STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2213

In the Matter of the Civil Commitment of: Michael Dewayne Perseke.

Filed May 6, 2013
Affirmed
Kalitowski, Judge

Chippewa County District Court
File No. 12-PR-12-217

Bradley A. Kluver, Litchfield, Minnesota (for appellant)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota; and

David Gilbertson, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

KALITOWSKI, Judge

Appellant Michael Dewayne Perseke challenges his civil commitment as a sexually dangerous person (SDP). Perseke argues that (1) he does not meet the statutory criteria to be committed as an SDP; (2) less-restrictive alternatives are available; and (3) commitment as an SDP violates the constitutional prohibition against double jeopardy. We affirm.

D E C I S I O N

I.

The Minnesota Commitment and Treatment Act provides for the civil commitment of SDPs. Minn. Stat. § 253B.185 (2012).[1] Under the act, the state must prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2012). We review a district court's factual findings for clear error. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). We will not reweigh evidence when reviewing findings of fact. *In re Salkin*, 430 N.W.2d 13, 16 (Minn. App. 1988), *review denied* (Minn. Nov. 23, 1988). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). "We review de novo whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

An SDP is defined as a person who (1) engaged in a course of harmful sexual conduct; (2) 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 (2012). The district court concluded that Perseke satisfies each element. Perseke does not challenge the district court's conclusions on the first two

[1] The district court applied the statutes in effect at the time of Perseke's commitment hearing. The applicable statutes have not changed. For ease of reference in this opinion, we refer to the current version of the statutes.

elements, and the record supports these determinations. We therefore limit our analysis to the third statutory element.

Initially, we note that the district court made thorough and detailed findings about 40-year-old Perseke's long history of criminal sexual conduct. As a juvenile, Perseke admitted to fourth-degree criminal sexual conduct, and as an adult, from 1992 to 2003, Perseke committed at least seven acts of criminal sexual conduct against at least seven victims. One such incident occurred in 1996, while Perseke was on conditional release. And in 2003, while on supervised release for previous sex-offense convictions, and within three months of completing an outpatient sex-offender treatment program, Perseke committed two acts of criminal sexual conduct.

Concerning the third element, the district court concluded that Perseke is highly likely to sexually reoffend and is dangerous. Perseke argues that the evidence is insufficient to establish by clear and convincing evidence that he is highly likely to reoffend. *See id.* (identifying criteria). The Minnesota Supreme Court has interpreted this third element to mean that, along with engaging in a course of harmful sexual conduct, the state must show that the person's "present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999). When district courts consider whether the evidence establishes that a person is highly likely to engage in future dangerous behavior, they must consider six factors: (1) the person's relevant demographic characteristics; (2) the person's history of violent behavior; (3) base-rate statistics for violent behavior among individuals of the

person's background; (4) sources of stress in the environment; (5) similarity of present or future contexts to those contexts in which the person used violence in the past; and (6) the person's record concerning sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994).

The district court thoroughly analyzed each of the *Linehan* factors and concluded that Perseke is highly likely to sexually reoffend and is dangerous. Perseke challenges the sufficiency of the evidence concerning the third *Linehan* factor, base-rate statistics for violent behavior. The district court found that the base-rate statistics show Perseke has a heightened risk of reoffending. Perseke argues that the evidence concerning the actuarial instruments is insufficient to support the district court's finding that he is highly likely to reoffend because the actuarial instruments are "inconclusive." He points to varying scores assigned to his risk level by the Department of Corrections (DOC), which used the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) during various times he was incarcerated, dating back to 2001. His argument is unavailing.

The court-appointed experts, Drs. Linda Marshall and Thomas Alberg, opined that Perseke is highly likely to engage in future acts of harmful sexual conduct and is dangerous to the community. Both experts testified that they did not rely solely on the actuarial scores, but considered a variety of actuarial tools, structured clinical-judgment tools, and risk-assessment tools. And both considered the *Linehan* factors and provided testimony that each factor indicated a high likelihood that Perseke would reoffend. Dr. Marshall considered Perseke's entire history and utilized base-rate statistics, actuarial risk-assessment tools, structured clinical-judgment tools, multi-dimensional analysis, and

dynamic risk factors. Dr. Alberg also relied on Perseke's entire history, applied clinical and actuarial tools, and considered both static and dynamic factors. Both experts concluded that Perseke's risk-assessment scores, deviant sexual arousal, psychopathy, and dynamic risk factors warrant assessing Perseke as a high risk to reoffend. Dr. Alberg also testified that Perseke has a long offending history despite sanctions and completion of an outpatient treatment program.

Although Perseke completed an outpatient sex-offender treatment program, the experts "agreed that Perseke is essentially an untreated sex offender without an effective plan to prevent future re-offense." Dr. Marshall testified that Perseke did not retain and could not apply anything he learned from his treatment. Dr. Marshall said that Perseke told her he did not have a reoffense-prevention plan, which identifies a participant's offending cycle, is approved by the participant's group and therapist, and identifies triggers and high-risk situations to aid the participant in planning how to avoid reoffending. And Dr. Alberg testified that Perseke demonstrated very little understanding of treatment principles, which is important to decrease the risk of reoffending.

Concerning the evidence on the third *Linehan* factor, Dr. Marshall testified that the base-rate studies referenced in her report show that Perseke's actuarial scores are above the base rates for sexual reoffending. Dr. Alberg noted that Perseke's risk of recidivism is higher than the base rate for the average offender. Perseke's most recent score on the MnSOST-R was a +9, which reflects a high risk to sexually reoffend. Dr. Marshall acknowledged that Perseke's scores on the MnSOST-R used by the DOC during his prison terms are "somewhat mixed," but explained that she frequently sees different

results on the same actuarial tools scored throughout the course of an offender's prison term or terms. She explained that this is not unusual for two reasons: (1) released offenders often return after committing more offenses, which usually increases an offender's score; and (2) when assessing an offender's risk level, the DOC does not have as much information as the court-appointed psychologists, which can affect the scores.

The district court made detailed and thorough findings concerning the scores that the experts assigned to Perseke. The district court considered Dr. Marshall's testimony about the varying scores on the MnSOST-R and Dr. Alberg's testimony that true base rates are difficult to discern, but nevertheless credited both experts' testimony that Perseke met the statutory criteria because he is highly likely to reoffend and is dangerous. We defer to the district court's ability to weigh the credibility of witnesses, especially when the findings rest on expert testimony. *Knops*, 536 N.W.2d at 620.

The district court's finding that Perseke is highly likely to sexually reoffend and is dangerous is supported by clear and convincing evidence. Thus, the district court did not err by concluding that Perseke satisfies the criteria for commitment as an SDP.

II.

When a person is determined to be an SDP, the district court "shall commit the patient 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 the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1(d) (2012). In considering treatment alternatives, the district court may consider such factors as the need for security, whether the individual needs long-term treatment,

and what type of treatment is required. *See In re Pirkl*, 531 N.W.2d 902, 909-10 (Minn. App. 1995) (stating that the district court considered the patient's need for security and his alcohol and drug addiction), *review denied* (Minn. Aug. 30, 1995); *see also In re Bieganowski*, 520 N.W.2d 525, 531 (Minn. App. 1994) (stating that the district court considered the patient's history of flight and need for long-term sex-offender and chemical-dependency treatment), *review denied* (Minn. Oct. 27, 1994). We will not reverse a district court's findings as to the propriety of a treatment program unless the findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

Perseke argues that the district court clearly erred in finding that MSOP is the least-restrictive treatment option. He contends that, if not civilly committed as an SDP, he (1) would be subject to a long-term intensive supervised release (ISR) until April 15, 2022; (2) is willing to enter another sex-offender treatment program as would be required by ISR; and (3) "believes that DOC would assist him" in locating, enrolling in, and completing a sex-offender treatment program.

Perseke relies on (1) his own testimony that he believes the DOC would assist him in locating, enrolling in, and completing a sex-offender treatment program; (2) Dr. Marshall's testimony that she is aware that he would be subject to ISR if not civilly committed; and (3) Dr. Alberg's testimony that there are outpatient sex-offender treatment programs in Minnesota that would accept Perseke if he were not civilly committed. But both experts testified that Perseke needs long-term, inpatient treatment in a secured and structured setting and that outpatient treatment cannot meet Perseke's

needs. We conclude that the district court did not clearly err by finding MSOP to be the least-restrictive treatment option.

III.

"We review the question of whether a statute is constitutional de novo." *State v. Martin*, 773 N.W.2d 89, 97 (Minn. 2009). Perseke argues that civil commitment as an SDP violates the constitutional prohibition against double jeopardy. *See* U.S. Const. amend. V; Minn. Const. art. I, § 7. We disagree.

The SDP act contravenes neither the Double Jeopardy nor Ex Post Facto Clauses. *Linehan*, 594 N.W.2d at 871. And the Minnesota Supreme Court has stated that "commitment under the psychopathic personality statute is remedial and does not constitute double jeopardy because it is for treatment purposes and is not for purposes of preventive detention." *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (citing *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (holding that civil commitment under the psychopathic personality statute does not violate substantive due process)).

Perseke asserts that *Gomez* should be overruled because commitment as an SDP is "functionally indistinguishable from criminal incarceration." But we are bound by supreme court precedent. *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). Because *Gomez* establishes that civil commitment is remedial, with the primary goal being treatment rather than detention, commitment as an SDP does not implicate double jeopardy.

Affirmed.