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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0591

In the Matter of the Civil Commitment of:
Melvin Louis Allen.

Filed October 8, 2018
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-MH-PR-17-424

Roderick N. Hale, Minneapolis, Minnesota (for appellant Melvin Louis Allen)

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Considered and decided by Ross, Presiding Judge; Florey, Judge; and Stauber, Judge.*

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

ROSS, Judge

From age 16 through age 39, Melvin Allen repeatedly and frequently raped children, including a 6-year-old girl, a 9-year-old girl, a 10-year-old boy, a 13-year-old girl, and a 14-year-old girl, one of whom—the 9-year-old girl—was Allen's daughter by his 13-year-old victim. When Allen was ending his latest prison sentence last year, the state

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

successfully petitioned the district court for his civil commitment as a sexually dangerous person and a sexual psychopathic personality. Allen argues on appeal that his commitment violates his constitutional rights and rests on insufficient evidence. He is wrong and we affirm.

FACTS

Melvin Allen is a 48-year-old man who has been sexually abusing young children since 1986. At 16 Allen raped two children, ages 6 and 10. An Illinois court convicted him as an adult of ten counts of criminal sexual assault and three counts of criminal sexual abuse. After his release from prison at age 19, he began grooming S.S.B. for sex using money and candy. Allen impregnated S.S.B. when she was 14 years old. Six years later, he began grooming an 11-year-old girl, V.D.B., for sex. He impregnated V.D.B. when she was 13. Years later police learned that Allen forced his (and V.D.B.'s) 9-year-old daughter to perform fellatio on him. The child told police that Allen had been doing this since she was 6. A jury found Allen guilty of three counts of first-degree criminal sexual conduct, and the district court sentenced him to 12 years in prison.

As Allen's prison sentence neared completion, Hennepin County petitioned the district court to civilly commit him to the Minnesota Sex Offender Program. Allen unsuccessfully challenged the petition as unconstitutional. The district court received evidence tending to show that Allen is a sexual psychopathic personality and a sexually dangerous person. The evidence included Allen's extensive predatory history, his mental-health record, and the opinions of mental-health professionals. Four experts diagnosed Allen with pedophilia and narcissistic personality disorder. He scored higher than 99.7%

of Minnesota's incarcerated offenders on the Minnesota Sex Offender Screening Tool in March 2017, four months before the end of his prison term. According to the Minnesota Sex Offender Screening Tool, Allen has an 82.04% chance of recidivating within four years. Another assessment tool puts Allen in the 30th percentile of men likely to reoffend.

The experts indicated that Allen has remarkably little insight into the harmfulness of his sexually predatory acts. He told one psychologist, for example, "How can you say [my behavior] is deviant? There's nothing deviant about it[.]" Allen's recounting of his conduct varied from one therapy session to the next, indicating dishonesty. Less than two weeks before his anticipated release, his therapist observed that he "does not seem to fully understand his offending behaviors." The testifying experts, including the one selected by Allen, said that Allen is both a sexually dangerous person and a sexual psychopathic personality. Their testimony can be fairly summarized to say that Allen is a narcissistic, pedophilic psychopath with a high likelihood of reoffending.

The district court indeterminately committed Allen to the Minnesota Sex Offender Program. Allen appeals.

D E C I S I O N

Allen challenges as unconstitutional both the statute and the risk-assessment tools applied to civilly commit him. He also argues that the evidence does not show that he is highly likely to reoffend. His arguments fail.

I

We review Allen's constitutional challenge to the civil-commitment statutes de novo, and we will uphold them unless they are unconstitutional beyond a reasonable doubt.

SooHoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007). Allen has a substantive due process theory. The federal and state constitutions prohibit "certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them." *In re Linehan*, 594 N.W.2d 867, 872 (Minn. 1999) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990) (internal quotation omitted)). Because the civil-commitment statutes restrain liberty, we apply an exacting, strict-scrutiny analysis to assess whether they violate substantive due process, "placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest." *Id.* Minnesota has compelling interests in "protecting the public from sexual violence and rehabilitating the mentally ill." *Id*. And the Sexually Dangerous Person Act is narrowly tailored to meet those interests. *Id*. at 872–76, 878. We can safely say that indeterminately civilly committing an untreated, predatory, narcissistic, pedophilic psychopath with a 20-year history of consistently raping children and a high likelihood of reoffending does not generally violate his constitutional right to liberty.

Allen specifically argues that Minnesota Statutes, sections 253D.07, subdivision 4 (2016), and 253D.02, subdivisions 15 and 16 (2016), which authorize the district court to indeterminately commit sexual psychopathic persons who are utterly incapable of controlling their dangerous sexual impulses and sexually dangerous persons who are highly likely to engage in future harmful sexual conduct, violate his substantive-due-process right to liberty because, he asserts, commitment is "punitive." It is self-evident that deeming a statute's superficially civil penalties as punitive might open that statute to challenges under constitutional provisions that protect individual rights in criminal cases. *See, e.g.*, *Seling v.*

Young, 531 U.S. 250, 260–65, 121 S. Ct. 727, 733–36 (2001). But Allen offers no cogent explanation why merely deeming the commitment statutes "punitive" would result in our holding that they are unconstitutional as a matter of substantive due process. This omission is fatal to his argument.

Equally fatal, the state supreme court has expressly rejected the assertion that the civil-commitment law is punitive, declaring in *Linehan III*, "The purpose and effect of the [Sexually Dangerous Person] Act is . . . predominantly remedial, not punitive." *In re Linehan*, 557 N.W.2d 171, 188 (Minn. 1996), *cert. granted, judgment vacated sub nom. Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997). Although the *Linehan III* decision was vacated by the United States Supreme Court, on remand for review under *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), the state supreme court in *Linehan IV* repeated that the statute "does not involve retribution" and "[saw] no need to modify [the] earlier rulings" on this issue because the "reasoning in *Linehan III* was supported by the Supreme Court's reasoning in *Hendricks*." *In re Linehan*, 594 N.W.2d 867, 871–72 (Minn. 1999). This referenced "reasoning in *Hendricks*" expressly rejected the theory that a similar Kansas law was punitive. *See Hendricks*, 521 U.S. at 361–69, 117 S. Ct. at 2081–85. We need not restate this reasoning outlined in *Linehan III* and expressly readopted and unmodified in *Linehan IV* or as developed by analogy in *Hendricks*. We stand on the conclusion: Minnesota's civil-commitment law is not punitive.

Allen argues that the *Linehan III*, *Linehan IV*, and *Hendricks* holding that the civil-commitment law is not punitive cannot be applied to his substantive due process claim because the operative section of *Hendricks*, like the parallel section of *Linehan*, "only

[addressed] claims of *ex post facto* and double jeopardy." He cites no authority and offers no logical theory supporting his supposition that precedent establishing a law as "not punitive" for the purpose of answering an *ex post facto* and double jeopardy challenge does not apply with equal force to defeat an assertion that the law is punitive in some other constitutional challenge. We will not speculate that any such authority or logic exists. And we observe that, when the *Hendricks* court rejected Hendricks's *ex post facto* and double jeopardy argument that the commitment laws at issue were punitive, it expressly relied on the substantive due process analysis in *United States v. Salerno*, 481 U.S. 739, 746, 748–49, 107 S. Ct. 2095, 2102 (1987); based on *Salerno* it held that a state "may take measures to restrict the freedom of the dangerously mentally ill" and that "[t]his is a legitimate nonpunitive governmental objective." *Hendricks*, 521 U.S. at 363, 117 S. Ct. at 2083. We have no reason to analyze whether the challenged statutes, which are not punitive in an *ex post facto* and double jeopardy challenge, might somehow be punitive in a due process challenge.

Allen also argues that the statutes authorizing his civil commitment are prohibited bills of attainder. The argument is frivolous on its face. It is indistinguishable from the argument raised by Allen's attorney, and rejected by us, four years ago in *In re Danforth*, A14-0951, 2014 WL 6863320 (Minn. App. Dec. 8, 2014), *review denied* (Minn. Feb. 25, 2015). A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803

(1977). The civil-commitment laws do not single out Allen for commitment either as an identifiable individual or as part of an identified group.

Allen also argues that the actuarial and clinical risk assessment evidence favoring his commitment was so faulty that relying on it violated his right to substantive due process. He cites no authority for the proposition. Instead he refers us to a Wisconsin trial-court decision excluding risk-assessment evidence derived from a tool about which the proponent had failed to provide foundational information requested during discovery. Order Excluding Actuarial Instrument Static-99R, *In re Perren*, Case No. 10-CL-03 (Wis. Cir. Ct. Nov. 28, 2012). That discovery decision does not suggest that relying on actuarial tools violates constitutional rights. Allen also cites an irrelevant federal district court decision that found only that the government had failed to prove the offender was highly likely to reoffend and says nothing about the constitutionality of actuarial assessments. *See United States v. Abregana*, 574 F. Supp.2d 1145, 1156–58 (D. Hawaii 2008). Allen's argument is baseless.

II

Allen argues last that the evidence of his likelihood to reoffend was not sufficient to support his commitment. This argument too is baseless. A district court may not, without violating the right to due process, civilly commit a person for being sexually dangerous or having a sexually psychopathic personality under the statute unless, among other things, the court receives clear and convincing evidence that the person is highly likely to reoffend. Minn. Stat. § 253D.07, subd. 3 (2016); *In re Ince*, 847 N.W.2d 13, 19–22 (Minn. 2014). Once the district court has found that clear and convincing evidence exists, we review its

factual findings for clear error to determine whether they are supported by the record. *Ince*, 847 N.W.2d at 22. We do not reweigh the evidence, deferring to the district court's superior position to determine the weight to be attributed to each factor and to evaluate witness credibility. *Id.* at 24. But we review de novo whether the record contains clear and convincing evidence that the person is highly likely to engage in future harmful sexual conduct. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994). The record overwhelmingly supports the district court's accurate summary of its thorough discussion on this key issue: "The expert testimony in this case and virtually all of the evidence point to a high likelihood of sexual re-offense if [Allen] is not committed."

To determine whether a person is highly likely to engage in harmful sexual conduct, district courts must consider six factors: (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) the sources of stress in the offender's environment; (5) the similarity of the present or future context to those contexts in which the offender used violence in the past; and (6) the offender's record or participation in sex treatment programs. *Id.* at 614. Allen does not discuss (or mention) these factors in challenging the district court's finding that he is highly likely to reoffend. He instead argues that, because he received different scores on different assessment tools, the evidence of his high likelihood to reoffend cannot be clear and convincing. The argument overlooks the supreme court's recent affirmation that "[t]he district court is free to determine the weight to be attributed to any particular piece of evidence, including predictions of future short- or long-term recidivism rates . . . ." *Ince*, 847 N.W.2d at 24.

And it overlooks the caution that predictions do not rest solely on statistics or isolated factors. *Id*. at 23. The district court's evaluation of expert witness credibility is therefore particularly significant. *Id*. at 23–24. The district court credited and relied on the experts' testimony, including the expert selected by Allen. No expert or evidence raised any doubt on the issue. We have reviewed the abundant supporting evidence in the record and the district court's evaluation of it, and we hold that the evidence clearly and convincingly establishes that Allen is highly likely to reoffend.

Affirmed.