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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1106**

In the Matter of the Civil Commitment of:
Richard Patrick Comeau.

**Filed December 23, 2008
Affirmed
Halbrooks, Judge**

Scott County District Court
File No. 70-PR-06-27475

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Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and
Collins, Judge.*

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his indeterminate civil commitment as a sexually dangerous
person (SDP) and a sexual psychopathic personality (SPP). He argues that the district

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

court abused its discretion in admitting disclosures he made during mandatory sex-offender treatment. He also argues that the district court lacked sufficient evidence to support its findings that he engaged in a course of harmful sexual conduct and a habitual course of sexual misconduct. Finally, appellant argues that the district court erred in finding that there was no less-restrictive treatment option available. Because the district court did not abuse its discretion in admitting disclosures made by appellant during sex-offender treatment, because clear and convincing evidence supports appellant's commitment as an SDP and an SPP, and because appellant has not shown that there is a less-restrictive treatment option available, we affirm.

FACTS

On November 19, 2007, Scott County filed a petition for the civil commitment of appellant Richard Patrick Comeau as an SDP and SPP. The district court appointed Thomas Alberg, Ph.D., as the first court-appointed examiner, and James Gilbertson, Ph.D., at appellant's request. Following a trial in February 2008, the district court issued an initial order, committing appellant to treatment in the Minnesota Sex Offender Program (MSOP) as an SDP and SPP. Following the 60-day review hearing pursuant to Minn. Stat. § 253B.18, subd. 2 (2006), the district court ordered appellant indeterminately committed to MSOP. Appellant appeals the district court's April 3, 2008 initial-commitment order and the June 5, 2008 indeterminate-commitment order.

DECISION

I.

Appellant argues that the district court erred in denying his motion to exclude evidence of disclosures he made during his February 2004 treatment sessions at KidsPeace Mesabi Academy (Mesabi). He contends that, absent his treatment disclosures, there is insufficient evidence to support the district court's findings regarding his commitment as an SDP and SPP.

Appellant was adjudicated delinquent and placed on indefinite probation after being charged with three counts of first-degree criminal sexual conduct arising from offenses committed in July 2003. The victims were two girls: 12-year-old N.R.C. and nine-year-old H.M.M. The district court ordered appellant to complete inpatient sex-offender treatment at Mesabi.

Appellant entered treatment in September 2003 and signed Mesabi's limits-to-confidentiality form on September 18, 2003. This form states that "[t]reatment and unit staff are required by law to report suspected or known child physical abuse, sexual abuse, or neglect if the child can be identified." The form also states that a judge may issue a court order for the release of a patient's file for various court proceedings and that Mesabi staff will comply with such a court order. Above appellant's signature, he indicated that he had read the form, understood it, and had an opportunity to ask questions regarding it. A Mesabi staff member also signed the form.

While in treatment, appellant made a number of disclosures regarding sexual offenses that he had committed. Appellant admitted to an offense against his female

cousin S.B.S. Appellant was 13 years old at the time, and S.B.S. was eight. Appellant stated that he “fingered [S.B.S.] when [he] was babysitting her.” S.B.S.’s mother had reported appellant to the police, but appellant was never charged for any offense against S.B.S. Appellant also admitted to the offenses against N.R.C. and H.M.M. that occurred in 2003 and for which he was adjudicated delinquent and ordered to complete sex-offender treatment.

Appellant also disclosed in treatment offenses that had not been reported to law enforcement. Appellant stated that he sexually assaulted a six- to seven-year-old girl at a playground when he was approximately 13 years old. He stated that he held a knife in one hand and told the girl to kiss him. Appellant later held the knife and felt the girl’s chest and vaginal area over her clothing. Appellant reported sexual contact with an eight- to ten-year old male victim named Deondra. Appellant stated that when he was approximately 13 years old, he and Deondra engaged in anal intercourse, oral sex, and joint masturbation. Appellant also reported engaging in oral sex and joint masturbation with a nine-year-old male named Garrett when appellant was 13, and sexually abusing a distantly related younger girl, T.E.¹ Appellant stated that on at least two occasions, he had T.E. remove her clothes, he “fingered” her, and he performed oral sex on her. Appellant also reported sexually abusing T.E.’s five-year-old sister, M.E, when appellant was 13. He had M.E. remove her clothes, and he “fingered” her. Appellant reported sexually abusing his half-brother, N.E., who is seven years younger than appellant.

¹ In his commitment examination with Dr. Alberg, appellant stated that she is three years younger than he.

Appellant stated that while taking a shower with N.E., he attempted sexual intercourse with N.E. Appellant also stated that he touched N.E.'s genitals while N.E. slept. Appellant reported that he "fingered" and attempted intercourse with a 13- to 14-year-old girl and "peer pressured" a 14-year-old girl to have sex with him when he was 16 or 17. He reported sex with a 14-year-old girl, Crissa, when he was 17. Finally, appellant reported that he had exposed himself to a girl when he was in a group home with her.

On February 1, 2008, appellant moved to prevent these disclosures from being considered during the civil-commitment process. The district court implicitly denied this motion by making findings based upon appellant's treatment disclosures. Appellant here argues that the district court abused its discretion in admitting these disclosures.

The decision "whether to admit or exclude evidence is within the district court's discretion and will be reversed only if the court has clearly abused its discretion." *In re Ramey*, 648 N.W.2d 260, 270 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002).

The Minnesota Commitment and Treatment Act provides that the county attorney

may move the court for an order granting access to *any records or data*, to the extent that it relates to the proposed patient, for the purposes of determining whether good cause exists to file a petition and, if a petition is filed, *to support the allegations set forth in the petition*.

Minn. Stat. § 253B.185, subd. 1b (2006) (emphases added). Here, the county obtained such an order. The act also provides that "[a]ny privilege otherwise existing between patient and physician, patient and psychologist, patient and examiner, or patient and social worker, is waived as to any physician, psychologist, examiner, or social worker who provides information with respect to a patient pursuant to any provision of this

chapter.” Minn. Stat. § 253B.23, subd. 4 (2006). Furthermore, a commitment court “shall admit all relevant evidence at the hearing.” Minn. Stat. § 253B.08, subd. 7 (2006); *see also* Minn. Spec. R. Commitment & Treatment Act 15 (“The Court may admit all relevant, reliable evidence, including but not limited to the respondent’s medical records, without requiring foundation witnesses.”); *In re Williams*, 735 N.W.2d 727, 730–31 (Minn. App. 2007) (holding that the district court properly relied upon section 253B.08, subd. 7, and Minn. Spec. R. Commitment & Treatment Act 15 for purposes of SDP and SPP commitment hearing), *review denied* (Minn. Sept. 26, 2007); *In re Morton*, 386 N.W.2d 832, 835 (Minn. App. 1986) (stating that in all commitment cases, there is a presumption of admissibility and that a district court shall admit all relevant evidence at the hearing). Appellant does not contest the relevance of his treatment disclosures.

In order to ensure that persons are not improperly subjected to involuntary civil-commitment proceedings, it is important that authorities in charge of the proceedings are well informed on the relevant characteristics of the proposed patient. *See In re D.M.C.*, 331 N.W.2d 236, 238 (Minn. 1983) (stating that more relevant information in a commitment proceeding equates to a better opportunity for a complete evaluation of the proposed patient). Access to information is necessary for the integrity of the civil-commitment process. This purpose would be frustrated if the person subject to commitment was able to limit the county’s record-gathering efforts to include only those records that were neutral or that served the person’s interest in avoiding commitment.

Because Minnesota law clearly allows the admission of relevant records or data in civil-commitment hearings, it was not an abuse of discretion for the district court to admit appellant's treatment disclosures.

But even if we were to conclude that the district court abused its discretion in admitting the treatment disclosures, there is clear and convincing evidence that appellant meets the statutory criteria for an SDP and an SPP without consideration of the treatment disclosures. *See In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (stating that our standard of review is de novo when addressing district court's conclusion that appellant meets standards for civil commitment); *In re Bieganowski*, 520 N.W.2d 525, 529 (Minn. App. 1994) (stating that a commitment based on the erroneous admission of evidence will not be reversed if properly admitted evidence supports the commitment), *review denied* (Minn. Oct. 27, 1994).

The district court may civilly commit a person under the Minnesota Commitment and Treatment Act if it finds by clear and convincing evidence the need for commitment. Minn. Stat. § 253B.18, subd. 1(a) (2006). We defer to the district court's factual findings, including credibility determinations and conflicting-evidence resolutions unless they are clearly erroneous. Minn R. Civ. P. 52.01; *see In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986).

A. Course of harmful sexual conduct

Minnesota law defines an SDP as 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) (2006). Appellant argues that the district court erred in finding that his offenses are part of a course of harmful conduct; he does not address any other element of the SDP statute.

Appellant does not dispute his three criminal-sexual-conduct convictions involving H.L.M., H.M.M., or N.R.C.; nor does he dispute his offense against J.A.E. Rather, appellant contends that these offenses are too dissimilar to constitute a “course” of harmful sexual conduct. At the time of his offenses against 12-year-old N.R.C. and nine-year-old H.M.M., appellant was 17. At the time of his offense against 15-year-old J.A.E., appellant was 19. At the time of his offense against 15-year-old H.L.M., appellant was 20. He argues that the offenses against the two 15-year-old female victims are “significantly different” than the offenses against the nine- and 12-year-old female victims because the latter offenses “involved touching and digital penetration . . . instigated by [appellant],” but the former involved “consensual vaginal sexual intercourse.”

The SDP statute does not define “course” or specify the number of incidents necessary to constitute 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) (quotation omitted), *review denied* (Minn. June 20, 2006). The county “is not required to show that the incidents of harmful sexual conduct are the same or similar harmful sexual conduct.” *Id.*; *see also id.* at 839 (stating that establishing a course of harmful sexual conduct “does not require that the harmful sexual conduct be precisely the same type or demonstrate a degree of similarity other than what is necessary

to establish that it is harmful sexual conduct”). Because appellant does not dispute that his admitted offenses against the four girls constitute harmful sexual conduct, his argument regarding the similarity of the offenses lacks merit.

Drs. Alberg and Gilbertson both testified at the commitment trial that appellant’s three convictions, not considering his other admitted offenses, are sufficient to meet the criteria for a course of harmful sexual conduct for the purposes of civil commitment.

We conclude that appellant’s admission to these four offenses, combined with the testimony of both court-appointed examiners that appellant’s three convictions, standing alone, constitute a course of harmful conduct, is clear and convincing evidence of a course of harmful sexual conduct for the purposes of the SDP statute.

B. Habitual course of sexual misconduct

Minnesota law defines an SPP 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) (emphasis added). Appellant argues that the district court erred in finding that he has demonstrated a habitual course of sexual misconduct. He does not dispute the district court’s findings as to any other element of the SPP statute. Appellant argues that the district court erred in finding clear and convincing evidence of a habitual course of sexual misconduct because “[c]ommon sense

dictate[s] . . . that if there is no ‘course of conduct,’ there can be no ‘habitual course of conduct.’” Even assuming we were to conclude that appellant’s offenses failed to constitute a “course” under the SDP statute, his argument is without merit because “the standard of ‘habitual course of conduct’ used in the SPP statute does not equate to the standard of ‘course of harmful sexual conduct’ used in the SDP statute.” *Stone*, 711 N.W.2d at 837.

This element of the SPP statute “has been defined to require evidence of a pattern of similar conduct.” *Id.*; see also *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994) (considering frequency and similarity of offenses to determine whether party should be committed under the psychopathic personality statute, the precursor to the SPP statute). Here, Dr. Alberg opined that due to appellant’s repeated sexual abuse of victims over a period of time and his sexual abuse of a variety of victims, appellant had engaged in a habitual course of sexual misconduct for purposes of the SPP statute. Dr. Alberg also noted that appellant has continued to commit sexual offenses even after treatment.² Dr. Gilbertson also opined that appellant’s course of harmful sexual conduct is habitual. According to Dr. Gilbertson, the clinical definition of habituation requires repetition, similar behavior, and resistance to change or redirection. Dr. Gilbertson opined that application of these factors to appellant shows that his course of sexual misconduct was habitual. Dr. Gilbertson also opined that appellant’s three convictions, standing alone, satisfy the clinical requirement of repetition.

² Appellant does not dispute his post-treatment offenses against H.L.M. or J.A.E.

We conclude that the testimony of the examiners, in addition to appellant's admission of his offenses against the four minors, constitutes clear and convincing evidence of a habitual course of sexual misconduct for the purposes of the SPP statute.

II.

Appellant argues that the district court erred in finding that there is no less-restrictive alternative to commitment available to him. If a district court finds that an offender is an SDP, the court must commit the person 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. This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

Here, appellant concedes that no less-restrictive alternative exists. Appellant argues that because it is therefore impossible for him to prove that a less-restrictive alternative exists, he should not be committed to MSOP. But we have held that if a less-restrictive alternative does not exist, a district court may commit a person to a more-restrictive alternative. *In re McPherson*, 476 N.W.2d 520, 522 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991). Appellant has the opportunity to prove the availability of a suitable less-restrictive treatment program, but he does not have the right to be assigned to a treatment program that is less restrictive than commitment. *See In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (stating that "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”), *review denied* (Minn. Dec. 19, 2001). Because appellant has not established by clear and convincing evidence that a less-restrictive treatment program is available to him, we conclude that the district court’s findings on this matter were not clearly erroneous.

Affirmed.