IN THE COURT OF APPEALS OF IOWA

No. 2-1180 / 11-1710
Filed February 13, 2013

IN RE THE DETENTION OF
MARVIN ALLEN MEAD,

MARVIN ALLEN MEAD,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Respondent appeals a district court's order committing him as a sexually violent predator under Iowa Code chapter 229A (2007). **AFFIRMED.**

Thomas J. Gaul, Assistant Public Defender, Special Defense Unit, for appellant.

Marvin A. Mead, Cherokee, appellant pro se.

Thomas J. Miller, Attorney General, and John McCormally, Assistant Appellate Defender, for appellee State.

Considered by Potterfield, P.J., Doyle, J., and Miller, S.J.* Tabor, J., takes no part.

Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

MILLER, S.J.

I. Background Facts & Proceedings

Respondent Marvin Mead was previously convicted of deviant sexual assault in Illinois in 1973. He was also convicted in Iowa in 1986 of burglary in the first degree and two counts of sexual abuse in the third degree. Mead has been diagnosed with paraphilia with sadistic features and an antisocial personality disorder.

On September 24, 2008, the State filed a petition claiming Mead was a sexually violent predator (SVP) as defined in Iowa Code chapter 229A (2007), and that he should be committed to the care of the Iowa Department of Human Services. The State submitted a statement of probable cause, which reviewed Mead's past criminal offenses and the preliminary findings of Dr. Canton Roberts, a psychologist. Mead had been interviewed by Dr. Roberts on September 22, 2008.

A probable cause hearing, as required by section 229A.5(2), was held on September 29, 2008. The district court found probable cause existed to believe that Mead was a SVP.

On November 21, 2008, Mead filed a pro se motion to dismiss, claiming that Dr. Roberts should have informed him of his right to counsel prior to conducting an interview with him. Mead's counsel then filed a supplemental motion to dismiss, claiming Mead had the right to counsel under the Iowa constitution and chapter 229A. The district court determined the evidence obtained from the interview by Dr. Roberts should be stricken. The court

concluded that without such evidence there was not probable cause to find Mead was a SVP, and vacated the previous order finding there was probable cause. The matter was set for a second probable cause hearing.

The State filed an amended petition. It also filed an amended statement of probable cause that cited an evaluation of Mead's records by Dr. Amy Phenix, a psychologist. Mead was evaluated by Dr. Phenix on March 2, 2009, and interviewed by her on March 26, 2009.

The second probable cause hearing was held on April 9, 2009. Dr. Phenix testified, but the district court noted, "in her hearing testimony she restricted her opinions to those developed from her review of the Respondent's criminal, correctional, treatment and associated records." Mead made an oral motion to dismiss, and this was denied by the district court. The court concluded there was probable cause to find Mead was a SVP.

Mead filed a request for interlocutory appeal, which was granted by the Iowa Supreme Court. The court determined Mead should have been informed of his right to counsel prior to his interview with Dr. Roberts. *In re Detention of Mead*, 790 N.W.2d 104, 109-10 (Iowa 2010). The court concluded Mead's statutory right to counsel under section 229A.5A had been violated, and the results of the interview by Dr. Roberts were inadmissible. *Id.* at 110. The court concluded, however, that there was sufficient other evidence in the record to support a reasonable belief at the time of the first probable cause hearing that Mead was a SVP. *Id.* at 113. The court held "the evidence provided at the first probable cause hearing was sufficient to find that probable cause existed and

hold Mead pending trial." *Id.* The court did not address issues Mead raised concerning the second probable cause hearing, finding it was not necessary. *Id.* The case was remanded to the district court for further proceedings. *Id.*

Mead filed a motion for rehearing before the Iowa Supreme Court, and this was denied on December 10, 2010. The case again proceeded in the district court.

On January 3, 2011, Mead filed a motion to strike the evaluation by Dr. Phenix and her testimony, claiming he had been prematurely interviewed by her under the provisions of section 229A.5A. He also claimed he had been denied due process because his interview with Dr. Phenix was not recorded and he had not been advised of his right to an attorney or his right against self-incrimination. The district court denied the motion to strike, finding Mead's arguments went more to the weight of the evaluation, as opposed to its admissibility.

On April 21, 2011, Mead filed a motion to enforce, claiming that under the Iowa Supreme Court's ruling, the evaluation by Dr. Phenix should be dismissed as a violation of his due process rights. Mead filed another motion, on May 27, 2011, seeking to dismiss the finding of probable cause based on his claim that his participation in a sex offender treatment program violated his right against self-incrimination in the present proceedings. On the same date he filed a motion to dismiss his counsel. On June 6, 2011, the district court denied the motion to enforce. The other two motions were denied on July 22, 2011.

On August 25, 2011, Mead filed a request to represent himself in the SVP proceedings. After a hearing the district court granted his request. Stand-by counsel was appointed to assist Mead.

The case proceeded to a jury trial on October 3 and 4, 2011. Dr. Phenix testified that she had conducted an evaluation of Mead, and had reviewed his records. Dr. Phenix gave the opinion that Mead's "mental abnormalities will lead him to commit future criminal sexual violence as in the past." She also stated he had a high risk to sexually reoffend, and that he was more likely than not to engage in predatory sexual acts of violence if not confined. The jury returned a verdict finding Mead was a SVP.

Mead's stand-by counsel made an oral motion for a judgment notwithstanding the verdict, claiming the jury instruction on probable cause was improper because it used the word "guilt," instead of the term "sexually violent predator." He noted that at the time the jury instructions were presented Mead did not object to the instructions, and had not asked stand-by counsel for advice. The district court found it had been a scrivener's error, in that "the words 'defendant guilty' instead of 'sexually violent predator'" were used. The court noted that no one had made an objection at the time the instruction was given. The district court overruled the motion and ordered that Mead be civilly committed as a SVP. Mead appealed the jury's verdict.

II. Standard of Review

Our review is for the correction of errors at law. *In re Detention of Altman*, 723 N.W.2d 181, 184 (Iowa 2006). On constitutional issues, however, we review

de novo in light of the totality of the circumstances. *In re Detention of Betsworth*, 711 N.W.2d 280, 289 (Iowa 2006).

III. Jury Instruction

Mead contends the jury instruction on reasonable doubt was improper because it included the term "guilty," instead of the term "sexually violent predator." The State claims this issue was not preserved for our review.

Timely objection to jury instructions is necessary to preserve error for appellate review. *Loehr v. Metille*, 806 N.W.2d 270, 278 (Iowa 2011). Proceedings under chapter 229A are civil proceedings, "and should be treated like a civil case." *In re Detention of Palmer*, 691 N.W.2d 413, 422 (Iowa 2005). Under Iowa Rule of Civil Procedure 1.924, all objections must be made before instructions are read to the jury, and "[n]o other grounds or objection shall be asserted thereafter, or considered on appeal." "The purpose of the rule is to enable trial counsel to correct any errors in the instructions before the court submits the case to the jury." *Pavone v. Kirke*, 801 N.W.2d 477, 496 (Iowa 2011).

We conclude Mead has not preserved this issue for our review. It is clear from the record that no objection was made to the instructions prior to the time they were submitted to the jury. The objections made at the time of the motion notwithstanding the verdict were untimely under rule 1.924, and should not be considered on appeal. Therefore, we do not further address this issue.

III. Pro Se Issues

A. Mead has raised several issues in a pro se brief. He claims: (1) the district court improperly held a second probable cause hearing because chapter 229A does not provide for a second hearing; (2) his right to due process was violated when the court held a second probable cause hearing; (3) the court had no jurisdiction to hold a second probable cause hearing; and (4) he received ineffective assistance of counsel at the second probable cause hearing.

We note that in *Mead*, 790 N.W.2d at 113, the supreme court stated, "we hold that the evidence provided at the first probable cause hearing was sufficient to find that probable cause existed and hold Mead pending trial." Based on this finding, the court determined:

> Therefore, we need not determine whether there was statutory authority for the court to hold a second hearing or whether the second hearing violated Mead's constitutional rights. The first hearing establish the necessary probable cause that served as the basis for the continued detention of Mead and the scheduling of a trial on the ultimate issue of Mead's SVP status.

Mead, 790 N.W.2d at 113.

It was the evidence presented at the first probable cause hearing that led to the finding that probable cause existed and that Mead should be held pending a trial on the issue of whether he was a SVP. As the supreme court determined, there is no need to address Mead's complaints about the second probable cause hearing. *See id*. Therefore, we will not address those issues in this opinion.

B. Mead asserts the district court should have granted his motion to dismiss based on his claim that his participation in a sex offender treatment program violated his right against self-incrimination. His claims are based on the

United States Constitution, the Iowa constitution, and section 229A.5A(2). Mead claims that evidence he provided several years earlier during the course of his participation in the treatment program was improperly used against him during the SVP proceeding. These claims were raised in a motion filed on May 27, 2011, and denied by the district court on July 22, 2011.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The amendment gives a person the right "not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *In re C.H.*, 652 N.W.2d 144, 148 (Iowa 2002) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)). "When the State 'compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment.'" *In re E.H. III*, 578 N.W.2d 243, 249 (Iowa 1998) (citation omitted).

We first note that civil commitment proceedings do not implicate the full panoply of protective constitutional rights that are present in criminal proceedings. *In re Detention of Seewalker*, 689 N.W.2d 705, 707 (Iowa Ct. App. 2004). There is no constitutional basis for applying the Fifth Amendment during civil proceedings to find a person is a sexually violent predator.[1] *See Allen v. Illinois*, 478 U.S. 364, 375 (1986) (holding there was no constitutional protection

[1] Mead does not raise any arguments urging us to consider the Iowa constitution differently than the federal constitution. Therefore, we will not separately discuss the Iowa constitution. *See State v. Clark*, 814 N.W.2d 551, 560 (Iowa 2012) ("We have considered the federal and state constitutional provisions 'as congruent' for purposes of appeal when the appellant provides no argument they should be applied differently.")

for a person who had claimed his Fifth Amendment rights were violated in an interview conducted as part of a psychiatric evaluation in SVP proceedings). The United States Supreme Court noted states were free to develop their own solutions on this issue. *Id.*

We turn then to Mead's statutory claim. Section 229A.5A(2) provides for the examination of witnesses by a prosecuting attorney before a petition alleging a person is a SVP is filed. This examination should be conducted in the manner of a deposition under the Iowa Rules of Civil Procedure. Iowa Code § 229A.5A(2). The statute also provides, "Prior to oral examination, the person shall be advised by the prosecuting attorney or attorney general of the person's right to refuse to answer any questions on the basis of the privilege against self-incrimination." *Id.*

Factually, Mead's claims on this issue are not based on an examination by the prosecuting attorney while that attorney was considering whether to file a petition pursuant to section 229A.4. In *Mead*, 790 N.W.2d at 109, the supreme court found Dr. Roberts was included in "investigative personnel working at the direction of the attorney general." Because he was a representative of the attorney general, the statutory protections mandated by section 229A.5A applied to Dr. Roberts. *Mead*, 790 N.W.2d at 109. Mead's statements made as part of the sex offender treatment program were not made to a representative of the attorney general, and therefore, the statutory provisions of section 229A.5A(2) do not apply.

Additionally, Mead's claims about self-incrimination are based on statements he made during sex offender treatment several years before the present proceedings. He specifically states he made the statements "with the expectation of completing the program, passing the polygraph test and being released back into the community." Thus, there is no evidence of unconstitutional compulsion. *See State v. Iowa Dist. Ct.*, 801 N.W.2d 513, 527-28 (Iowa 2011) (finding the State did not require admission of prior acts in a sex offender treatment program for the purpose of future use, but the statements were part of a bona fide rehabilitation program for sex offenders); *see also State v. Ronek*, 389 N.W.2d 384, 385 (Iowa 1986) ("A compulsion upon the person asserting the privilege is an important element of the self-incrimination privilege.").

We conclude the district court properly denied Mead's motion to dismiss based on his claims regarding self-incrimination.

C. Mead asserts the district court should have granted his motion to strike the evaluation by Dr. Phenix and her testimony. He claims the interview by Dr. Phenix was premature under section 229A.5(5).[2] Section 229A.5(5) permits "an evaluation as to whether the respondent is a sexually violent predator," after a court has determined that probable cause exists. Mead was evaluated by Dr. Phenix in March 2009. At that time the first probable cause determination had

[2] The issues concerning the timing of the evaluation by Dr. Phenix were raised in Mead's motion filed on January 3, 2011. The district court denied the motion on January 19, 2011. Mead also filed a motion to enforce on April 21, 2011, which claimed the evaluation by Dr. Phenix violated his due process rights, that the interview should have been recorded, and that he was not advised of his right against self-incrimination. He also claimed the evaluation violated the supreme court's ruling in *Mead*, 790 N.W.2d at 113. The motion to enforce was denied on June 6, 2011.

been overturned in the district court, and the second probable cause hearing had not yet been held. Mead argues he should not have been evaluated until after a finding that probable cause existed.

In *Mead*, 790 N.W.2d at 113, the Iowa Supreme Court determined there was sufficient evidence presented at the first probable cause hearing to determine that probable cause existed. We conclude that based on the supreme court's decision Dr. Phenix could properly conduct an evaluation of Mead after the first probable cause hearing. Furthermore, even if the evaluation had been premature, Mead has not shown he was prejudiced by the timing of the evaluation.

Mead also contends the evaluation by Dr. Phenix violated his rights under section 229A.5A.[3] He claims that under section 229A.5A(2) his interview with Dr. Phenix should have been recorded and he should have been informed of his right to refuse to answer questions on the basis of the privilege against self-incrimination.

Section 229A.5A applies "[a]fter receiving notice of a person's anticipated discharge and before filing a petition." *Altman*, 723 N.W.2d at 186. The provisions of section 229A.5A apply during the time when a prosecutor's review committee is determining whether a person who is presently confined may meet the definition of a SVP. *Mead*, 790 N.W.2d at 108. "Iowa Code section 229A.5A provides procedures for gathering information before a petition is filed." *Id.* at 108-09.

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[3] Mead raises this as a constitutional issue, claiming his procedural and substantive due process rights were violated. His arguments, however, are based on the specific language of section 229A.5A.

At the time Mead was evaluated by Dr. Phenix the petition had already been filed, and therefore, we conclude section 229A.5A does not apply. We note that Dr. Roberts interviewed Mead before the petition was filed, and the provisions of section 229A.5A clearly applied in that situation, as found by the Iowa Supreme Court. *See id.* at 109-10. The same statutory provisions do not apply to the interview with Dr. Phenix, or her evaluation of Mead, because these took place after the petition had been filed on September 24, 2008. We conclude the district court properly denied Mead's motions to strike the evaluation by Dr. Phenix and her testimony.

D. Mead claims he received ineffective assistance during the first probable cause hearing because his counsel did not raise the issue of whether Dr. Roberts should have advised him of his right to counsel. Mead filed a pro se motion raising the issue that Dr. Roberts should have advised him of his right to counsel. As a result, the district court overturned the first determination of probable cause. The Iowa Supreme Court eventually entered a ruling on Mead's argument, finding Dr. Roberts should have advised him of his right to counsel, and his evaluation should not be considered. *Id.* at 110. Thus, Mead's argument regarding Dr. Roberts has been fully addressed. He cannot show he was prejudiced because this issue was not raised at the first probable cause hearing. *See In re Detention of Crane*, 704 N.W.2d 437, 439 (Iowa 2005) (noting that in order to show ineffective assistance a party must show counsel failed to perform an essential duty and the party was prejudiced).

Mead also claims he was not afforded the right to present evidence on his own behalf at the first probable cause hearing, cross-examine the witnesses that testified against him, or view and copy all petitions and reports in the possession of the court. *See* Iowa Code § 229A.5(2). A party claiming ineffective assistance "must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Mead does not state what witnesses he would have called, what questions should have been asked on cross-examination, or what documents he did not receive. Nor does he state "how anything discovered would have affected the result obtained below." *See id.* Mead's claims are not sufficiently specific for us to address them.

We conclude Mead has not shown he received ineffective assistance of counsel at the first probable cause hearing.

E. Finally, Mead claims the Iowa Supreme Court should have granted his motion for a rehearing of the supreme court's decision in *Mead*, 790 N.W.2d at 113. The Iowa Court of Appeals, however, is not at liberty to overturn Iowa Supreme Court precedent. *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). Therefore, we will not address this issue.

We affirm the decision in the district court finding Mead was a sexually violent predator under the provisions of chapter 229A.

AFFIRMED.