STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0793

In the Matter of the Civil Commitment of: Brandon Keith Benson

Filed November 3, 2008
Affirmed
Toussaint, Chief Judge

Scott County District Court
File No. 70-PR-07-2053

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Considered and decided by Toussaint, Chief Judge; Worke, Judge; and Larkin, Judge.

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

TOUSSAINT, Chief Judge

Brandon Keith Benson appeals the district court orders initially and indeterminately committing him to treatment in the Minnesota Sex Offender Program

(MSOP) as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). Because clear and convincing evidence supports the district court's orders for initial and indeterminate commitment and because the district court's determination that MSOP is the least-restrictive treatment alternative is not clearly erroneous, we affirm.

D E C I S I O N

"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). This court defers to the district court's role as factfinder and its ability to judge the credibility of witnesses. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144 (quotation omitted).

A district court will commit a person as an SDP or an SPP if the person meets the criteria for commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a) (2006), 253B.185, subd. 1 (2006).

I.

An SDP is one 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) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2006). It is not necessary for the petitioner to prove that the person to be

committed as an SDP has an inability to control his sexual impulses. Minn. Stat. § 253B.02, subd. 18c(b) (2006). But the statute requires a showing that the person's disorder does not allow him to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

Appellant challenges the district court's conclusion that he engaged in a course of harmful sexual conduct.[1] "Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2006). To be harmful, the conduct does not have to cause actual physical or emotional harm, but rather must create a substantial likelihood of physical or emotional harm. *Ramey*, 648 N.W.2d at 269. There is a rebuttable presumption that conduct described in the statutes defining criminal sexual conduct in the first through fourth degrees "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(b) (2006).

The SDP statute does not define "course" of harmful sexual conduct, or specify the number of incidents necessary to qualify as a "course," but Minnesota caselaw indicates that a "course" is a "systematic or orderly succession; a sequence." *In re Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006) (quotation omitted). The incidents establishing a course of conduct may extend over a long period. *Id.* (stating that conduct need not be recent). "An examination of whether

[1] Appellant does not challenge the district court's determinations that he "has manifested a sexual, personality, or other mental disorder or dysfunction," and "is likely to engage in acts of harmful sexual conduct."

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.* Harmful sexual conduct constituting a "course" is not required to "be precisely the same type or demonstrate a degree of similarity." *Id.* at 839.

Here, both court-appointed examiners agreed that appellant engaged in a course of harmful sexual conduct and described how appellant's assaults harmed his victims. The district court concluded that appellant sexually assaulted E.S. and K.A.B., even though he was not prosecuted for these offenses, and that the assaults constituted first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd.1 (2006) (stating elements of first-degree criminal sexual conduct).

The record indicates that appellant disclosed his sexual abuse of E.S. on two occasions, stating that he forcibly vaginally penetrated her with his penis. At the time, E.S. admitted that appellant only touched her vagina while she was clothed, but Rice County Human Services determined that the abuse occurred and that child-protection services were needed for E.S. Although appellant and E.S. now completely deny the sexual assault, we must defer to the district court's credibility determinations.[2] Clear and convincing evidence supports the district court's conclusion that appellant's abuse of E.S. constituted first-degree criminal sexual conduct.

[2] Appellant claims that he fabricated his sexual assault against E.S. while in treatment "to get attention." But as the first court-appointed examiner noted, appellant's offenses against E.S. are strongly supported by the record, "very specific," and were reported by appellant to more than one person.

As to K.A.B., the record establishes that appellant forced sexual intercourse upon her, causing her mental and physical harm. Again, although appellant denies this assault, we must defer to the district court's ability to determine witness credibility. Clear and convincing evidence supports the district court's conclusion that appellant's abuse of K.A.B. constituted first-degree criminal sexual conduct.

Appellant was adjudicated delinquent after he admitted to an amended count of second-degree criminal sexual conduct for molesting C.J.K, and was convicted of third-degree criminal sexual conduct for sexually assaulting M.M. Both of these offenses raise the rebuttable presumption that there is a "substantial likelihood" that C.J.K. and M.M. "will suffer serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(b). Because the district court did not err in determining that the assaults of E.S. and K.A.B. constituted first-degree criminal sexual conduct, the rebuttable presumption of harm applies to these assaults as well. Because appellant did not present evidence rebutting the presumption of harm, the district court did not err in its determination that appellant's sexual assaults against C.J.K., M.M., E.S., and K.A.B. constitute a course of harmful sexual conduct.

Clear and convincing evidence supports the district court's orders for initial and indeterminate commitment of appellant as an SDP. Appellant has engaged in a course of harmful sexual conduct, has manifested a sexual, personality, or other mental disorder or dysfunction, and is likely to engage in future acts of harmful sexual conduct. And the record establishes appellant's disorders do not allow him to adequately control his sexual

impulses, even while confined.

II.

A "sexual psychopathic personality" is defined by statute as

> the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Minn. Stat. § 253B.02, subd. 18b (2006). The SPP statute requires that the district court find: (1) a habitual course of misconduct; (2) an utter lack of power to control sexual impulses; and (3) dangerousness. *Id.; see also Matter of Linehan,* 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). "While excluding 'mere sexual promiscuity,' and 'other forms of sexual delinquency,' a psychopathic personality 'is an identifiable and documentable violent sexually deviant condition or disorder.'" *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001) (quoting *In re Blodgett,* 510 N.W.2d 910, 915 (Minn. 1994)). Appellant challenges the district court's determinations that he utterly lacks the power to control his sexual impulses and is therefore dangerous.

First, appellant challenges the district court's determination that he engaged in a habitual course of sexual misconduct. This element "has been defined to require evidence of a pattern of similar conduct."[3] *Stone,* 711 N.W.2d at 837. Appellant

[3] This element "does not equate to the standard of 'course of harmful sexual conduct'" found in the SDP statute. *Stone,* 711 N.W.2d at 837.

contends that his alleged sexual offenses were dissimilar because the victims were of different ages and because the circumstances and outcomes of the offenses were different.

In her report, the first court-appointed examiner opined that if the district court found that appellant committed all of the allegations of sexual assault against him, his course of harmful sexual conduct would be considered habitual. And at trial, after hearing the evidence submitted, the same examiner testified that if the district court found that appellant sexually abused either E.S. or K.A.B., in addition to his two conviction offenses, his course of harmful sexual conduct would be considered habitual. The second court-appointed examiner opined that whether appellant's course of harmful sexual conduct is habitual is "arguable." He noted that appellant's sexual assaults were frequent and repetitive, but not similar. But he also reported that the extent of appellant's past victim pool "increases his [future] victim pool and demonstrates a broader spectrum of dyscontrol with regard to sexual opportunities."

Appellant has sexually offended against a male victim, female victims, victims much younger than he, a victim closer to his age, a victim related to him, a victim who was a stranger, and victims who were acquaintances. As noted above, the record supports the district court's conclusion that appellant sexually abused C.J.K., E.S., K.A.B., and M.M. The offenses against the females involved forced and violent vaginal (and anal, in one situation) penetration, and the offense against the male involved forced oral sex. Although the ages of appellant's victims differed, the natures of the assaults

against them were very similar. The victims were not groomed; they were suddenly abused or attacked by appellant because he could not control his sexual impulses. The record establishes a pattern of sexual assault with a progression of boldness. Each of the victims was essentially helpless, and the harm suffered by each victim was also similar. Clear and convincing evidence supports the district court's conclusion that appellant engaged in a habitual course of sexual misconduct.

Second, appellant argues that the district court erred in determining that he possessed an utter lack of power to control his sexual impulses, claiming that the district court should have considered that he has never refused treatment and that the experts disagreed about this element of the SPP statute.[4] "If a person has the ability to control the sexual impulse, the standard for commitment is not met." *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). In determining whether an individual exhibits an utter lack of control over his sexual behavior, there are several significant factors:

> [1] the nature and frequency of the sexual assaults, [2] the degree of violence involved, [3] the relationship (or lack thereof) between the offender and the victims, [4] the offender's attitude and mood, [5] the offender's medical and family history, [6] the results of psychological and psychiatric testing and evaluation, and [7] such other factors that bear on the predatory sex impulse and the lack of power to control it.

Blodgett, 510 N.W.2d at 915.

[4] Appellant does not challenge the district court's conclusion that he is dangerous to the public if released, the third element of the SPP statutory provision.

Here, the first court-appointed examiner opined that appellant exhibits an utter lack of control. The second examiner opined that it is "arguable" whether appellant meets this element but noted that there is no "persuasive evidence that [appellant] has demonstrated a past attempt to control his harmful sexual behaviors." Each examiner considered the *Blodgett* factors.

1. Nature & Frequency of Sexual Assaults

Impulsive sexual assault demonstrates a lack of control. *See Matter of Schweninger*, 520 N.W.2d 446, 450 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994) (holding that defendant demonstrated control because he plotted and planned his sexual assaults and groomed his victims, "which is different from an impulsive lack of control"). The first examiner reported that appellant "is too impulsive to stop himself from offending," and targets "younger or more vulnerable peers," showing "a lack of empathy for others." She opined that the "indiscriminate nature of [appellant's] behavior shows lack of power to control his impulses and the potential for egregious harm to the victim." The second examiner agreed that appellant's sexual-assault history indicates "substantial impulsiveness," "momentary aggressivity," and "substantial frequency." On this record, we conclude that appellant's sexual impulsiveness demonstrates an utter lack of control.

2. Degree of Violence Used by Appellant

Evidence of the likelihood of future offenses is sufficient even if, in the past, the offender used only limited physical restraint in performing sexual assault, if the offender

used "the amount of force necessary to accomplish his will." *Preston*, 629 N.W.2d at 113 (finding that, when defendant performed oral sex and digital penetration on victims, committed numerous offenses, and engaged in level of force required to reach objectives, and both experts testified that defendant was pedophile, there was adequate evidence in record to support commitment). Mental harm, even without physical harm, can be egregious enough to merit commitment as an SPP. *Id.* at 112 n.4.

Here, the first examiner opined that appellant "typically uses whatever force is necessary to obtain his desired outcome and will do what interests him sexually, e.g. anal intercourse or contact with children." And the second examiner reported: "I do not find that [appellant] has used violence in his sexual offending. He certainly has utilized force, persuasion and control but one could reasonably differentiate that from the use of violence."

The record establishes that appellant's sexual assaults have been sudden, unexpected, and violent. The majority of appellant's assaults were violent because he used whatever force was necessary to perpetrate his assaults. He used violence with K.A.B. by grabbing her hair and holding her down while forcing vaginal and anal intercourse; he used violence with M.M. by holding her arms and using his weight so that she could not escape; and he forced E.S. to have sexual intercourse with him by lying on top of her body.

3. Appellant's Relationships with Victims

The record shows that appellant was not interested in relationships with his victims; his conduct was driven by his sexual impulsiveness. The first examiner reported that appellant "views others as unimportant or tools to be used for his own satisfaction," and "is not interested in relationships with victims or a sense of emotional closeness." This factor supports the district court's finding that appellant is utterly unable to control his sexual impulses.

4. Appellant's Attitude & Mood

Without insight into his sexual problem, an offender demonstrates an utter lack of control. *In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995). The first examiner stated that appellant "is self focused and rebellious with regard to social convention," "has little interest in constraints on his behavior," "does not view himself as responsible for his actions," blames others for his behavior, acts out in anger, and "his attitudes and lack of behavioral regulations make it highly likely that he will engage [in] harmful sexual conduct in the future." She wrote that appellant's "combination of negative role models and lack of empathy for him as a child has made it difficult for him to develop empathy for others." The record establishes that appellant lacks insight into his sexual impulses, supporting a finding that he utterly lacks the power to control his sexual impulses.

5. Appellant's Medical & Family History

A review of the record shows that appellant comes from a very dysfunctional family, with significant levels of physical and emotional abuse, and also has a long history of alcohol abuse, drug abuse, and failed treatment attempts. Appellant's medical and family history increases his utter lack of ability to control his sexual impulses.

6. Psychological Testing & Evaluation

Appellant has repeatedly undergone psychological testing and actuarial assessments, and according to the record, his test results reflect a high risk of sexual reoffense. The first examiner reported that the results of appellant's testing "suggest[] that he is a rather angry and impulsive man who enjoys risk taking and who has little regard for social convention." The results of appellant's testing support the district court's finding that he is utterly unable to control his sexual impulses.

7. Other Factors

Courts may consider the offender's refusal of treatment opportunities and lack of a meaningful relapse prevention plan. *Pirkl*, 531 N.W.2d at 907. Courts may also consider an offender's lack of sex-offender treatment or successful completion of a sex-offender program and the failure of an offender to remove himself from situations similar to those in which offenses occurred in the past. *See, e.g.*, *In re Bieganowski*, 520 N.W.2d 525, 529-30 (Minn. App. 1994) (holding offender's failure to avoid precursors that trigger impulsive behavior, such as alcohol consumption, demonstrated lack of control), *review denied* (Minn. Oct. 27, 1994).

The first examiner noted that appellant has "refused treatment," "has failed to remove himself from situations where he notices potential victims" such as "parties with adolescents," and "has not completed sex-offender treatment since his most recent offense." The second examiner disagreed, stating that appellant "has not refused sex offender treatment opportunities," but did admit that appellant has "a lack of effective sex offender treatment," and "did not have a [relapse prevention] plan available."

When considering these additional factors, the district court did not err in concluding that appellant utterly lacks the ability to control his sexual impulses. The record indicates that while appellant has never refused sex-offender treatment, he has repeatedly failed to complete treatment and has continually offended due to his failure to avoid his triggers.

Because appellant has engaged in a habitual course of sexual misconduct, utterly lacks the ability to control his sexual impulses, and is dangerous to the public if released, clear and convincing evidence supports the district court's orders for initial and indeterminate commitment of appellant as an SPP.

III.

Appellant challenges his commitment to MSOP on the ground that it is not the least-restrictive alternative, arguing that he has not been permitted to enroll in a less-restrictive Department of Corrections (DOC) sex-offender treatment program while incarcerated. This court reviews a district court's determination of the least restrictive alternative under the clearly erroneous standard. *Thulin*, 660 N.W.2d at 144.

"Under the current statute, patients have the *opportunity* to prove that a less-restrictive treatment program is available, but they do not have the *right* to be assigned to it." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). The commitment statute provides that

> the 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 (2006).

Appellant has not established that a less-restrictive treatment program is available that is consistent with his treatment needs and the requirements of public safety. Both court-appointed examiners agreed that MSOP is the most appropriate program for appellant to attend sex-offender treatment. Appellant claims that he should be treated in prison, but we find no evidence in the record that DOC treatment would appropriately meet appellant's treatments needs and the requirements of public safety. Having heard two examiners testify that no less-restrictive alternative would be appropriate for appellant, the district court did not err in committing appellant to treatment at the MSOP.

Affirmed.