STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1862

In the Matter of the
Civil Commitment of:
Ricky Lee Mason.

Filed February 13, 2012
Affirmed
Klaphake, Judge

Chippewa County District Court
File No. 12-PR-10-769

Lori Swanson, Attorney General, Scott E. Haldeman, Assistant Attorney General, St. Paul, Minnesota (for respondent State of Minnesota)

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Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

KLAPHAKE, Judge

Appellant Ricky Lee Mason was civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP). Appellant challenges the district court's order for indeterminate civil commitment, arguing that there is insufficient evidence to support his commitment as an SDP and that there is a less restrictive alternative program that can meet his needs.

Based on the record before us, because there is sufficient clear and convincing evidence to commit appellant as an SDP, and because appellant failed to establish that there is a less restrictive program available that both meets his needs and is consistent with the requirements of public safety, we affirm.

D E C I S I O N

In an appeal from civil commitment as an SDP, we review the district court's factual findings for clear error and the district court's determination of whether the statutory standard for commitment has been satisfied as a question of law subject to de novo review. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). A petition for civil commitment as an SDP must be proved by clear and convincing evidence. *Id.* We view the evidence in the light most favorable to the district court's conclusion. *Id.* at 840.

Sufficiency of the Evidence

A "sexually dangerous person" is defined as a person who "(1) has engaged in a course of harmful sexual conduct"; (2) "has manifested a sexual, personality, or other mental disorder or dysfunction"; and (3) "as a result, is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2010). Appellant asserts that the evidence is insufficient to show that he has engaged in a course of harmful sexual conduct or that he is likely to engage in harmful sexual conduct in the future.[1]

[1] Appellant concedes that there is sufficient evidence to show a mental or personality disorder, the second prong of the definition of an SDP.

"Harmful sexual conduct" is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2010). There is a rebuttable presumption that third- and fourth-degree criminal sexual conduct creates a substantial likelihood that a victim will suffer serious physical or emotional harm. *Id.*, subd. 7a(b) (2010).

Appellant was convicted of three counts of third-degree criminal sexual conduct involving one victim, JEH, in three separate incidents; the district concluded that as to another victim, ADD, appellant committed acts that were the equivalent of fourth-degree criminal sexual conduct, although he was not convicted of that charge.[2] Further, both JEH and ADD testified that they had suffered emotional harm as a result of appellant's assaults. The district court found that both ADD and JEH were persuasive and credible witnesses. There is sufficient clear and convincing evidence in the record to support the district court's findings of harmful conduct.

The state must show that there has been a "course" of harmful sexual conduct. While not defined in the statute, this court has defined a "course" as "a systematic or orderly succession," "a sequence." *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. Sep. 17, 2002). For this purpose, a succession of events can include both charged and uncharged offenses. *Stone*, 711 N.W.2d at 837. Here, appellant made sexual contact with ADD by cornering her in a car and pinning her against the window. He forcibly raped JEH on three separate occasions,

[2] Fourth-degree criminal sexual conduct includes the use of force or coercion to accomplish sexual contact, the intentional touching of the victim's intimate parts. Minn. Stat. §§ 609.345, subd. 1(c); .341, subd. 11(a)(i) (2010).

pinning her down while engaging in an escalating series of acts of sexual penetration and humiliation.[3] Two of the trial experts, Drs. Marston and Marshall, agreed that appellant demonstrated a course of harmful sexual conduct in his actions toward JEH and ADD. The third expert, Dr. Alberg, apparently was unaware of the facts of the assault on ADD and considered only the assaults on JEH, but stated that he would consider the assault on ADD if she testified that it caused emotional harm, which she did. In addition, Dr. Marshall considered that appellant's large number of sexual partners showed that he engaged in compulsive sexual behavior. The record includes clear and convincing evidence to support the district court's finding that appellant engaged in a course of harmful sexual conduct.

In *In re Linehan* (*Linehan I*), 518 N.W.2d 609, 614 (Minn. 1994), the supreme court set forth six factors to consider when evaluating a sex offender's future risk of offending. The supreme court applied these factors to analyze future dangerousness in an SDP commitment. *In re Linehan* (*Linehan III*), 557 N.W.2d 171, 189 (Minn. 1996), *cert. granted, judgment vacated and case remanded*, 522 U.S. 1011, 118 S. Ct. 596, *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). These six factors are: (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) a statistical analysis of the offender's behavior as compared to others with a similar background, usually using actuarial or predictive tests; (4) stresses in the offender's environment upon release; (5) similarity of release environment to the environment that

[3] The district court noted that although other uncharged sexual behavior was alleged, it did not rely on those incidents in reaching its decision because proof of these encounters was not clear and convincing.

existed during the offenses; and (6) the offender's record of participation in sex-offender treatment programs. *Linehan I*, 518 N.W.2d at 614; *Stone*, 711 N.W.2d at 840. All three experts addressed these six factors.

(1) Both Marshall and Marston stated that appellant's current age, 35, would not reduce his propensity to re-offend and that no reduction in the rate of offense would occur until the age of 60; Alberg opined that appellant was less likely to offend at the age of 35.

(2) Marshall and Marston considered appellant's sexual offenses to be violent because they involved force. Marston considered appellant's "high sex drive" an additional risk factor. Alberg stated that appellant's history of violent offenses, including fighting and assaults, occurred when he was younger, but stated that "[o]therwise, his violent behavior is related to his sex offenses." Alberg stated that if appellant engaged in violent behavior, it would have sexual content.

(3) The experts considered a wide variety of actuarial and diagnostic test results, including the MMPI-R, the MnSOST-R, the PCL-R, the SORAG, VRAG, SVR-20, and the MCMI-III. Although the results obtained by the experts were fairly consistent, the interpretation of the results varied. For example, appellant scored 27 out of 40 on the PCL-R, a test for psychopathy. Alberg felt this was lower than the clinical cut-off of 30 for psychopathy, while Marston and Marshall considered it was elevated and within the range of error for a diagnosis of psychopathy. Appellant scored as a low risk to re-offend on the MnSOST-R, which is used by the Department of Corrections to assess risk, until near his release date in December 2010; as he was being considered for

commitment, his score on this assessment rose to 10, a high risk of re-offense. Marston, Marshall, and Alberg all acknowledged that the accuracy of MnSOST-R depends on the quality of information available to the examiner and opined that appellant's previous low scores could reflect a lack of accurate information. With his current score, all three experts agreed that it showed appellant was highly likely to re-offend, because it placed appellant at the 94-98th percentile of other offenders. The other diagnostic tests show generally a moderate to high level of risk of re-offending. Both Marston and Marshall testified that in their expert opinions, appellant was highly likely to re-offend; Alberg felt the factors were mixed. Marshall stated that the combination of sadomasochistic behavior, personality disorder, and deviant sexual behavior made appellant a greater risk to re-offend. The district court found that Marshall and Marston's opinions were credible and more persuasive than Alberg's.

(4) All three experts agreed that appellant would be subject to a great deal of stress if he were released, because of his status as a sex offender. Appellant reported that his sexual assaults against JEH were at least partially prompted by a desire to deal with stress. Alberg testified that appellant would be likely to react to stress by using alcohol or drugs, which would increase the likelihood of re-offending.

(5) The experts agreed that there would be no significant change in appellant's community situation because he had no firm plans regarding jobs, family support, relationships, or treatment. Appellant's plans included an equivocal commitment to re-entering a community-based sex offender program, the CORE program, and returning to a job he had worked at before he was imprisoned. Alberg noted that appellant had not re-

offended during his previous releases into the community, but he had been under supervision; if appellant were released, he would be supervised for only a short period before his conditional release time expired.

(6) Appellant never successfully completed sex offender treatment, either while in prison or during his release periods. Alberg felt that appellant had learned to recognize certain risks but acknowledged that appellant's "record with regard to sex therapy programs is poor in that he has been terminated from all his programs."

The district court made a thorough examination of the record and issued detailed findings. There is sufficient clear and convincing evidence to support the district court's conclusion that appellant meets the statutory standard for commitment as an SDP.

Least Restrictive Alternative

A person who is civilly committed as an SDP must be committed to a secure treatment facility "unless the patient establishes by clear and convincing evidence that a less restrictive treatment program is available that is consistent with patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1(d) (2010). The burden of proof, therefore, is on the patient to prove that an appropriate program is available. *In re Robb*, 622 N.W.2d 564, 574 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001).

Both Marshall and Marston testified that appellant needs to be in a secure facility. Alberg testified that appellant could safely be released into the community as long as he received sex offender treatment and suggested that the CORE program would be an appropriate alternative. The district court found that Marshall and Marston were more

credible than Alberg, who discounted the assault against ADD. Appellant was terminated from CORE on three occasions: once in 2007 because he missed three meetings in a six-month period, tested positive for marijuana, and had sexually explicit letters in his possession; once in 2009, when he failed to complete assignments for three weeks and entered into a sexual relationship with his community support person, who was married to someone else; and once in 2010, for having unauthorized contact with his son, a minor. Appellant also failed to complete sex offender treatment while in prison, having been terminated from sex offender treatment at Lino Lakes in 2006 for rule breaking and disruptive conduct. Although many treatment notes indicate that appellant made some progress in therapy, others show that he was disruptive, disrespectful of others, manipulative, and dishonest.

Appellant bears the burden of proving that a less restrictive alternative to MSOP is available. Appellant did not show that any program was willing to accept him. *See Robb*, 622 N.W.2d at 574 (concluding no less restrictive alternative was available when patient failed to show that a program was willing to accept him). Further, Alberg conceded that the fact that appellant would no longer be under court supervision would be "unfortunate [ ]." *See id.* (acknowledging that expert who considered outpatient treatment a possibility believed that patient should be strictly supervised). Finally, when asked what he would do if released, appellant indicated that he would look for alcohol and sex offender treatment, but he had no firm plans.

The district court concluded that appellant had failed to produce clear and convincing evidence that there is a viable less restrictive alternative to commitment to MSOP. We agree that appellant did not meet this burden.

Affirmed.