Smith's request to appoint an independent examiner. The court likewise denied Smith's petition for release, finding that Smith's mental abnormality or personality disorder has not so changed that it would be safe to place him in transitional release.

In its subsequent journal entry, the district court denied Smith's request to appoint an independent examiner because Smith "has not fully participated in his treatment and failed to comply with institutional requirements." The court further determined that Smith's "mental abnormality or personality disorder has not so significantly changed that he is safe to be placed in transitional release."

Smith now appeals.

DISCUSSION

On appeal, Smith argues that the district court erred in not appointing an independent examiner for his annual evaluation and by finding that he did not qualify for transitional release. The KSVPA was enacted to provide the long-term care, treatment, and control of persons identified as a sexually violent predator. *In re Care & Treatment of Burch*, 296 Kan. 215, 219, 291 P.3d 78 (2012). Once a person is found to be a sexually violent predator—which Smith admitted to in 2007—the person is civilly committed "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." K.S.A. 2021 Supp. 59-29a07(a). During the commitment, the detainee receives treatment in a program comprised of steps or phases, the last of which is transitional release. *In re Burch*, 296 Kan. at 220.

Pursuant to the KSVPA, the State is required to regularly review the mental condition of the detainee to determine their appropriateness for movement through the program phases, including moving to transitional release. Specifically, the KSVPA requires that the State, among other things, conduct an annual examination of the detainee's mental condition. K.S.A. 2021 Supp. 59-29a08(a). As part of that evaluation, the detainee has the right to retain an independent examiner or, if the detainee is indigent, the court may appoint an independent examiner. K.S.A. 2021 Supp. 59-29a08(c). "The appointment of an examiner is discretionary." K.S.A. 2021 Supp. 59-29a08(c). The district court, in determining whether to appoint an independent examiner, "shall consider factors including the person's compliance with institutional requirements and the person's participation in treatment to determine whether the person's progress justifies the costs of an examination." K.S.A. 2021 Supp. 59-29a08(c). Appellate courts review a district court's decision of whether to appoint an independent examiner for an abuse of discretion. *In re Care & Treatment of Twilleger*, 46 Kan. App. 2d 302, 310, 263 P.3d 199 (2011).

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING SMITH'S REQUEST FOR AN INDEPENDENT EXAMINER

Smith argues that the district court abused its discretion in denying his request for an independent examiner because his "participation in treatment and his active role in elective leisure sessions show a commitment to participation in treatment." Smith argues that because he enrolled in elective classes and attended 78 percent of them, he complied with institutional requirements and participated in enough treatment classes to warrant appointment of an independent examiner. Smith further argues that the district court "abused its discretion by its unreasonable determination that Mr. Smith must complete the remaining tiers in order to warrant the assistance of an independent evaluator."

A judicial action constitutes an abuse of discretion if it is (1) arbitrary, fanciful, or unreasonable; (2) based on an error of law; or (3) based on an error of fact. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). A district court likewise abuses its discretion "when no reasonable person would adopt the district court's position." *Consolver v. Hotze*, 306 Kan. 561, 568-69, 395 P.3d 405 (2017). Smith, as the party asserting the error, bears the burden of showing the district court abused its discretion. *Gannon v. State*, 305 Kan. 850, 868, 390 P.3d 461 (2017).

The district court denied Smith's request for an independent examiner because of Smith's lack of progress in the SPTP, his failure to fully participate in treatment, and his failure to comply with institutional requirements. Despite having been in the SPTP for 15 years, Smith remains on Tier one of the program, and he is still restricted to only those privileges afforded to newly admitted residents of the program. After 15 years, Smith has made no measurable progress.

The Report also shows that Smith failed to comply with institutional requirements with dozens of documented significant events during the Evaluation Period. This factor

alone is sufficient to support the reasonableness of the district court's decision not to appoint an independent examiner. See, e.g., *In re Twilleger*, 46 Kan. App. 2d at 311 (When affirming the district court's denial of the appointment of an independent examiner, the panel emphasized that the offender "was only in phase four of the seven phase treatment program."). As described in the Report, Smith's spotty participation in treatment, negative participation in group sessions, refusal to take his medication as prescribed, refusal to regularly submit his RSAs and fantasy logs, suicidal statements, and results of the risk assessments all support the district court's decision. The district court properly applied the law, did not rely on an error of fact, and numerous reasonable jurists could have reached the same decision. Thus, this court finds no abuse of discretion and affirms the district court's decision to not appoint an independent examiner.

II. THE DISTRICT COURT DID NOT ERR IN DENYING SMITH'S PETITION TO BE PLACED IN TRANSITIONAL RELEASE

Pursuant to the KSVPA, to be placed in the transitional release phase of the program the detainee must demonstrate there is "probable cause to believe the person's mental abnormality or personality disorder has significantly changed so that the person is safe to be placed in transitional release." K.S.A. 2021 Supp. 59-29a08(d). This court exercises unlimited review over the district court's probable cause determination. *In re Burch*, 296 Kan. 215, Syl. ¶ 9. Accordingly, Smith carries the burden to demonstrate probable cause to believe his mental abnormality or personality disorder has significantly changed to the extent he is safe to be placed in transitional release. In evaluating Smith's claim that he demonstrated probable cause, this court must view the evidence in the light more favorable to him and resolve all conflicting evidence in his favor. See 296 Kan. 215, Syl. ¶¶ 8, 9. Smith must present facts "that are sufficient to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the person's mental abnormality or personality disorder has so changed that he or she is safe to be placed in transitional release." 296 Kan. 215, Syl. ¶ 7. However, if the detainee

"does not participate in the prescribed treatment plan, the person is presumed to be unable to show probable cause to believe the person is safe to be released." K.S.A. 2021 Supp. 59-29a08(d).

Smith argues that he has engaged in the program to the best of his ability and has "an understanding of what needs to be done in order to progress through the program." Therefore, according to Smith, his "willingness to engage in the program demonstrates a significant change in his attitudes towards the program and is evidence that his mental abnormality or personality disorder has so changed that it warrants his" placement in transitional release.

The KSVPA requires more than a changed attitude or willingness toward progressing in the program. It requires that Smith demonstrate his mental abnormality or personality disorder has significantly changed making him safe for transitional release. Smith has not shown this. Moreover, Smith triggered the rebuttable presumption that he is unable to show probable cause that he is safe to be released when he refused to take his psychiatric medications, failed to regularly submit his RSAs and fantasy logs, and missed treatment sessions. See K.S.A. 2021 Supp. 59-29a08(d). Smith's litany of documented significant events during the Evaluation Period, status on the lowest level of the program with the lowest privileges despite his numerous years of participation, and his risk assessments and current diagnoses demonstrate his mental abnormality or personality disorder has not significantly changed. Smith failed to overcome the presumption that he is unable to show probable cause that he is safe to be released.

Even assuming Smith's behavior did not trigger the rebuttable presumption, the record contains more than sufficient evidence that Smith's mental abnormality or personality disorder has not significantly changed and that it would not be safe to place him in transitional release. To be clear, this evidence includes: (1) Smith's lack of progress in the SPTP after 15 years; (2) his unchanged psychiatric diagnoses; (3) his

refusal to take his psychiatric medications despite those diagnoses; (4) the voluminous significant events of misbehavior and rule-breaking during the Evaluation Period; (5) the results of the risk assessments categorizing Smith as high risk for recidivism; (6) his spotty and sometimes negative participation in treatment sessions; (7) his failure to regularly submit his RSAs and fantasy logs; and (8) his refusal to participate in the interview and annual examination process. Smith counters this substantial evidence with only his varied attendance at optional treatment sessions as a reason the court should have appointed an independent examiner or ordered transitional release. He claims this demonstrates that he has "an understanding of what needs to be done in order to progress through the program" and a "willingness to engage in the program." This is not the standard Smith must show to achieve his requested relief.

CONCLUSION

A person detained pursuant to the KSVPA cannot be granted transitional release by showing probable cause to believe that they understand what needs to be done to make progress in the treatment of their mental abnormality or personality disorder. Rather, the KSVPA required Smith to actually accomplish those tasks and show probable cause to believe that his mental abnormality or personality disorder *has* significantly changed, not that it could one day change. The mere fact that Smith sometimes showed up to leisure sessions is insufficient to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that Smith's mental abnormality or personality disorder has so changed that he is safe to be placed in transitional release. Accordingly, the district court properly denied Smith's petition to be placed in transitional release.

Affirmed.