STATE OF MINNESOTA
IN COURT OF APPEALS
A08-898

In the Matter of the Civil Commitment of: David Kendall Renz.

Filed October 28, 2008
Affirmed
Worke, Judge

Hennepin County District Court
File Nos. 27-P1-98-060203, 27-MH-PR-05-295,
27-MH-PR-06-319, 27-PR-CV-08-4

Ronald Thorsett, 7328 Ontario Boulevard, Eden Prairie, MN 55346 (for appellant)

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

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

WORKE, Judge

On appeal from his commitment as mentally ill and dangerous, appellant argues that commitment as mentally ill is a better fit because there is no clear and convincing evidence that he engaged in an overt act causing or attempting to cause serious physical harm to another and there is not a substantial likelihood that he will engage in acts capable of inflicting serious physical harm. We affirm.

D E C I S I O N

To commit a person as "mentally ill and dangerous," the district court must find by clear and convincing evidence that the person is mentally ill and, as a result, presents a "clear danger to the safety of others" because 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 acts capable of inflicting serious physical harm on another." Minn. Stat. § 253B.02, subd. 17 (2006) (defining "person who is mentally ill and dangerous to the public"); Minn. Stat. § 253B.18, subd. 1(a) (2006) (applying clear-and-convincing standard to proceedings for persons who are mentally ill and dangerous). "These statutory requirements are interpreted strictly." *In re Civil Commitment of Carroll*, 706 N.W.2d 527, 530 (Minn. App. 2005).

On appeal, we examine whether the commitment is justified by findings based on the evidence presented at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). The record is viewed in the light most favorable to the district court's decision, and due regard is given to the district court's judgment of credibility. *Id.* We will not reverse the district court's factual findings unless they are clearly erroneous. *Id.*; Minn. R. Civ. P. 52.01. Whether the evidence is sufficient to support a finding that an overt act has occurred is a legal question subject to de novo review. *Knops*, 536 N.W.2d at 620.

Appellant David Kendall Renz concedes that he is mentally ill, but contends that he is not dangerous because there is no clear and convincing evidence that he engaged in an overt act causing or attempting to cause serious physical harm to another. A person who is "mentally ill" is:

> any person who has an organic disorder of the brain or 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:
>
> (1) a failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment;
>
> (2) an inability for reasons other than indigence to obtain necessary food, clothing, shelter, or medical care as a result of the impairment and it is more probable than not that the person will suffer substantial harm, significant psychiatric deterioration or debilitation, or serious illness, unless appropriate treatment and services are provided;
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> (3) *a recent attempt or threat to physically harm self or others*; or
>
> (4) recent and volitional conduct involving significant damage to substantial property.

Minn. Stat. § 253B.02, subd. 13(a) (2006) (emphasis added). In contrast, a person who is "mentally ill and dangerous" is:

> a person (a) who is mentally ill; and (b) who as a result of that mental illness presents a clear danger to the safety of others as demonstrated by the facts that *(i) the person has engaged in an overt act causing or attempting to cause serious physical harm to another and (ii) there is a substantial likelihood that the person will engage in acts capable of inflicting serious physical harm on another*.

Id., subd. 17 (emphasis added).

There are different consequences for commitment as "mentally ill" versus commitment as "mentally ill and dangerous." There is a difference in the place of commitment. *See* Minn. Stat. § 253B.09, subd. 1(a) (2006) (committing individual to

least restrictive treatment program for mentally ill); Minn. Stat. § 253B.18, subd. 1(a) (committing individual to a secure treatment facility for mentally ill and dangerous). Additionally, there is a difference in the length of the commitment. *See* Minn. Stat. § 253B.13, subd. 1 (2006) (stating commitment as mentally ill shall not exceed 12 months); Minn. Stat. § 253B.18, subd. 3 (2006) (stating commitment as mentally ill and dangerous may be for an indeterminate period of time). Further, once the commitment period as mentally ill ends, commitment may not be continued unless a new petition for commitment is filed and a new hearing and determination is made. Minn. Stat. § 253B.13, subd. 1. In contrast, once committed indeterminately as mentally ill and dangerous, the person can be transferred, provisionally discharged, or discharged only as provided in Minn. Stat. § 253B.18. Minn. Stat. § 253B.18, subd. 3. Thus, whether appellant meets the criteria for commitment as mentally ill and dangerous is important.

Appellant argues that without a specific act of violence there is no clear and convincing evidence that he engaged in a serious overt act for commitment as mentally ill and dangerous. But the district court found that there was clear and convincing evidence that appellant "deliberately engaged in unprotected sexual activity with others even though he has been diagnosed with HIV . . . and, thus, has 'engaged in an overt act causing or attempting to cause serious physical harm to another' regardless of intent or the outcome of the action." The district court based this finding on the record showing that appellant engaged in unprotected sexual activity, which was evidenced by his contracting gonorrhea and syphilis. The district court also determined that appellant

acknowledged engaging in such activity, at times without disclosing his HIV diagnosis to his sexual partners.

Appellant contends that he is not dangerous because there is no identified victim. Appellant suggests that his case is similar to *In re Kottke*, in which the supreme court determined that the evidence was insufficient to show that the appellant was mentally ill and dangerous. 433 N.W.2d 881, 884 (Minn. 1988). In *Kottke*, the supreme court examined the difference between "physical harm" required for commitment as mentally ill and "serious physical harm" necessary for commitment as mentally ill and dangerous. *Id.* The court ruled that the district court erred in determining that Kottke met the serious-physical-harm requirement based on his annoying public behavior, insulting comments, and two unprovoked assaults. *Id*. at 883-84.

The requisite overt act can occur "regardless of intent or the outcome of the action." *In re Jasmer*, 447 N.W.2d 192, 195 (Minn. 1989). Just as a mentally ill person who fires a shotgun at another or drives a vehicle into a crowd of people at 100 m.p.h. commits an overt act causing or attempting to cause serious physical harm to another, so too does a mentally ill person with HIV who engages in unprotected sexual activity. *See id.* (setting out above examples involving a shotgun and a vehicle). Unlike *Kottke*, there is evidence that appellant is dangerous because he has engaged in unprotected sexual activity without disclosing to his partners that he has been diagnosed with HIV.

Dr. Dawn Peuschold, a court-appointed examiner, opined that appellant is mentally ill and dangerous because he has sexually transmitted diseases and he engages in unprotected sexual activity putting others at risk of acquiring HIV. Dr. Peuschold

stated that it was "pretty clear" in speaking with appellant that he has unprotected sex because he reported that "it would be impossible to use protection all the time." Dr. Peuschold further testified that appellant did not have an appreciation of the need for consistently taking his HIV medication because appellant believes that he cured himself. Dr. Elliot Francke, appellant's treating physician for HIV, testified that appellant took his HIV medication intermittently, which can induce resistance to medication. Dr. Francke also treated appellant for other sexually transmitted diseases—gonorrhea, chlamydia, and syphilis in August 2007. Dr. Francke testified that he inferred that appellant did not use protection because of the diseases he contracted; while syphilis can be occasionally acquired by non-sexual skin-to-skin contact, gonorrhea and chlamydia cannot.

In support of his position that the record does not support the district court's finding that he engaged in unprotected sexual activity despite his HIV status, appellant relies on the testimony of Dr. James Alsdurf, a court-appointed examiner, who testified that appellant is not dangerous because there is no clear victim of sexual contact. But Dr. Alsdurf also acknowledged that it appeared likely that appellant had engaged in unprotected sex acts because he had contracted STDs. Dr. Alsdurf also testified that if appellant were released into the community he would likely be "sexually active in a way that puts him at higher exposure for engaging in reckless sexual behavior, in part due to his psychiatric state." Dr. Alsdurf acknowledged that appellant admitted to him that he had five or six sexual partners during the past year and "assumed" that appellant engaged in unprotected sex.

Finally, Dr. Thomas Keul, appellant's treating physician, testified that appellant has been diagnosed with schizophrenia which has caused him to not understand his HIV infection and how it can be transmitted to others. Dr. Keul also testified that appellant has denied having HIV, believed that he had cured himself of the infection, and that he has told his sexual partners that he has the infection and if they do not care then he does not use protection. Dr. Keul opined that appellant's "long history of engaging in sexual activities without any protection" has put his sexual partners at high risk of acquiring the HIV infection. Further, within the past year, appellant acquired sexually transmitted diseases other than HIV which indicate that he is "certainly not in all likelihood" using protection. Moreover, appellant admitted to Dr. Keul that he was not using protection. Dr. Keul testified that he attempted to educate appellant regarding his HIV infection, but that appellant did not understand the infection, and that he is not willing to take his HIV medication.

Appellant's history of commitments as mentally ill also defeats his argument that commitment as mentally ill is more appropriate, because the record shows that each time he has been discharged he resumed engagement in unprotected sexual activities. From May 1998 through June 1999, appellant was committed as mentally ill, and again from October 2000 through October 2001. At that time the district court noted that appellant failed to obtain treatment for his HIV and that he did not have significant insight into his mental illness and his need for treatment. During a hospital stay in October 2002, appellant stated that he was better off without his medications (HIV and otherwise). Appellant was next committed as mentally ill and chemically dependent from October

2002 through February 2003. In the commitment order, the court noted that appellant admits to having multiple sexual partners and engaging in unprotected sexual activity. At a hospital admission in February 2003, appellant admitted to having sex without advising his partners that he is HIV positive.

Appellant was again committed as mentally ill in March 2003. At that time, the district court again noted appellant's admission to engaging in unprotected sex despite having STDs. The district court further stated that appellant does not control his sexual behavior or take necessary precautions to prevent the spread of his illnesses. Additionally, the district court stated that appellant "describes sexual practices that place innocent people in grave danger of contracting a fatal illness if they engage in sexual activity with him. The court cannot tolerate this risk to the public from [appellant's] diminished judgment in sexual matters when his mental illness is not controlled." Appellant was granted a provisional discharge in July 2003 and was fully discharged in August 2003. Appellant was then committed as mentally ill in April 2005, was provisionally discharged in September 2005, and fully discharged in October 2006. Based on appellant's extensive history of commitments as mentally ill, the record supports the district court's determination that appellant engaged in overt acts causing or attempting to cause serious physical harm to another.

Further, it is worth noting that in *In re Stillinovich*, this court determined that the risk posed by a carrier of HIV who intended to have intercourse with others without advising them of his HIV status should have been addressed by the Health Threat Procedures Act, rather than civil commitment. 479 N.W.2d 731, 732, 735 (Minn. App.

1992). This court noted, however, that the "fact that a person is HIV positive would, of course, not preclude commitment . . . if the requirements of th[e] law were otherwise met." *Id.* at 736. Here, it is noted in Dr. Alsdurf's report that appellant "has a history of admitting to unprotected sex with his partners and has had 'acute syphilis and a recent episode of gonorrhea' which was reported to the state health department and resulted in a health directive that prohibited [appellant] from 'engaging in any sexual contact with another person[.]'" A violation of a health-care directive can result in a 72-hour temporary emergency hold. *See* Minn. Stat. § 144.4182 (2006). But based on Dr. Keul's testimony that appellant will continue to engage in similar behavior because appellant insists on doing what he wants to do, and because appellant's prior commitments described about did not change his behavior, a temporary hold would not sufficiently deter appellant from engaging his dangerous behavior.

Thus, while there is no evidence of a specific victim, there is evidence that appellant engaged in unprotected sexual activity putting others at risk of contracting HIV. Because the evidence shows that appellant has engaged in overt acts causing or attempting to cause serious physical harm to another, the requirements for commitment as mentally ill and dangerous are met, and the district court did not err in concluding that appellant meets the requirements for commitment as mentally ill and dangerous.

Affirmed.