

NOT DESIGNATED FOR PUBLICATION

No. 126,123

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Care and Treatment of  
CALVIN WESLEY RICH.

MEMORANDUM OPINION

Appeal from Barton County District Court; STEVEN E. JOHNSON, judge. Submitted without oral argument. Opinion filed November 9, 2023. Affirmed.

*Kristen B. Patty, of Wichita*, for appellant.

*Ryan J. Ott*, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ARNOLD-BURGER, C.J., SCHROEDER and COBLE, JJ.

PER CURIAM: After being deemed a sexually violent predator in 2003, Calvin Wesley Rich was civilly committed to Larned State Hospital (Larned). Following his 2022 annual exam, Rich petitioned the district court for placement in transitional release. The district court denied his petition and Rich now appeals. On review, we find Rich did not meet his burden to demonstrate such a significant change in his personality disorder that he would be safe for transitional release, and we affirm the district court's ruling.

FACTUAL AND PROCEDURAL BACKGROUND

Shortly before Rich completed his sentence for aggravated sodomy in 2003, the State filed a petition seeking to confine him under the Kansas Sexually Violent Predator Act (KSVPA), K.S.A. 59-29a01 et seq. In addition to his aggravated sodomy conviction, the State alleged Rich had been previously convicted of aggravated indecent liberties

with a child and "had 14 different [s]exual charges in the past." After Rich waived his evidentiary hearing and stipulated to a report finding he met the criteria of a sexually violent predator, the district court committed Rich to the custody of the Secretary of Social and Rehabilitation Services (now known as the Secretary of the Department for Aging and Disability Services [KDADS]) for treatment in the Sexual Predator Treatment Program (SPTP) at Larned. Rich has remained civilly committed under the KSVPA since 2003.

As required by statute, Rich has annually received an examination of his mental condition and the resulting report. See K.S.A. 2022 Supp. 59-29a08(a). In Rich's case, each annual examination has concluded his mental abnormality or personality disorder has not changed and that he is not safe to be released. And each year, KDADS has recommended that Rich remain in custody. Rich 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 appeal arises from Rich's fifth attempt seeking release over KDADS's objection.

The 2022 report outlined that Rich was diagnosed with multiple psychological or personality disorders. The report also acknowledged that, over the prior year, Rich had not attended all required treatment sessions, had not submitted Rational Self-Analysis Reports (RSA) or Fantasy Logs, had not taken a polygraph exam, and he had refused to participate in the interview process for all the annual examinations since 2019. The report concluded Rich's mental abnormalities or personality disorders had not so significantly changed that it would be safe to place him in transitional release. After KDADS filed its 2022 annual report and examination of his mental condition, Rich requested an independent evaluation and annual review hearing by the district court.

The district court denied Rich's request for an independent evaluation but held an annual review hearing on November 28, 2022. Ultimately, the court found Rich did not

establish the requisite probable cause to show his mental abnormality or personality disorders had significantly changed such that it would be safe to place him in transitional release. The court determined that Rich's behavior did not indicate "a change in his thinking or attitude" despite being in the SPTP since 2003. The court also reasoned that Rich's lack of participation in "treatment [raises] the statutory presumption that he is unable to show probable cause."

Rich appeals.

THE DISTRICT COURT DID NOT ERR IN  
DENYING RICH'S MOTION FOR TRANSITIONAL RELEASE

On appeal, Rich argues the district court erred by finding he did not qualify for transitional release. Despite his request to the court, Rich does not challenge the court's refusal to appoint an independent examiner for his annual evaluation. As a result, Rich has abandoned any challenge to the lack of independent exam. See *State v. Davis*, 313 Kan. 244, 248, 485 P.3d 174 (2021) (finding an issue not briefed is deemed waived or abandoned).

*Applicable Legal Standards*

The KSVPA was enacted to provide the long-term care, treatment, and control of persons identified as sexually violent predators. *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—to which Rich stipulated in 2003—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. 2022 Supp. 59-29a07(a). During commitment, the detainee receives treatment in a program comprised of steps or phases, the last of which is transitional release. *Burch*, 296 Kan. at 220.

Each person committed under the KSVPA has the right to an annual examination of his or her mental condition, along with a report of that examination. See K.S.A. 2022 Supp. 59-29a08(a). After receiving a copy of the annual report from KDADS, as Rich did here, the person may request an annual review hearing and petition the district court 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). To meet this burden, the committed person 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." *Burch*, 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. 2022 Supp. 59-29a08(d). And, 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) requires the court to dismiss a subsequent petition unless the new petition contains facts showing such a significant change.

Appellate courts apply a de novo standard of review when a person committed under the SVPA appeals a district court's probable cause determination following an annual review hearing. *Burch*, 296 Kan. at 222-23. On review, appellate courts 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.

## *Discussion*

On appeal, Rich acknowledges these underlying presumptions and rules but nevertheless argues he "received the maximum benefit from [the SPTP] long ago." Given this belief, he concludes: "If the treatment program is truly effective, then [he] has clearly benefitted from it."

For its part, the State argues Rich's annual report showed he did not fully participate in the program, he was not transparent with his treatment team, he was restricted for being hostile with staff, and he has not changed his attitude or thinking despite being in the program since 2003. Relying on the statutory presumption, the State maintains Rich did not meet his burden of establishing probable cause.

In its decision finding Rich did not establish probable cause to show his condition had changed, the district court noted the presumption against finding probable cause when a detainee does not participate in the program. But the court also found that "even without that presumption, the Court can't find there's probable cause based on the annual report."

Although Rich makes a brief argument reweighing the facts in his annual report to suggest he has received the maximum benefit from the program, he presents no argument against the application of either statutory presumption. First, he fails to challenge the applicability of the presumption against finding probable cause due to his failure to participate in the treatment program. Second, although the district court did not rely on the presumption requiring the denial of subsequent petitions under K.S.A. 2022 Supp. 59-29a11(a), Rich does acknowledge the presumption in his appellate brief. Despite raising the presumption in his brief, though, he makes no attempt to argue his current petition for transitional release "contains facts upon which a court could find" his condition was so

significantly changed that a hearing was warranted and his subsequent petition should not be denied on its face. K.S.A. 2022 Sup. 59-29a11(a).

Regardless of the applicability of K.S.A. 2022 Sup. 59-29a11(a), Rich triggered the rebuttable presumption that he is unable to show probable cause that he is safe for release when he refused to participate in many aspects of the treatment program and exam interviewing process. See K.S.A. 2022 Sup. 59-29a08(d). As previously noted, Rich's 2022 annual report showed he has refused to complete the interview portion of the annual examination since 2019. As a result of Rich's refusal to complete the annual interview, the report stated "no information is available pertaining to his perception and understanding of his treatment progress or current sexual behavior . . . there is no information regarding [his] opinion regarding his sexual fantasies or coping mechanisms." The 2022 annual report also stated Rich refused to complete group treatment, he only attended 71% of individual treatment sessions and was resistant to or rejected the treatments discussed. He was also unwilling to work in the program, he did not submit RSA reports or Fantasy Logs, and he did not undergo a polygraph test.

In a recent case from this court, a panel found the detainee triggered the presumption against probable cause under K.S.A. 2022 Sup. 59-29a08(d) because the detainee "refused to take his psychiatric medications, failed to regularly submit his RSAs and fantasy logs, and missed treatment sessions." *In re Care and Treatment of Smith*, No. 124,832, 2023 WL 3262437, at \*4 (Kan. App. 2023) (unpublished opinion). And as just observed, the record shows Rich behaved in a comparable manner, with additional facts supporting a finding that Rich's behavior triggered the rebuttable presumption under K.S.A. 2022 Sup. 59-29a08(d). Because Rich made no attempt to rebut this presumption, we can conclude the district court did not err in finding Rich failed to establish probable cause to demonstrate a significant change in his condition and end our inquiry there.

But even were we to assume Rich's behavior did not trigger the rebuttable presumption, the record before us contains more than sufficient evidence that Rich's condition has not significantly changed and moving him to transitional release would be unsafe. Rich has not shown progress through the treatment program despite being in various forms of the program for 20 years. The 2022 report noted Rich remained in Tier One in 2021 because he did not attend classes. And this problematic behavior persisted in 2022. Additionally, Rich's psychiatric diagnoses have not changed, he has continuously been hostile with treatment staff and disruptive in the program, and his risk assessment results have not improved for many years. And given that Rich has refused to complete group treatment, had a spotty or negative participation in individual treatment, refused to regularly submit his RSAs and Fantasy Logs, and refused to participate in the interview and examination process, Rich cannot show his behavior related to such factors has changed.

In this vein, Rich has generally made no attempt to show his behavior has changed. Rather, he simply argues the record shows he has received the maximum benefit possible from the program which demonstrates his mental abnormality or personality disorder has significantly changed so that he is safe to be placed in transitional release. But this is not the standard Rich must reach to achieve his requested relief. The test for transitional release is not whether he received a general benefit from the treatment program, and it is not enough to show he has participated in some aspects of the treatment program with some success. Instead, Rich is required to show a significant change in his condition. K.S.A. 2022 Supp. 59-29a07(a). Rich's refusal to participate in an interview, combined with the information contained in his annual report, is inconsistent with his allegations of significant change. K.S.A. 2022 Supp. 59-29a08(d).

Viewing the record in a light most favorable to Rich, he shows only that he has made some progress in the program over the prior 20 years, yet he presents no facts upon which a court could find his condition has so significantly changed that he is safe to be

placed in transitional release. The district court did not err in denying Rich's petition for transitional release.

Affirmed.