STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0612

In the Matter of the Civil Commitment of:
Adam Christopher Robb.

Filed August 27, 2012
Affirmed
Halbrooks, Judge
Dissenting, Harten, Judge[*]

Aitkin County District Court
File No. 01-PR-12-13

Erica Austad, St. Cloud, Minnesota (for appellant)

James Ratz, Aitkin County Attorney, Sarah Winge, Assistant County Attorney, Aitkin, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Hudson, Judge; and Harten, Judge.

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

HALBROOKS, Judge

Appellant Adam Robb, whom the district court found to be mentally ill and dangerous (MI&D) and committed to the Minnesota Security Hospital (MSH), was discharged from MSH after it was determined that he was not in need of further treatment. He seeks reversal of the district court order finding him MI&D and

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

committing him. Because the district court's findings that appellant was mentally ill and a clear danger to the safety of others and that MSH was the least restrictive alternative are not clearly erroneous, we affirm.

FACTS

Appellant was born in 1985. He has an extensive criminal record, including convictions on five charges in 2004 and two charges in 2005. In 2008, he hit and tried to strangle his girlfriend, who was then pregnant with their child. As a result, he was convicted of gross misdemeanor domestic assault (subsequent violation). In 2009, he choked his girlfriend and bashed her head into a car; in another incident, he hit her on the head, injuring her nose and ear. Both incidents resulted in convictions of harassment and stalking with intent to injure.

In May 2011, law enforcement was called to the residence of appellant's girlfriend after appellant pushed her in the throat and hit her in the face during an argument. When she called 911, he broke her phone and then drove away. He was charged with criminal assault, but found not competent to proceed to trial.

Respondent Aitkin County Health and Human Services (ACHHS) petitioned for appellant's judicial commitment as mentally ill (MI). Early in 2012, a court-appointed psychological examiner filed a report stating that appellant met the criteria as MI&D. ACHHS subsequently filed an amended petition for his judicial commitment as MI&D.

Prior to the trial on both petitions, a second psychological examiner filed a report saying, "[I]t is questionable as to whether [appellant] meets the criteria to be committed as mentally ill and dangerous." At trial, counsel for ACHHS asserted that there "[wa]sn't

a lot of difference in the examiners with regard to the finding of mental illness" and that the issue was whether "that mental illness presents a clear danger to the safety of others as demonstrated by the facts with regard to finding [appellant MI&D]." Both examiners testified.

On February 3, 2012, the district court issued an order finding that appellant was MI&D and that commitment to MSH was the least restrictive alternative for him. On April 3, 2012, an MSH treatment report informed the district court that (1) appellant did not meet the criteria for MI under Minn. Stat. § 253B.02, subd. 13 (2010); (2) appellant had been diagnosed with polysubstance dependence and antisocial personality disorder; (3) appellant was at an elevated risk for engaging in future violent acts; (4) this risk resulted not from mental illness but from appellant's antisocial personality disorder; and (5) MSH was not an optimal setting for appellant, and its treatment program was unlikely to resolve his antisocial personality disorder. On April 5, 2012, appellant filed a notice of appeal from the February 3 district court order. On April 17, 2012, MSH discharged appellant. ACHHS declined to participate in the appeal, saying appellant's discharge rendered it moot.

This court questioned its jurisdiction and asked both appellant and ACHHS to brief the issue. Appellant argued that "the district court should have denied the County's petition to commit [a]ppellant as [MI&D] but at the very most, granted only the petition as [MI]" and that "the [district] court's order [committing appellant as MI&D] should be reversed and/or remanded for a new trial." This court concluded that the appeal was not moot and accepted jurisdiction.

Appellant argues that the district court findings that he was MI, that he was a clear danger to the safety of others, and that commitment to MSH was the least restrictive alternative for him are clearly erroneous.

D E C I S I O N

1. Mootness

As a threshold matter, we address ACHHS's refusal to participate in this appeal on the ground that it was moot because of appellant's discharge from MSH. "A case is moot if there is no justiciable controversy for a court to decide." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 97 (Minn. App. 2009) (holding that, because collateral consequences attach to an order for protection (OFP), an appeal from an expired OFP is not moot).

> There are two exceptions to the mootness doctrine: (1) if an issue is capable of repetition yet evading review and (2) if collateral consequences may attach to the otherwise moot ruling. Where real and substantial limitations will arise from a judgment, courts do not require actual evidence of such limitations and instead, presume that collateral consequences will attach. A party may rebut this presumption of collateral consequences only by showing there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged [ruling].

Id. at 97-98 (quotations and citations omitted).

ACHHS has not shown that there is no possibility that collateral consequences will be imposed on the basis of the district court's order committing appellant as MI&D. Thus, ACHHS has not rebutted the presumption of collateral consequences, and the appeal from the district court's order is not moot.

We note that appellant's discharge, while relevant to the issue of mootness, is not relevant to a determination of the merits of his appeal because his discharge occurred after the trial on the amended commitment petition. So the fact of appellant's discharge was not presented to or considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (this court does not generally address issues not presented to and considered by the district court). Moreover, in a trial on a commitment petition, the district court properly evaluates placement alternatives as they appear at the time of trial. *In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) ("Because this was a trial on the commitment petition, the [district] court properly evaluated [the patient's placement] alternatives at the time of trial.").

2. Finding that Appellant is Mentally Ill

In reviewing a determination of mental illness, this court will not reverse a district court's "findings unless they are clearly erroneous." *In re McGaughey*, 536 N.W.2d 621, 623 (Minn. 1995).

> A "person who is mentally ill" means any person who has . . . a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which is manifested by instances of grossly disturbed behavior or faulty perceptions and poses a substantial likelihood of physical harm to self or others as demonstrated by . . . (3) a recent attempt . . . to physically harm self or others[.]

Minn. Stat. § 253B.02, subd. 13(a). The district court found that appellant "has Bipolar Disorder, which is a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize

reality, or to reason or understand. This finding is based on the diagnoses of both [experts]."

Substantial evidence supports this finding. The first expert, when asked his opinion as to whether appellant was mentally ill pursuant to the statute, testified, "My opinion [is] that [appellant] does suffer from a substantial psychiatric disorder; namely, Bipolar Disorder." The second expert, in response to the same question, stated, "I believe he does have a major mental illness. The records are quite clear that he has a Bipolar Affective Disorder." The experts' reports are consistent with their testimony. The first expert reported that "[appellant] has many risk factors that render him highly likely to engage in aggressive and assaultive behavior. He has bipolar disorder with manic and psychotic features." The second expert reported that appellant's "most appropriate diagnoses . . . [included] Bipolar Affective Disorder" and that "[appellant's] records are consistent with a mood disorder and there is ample evidence of a mood disorder with mood swings, impulsivity and poor judgment on [appellant]'s part."

Appellant does not dispute the finding that he has bipolar disorder but argues that the district court "did not address [his] well established Antisocial Personality Disorder" and that, because an antisocial personality disorder is arguably not a basis for commitment, the district court erred in committing him. But the fact that appellant may also have another disorder does not negate the finding that he has a major mental illness, namely bipolar disorder, and he was committed on the basis of that major mental illness.

Appellant also argues that "the district court erred by finding that he was mentally ill without considering his developmental disabilities and chronic substance abuse." For

this argument, he relies on Minn. Stat. § 253B.02, subd. 13(b)(2)-(4) (providing that a person is not MI if the person's impairment is due to "developmental disability," "brief periods of intoxication caused by alcohol, drugs, or other mind-altering substances," or "dependence upon or addiction to any alcohol, drugs, or other mind-altering substances"). But the district court specifically found that "[appellant's] impairment is not solely due to . . . developmental disability, brief periods of intoxication, or dependence upon or addiction to any alcohol, drugs, or other mind-altering substances," and that finding is supported by substantial evidence.

The district court did not clearly err in concluding that appellant was MI.

3. Finding that Appellant Presents a Clear Danger to the Safety of Others

A person defined as MI&D is a person who is MI and who, as a result of that illness, presents a clear danger to the safety of others as demonstrated by the fact that the person has engaged in an overt act causing or attempting to cause serious physical harm to another and there is a substantial likelihood that the person will engage in further acts capable of inflicting serious physical harm on another. Minn. Stat. § 253B.02, subd. 17 (2010). The district court found "a substantial likelihood that [appellant], as a result of his mental illness, will engage in acts capable of inflicting serious physical harm on another."

"Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witness." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

The district court supported its finding with ample evidence, citing appellant's repeated assaults of his girlfriend: one in 2008 in which he "hit [her] several times, head-butted her on her nose, smashed her head into a coffee table, tried to strangle her, and threw her neck around . . . [and] body slammed [her] on the floor several times and on the couch causing her to land on her stomach . . . [when she] was pregnant with [his] child"; two in 2009 in which he "choked [her] when he grabbed her by the neck and bashed her head into a car" and "hit [her] on her arms and in the back of her head, injuring her nose and ear"; and one in 2011, when he "pushed [her] on her throat area and hit her in the face while they were arguing."

The experts' reports and testimony provide additional support for the finding. One expert reported that appellant "ha[d] repeated his aggressive acts with the mother of his child" and "ha[d] no intention of not seeing her once [he was] released." This expert also had "serious concerns about [appellant] potentially becoming homicidal." The expert testified that, since completing his report, he had reviewed the amended petition and its attachments, which include the transcript of the physician at appellant's competency hearing, the criminal records resulting from the four assaults, and letters from the victim. He stated that this review "intensifie[d]" his opinion that appellant had engaged in an overt act within the meaning of the statute and added that "domestic assault is considered to be a highly volatile incident . . . where there is a great likelihood for a potential homicide to occur," that "[t]his is not the first time that this has happened with [appellant's girlfriend]," and that "[appellant] needs to be separated for a long period of time and stabilized so that hopefully he will not cause her death."

The other expert reported that appellant "has engaged in an overt act causing . . . serious physical harm in that he has assaulted his girlfriend . . . on more than one occasion. . . . [He] continues to suffer from the same mental illnesses and personality disorders as before and as a result of these two conditions is likely to continue his past behaviors." The expert also noted that appellant's score on a clinical-judgment instrument used for "assessing whether a person who has committed past violent offenses is likely to continue to commit violent offenses . . . indicates an extremely high likelihood of committing another violent offense." In his testimony, the expert reiterated that "It's clear [appellant is] likely to reoffend."

Appellant relies on the statement in this expert's report that

> [appellant's] overt act is considerably less serious than that for which a person is typically committed for being mentally ill and dangerous. There was not significant physical damage upon the victim and certainly there was not a homicide. It is also not totally clear that [appellant]'s assaults are a result of his mental illness. They may well be a result of his ongoing personality disorder, which is exacerbated by his chemical dependency.

But appellant ignores the next sentence: "People with this type of personality disorder are frequently incarcerated and the Minnesota criminal justice system may well be an appropriate place for [appellant] as well as civil commitment as [MI&D]." Thus, this examiner did not suggest that appellant be released into society.

The district court's finding that appellant is a danger to others because he is likely to reoffend is not clearly erroneous.

4. Finding that MSH is the Least Restrictive Alternative

"A district court's decision as to placement will not be reversed unless clearly erroneous." *In re Kellor*, 520 N.W.2d 9, 12 (Minn. App. 1994) (addressing commitment as mentally ill), *review denied* (Minn. Sept. 28, 1994).

Appellant contends that the district court "erred by not considering alternative options to committing [him] as [MI&D]." But the district court's order shows that less restrictive alternatives were considered:

> Specifically, this Court considered the options of commitment as mentally ill or outpatient treatment. [Appellant] has a history of mental illness, medication noncompliance, polysubstance dependence, and anti-social personality disorder. Commitment as a person who is [MI] is not likely to provide a sufficient amount of treatment to prevent [appellant] from engaging in acts capable of inflicting serious physical harm on another person. Similarly, outpatient treatment will not allow [appellant] to sufficiently stabilize and mature to prevent [him] from engaging in acts capable of inflicting serious physical harm on another person.

Moreover, the district court's consideration of less restrictive alternatives reflected the testimony of the experts.

Appellant relies on that suggestion from the first expert that Anoka Metro Regional Treatment Center (AMRTC) was a possible option for appellant. But the first expert also testified:

> [A]s you know, in my report I said [treatment could perhaps be] something less restrictive than [MSH], but maybe he'd be sent to AMRTC for a longer period of time. He was. That did occur. And this still failed to stop his becoming noncompliant with his medications and then becoming very aggressive.

. . . .

> My opinion would be, again with reasonable psychological certainty, that the least restrictive alternative is for [appellant] to be committed to [MSH]. I firmly believe by doing that he could potentially be stabilized; in other words, he'd be—he'd be there much more than a year or two, and he would have to go through the different phases of their program, with a gradual reintegration into the community.

The other expert, when asked if there was any less restrictive alternative short of hospitalization for appellant, answered, "No." When asked if he would support either outpatient treatment or no commitment for appellant, the expert again answered, "No." When asked why, he answered, "I think [appellant] isn't someone who cooperates with programs very well. I haven't seen any kind of program presented that would indicate any type of realistic chance of success."

Thus, the record shows that the district court did consider less restrictive alternatives to commitment to MSH, that the experts' testimony supported the finding that commitment to MSH was the least restrictive alternative, and that this finding, like the findings that appellant is MI and presented a clear danger to the safety of others, are not clearly erroneous.

Affirmed.

HARTEN, Judge (dissenting)

Because I agree with Aitkin County Health and Human Services (ACHHS) and would dismiss this appeal as moot, I dissent from the majority opinion, which accepts jurisdiction and issues what amounts to an advisory opinion.

"Well established in this state's jurisprudence is the precept that the court will decide only actual controversies. If the court is unable to grant effectual relief, the issue raised is deemed to be moot resulting in dismissal of the appeal. Moreover, the court does not issue advisory opinions . . . ." *In re Schmidt*, 443 N.W.2d 824, 826 (Minn. 1989) (citation omitted); *see also Hous. & Redevelopment Auth. ex rel. Richfield v. Walser Auto Sales, Inc.*, 641 N.W.2d 885, 888 (Minn. 2002) (an issue on appeal is moot if "an event occurs pending appeal that makes a decision on the merits unnecessary or an award of effective relief impossible").

Appellant seeks a determination that the district court erred when it found that, at the time of the trial, appellant met the statutory requirements for MI&D and committed him, and the relief he requests is that "the [district] court's order should be reversed and/or remanded for a new trial." But, in light of appellant's discharge from MSH, neither a reversal nor a remand of the district court's order could have any practical effect.

Moreover, as the majority acknowledges, appellant's discharge is irrelevant to a determination of the merits of his appeal because the order from which the appeal is taken was filed more than two months before his discharge. *See In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) ("Because this was a trial on the commitment petition, the

court properly evaluated [the patient's placement] alternatives *at the time of trial*.") (emphasis added). Anything that happened to appellant after the filing of the district court's order is irrelevant to an appeal from that order. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (this court does not generally address matters not presented to and considered by the district court).

Appellant also argues that the district court "should have denied the County's petition to commit [him] as [MI&D] but at the very most, granted only the petition [to commit him] as [MI]." Thus, appellant implicitly requests this court, in the alternative, to direct the district court to grant only the petition to commit him as MI. But this court cannot provide that relief: there is no district court order committing appellant as MI for this court to affirm. It is obvious from the district court's order that the 22 December 2011 petition to commit appellant as MI filed in response to the finding of his incompetence to proceed to trial under Minn. R. Crim. P. 20 was merged with the subsequent 5 January 2012 amended petition to commit him as MI&D.

Finally, appellant speculates that, unless this court considers his appeal, he will suffer harm to his reputation because of his commitment to MSH as MI&D, even though MSH found him not to meet the criteria for MI&D and discharged him. But the harm to appellant's reputation would result less from the commitment itself than from his local criminal record and from the experts' opinions on which the commitment was based; in any event, appellant's future involvement in either the criminal justice system or the civil commitment system is entirely speculative.

In concluding that appellant would face collateral consequences from his MI&D commitment, the majority relied on Minn. Stat. § 253B.065, subd. 5(a) (2010), which pertains only to commitments as mentally ill, not to MI&D commitments; Minn. Stat. § 253B.18 (2010) covers the more serious MI&D commitments. *See In re McCaskill*, 603 N.W.2d 326, 329 (Minn. 1999) (construing Minn. Stat. § 253B.065, subd. 5, and holding that the collateral consequences resulting from a commitment as MI meant that an appeal by a person discharged from such a commitment was not moot). Moreover, the supreme court in *McCaskill* explicitly restricted its holding: "We note that the early intervention provisions [of Minn. Stat. § 253B.065, subd. 5] apply only to commitments of [MI] persons under Minn. Stat. § 253B.09 and do not address the collateral consequences of other civil commitments." *Id*. at 331. *McCaskill* is irrelevant here.

Minnesota's courts, however dynamic and industrious, have no business deciding moot cases or issuing advisory opinions.