STATE OF MINNESOTA
IN COURT OF APPEALS
A11-901

In the Matter of the Civil Commitment of: Joe Henry Bandy, III

Filed October 24, 2011
Affirmed
Connolly, Judge

Redwood County District Court
File No. 64-PR-10-230

Ryan B. Magnus, Linda Zarrett, Jones and Magnus, Mankato, Minnesota (for appellant)

Lori A. Swanson, Attorney General, John Gross, Matthew Frank, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Minge, Judge.

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

CONNOLLY, Judge

Appellant challenges his commitment as a sexually dangerous person (SDP) on the ground of insufficient evidence. Because we conclude that there is sufficient evidence to support the commitment, we affirm.

FACTS

Appellant Joe Henry Bandy III was born in 1963. In 1990, he was charged with and pleaded guilty to the sexual assault and attempted sexual assault of two sisters, J.S.,

nine, and L.S., ten. Execution of a 17-month prison sentence was stayed on condition that he complete treatment; when he left treatment, the sentence was executed.

In 1998, appellant took A.L., 16, who had an IQ of 61, from her parents' home and repeatedly assaulted her. He was found guilty of third-degree criminal sexual conduct and deprivation of parental rights. He was sentenced to 34 months in prison for the deprivation-of-parental-rights counts and 176 months in prison on the third-degree criminal-sexual-conduct counts.

In 2006, appellant was twice interviewed for admission into sex-offender treatment programs at Minnesota correctional facilities, first in Lino Lakes, then in Moose Lake. In both instances, appellant denied having committed any sex offenses and was therefore not admitted to the programs. In 2010, Redwood County petitioned to have appellant committed as SDP under Minn. Stat. § 253B.02, subd. 18c (2008). In a 2009 SPP/SDP review report, appellant admitted that, "in the community he 'spent a lot of time promoting prostitution.'" Following a hearing, he was initially committed. The district court appointed two examiners for appellant. Appellant told one that he did not remember the 1990 incidents because he was then using a lot of chemicals and told the other that he did not believe he offended with J.S. or L.S. After a review hearing, he was committed indeterminately for treatment as SDP.

He challenges his indeterminate commitment, claiming that the evidence does not support it.

D E C I S I O N

Whether evidence is sufficient to meet the standards for commitment is a question of law reviewed de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). The criteria for commitment must be met by clear-and-convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1(c) (2010). To be committed as SDP, an individual must have engaged in a course of harmful sexual conduct as defined in Minn. Stat. § 253B.02, subd. 7a, must have manifested a sexual, personality, or other mental disorder or dysfunction, and, as a result, must be highly likely to engage in acts of harmful sexual conduct as defined in Minn. Stat. § 253B.02, subd. 7a. Minn. Stat. § 253B.02, subd. 18c(a) (2010); *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (establishing degree of likelihood as "highly likely"), *vacated and remanded on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd*, 594 N.W.2d 867 (Minn. 1999) (*Linehan III*). There must also be a showing that the individual's disorder does not allow adequate control of sexual impulses, *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*), or that the disorder causes serious difficulty in controlling sexual behavior. *In re Commitment of Ramey*, 648 N.W.2d 260, 267 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002).

Six factors are considered in predicting an individual's danger to the public: (1) relevant demographic characteristics; (2) history of violent behavior; (3) base rate statistics for violent behavior for those of the individual's background; (4) sources of stress in the environment; (5) similarity of the present or future context to contexts in which the individual has used violence in the past; and (6) the individual's record with

respect to sex therapy programs. *Linehan I*, 518 N.W.2d at 614. The district court considered all six factors.

In regard to the first factor, the district court found that one examiner "opined [appellant's] age does not decrease his risk. and he has [a] history of family dysfunction, sporadic employment, and repeated violation while in the community" and the other examiner "noted [appellant's] gender, limited education, and unstable life contribute to his increased risk."[1]

In regard to the second factor, the district court found that "both doctors noted [appellant] has a history of both physical and sexual violence" and one "noted [appellant's] behavior with A[.]L[.] suggests a pattern of control and sexual assault designed to gain control over her."

In regard to the third factor, the district court found that appellant's "base rate statistics . . . are associated with a moderate to high likelihood of re-offense" and that one examiner "noted [appellant's] risk for re-offense is higher than the base rates for the average offender." The examiner's report confirms this finding.

In regard to the fourth factor, sources of stress, the district court found that one examiner "testified that [appellant] has a history of chemical dependency, a history of not staying sober while in the community, has difficulty following rules, and has had problems remaining law abiding" and that the other "testified that [appellant's] sources of stress would be the same as before."

[1] Thus, appellant's argument that his increased age makes him less likely to offend is contradicted by expert testimony.

In regard to the fifth factor, the district court found that one examiner "testified that [appellant's] attitude remains the same, he does not listen to others, he makes his own decisions, he remains grandiose, he does not have a support system, and he does not have a re-offense prevention plan" and that the other "testified that [appellant] has no resources and even less social support than before."

In regard to the sixth factor, the district court noted that "[appellant] has not participated in sex offender treatment, even refusing to participate in the past"; that one examiner "testified that [appellant] has little knowledge of treatment principles and has minimal insight into his triggers . . . [and] did not have a specific plan to avoid re-offending" and that the other testified "[appellant] thinks he is at 'zero' risk to reoffend, but he is fairly impulsive and only thinks about his own needs." Finally, the district court noted that both examiners "testified that [appellant] is highly likely to sexually re-offend and is dangerous to others" and found "[the examiners'] opinions credible with respect to [appellant's] likelihood of re-offense."

Appellant challenges his commitment first on the ground that his most recent conviction for an offense was in 1998, and "the district court, in predicting serious danger to the public, should consider . . . the offender's history of violent behavior (with special attention to recency . . . of violent acts)[.]" *In re Preston*, 629 N.W.2d 104, 112 (Minn. App. 2001). But since his incarceration in 1999, appellant has been in all-male environments, where he had little opportunity for further sexual offenses with young girls. Thus, the fact that he has not reoffended cannot be taken as evidence that he would not do so if he had the opportunity. Moreover, *Preston* also held that the district court is

to consider the severity and frequency of an individual's violent acts. *Id.* Appellant's history shows that he pleaded guilty to simple assault in 1981 and to aggravated robbery and second degree assault in 1983 and that he was involved in other violent offenses.

Appellant also argues that, because the incidents leading to his two convictions were very different, there was no "course of harmful sexual conduct" as required by the statute. But, to establish the "course of harmful sexual conduct" under the SDP statute, the state "is not required to show that the incidents of harmful sexual conduct are the same or similar harmful sexual conduct." *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). As the district court concluded, appellant's offenses against A.L., even taken alone, would constitute a course of harmful sexual conduct.

Moreover, "[a]n examination of whether an offender engaged in a course of harmful sexual conduct takes into account both conduct for which the offender was convicted and conduct that did not result in a conviction." *Id.* Appellant implies that his only harmful sexual conduct was that leading to his convictions. But, even assuming there was no other harmful sexual conduct, appellant was convicted of harmful sexual conduct with two young children and of repeated harmful sexual conduct with a vulnerable young woman of 16. Thus, the district court's finding that appellant engaged in a course of harmful sexual conduct is not clearly erroneous.[2]

[2] The district court concluded that appellant also promoted prostitution and that promotion of prostitution is harmful sexual conduct but explicitly stated that appellant's commitment as SDP "was not contingent upon this conclusion." We agree that

Finally, appellant does not refute the finding that he has not completed any sex-offender treatment, and he offers no support for his claim that supervised release will effectively prevent him from reoffending.

The evidence is sufficient to support appellant's commitment as SDP.

Affirmed.

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appellant's course of harmful sexual conduct exists independent of his promotion of prostitution.