

NOT DESIGNATED FOR PUBLICATION

No. 125,260

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Care and Treatment of
RANDALL J. RITCHIE.

MEMORANDUM OPINION

Appeal from Barton District Court; STEVEN E. JOHNSON, judge. Opinion filed June 9, 2023.
Affirmed.

Shannon S. Crane, of Hutchinson, for appellant.

Dwight R. Carswell, deputy solicitor general, and *Derek Schmidt*, attorney general, for appellee.

Before ISHERWOOD, P.J., SCHROEDER, J., and TIMOTHY G. LAHEY, S.J.

PER CURIAM: Randall Joe Ritchie is a sexually violent predator who was civilly committed to Larned State Hospital (Larned) in 2012. Following his 2021 annual exam, Ritchie petitioned the district court for placement in transitional release. The district court summarily denied his petition, and he has timely appealed. We find no merit in Ritchie's appeal and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

Ritchie has acknowledged a lengthy history of sexually abusing dozens of victims, mostly children. There is an extensive accounting of Ritchie's historically predatory behavior in the record of his previous appeals. See *In re Care & Treatment of Ritchie*, 50 Kan. App. 2d 698, 699-701, 334 P.3d 890 (2014) (upholding Ritchie's commitment to Larned as a sexually violent predator); *In re Care & Treatment of Ritchie*, 58 Kan. App.

2d 189, 200, 465 P.3d 184 (2020) (upholding revocation of Ritchie's 2017 placement in transitional release); *In re Care & Treatment of Ritchie*, No. 124,773, 2022 WL 4391892, at *1 (Kan. App. 2022) (unpublished opinion) (upholding district court's determination that Ritchie failed to establish probable cause that his mental abnormality or personality disorder had so changed that he was safe for placement in transitional release), *rev. denied* 317 Kan. ____ (February 7, 2023). We begin by briefly summarizing the procedural history of Ritchie's case.

In November 2012, Ritchie was civilly committed as a sexually violent predator under the Kansas Sexually Violent Predator Act (SVPA), K.S.A. 59-29a01 et seq. Expert testimony at his commitment hearing established that Ritchie had been convicted of a sexually violent offense and suffered from mental abnormalities or personality disorders, including pedophilia, frotteurism, alcohol dependence, and antisocial personality disorder. These conditions made Ritchie likely to commit repeat acts of sexual violence, and he had serious difficulty controlling his dangerous behavior. *Ritchie*, 50 Kan. App. 2d at 709-12. As a result, Ritchie has been committed to Larned under the custody and care of the Secretary of the Kansas Department for Aging and Disability Services (KDADS) until it is determined he is safe to be at large.

The Sexual Predator Treatment Program (SPTP) consists of three tiers of inpatient treatment and two levels of outpatient treatment. KDADS will not consider a patient for the first level of outpatient treatment, transitional release, until the person has at least reached the third tier of inpatient treatment. Each person committed under the SVPA receives an annual report of examination of the person's mental condition. See K.S.A. 2022 Supp. 59-29a08(a). In Ritchie's case, each annual examination has concluded that Ritchie's mental abnormality or personality disorder has not changed and that he is not safe to be released. KDADS has continuously recommended that Ritchie remain in custody. Ritchie has the right to petition the district court for a review of the report and to petition for transitional release over the objection of KDADS. See K.S.A. 2022 Supp. 59-

29a08(b). This case marks the third time Ritchie has sought release over KDADS's objection.

After his 2015 annual review, Ritchie petitioned for transitional release over KDADS's objection, and his petition was granted following a hearing in 2017. Ritchie was placed on transitional release, but in early 2019, the State removed Ritchie from transitional release for violating program rules and other concerning behavior. Ritchie was returned to secure commitment in Larned and was placed back in Tier One of the SPTP. Following an evidentiary hearing over his removal, the district court found that Ritchie's revocation from transitional release was warranted. Ritchie appealed his revocation, and this court affirmed the district court's decision. *Ritchie*, 58 Kan. App. 2d at 189. Ritchie remained at the Tier One inpatient treatment level throughout 2019 and 2020.

Ritchie petitioned for transitional release following his 2019 annual review, again, over KDADS's objection. Due to circumstances presented by the COVID-19 pandemic, the 2019 and 2020 annual reviews were conducted at the same time. Following an evidentiary hearing, the district court found that Ritchie's "mental abnormality or personality disorder has not so significantly changed that he [was] safe to be placed in transitional release." The district court's order denying Ritchie's petition was filed December 1, 2021. Ritchie appealed, and this court affirmed the district court's decision. *Ritchie*, 2022 WL 4391892, at *8-9.

Less than a month after the district court denied his 2019 petition, and while his appeal of that decision was pending, Ritchie filed a new petition for transitional release over KDADS's objection, this time following his 2021 annual examination. The district court's denial of that petition is the subject of this appeal.

Ritchie contends on appeal that the district court erred when it held that Ritchie failed to establish probable cause that his mental abnormality or personality disorder had significantly changed so that it would be safe to place him in transitional release.

ANALYSIS

Appellate courts apply a de novo standard of review when a person committed under the SVPA appeals a district court's probable cause determination after an annual review hearing. *In re Care & Treatment of Burch*, 296 Kan. 215, 222-23, 291 P.3d 78 (2012). In our review, we consider the evidence in the light most favorable to the committed person and resolve all conflicting evidence in that person's favor. 296 Kan. at 225.

A sexually violent predator has the right to an examination of their mental condition once every year. K.S.A. 2022 Supp. 59-29a08(a). After receiving a copy of the annual report from KDADS, as Ritchie has done here, the person may request an annual review hearing and petition for transitional release. K.S.A. 2022 Supp. 59-29a08(b). At the annual review hearing, it is the committed person's burden to establish probable cause to believe the person's mental abnormality or personality disorder has significantly changed so that they are safe to be placed in transitional release. K.S.A. 2022 Supp. 59-29a08(d). Probable cause exists when there is sufficient evidence to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that the committed person's mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional release. *Burch*, 296 Kan. at 226 (citing *In re Care & Treatment of Sipe*, 44 Kan. App. 2d 584, 592-93, 239 P.3d 871 [2010]). Thus, Ritchie must show probable cause for two statutory requirements contained in K.S.A. 2022 Supp. 59-29a08(d): (1) His mental abnormality or personality disorder has changed; and (2) it has changed to such a degree that he is safe to be placed in transitional release. *Burch*, 296 Kan. at 226-27. If the court at the annual review hearing determines that

probable cause exists to believe that the person's mental abnormality or personality disorder has significantly changed so that the person is safe to be placed in transitional release, then the court shall set a hearing for transitional release on the issue. K.S.A. 2022 Supp. 59-29a08(g).

In response to Ritchie's petition, the State filed a motion for summary dismissal, citing K.S.A. 2022 Supp. 59-29a11(a), which provides:

"If a person has previously filed a petition for transitional release, conditional release or final discharge without the secretary for aging and disability services approval and the court determined either upon review of the petition or following a hearing, that the person's petition was frivolous or that the person's condition had not significantly changed so that it is safe for the person to be at large, then the court shall deny the subsequent petition, unless the petition contains facts upon which a court could find the condition of the petitioner had significantly changed so that a hearing was warranted. Upon receipt of a first or subsequent petition from committed persons without the secretary's approval, the court shall endeavor whenever possible to review the petition and determine if the petition is based upon frivolous grounds and if so shall deny the petition without a hearing."

Relevant to the analysis here, Ritchie filed a previous petition for transitional release in 2019 without KDADS's approval, and after an evidentiary hearing, the court determined Ritchie's condition had not significantly changed such that it was safe for him to be at large. Thus, unless his current petition for transitional release contains facts upon which a court could find Ritchie's condition has significantly changed, K.S.A. 2022 Supp. 59-29a11(a) directs the court "shall" deny the petition. We have examined Ritchie's petition for facts from which a court could find a significant change in Ritchie's condition and find *none* that reflect *significant* change.

The district court heard evidence on November 2, 2021, of Ritchie's condition in connection with his 2019 petition for release and determined his condition had not

significantly changed. Ritchie did not participate in an interview in connection with his annual review in 2019 or 2020. Likewise, he again declined the opportunity for an interview in his 2021 annual review, which has an apparent significant negative impact on his evaluation. As reflected in the report itself, one result of Ritchie's decision to decline to participate in the interview is that "no information is available pertaining to his perception and understanding of his treatment progress or current sexual behavior," and "there is no information regarding Mr. Ritchie's opinion regarding his sexual fantasies or coping mechanisms." One consequence of Ritchie's refusal to participate in an interview is that we are left to consider Ritchie's "perception and understanding of his treatment progress" by considering the information he provided in his petition.

In his pro se petition for transitional release, Ritchie asserts that his "mental abnormality or personality disorder has so changed that he is safe for release." In support, he notes that he has "progressed very well in the program since his return from transitional release" and is now at Tier Two, which he says demonstrates that he has worked through the previous issues involving his removal from transitional release. But Ritchie simultaneously denies that there ever were any issues while he was on transitional release and steadfastly maintains he should never have been removed from it. He further argues that even if the "State's accusations of rule violations and rejection of supervision from isolated disputed incidents from over 3 years ago were true," those incidents have nothing to do with sexually deviant behavior or "whether or not he is likely to reoffend and not safe for release." Ritchie asserts the "so-called rule violations have nothing to do with sexually deviant behavior" and he contends his "three years of nothing but appropriate behavior" shows that he has acquired skills which demonstrate that he is safe for release. Notably, Ritchie made these same or similar arguments in 2019—arguments that did not rise to the level of establishing probable cause of a significant change in his condition.

New arguments made by Ritchie in 2021 include: The district court erred by consolidating Ritchie's 2019 and 2020 annual review hearings; the State's witnesses in the previous hearing committed perjury; and he received ineffective assistance of counsel during the prior hearing, which prevented him from proving he did not violate program rules or reject supervision. None of these issues have any bearing on whether his mental condition or personality disorder has significantly changed so that Ritchie is safe to be at large in the community. It is clear that Ritchie's "perception and understanding of his treatment progress" is far different from that expressed by the State in its annual review, and different from the findings of the district court and appellate panels that have reviewed the evidence in his cases. Thus, where the court finds that Ritchie has failed to follow program rules, Ritchie contends that the court erred, witnesses committed perjury, and his lawyer prevented him from presenting evidence. Indeed, contrary to various court findings, Ritchie simply asserts "he has proven by this three years of nothing but appropriate behavior" that he has acquired skills to keep both himself and the community safe. This assertion is not only unsupported by the record, but also contradicted by the facts in the record from the past three years.

Ritchie points to his score on one of the State's actuarial instruments as showing he is safe for release, arguing the results of the ACUTE-2007 test shows he has zero risk of recidivism and that he is clearly safe for release. The ACUTE-2007 is a risk assessment instrument that measures dynamic factors that may change very rapidly, over a period of weeks or days. It consists of seven areas of acute risk vulnerability, including hostility, emotional collapse, collapse of social supports, substance abuse, victim access, sexual preoccupation, and rejection of supervision. Ritchie's results on the ACUTE-2007, on September 30, 2021, showed no clinically significant problems in any of the risk areas. While this weighs in favor of Ritchie's petition, it is only one of the assessment instruments used by the State, and the only one suggestive of reduced risk. As noted, the results of the ACUTE-2007 may change very rapidly and, self-evidently, assess risk vulnerability at a given point in time. We find no evidence that the ACUTE-2007 is

designed to measure whether a person's mental condition has significantly changed. The ACUTE-2007 assesses dynamic factors that may impact acute risk at a given point, but it is not factual support reflecting that Ritchie's mental condition or personality disorder has significantly changed. It is one of three instruments the State uses to collectively assess the person. Here, the Static-99R, which is used to estimate the probability that an offender will reoffend against a child or nonconsenting adult, shows Ritchie continues to be in the average risk category for sexually violent predators, all of whom are considered high risk. A third instrument, the STABLE-2007 assessment, could not be correlated to the Static-99R because Ritchie refused, for the third year in a row, to be interviewed for his annual review. Ritchie's petition declares that "[t]he actuarial instruments the State uses to claim petitioner is high risk are not reliable, they do not take into account the healthy thinking changes and behaviors petitioner has made in his life." Ritchie presents no facts in support of his declaration.

We find Ritchie's score on a single actuarial instrument, which measures dynamic risk factors subject to rapid change, is not evidence of significant change nor is it sufficient evidence "to cause a person of ordinary prudence and action to conscientiously entertain a reasonable belief that [the committed person]'s mental abnormality or personality disorder ha[s] so changed that [the person is] safe to be placed in transitional release." *Burch*, 296 Kan. at 226.

When a committed person has filed a previous petition for transitional release and the court determines the person's condition has not significantly changed, K.S.A. 2022 Supp. 59-29a11(a) provides the court "shall" dismiss a subsequent petition unless the new petition contains facts showing a significant change in the person's condition. As the KDADS's annual report points out, Ritchie has declined to be interviewed in connection with his annual report which deprives KDADS, and a reviewing court, of relevant and significant information about Ritchie's perception and understanding of his treatment progress and current sexual behavior, as well as information about Ritchie's outlook or

opinion regarding his sexual fantasies or coping mechanisms. Finally, the lack of interview impairs the State's ability to utilize one of its assessment instruments, the STABLE-2007.

We note the State makes a solid argument in favor of this court finding Ritchie's petition subject to summary dismissal for being frivolous. The term "frivolous" is not specifically defined in the SVPA, so we apply its ordinary meaning. Frivolous means "of little value or importance." Webster's New World College Dictionary 581 (5th ed. 2014); see also Black's Law Dictionary 811 (11th ed. 2019) ("Lacking a legal basis or legal merit; manifestly insufficient as a matter of law."). We agree that much of Ritchie's petition is indeed frivolous. Reasons given by Ritchie in support of his petition include his disagreement with the findings by the district court in his 2019/2020 annual review; his continuing argument that his transitional release should never have been revoked; his claim witnesses lied in his previous hearing and that he would have proved it but for the ineffectiveness of counsel; his assertion he never rejected supervision at any stage of the program; and that his 2019 and 2020 annual reviews should not have been conducted at the same time. These complaints are varied and unrelated to establishing probable cause of a significant change in Ritchie's condition. If these complaints were the sole facts alleged in the petition, we would agree with the State's argument that Ritchie's petition is frivolous.

Yet, Ritchie's petition and his 2021 annual review show an acceptable score on one of the State's assessment tools and that Ritchie has participated actively in the SPTP. After two years back at Tier One, he has advanced to Tier Two. He expresses optimism, but not facts, that he will soon move to Tier Three of inpatient treatment. As we held in *Ritchie*, the "test for transitional release is not 'potential' change, and it is not enough to show the committed person has participated in the treatment program." 2022 WL 4391892, at *7. Ritchie is required to show significant change in his condition. His refusal to participate in an interview, in conjunction with his annual review, seems

inconsistent with Ritchie's claim of significant change. Viewing the facts in a light most favorable to Ritchie, as we must, Ritchie shows only that he is making some positive progress—his petition does not show facts upon which a court could find Ritchie's condition has significantly changed so that a hearing is warranted. See K.S.A. 2022 Supp. 59-29a11(a). We therefore affirm the district court's summary dismissal of Ritchie's petition.

Affirmed.