STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0648

In the Matter of the Civil Commitment of: Russell John Hatton.

Filed September 23, 2008
Affirmed
Kalitowski, Judge

Beltrami County District Court
File No. 04-PR-07-177

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Timothy Faver, Beltrami County Attorney, 619 Beltrami Avenue Northwest, Suite 40, Bemidji, MN 56601 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

KALITOWSKI, Judge

On appeal from his indeterminate commitment as a sexually dangerous person (SDP), appellant Russell John Hatton argues that: (1) the SDP statute deprived him of due process by not requiring that all facts underlying his civil commitment be proven

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

beyond a reasonable doubt; (2) his attorney provided ineffective assistance that resulted in appellant's indeterminate commitment; (3) the district court committed reversible error in denying three of appellant's motions for continuance; (4) the district court committed reversible error when it denied appellant an additional examiner of his choosing for the 60-day review hearing; and (5) the record does not contain clear and convincing evidence supporting appellant's indeterminate commitment as an SDP. We affirm.

D E C I S I O N

I.

Appellant argues that the clear and convincing standard of proof required by the Minnesota Commitment and Treatment Act is inadequate under the due process clauses of the Minnesota and United States Constitutions. Because this argument was rejected by the United States Supreme Court in *Addington v. Texas*, we disagree. *See* 441 U.S. 418, 431-33, 99 S. Ct. 1804, 1812-13 (1979).

We subject a civil commitment law to strict scrutiny when examining whether the law violates substantive due process. *In re Linehan* (*Linehan IV*), 594 N.W.2d 867, 872 (Minn. 1999). To withstand strict scrutiny, a law must be narrowly tailored to serve a compelling state interest. *Id*. Because "[e]valuating a statute's constitutionality is a question of law," we are "not bound by the [district] court's decision." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999).

In *Addington*, the Supreme Court held that the clear-and-convincing-evidence standard of proof satisfies due process in a civil commitment hearing. 441 U.S. at 431-33, 99 S. Ct. at 1812-13. The Court determined that while the "individual's interest in the

outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence," the state should not be required to employ a standard of proof that might frustrate efforts to further the interests served by civil commitments, including treating citizens unable to care for themselves and protecting the public from harm. *Id.* at 426, 430, 99 S. Ct. at 1810, 1811-12. The Court concluded that the clear-and-convincing-evidence standard of proof "strikes a fair balance between the rights of the individual and the legitimate concerns of the state." *Id.* at 431, 99 S. Ct. at 1812.

Moreover, the issue of whether the Minnesota Commitment and Treatment Act violates a person's right to substantive due process was addressed by the Minnesota Supreme Court in *Linehan IV*, 594 N.W.2d at 872. In that case, the supreme court, relying on the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), found that because the Act requires a finding that a person lacks adequate control over his or her sexually dangerous actions, civil commitment under the Act does not violate substantive due process. *Linehan IV*, 594 N.W.2d at 876. Therefore, we reject appellant's due-process argument.

II.

Appellant asserts that there is prima facie evidence that his attorney was ineffective, and that he should be granted an evidentiary hearing to determine whether he is entitled to a new trial. We disagree.

An individual has the right to be represented by counsel at a commitment proceeding. Minn. Stat. § 253B.07, subd. 2c (2006). "The court shall appoint a qualified

attorney to represent" the individual. *Id.* Among other things, counsel is to "be a vigorous advocate on behalf of the person." *Id.*, subd. 2c (4).

In deciding whether an individual received ineffective assistance of counsel in a commitment proceeding, we apply the same standards set forth in criminal proceedings. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). Representation is inadequate "if counsel fails to exercise the diligence of a reasonably competent attorney under similar circumstances." *Id.* "Even if counsel's representation is less than perfect, the result of a hearing or trial will be set aside only if counsel's actions so undermine the hearing process that the result is prejudiced." *In re Cordie*, 372 N.W.2d 24, 29 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985). The claimant "must demonstrate that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003).

Appellant contends that his attorney's representation was ineffective because (1) appellant was unhappy with his attorney's performance and attempted to secure alternate counsel; (2) his attorney did not file a witness disclosure list with the court before the October hearing; and (3) less than 24 hours before appellant stipulated to his commitment as an SDP, appellant's attorney admitted that she did not have adequate time to meet with appellant and review his file.

We conclude that there is no evidence supporting appellant's contention that his attorney's representation was inadequate. Appellant's attorney made a number of

motions on appellant's behalf, attempting to withdraw from the case as requested by appellant and securing from the court a continuance for an examination by an independent examiner. Importantly, when appellant stipulated to his commitment, the district court conducted a thorough examination on the record to ensure that appellant was satisfied with his attorney and had not been pressured to accept the stipulation. Appellant confirmed that he was satisfied that his attorney was fully informed about the case and had represented his interests to the best of her ability. Appellant also verified that he had sufficient time to review the stipulation with his attorney and that he understood the rights he was giving up by agreeing to be committed. Furthermore, there is no evidence that there is a reasonable probability that the outcome here would have been different but for alleged inadequate representation by appellant's counsel. Accordingly, we conclude that appellant received effective representation and was not prejudiced by his attorney's performance.

III.

Appellant argues that the district court abused its discretion by denying his motions for a continuance to seek alternate counsel. We disagree.

We will not reverse the district court's decision regarding whether to grant a motion for a continuance absent a clear abuse of discretion. *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). Deciding whether to appoint a substitute attorney or grant a continuance to allow a defendant to obtain private counsel depends "on the facts and circumstances surrounding the request." *State v. Fagerstrom*, 176 N.W.2d 261, 264 (Minn. 1970). A lack of diligence by a defendant justifies denial of a continuance. *City*

of Minneapolis v. Price, 280 Minn. 429, 434, 159 N.W.2d 776, 780 (1968). The party seeking a continuance must show that it was prejudiced as a result of the district court's denial; that is, that the denial affected the outcome of the trial. *In re Muntner*, 470 N.W.2d 717, 719 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991); *Weise v. Comm'r of Pub. Safety*, 370 N.W.2d 676, 678 (Minn. App. 1985).

In commitment proceedings, the Minnesota Commitment and Treatment Act requires that the court-appointed attorney "(1) consult with the [individual] prior to any hearing [and] (2) be given adequate time and access to records to prepare for all hearings[.]" Minn. Stat. § 253B.07, subd. 2c. The individual may employ private counsel at his own expense. Minn. Spec. R. Commitment & Treatment Act 9. If private counsel is retained, the court must discharge the appointed attorney. *Id.*

On August 14, 2007, appellant filed a motion to remove his court-appointed attorney. The district court judge responded that he would not grant the motion until appellant retained a new attorney. On October 10, 2007, appellant filed a motion for a continuance of the hearing scheduled for October 11-12 to allow him to retain private counsel. The hearing had already been continued from July so that an independent examiner could be obtained. On October 10, 2007, the district court heard arguments on appellant's motion. Appellant's counsel stated that appellant did not want her to represent him and was trying to secure another attorney. Appellant's counsel also complained that she had not received a report from one of the examiners until October 8 and did not feel prepared for the hearing. The district court denied appellant's motions,

noting that the petition for commitment was filed six and a half months earlier and that the hearing had already been continued. The district court also stated:

> I am not at all persuaded or convinced that if we give [appellant] another month, two months, three months, that his family will come up with enough money to be able to hire private counsel. Nothing has happened in the past two months.
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> . . . .
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> And the problem is, we have two experts that have set aside this trial time. This case was scheduled for trial at the end of August . . . And now the eve of the hearing, with people [ ] schedule[d] to come up to Bemidji, we are getting another request for a continuance. I am just not going to grant it . . . . He's had sufficient time to get counsel.

Similarly, the district court responded to appellant's December 10, 2007 motion requesting removal of his attorney by e-mail, indicating that appellant's opposition was not new, that he was concerned about the prejudice to appellant "if a new attorney [were] appointed at this late stage," and that he was "not inclined to grant the motion to withdraw without more."

In December 2007, the district court granted appellant's request for a continuance of his 60-day review hearing. At the hearing on February 14, 2008, appellant requested another continuance and reconsideration of appellant's December 10, 2007 motion for withdrawal of counsel. Under Minn. R. Gen. Pract. 115.11, "[m]otions to reconsider are prohibited except by express permission of the [district] court, which will be granted only upon a showing of compelling circumstances." The district court found no showing of compelling circumstances, characterizing appellant's motion as "simply a rehashing of previous arguments raised multiple times."

Although appellant claimed in each withdrawal/removal motion to have found alternate counsel, no other attorney ever filed a notice of appearance or a notice of substitution of counsel. Because the rules provide that the court must discharge appellant's attorney only when private counsel is employed, the district court's repeated denials were within its discretion. *See* Minn. Spec. R. Commitment & Treatment Act 9.

Although appellant claims the district court abused its discretion by not granting additional continuances, because both the commitment hearing and 60-day review hearing were continued, the district court properly concluded that appellant's attorney was given adequate time to prepare for the hearings. *See* Minn. Stat. § 253B.07, subd. 2c. The record also shows that appellant's attorney consulted with appellant and made numerous motions on his behalf. Accordingly, we conclude that it was within the district court's discretion to deny appellant's motions to further postpone his hearing.

IV.

Appellant argues that the district court erred in denying appellant's request for an additional independent examiner for the 60-day review hearing. Because appellant cites no authority for the proposition that he was entitled to a third examiner, we disagree.

After a commitment petition is filed, the district court must appoint an examiner and inform the individual of his right to an independent second examiner. Minn. Stat. § 253B.07, subd. 3 (2006). If requested, the commitment statute requires the court to appoint an examiner selected by the individual. *Id.* But neither the statute nor the civil commitment rules contemplate the appointment of a third examiner, and there is no Minnesota caselaw holding that a proposed patient is entitled to an additional

independent examiner of his choosing. *See id*; Minn. Spec. R. Commitment & Treatment Act 23(c). Accordingly, we conclude that the district court did not err in denying appellant's request for a third examiner.

V.

Appellant argues that the stipulated facts do not establish that he meets the statutory requirements for commitment as an SDP. As a preliminary matter, appellant waived this issue by stipulating that he "fit the description of a 'sexually dangerous person' as defined in Minnesota Statute § 253B.02, subd. 18c (2006)," agreeing to initial judicial commitment, and "waiv[ing] any right to bring a legal challenge to the validity of his commitment, unless supported by a change in controlling case law or statute." Appellant does not argue that there has been a change in the law or the commitment statute, or that his stipulation was in any way invalid. Nevertheless, we will address appellant's argument that the stipulated facts do not support his indeterminate commitment.

Whether the evidence is sufficient to meet the standards for commitment is a question of law that we review de novo. *In re Linehan* (*Linehan I*), 518 N.W.2d 609, 613 (Minn. 1994). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (quotation omitted).

To commit an individual as an SDP, the state must prove certain elements by clear and convincing evidence. Minn. Stat. §§ 253B.185, subd. 1 (2006); 253B.18, subd. 1 (2006). A sexually dangerous person is 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). Appellant contends that the record does not contain clear and convincing evidence that he is an SDP. We disagree.

Course of Harmful Sexual Conduct

The first element required for commitment under the SDP law is proof that the individual "engaged in a course of harmful sexual conduct as defined in subdivision 7a." Minn. Stat. § 253B.02, subd. 18c(a)(1). "Harmful sexual conduct" is defined in subdivision 7a(a) as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2006). Furthermore, subdivision 7a(b) explains that when an individual engages in certain enumerated behaviors, including criminal sexual conduct in the third degree, a rebuttable presumption of serious physical or emotional harm to the victim of the offense attaches. Minn. Stat. § 253B.02, subd. 7a(b) (2006). Minnesota courts have 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) (quotation omitted), *review denied* (Minn. Sept. 17, 2002). In determining whether a person has engaged in a course of harmful sexual conduct, the district court may consider conduct occurring over a period of time, which need not be recent, and conduct that did not result in a conviction. *In re Irwin*, 529 N.W.2d 366, 374 (Minn. App. 1995), *review denied* (Minn. May 16, 1995).

Appellant's victims include J.R., C.S.N., and D.M.N. Appellant does not dispute that his third-degree criminal-sexual-conduct conviction gives rise to a rebuttable

presumption of serious physical or emotional harm. And although appellant was never convicted of his offenses against C.S.N., he stipulated to facts that comprise first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1 (2004) (defining first-degree criminal sexual conduct). And it is undisputed that D.M.N. became pregnant with appellant's child when she was 13 years old and appellant was 17 years old; therefore, appellant could have been charged with third-degree criminal sexual conduct based on his sexual relationship with D.M.N. *See* Minn. Stat. § 609.344, subd. 1 (b) (1996) (defining third-degree criminal sexual conduct as "sexual penetration with another person . . . if . . . the [victim] is at least 13 but less than 16 years of age and the actor is more than 24 months older than the [victim].").

Appellant did not present any evidence to rebut the presumption of harm that attaches to these offenses. Moreover, both examiners concluded that appellant's conduct could cause significant psychological harm to his victims. Accordingly, we conclude that the district court did not err in finding that appellant engaged in a course of harmful sexual conduct.

Sexual, Personality, or Mental Disorder

The second factor for an SDP commitment is whether the offender "has manifested a sexual, personality, or other mental disorder or dysfunction." Minn. Stat. § 253B.02, subd. 18c(a)(2). In his appellate brief, appellant appears to agree that he was diagnosed with at least one qualifying personality disorder, Antisocial Personality Disorder. *See, e.g.*, *Linehan IV*, 594 N.W.2d at 877-78. But appellant contends that "in so far as [his] diagnoses are dependent . . . on [a]ppellant's alleged but not fairly

adjudicated conduct, any opinion based on such conduct is without foundation, unreliable and should not be properly considered for SDP commitment purposes until the conduct has been found to have actually occurred." But appellant has not provided any authority for the proposition that an examiner cannot consider nonadjudicated conduct when evaluating whether an individual has a sexual, personality, or other disorder. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that issues not adequately briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997). And we have held that courts may consider conduct not resulting in conviction during commitment proceedings. *See*, *e.g.*, *Ramey*, 648 N.W.2d at 268.

Highly Likely to Reoffend

The third factor in assessing a candidate for classification as an SDP is whether, as a result of the offender's course of misconduct and mental disorders or dysfunctions, the offender is "likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). To affirm a finding regarding this factor, we must determine that it is "highly likely" that appellant will engage in further harmful sexual conduct. *Linehan IV*, 594 N.W.2d at 876. A district court should consider six factors when considering whether an offender is highly likely to reoffend, including: (1) the offender's demographic traits; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) sources of stress in the offender's environment; (5) the similarity of present or future contexts to past contexts in which the offender has used violence; and (6) the offender's record of participation in sex-therapy programs. *Linehan I*, 518 N.W.2d at 614.

Here, both examiners opined that appellant is highly likely to engage in future acts of harmful sexual conduct. The examiners considered the *Linehan* factors and conducted several tests assessing appellant's risk of reoffense. Dr. Alsdurf's evaluation indicates that although appellant's scores on the risk assessment tools reveal a moderate likelihood of reoffense, his risk of reoffense is high when the *Linehan* factors are considered. Dr. Alsdurf noted that appellant: (1) has a limited work history, poor social adjustment, limited social relationships and questionable opportunities for community placement; (2) has a history of violent behavior; (3) has a high likelihood of reoffense in light of base-rate statistics; (4) would have a high level of stress if released; (5) would return to a social environment similar to the one in which he committed his prior offenses if released; and (6) has not completed sex offender treatment and has been noncompliant during treatment.

Dr. Meyers found that appellant (1) is sexually deviant, a victim of child abuse, abused substances, and has relationship and employment problems; (2) has a history of violent behavior; (3) is in the medium-high risk category for sexual recidivism; (4) would be under stress if released; (5) has taken very limited responsibility for his actions; and (6) has a negative attitude toward intervention, and has not completed sex offender treatment. The district court found the opinions of both examiners credible and persuasive. Accordingly, the record contains clear and convincing evidence that appellant is highly likely to reoffend.

In sum, because appellant engaged in a course of harmful sexual conduct, has a personality disorder, and is highly likely to reoffend, we conclude that the district court did not err in committing him as an SDP.

Affirmed.