SUPREME COURT OF ILLINOIS

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May 22, 2019

In re: People State of Illinois, respondent, v. Richard Kalinowski, petitioner. Leave to appeal, Appellate Court, Fourth District. 124569

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 06/26/2019.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

2018 IL App (4th) 170823-U

NO. 4-17-0823

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 11, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
RICHARD KALINOWSKI,	)	No. 97CF103
Defendant-Appellant.	)	
	)	The Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court concluded respondent's right to a speedy trial was not violated but the trial court could not dismiss respondent's application for recovery.

¶ 2 In August 1997, a jury found respondent, Richard Kalinowski, to be a sexually dangerous person within the meaning of the Sexually Dangerous Persons Act (Act) (725 ILCS 205/0.01 to 12 (West 1996)), and the trial court committed him to the custody of the Director of the Illinois Department of Corrections (DOC) until such time as he was no longer a sexually dangerous person. In June 2000, respondent filed an application showing recovery. Between June 2000 and December 2004, this case was heavily litigated, but a trial did not occur. In December 2004, the trial court denied respondent's motion to appoint an independent evaluator. In January 2005, respondent appealed but later voluntarily dismissed his appeal.

¶ 3 No further action took place in the trial court until 2015, when respondent filed a "motion to represent himself." The trial court appointed counsel for respondent, who later filed a

motion to dismiss, arguing respondent should be released because the State violated his right to a speedy trial. In May 2016, the court denied the motion, concluding respondent had "withdrawn by default" his application for recovery. Respondent filed a motion to reconsider arguing his original counsel was ineffective for failing to preserve his speedy trial rights. The court denied the motion.

¶ 4 Respondent appeals, arguing the trial court erred by denying his motion to dismiss because the State violated his right to a speedy trial. We conclude that (1) respondent's right to a speedy trial was not violated and (2) the trial court erred by concluding respondent had withdrawn his application by default. Accordingly, we affirm the denial of the motion to dismiss, vacate the trial court's finding that the application for recovery was withdrawn, and remand for a trial on respondent's application.

¶ 5 I. BACKGROUND

¶ 6 A. Procedural History

¶ 7 In February 1997, respondent was indicted for aggravated criminal sexual abuse. 720 ILCS 5/12-16 (West 1996). In May 1997, the State filed a petition to commit respondent to the custody of the Director of the DOC as a sexually dangerous person within the meaning of the Act. 725 ILCS 205/3 (West 1996). In August 1997, a jury found respondent to be a sexually dangerous person, and the trial court committed respondent to the custody of the Director of the DOC until such time as he was no longer a sexually dangerous person. Respondent appealed, and this court affirmed. *People v. Kalinowski*, No. 4-97-1151 (Mar. 26, 1999) (unpublished order under Supreme Court Rule 23).

¶ 8 B. The Application Showing Recovery

¶ 9 In June 2000, respondent filed an application showing recovery, alleging he was

no longer sexually dangerous. 725 ILCS 205/9 (West 2000). Respondent also filed a motion for a jury trial and a motion for a speedy trial. In July 2000, the trial court appointed Brian Dees as standby counsel for respondent.

¶ 10 Between July 2000 and December 2004, respondent filed dozens of motions, both *pro se* and through counsel. These motions requested—among other things—discovery, independent evaluations, a speedy trial, to strike psychiatric reports, and for the court to appoint new counsel or to allow respondent to represent himself. Given the extensive litigation that took place in this case, we highlight only what is necessary.

¶ 11 In October 2000, respondent filed a motion for an independent socio-psychiatric examination, and the trial court granted this motion. In January and March 2001, respondent filed motions to terminate or replace his standby counsel; the court denied those motions. In September 2001, the State sought an independent evaluator. The court granted that request and set the matter for trial in January 2002. Thereafter, respondent filed multiple motions seeking to strike or otherwise challenge the State's evaluation. In December 2001, the trial court denied those motions. Later that month, the judge hearing the case was assigned to this court, and the matter was reassigned to a new judge.

¶ 12 In January 2002, shortly before the scheduled trial date, respondent filed several motions, one of which sought to terminate his standby counsel and another which renewed his request for a speedy trial. Later in January, the trial court conducted a hearing at which respondent and his standby counsel were present. The court appointed standby counsel to act as full counsel for respondent. At a subsequent status hearing, the court entered a scheduling order for the completion of discovery, set a final pretrial hearing date in May 2002, and set a jury trial in June.

¶ 13 A week before the final pretrial hearing, respondent *pro se* filed several motions. Among other things, respondent requested that his counsel be changed to standby counsel and a *Frye* hearing be conducted challenging the State's expert. See *In re Commitment of Simons*, 213 Ill. 2d 523, 529, 821 N.E.2d 1184, 1188 (2004) ("the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)."). In May 2002, the trial court conducted a hearing at which respondent and his counsel were present. The court ordered respondent's counsel to timely file any appropriate motions and granted his request for a continuance, cancelling the scheduled trial. Thereafter, respondent's counsel filed new discovery requests.

¶ 14 In the fall of 2002, respondent *pro se* filed multiple motions seeking to represent himself and to be present at depositions. In October 2002, the trial court conducted a hearing at which respondent was not personally present. The court commented that respondent seemed to equivocate between wanting counsel and wanting to represent himself depending on how he felt about his counsel. The court also noted the *pro se* motions were slowing down the proceedings and that respondent needed to communicate solely through counsel. The court denied respondent's request to be present at depositions and ordered a transcript of the hearing to be sent to respondent.

¶ 15 In December 2002, the trial court entered a scheduling order giving respondent a deadline to disclose a possible new expert and setting a final pretrial hearing date in February 2003. In February 2003, the court granted respondent additional time to disclose an expert and ordered a trial "to begin within 75 days." In April 2003, respondent *pro se* filed a motion to waive counsel. In December 2003, respondent *pro se* filed a motion for a new expert. In January 2004, respondent *pro se* filed a motion for a hearing on his pending motions.

¶ 16 In September 2004, the trial court conducted a status hearing to determine why a trial had not occurred. The State mentioned that respondent had a motion for a *Frye* hearing pending and because there was a case pending before the Illinois Supreme Court on the subject, there was some debate about whether and how to proceed. Respondent's counsel agreed that respondent wanted a *Frye* hearing. Respondent was not present. The court expressed its dissatisfaction that the case had lingered and ordered respondent's counsel to sort out what needed to be filed so the matter could be set for trial.

¶ 17 Respondent's counsel asked for continuances in October and November 2004 so that he could file the appropriate motion. In December 2004, respondent, through counsel, filed a motion for a new expert because one of the experts who had authored his initial evaluation had died. The trial court denied the motion and ordered respondent's counsel "to verify the qualification of [the] potential [expert] witness *** and report to the court."

¶ 18 In January 2005, respondent *pro se* filed a notice of appeal. In April 2005, respondent was appointed counsel on appeal. In June 2005, this court granted respondent's motion to voluntarily dismiss the appeal.

¶ 19 C. Proceedings Following Appeal

¶ 20 Then, for all intents and purposes, nothing occurred until 2015. (We note that in 2012, respondent filed a motion for the preparation of transcripts, but the motion was denied without a hearing and no further action took place.) In July 2015, respondent filed a "motion to represent himself." The trial court appointed new counsel, and respondent withdrew that motion.

¶ 21 In September 2015, respondent filed a motion to dismiss, arguing the State violated his right to a speedy trial. Attached to the motion, respondent filed an affidavit stating he had communicated with his prior trial counsel dozens of times since the appeal was dismissed

and that his counsel told him he was working on his case.

¶ 22 In March 2016, the trial court conducted a hearing on respondent's motion to dismiss. In May 2016, the court entered a written order denying the motion to dismiss, concluding respondent had not been denied a speedy trial because he had "withdrawn by default" his application showing recovery because he had not taken any action following the voluntary dismissal of his 2005 appeal. Regarding a speedy trial violation, the court concluded the delay between 2000 and 2005 was attributable to respondent because he agreed to continuances and filed many motions which caused delay. The court further found that the delay between 2005 and 2015 was also attributable to respondent because he did not take any action on the application after he voluntarily dismissed his appeal. Finally, the court stated respondent did not suffer prejudice because he had not demonstrated he had recovered.

¶ 23 Respondent filed a motion to reconsider in which he argued (1) the trial court erred in finding there was no speedy trial violation and (2) his trial counsel was ineffective for failing to preserve the speedy trial issue. In August 2016, the trial court conducted a hearing on the motion to reconsider. The court expressed concern that respondent's trial counsel "didn't do anything" but did not want to release respondent without a "safety net for the community." The court ordered an independent evaluation of respondent and stated it "would not hesitate to do the conditional discharge if *** an updated evaluation *** said that it was appropriate." The court continued the hearing on respondent's motion until the evaluation was completed.

¶ 24 At a status hearing in July 2017, the State requested that it be allowed to conduct its own examination of respondent. Over respondent's objection, the trial court granted the State's request.

¶ 25 In November 2017, the trial court conducted a hearing on respondent's motion to

reconsider. Respondent argued that the court should set the matter for a trial on his application because two recent evaluations had been conducted and the application could still be considered pending. The court was concerned that it could not schedule a trial because it had previously ruled that the application had been withdrawn. Nonetheless, the court was eager for respondent to have a trial. The court denied the motion to reconsider but stated it wanted respondent to file a new application.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Respondent appeals, arguing the trial court erred by denying his motion to dismiss because the State violated his right to a speedy trial. We conclude that (1) respondent's right to a speedy trial was not violated and (2) the trial court erred by concluding respondent had withdrawn his application by default. Accordingly, we affirm the denial of the motion to dismiss, vacate the trial court's finding that the application for recovery was withdrawn, and remand for a trial on respondent's application.

¶ 29 A. Jurisdiction

¶ 30 Initially, we note that this case comes to us in an unusual procedural posture. "[A] reviewing court has an independent duty to *sua sponte* consider questions of jurisdiction." *People v. Vari*, 2016 IL App (3d) 140278, ¶ 7, 48 N.E.3d 265. It is well settled that appellate courts have jurisdiction only over final orders. *Id.* ¶ 8. Typically, the denial of a motion to dismiss is an interlocutory order and not appealable. *Mund v. Brown*, 393 Ill. App. 3d 994, 996, 913 N.E.2d 1225, 1228 (2009). However, in this case, when the trial court denied respondent's motion to dismiss, it found that respondent had withdrawn his application "by default" and respondent needed to file a new application to proceed. Because respondent asserted his

application was still pending and never took any affirmative steps to withdraw his application, the trial court's order was tantamount to a dismissal of the application. A dismissal of a claim with prejudice is a final and appealable order (*People v. Kruger*, 2015 IL App (4th) 131080, ¶ 9, 45 N.E.3d 1103); thus, this court has jurisdiction over this appeal.

¶ 31 B. Speedy Trial Violation

¶ 32 Respondent argues the State violated his right to a speedy trial. We disagree.

¶ 33 Although proceedings under the Act are civil in nature, respondents have rights similar to criminal defendants, including the right to counsel and a speedy trial. *People v. Donath*, 2013 IL App (3d) 120251, ¶ 44, 986 N.E.2d 1222; *People v. Trainor*, 196 Ill. 2d 318, 328-29, 752 N.E.2d 1055, 1061 (2001). To determine whether a respondent's right to a speedy trial has been violated, four factors must be balanced: "[(1)] the length of delay in bringing respondent to trial, [(2)] the reasons for the delay, [(3)] the prejudice, if any, to respondent, and [(4)] respondent's assertion of his right." *Donath*, 2013 IL App (3d) 120251, ¶ 44. (These factors are known as the *Barker* factors from the Supreme Court case which first defined them: *Barker v. Wingo*, 407 U.S. 514 (1972).) "Delays approaching one year are generally presumed to be prejudicial, such that they will trigger consideration of the four factors; however, this presumption does not imply that respondent was prejudiced by the delay. [Citation.] No single factor is necessary or sufficient to find that a speedy trial violation occurred." *Donath*, 2013 IL App (3d) 120251, ¶ 45.

¶ 34 Whether a respondent has been denied his right to a speedy trial presents a mixed question of law and fact. *People v. Crane*, 195 Ill. 2d 42, 51, 743 N.E.2d 555, 562 (2001). A trial court's findings of fact are entitled to substantial deference and will be reversed only if they are against the manifest weight of the evidence. *Id.* However, the ultimate conclusion of

whether a speedy trial violation has occurred is a question of law reviewed *de novo*. *Id.* at 52; *Donath*, 2013 IL App (3d) 120251, ¶ 45. "A finding is against the manifest weight of the evidence where the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." (Internal quotation marks omitted.) *People v. Peterson*, 2017 IL 120331, ¶ 39, 106 N.E.3d 944.

¶ 35 1. *The Length of the Delay*

¶ 36 In this case, both parties agree that a presumption exists that respondent's right to a speedy trial had been violated because the delay was greater than one year. However, a finding of presumptive prejudice " 'simply marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* enquiry.' " *Crane*, 195 Ill. 2d at 53 (quoting *Doggett v. United States*, 505 U.S. 647, 652 n. 1 (1992)).

¶ 37 2. *Reasons for the Delay*

¶ 38 "[T]he State bears the burden to justify the delay." *Donath*, 2013 IL App (3d) 120251, ¶ 49. The reasons for the delay are afforded different weight, "such that an intentional delay will weigh heavier against the State than a more neutral reason." *Id.* Neutral reasons include crowded court dockets, errors by the police, unavailability of witnesses, or a judge's illness. *Crane*, 195 Ill. 2d at 53-54. "[T]he mere fact that the delay is attributable to the State does not always mean that a speedy trial violation has occurred," and a respondent may be responsible for a delay. *Donath*, 2013 IL App (3d) 120251, ¶¶ 49, 51. "A delay is occasioned by respondent when respondent's acts caused or contributed to the delay. [Citation.] When respondent's counsel requests a continuance on behalf of respondent, any delay caused by that continuance will be attributed to respondent, as a client is generally bound by the acts or admissions of his attorney." *Id.* ¶ 51. A respondent is not bound if he "clearly and convincingly

asserts his right to discharge his attorney." *People v. Kaczmarek*, 207 Ill. 2d 288, 297, 798 N.E.2d 713, 719 (2003).

¶ 39 The trial court found that the delay between 2000 and 2005 was attributable to respondent because he agreed to multiple continuances, requested independent examinations, and filed numerous motions which prevented the case from proceeding to trial. The trial court also found respondent responsible for the delay between 2005 and 2015 because he failed to pursue his application following the dismissal of his appeal.

¶ 40 We conclude that the trial court's findings that respondent caused the delay were not against the manifest weight of the evidence. Respondent filed numerous motions which necessarily caused delay. In addition to filing motions for independent evaluations, respondent repeatedly filed motions to strike the State's psychiatric report and motions to terminate his attorney's representation. Indeed, respondent tended repeatedly to file such important motions on the eve of trial, as demonstrated by his motions to terminate counsel filed in January 2002, May 2002, and April 2003.

¶ 41 Respondent claims he attempted to discharge his attorney and therefore should not be held responsible for his trial counsel's actions. Although respondent filed many motions complaining about his trial counsel, the record does not support respondent's claim. The vast majority of transcripts from the hearings on these various motions do not appear in the record. In the absence of a complete record, it is presumed that trial court acted in conformity with the law and had a sufficient basis in fact to support its order. *People v. Deleon*, 227 Ill. 2d 322, 342, 882 N.E.2d 999, 1010 (2008). Despite respondent's complaints, the trial court actually appointed his trial counsel as full counsel, instead of merely standby counsel, when respondent was present before the trial court in January 2002. In May 2002, respondent was again present at the final

pretrial hearing after filing motions to terminate, but his counsel was not discharged. Instead, his counsel was instructed to continue acting as counsel, determine which *pro se* motions to adopt, and his motion to continue was granted, thus canceling the scheduled trial date in June 2002. In October 2002, the court explained that respondent seemed to equivocate back and forth about representing himself depending on how satisfied he was with his counsel's actions at the time. Further, in the affidavit submitted with his motion to dismiss, respondent stated that when he communicated with his trial counsel following the dismissal of his appeal, his counsel assured him the case would be proceeding. Notwithstanding the veracity of whether someone previously so personally involved in their own litigation could believe an attorney who said they were working on a case while not filing anything or appearing in court for 10 years, the fact that respondent attested that he believed his counsel was working on the case clearly demonstrates that he *wanted* to be represented by counsel between 2005 and 2015.

¶ 42 The transcripts that do appear in the record demonstrate respondent's counsel was adopting and proceeding on most, if not all, of respondent's *pro se* filings. Of particular relevance, respondent's counsel adopted a motion seeking a *Frye* hearing to challenge the qualifications of the State's expert. Counsel sought and received multiple continuances to speak with his client to determine a course of action concerning the *Frye* hearing and to obtain a new independent evaluation in the fall and winter of 2004. Therefore, the delay up to 2005 was primarily caused by respondent.

¶ 43 Further, respondent filed a *pro se* appeal in January 2005 after the trial court denied his motion for an independent evaluation. The trial court had to wait for the resolution of the appeal before it could continue. Respondent voluntarily dismissed that appeal and never filed anything in the trial court to indicate he wished to continue on his application. The State

did not act unreasonably when it concluded that respondent did not wish to proceed on his application, considering the context that respondent voluntarily abandoned his appeal and the trial court's last order required respondent's counsel to verify respondent's expert witness's qualifications and report to the court before proceeding.

¶ 44 Respondent argues he had no obligation to proceed with his application and therefore the delay should be attributed to the State. Respondent filed nothing in the trial court until 2012 and only requested further proceedings in 2015. By doing nothing, respondent certainly contributed to the confusion over whether he wished to proceed. Accordingly, the trial court's conclusion that respondent was, in large part, the reason for the delay was not against the manifest weight of the evidence.

¶ 45 3. *Prejudice*

¶ 46 There are three types of prejudice recognized for violations of the right to a speedy trial: "(1) the prevention of oppressive pretrial incarceration, (2) the minimization of defendant's anxiety and concern about the pending charge, and (3) the limitation of the possibility that the defense will be impaired by the delay." *Kaczmarek*, 207 Ill. 2d at 299 (citing *Barker*, 407 U.S. at 532). The third factor is the most serious because it impacts "the fairness of the entire system." (Internal quotation marks omitted.) *Id.* The second factor, on its own, "is of slight import" because it "is present to some extent in every case." *Id.* at 300.

¶ 47 The State does not dispute that respondent suffered oppressive incarceration and anxiety and concern about the pending charge. However, the State insists that respondent's ability to prepare a defense was not impaired by the delay. In particular, the State notes that respondent received an independent evaluation in 2000 and that his *pro se* motions caused the delay between 2000 and 2005. Therefore, the fact that one of the independent evaluators died

prior to trial is attributable to respondent.

¶ 48 The delay in this case was extremely long, although not unprecedented. See *People v. Sims*, 403 Ill. App. 3d 9, 19, 931 N.E.2d 1220, 1230 (2010) (17-year delay before ruling on appeal did not violate right to speedy trial). However, respondent's claim of anxiety and concern is questionable, considering that he did almost nothing to seek release between 2005 and 2015. Additionally, though respondent was detained without a trial on his application, a jury had already found him to be a sexually dangerous person. Therefore, this case does not invoke the identical concerns of pretrial incarceration that most cases address. *Crane*, 195 Ill. 2d at 59 ("Detention prior to a proper adjudication is exactly the type of prejudice that the speedy-trial clause was intended to protect against.").

¶ 49 Most important, respondent has not demonstrated that the ability to prepare his case was impaired. The State is correct that any problems caused by the delay between 2000 and 2005 are attributable to respondent because of his oppressive filings. Respondent contends that therapists, psychologists, or other treatment personnel with information or their records could have been lost, thus inhibiting his ability to present his case. Respondent's contentions are highly speculative and are unsupported by the record. We note that respondent did receive an evaluation in 2016 that relied on treatment records and concluded the treatment respondent received while incarcerated was largely effective. Accordingly, we conclude the trial court's ruling that respondent did not demonstrate prejudice was not against the manifest weight of the evidence.

¶ 50 4. *Respondent's Assertion of His Right*

¶ 51 "[W]hen assessing defendant's constitutional speedy-trial claim, his assertion of the right may be factored into the balancing test." *Crane*, 195 Ill. 2d at 58. A court may not

presume a respondent's waiver of a fundamental right from his inaction; however, "this does not mean a defendant will be completely absolved from all responsibility to assert his right to a speedy trial." *Id.* "[F]ailure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Barker*, 407 U.S. at 532.

¶ 52 Here, respondent asserted his right to a speedy trial in 2000 and 2002. However, respondent filed numerous motions and agreed to several continuances thereafter. Additionally, respondent filed a *pro se* appeal in January 2005 after the trial court denied his motion for independent examination. Between 2005 and 2015, respondent failed to assert his right to a speedy trial at all. This failure is particularly glaring given the context that respondent (1) had previously *pro se* filed motions asserting this right, (2) had filed many *pro se* motions despite being represented by counsel, and (3) voluntarily dismissed his appeal.

¶ 53 In short, the trial court's finding that respondent failed to assert his right to a speedy trial was not against the manifest weight of the evidence.

¶ 54 5. *Weighing the Factors*

¶ 55 "Because of the seriousness of the remedy—'a defendant who may be guilty of a serious crime will go free, without having been tried'—the right to a speedy trial should always be in balance, and not inconsistent, with the rights of public justice." *Crane*, 195 Ill. 2d at 47 (quoting *Barker*, 407 U.S. at 522). "The Act's purpose is twofold: (1) to protect the public by sequestering a sexually dangerous person until such a time as the individual is recovered and released, and (2) to subject sexually dangerous persons to treatment such that the individual may recover from the propensity to commit sexual offenses and be rehabilitated." *Trainor*, 196 Ill. 2d at 323-24.

¶ 56 As noted earlier, this case is in a different procedural posture than most. A jury

previously found respondent to be a sexually dangerous person. Accordingly, his incarceration was not without due process. Moreover, the legislature enacted the Act to protect the public from sexually dangerous persons, who have a high likelihood of recidivating. 725 ILCS 205/1.01 (West 2000); *Trainor*, 196 Ill. 2d at 323-24.

¶ 57 We agree with respondent that the delay was excessive and should not have occurred. However, the trial court's findings that respondent was to blame for the delay were not against the manifest weight of the evidence. Considering the important interests of the public in these cases, we conclude that the court correctly weighed the factors when it determined respondent's right to a speedy trial was not violated.

¶ 58 C. The Propriety of the Dismissal of Respondent's Application

¶ 59 Although the trial court correctly found that the State did not violate respondent's right to a speedy trial, it nonetheless erred when it essentially dismissed his application by concluding he had withdrawn it by default.

¶ 60 In *Trainor*, the supreme court determined that a trial court could not resolve a respondent's application for recovery by granting a motion for summary judgment filed by the State. *Trainor*, 196 Ill. 2d at 342. The court explained that, were such a remedy permitted, the State could avoid its obligation to prove the respondent was still a sexually dangerous person and deny the respondent his right to a jury trial. *Id.* at 340-42. Instead, the Act demands that the trial court conduct a trial on a respondent's application for recovery. *Id.* at 342. We conclude this reasoning is equally applicable to dismissals.

¶ 61 The Act recognizes that a respondent has the right to withdraw an application showing recovery. See 725 ILCS 205/9(d) (West 2016) ("If a person has previously filed an application *** and the court determined either at a hearing or following a jury trial that the

applicant is still a sexually dangerous person, or if the application is withdrawn, no additional application may be filed for 2 years[.]"). Here, respondent never indicated a desire to withdraw his application. Indeed, he consistently argued that the application was still pending. Instead, the trial court found that the application was "withdrawn by default." Although it is unclear exactly what the trial court meant, a dismissal "by default" is analogous to a dismissal for want of prosecution. See *Kruger*, 2015 IL App (4th) 131080, ¶ 11 ("Under Illinois law, trial courts have the power to dismiss civil actions for inexcusable delay and lack of diligence, which is referred to as a dismissal for want of prosecution." (Internal quotation marks omitted.)). However, respondent had no obligation to prosecute the application. *Trainor*, 196 Ill. 2d at 334-35. *Trainor* makes clear that the State has the burden of proceeding with evidence and proving respondent is still a sexually dangerous person. *Id.* at 335.

¶ 62 We recognize that we earlier concluded that the delay was not unreasonable. Respondent's failure to take any action in the trial court after voluntarily dismissing his appeal certainly does give the impression that he no longer wished to proceed on his application. Nonetheless, the court had no authority to dismiss the application in the absence of an indication from respondent that he no longer wished to proceed. Put another way, the court could not *sua sponte* determine the application was withdrawn any more than it could have granted a motion to dismiss filed by the State. See *People v. Burk*, 289 Ill. App. 3d 270, 273, 682 N.E.2d 352, 353 (1997) ("The Act contains no provision for dismissing applications showing recovery, however frivolous, without a hearing."). When respondent finally took further action on his application, the court was required to take the necessary steps to insure a trial took place in accordance with the Act.

¶ 63 We wish to express our dissatisfaction with the proceedings below. Based on our

review of the record, it is clear the respondent, State, and trial court all failed to live up to their obligations at some point in this litigation. Respondent, like any litigant, is required to follow the progress of his own case even if he is represented by counsel. *Fiallo v. Lee*, 356 Ill. App. 3d 649, 656, 826 N.E.2d 936, 942 (2005). In short, respondent should have followed up with the trial court if the case was not proceeding. If his counsel was the cause of the delay, he should have requested new counsel, something he did several times previously.

¶ 64 The State also had an obligation to set the matter for a hearing. The Act places a clear burden on the State to proceed with the evidence after an application is filed. *Trainor*, 196 Ill. 2d at 335. After the appeal was dismissed, the State could have and should have set the case for trial or a status hearing. At the very least, the State should have conferred with respondent's counsel and determined if respondent wished to proceed with the matter. If counsel indicated respondent did not wish to proceed and still took no action, the State should have requested a hearing to clear up the matter on the record.

¶ 65 Finally, the trial court had an obligation to manage its docket. We are not without sympathy for the trial court in this matter. Undoubtedly, respondent made this case difficult by filing numerous motions *pro se* despite being represented by counsel. And we recognize that the trial court did what it could to (1) discourage respondent from filing inappropriate motions, (2) encourage counsel to communicate with respondent and reign in his filings, and (3) keep the case moving forward. Twice the court set the matter for trial, yet twice no trial occurred without any indication as to why. Notwithstanding these laudable efforts, the court failed to conduct any proceedings following the dismissal of respondent's appeal. When no action had occurred in the case for a substantial period of time, the court should have set the case for a status hearing, required the attendance of the parties, and demanded an explanation for the inaction and a plan

for the resolution of the case. Again, this is something the trial court did on multiple occasions in this very case. We are therefore perplexed as to why nothing happened following the dismissal of respondent's appeal.

¶ 66 As a result of these failures, a person was held in prison for 10 years without receiving a hearing on his application showing recovery.

¶ 67 D. Remand Instructions

¶ 68 We note that a respondent may file and proceed on a new application notwithstanding the fact that an appeal is pending on a previous application. *People v. Tunget*, 287 Ill. App. 3d 533, 535, 678 N.E.2d 1246, 1247 (1997). We sincerely hope respondent was able to file a new application and proceed on it while this appeal has been pending. If he has, and if he has been conditionally discharged, then a trial on his original application is not required. If not, a trial on his application showing recovery must be conducted. (In the event of a trial, we remind the trial court that the relevant inquiry is whether respondent is a sexually dangerous person on the date of the trial court's decision. *People v. Guthrie*, 2016 IL App (4th) 150617, ¶ 43, 57 N.E.3d 621. We leave it up to the trial court to determine whether the most recent evaluations are sufficient or if new evaluations are required.)

¶ 69 III. CONCLUSION

¶ 70 For the reasons stated, we affirm the denial of the motion to dismiss, vacate the trial court's finding that the application for recovery was withdrawn, and remand for a trial on respondent's application.

¶ 71 Affirmed in part and vacated in part. Cause remanded with directions.

Additional material from this filing is available in the Clerk's Office.