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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1701**

In the Matter of the Civil Commitment of:
Scott Phillip Johnson.

**Filed April 26, 2011
Affirmed in part, reversed in part
Johnson, Chief Judge**

Winona County District Court
File No. 85-PR-10-65

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Considered and decided by Johnson, Chief Judge; Hudson, Judge; and Ross, Judge.

UNPUBLISHED OPINION

JOHNSON, Chief Judge

The Winona County District Court committed Scott Phillip Johnson as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). On appeal,

Johnson challenges both legal bases of his commitment. We conclude that the district court erred by committing Johnson as an SPP because his pattern of sexual misconduct was not so egregious as to create a substantial likelihood of infliction of serious physical or emotional harm in the future. But we also conclude that the district court did not err by committing Johnson as an SDP. Therefore, we affirm in part and reverse in part.

FACTS

Johnson was born in July 1978 and was 31 years old at the time of his commitment trial in May 2010. He quit high school in the tenth grade but received his GED in February 1999, when he was 20 years old. He began using marijuana and alcohol when he was 13 years old and has used other illegal drugs, including cocaine, hallucinogens, and methamphetamine. His work history is limited and sporadic, in part because he often has been incarcerated.

Johnson's commitment is based in part on four convictions of criminal sexual conduct. We describe each incident below in the light most favorable to the district court's findings.

First, in 1994, when he was 16 years old and living with his mother in Hawaii, Johnson had inappropriate sexual contact with a seven-year-old girl. The girl reported that, on three consecutive days, Johnson touched her vagina, both over and under her clothing. Johnson was adjudicated guilty by a Hawaii court of two counts of third-degree sexual assault and was placed on probation.

Second, in 1997, when he was 18 years old and living in Minnesota, Johnson had inappropriate sexual contact with a five-year-old girl, who was a family friend. Johnson

touched the girl in the vaginal area, over her clothing, while they were playing a video game. Johnson pleaded guilty in the Carlton County District Court to second-degree criminal sexual conduct. The district court sentenced him to 26 months of imprisonment but stayed the sentence and placed him on probation for ten years. In June 2000, the district court executed the sentence after Johnson tested positive for drug and alcohol use.

Third, in 2007, when he was 29 years old, Johnson had inappropriate sexual contact with a nine-year-old girl, who was a neighbor. Johnson touched the girl's vagina over her clothing on three occasions. Johnson pleaded guilty in the Winona County District Court to second-degree criminal sexual conduct. The district court sentenced him to 36 months of imprisonment but stayed the sentence and placed him on probation for 25 years. In October 2008, the district court executed the sentence after Johnson committed several probation violations.

Fourth, in 2006, when he was 27 or 28 years old, Johnson had inappropriate sexual contact with a six-year-old stepniece, who reported the incident in October 2008. Johnson touched the girl's vagina over her clothing. In 2009, a Winona County jury found Johnson guilty of second-degree criminal sexual conduct. The district court sentenced him to 46 months of imprisonment.

Johnson's commitment also is based in part on four incidents of inappropriate sexual conduct that were not the subjects of criminal proceedings. Johnson divulged information about these incidents during treatment or assessments. At trial in this case, however, he denied all of the conduct attributed to him in these uncharged offenses. First, in 1990 or 1991, when he was 12 or 13 years old, he had sexual contact with a five-

year-old girl by touching her vagina over her clothing. Second, on one occasion between 1995 and 1998, when he was between 17 and 20 years old, he put his hand up the pant leg of a 12- to 15-year-old stepsister while she was sleeping. Third, Johnson admitted in a 2003 polygraph examination that he had touched the vaginal area of another five-year-old girl while she slept. Fourth, in 2007, when he was 28 or 29 years old, he fondled a nine-year-old niece over her swimsuit while they were on a ride together at an amusement park.

In January 2010, Winona County petitioned to civilly commit Johnson as an SDP and an SPP. The district court appointed two examiners, Andrea Lovett and Paul Reitman, each of whom submitted written reports. Lovett supported Johnson's commitment as an SDP but did not believe that he met the criteria for commitment as an SPP. Reitman opined that Johnson met the criteria for commitment both as an SDP and an SPP. At the two-day commitment trial, the district court heard testimony from the two examiners as well as Johnson, his mother, and his fiancée. The district court thereafter made findings of fact and concluded that Johnson met the criteria for commitment as an SDP and an SPP. Johnson appeals.

D E C I S I O N

A person may be civilly committed as an SDP or an SPP if the petitioner proves the statutory criteria by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1(a) (2010). This court applies a clear-error standard of review to a district court's factual findings. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). We apply a *de novo* standard of review to the question whether given

facts satisfy the statutory criteria for commitment. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

I. SPP

Johnson first argues that the district court erred by ordering his commitment as an SPP. Among the statutory requirements for commitment as an SPP is proof, by clear and convincing evidence, that a 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 (2010). The SPP statute is equivalent to the former psychopathic personality (PP) statute, and the caselaw concerning the PP statute continues to apply to the SPP statute. *See* 1994 Minn. Laws 1st Spec. Sess. ch. 1, art. 1, § 5, at 8; *In re Robb*, 622 N.W.2d 564, 568-69 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001).

Under either the PP statute or the SPP statute, there must be (1) “a habitual course of sexual misconduct,” (2) “an utter lack of power to control the sexual impulses,” and (3) a likelihood that “the person will ‘attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desire.’” *In re Rickmyer*, 519 N.W.2d 188, 190 (Minn. 1994) (quoting *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 555, 287 N.W. 297, 302 (1939), *aff’d*, 309 U.S. 270 (1940)). The supreme court cautioned that the PP statute did not apply “to every person guilty of sexual misconduct.” *Rickmyer*, 519 N.W.2d at 190 (quoting *Pearson*, 205 Minn. at 555, 287 N.W. at 302). Rather, the application of the PP statute depended primarily on “the nature of the sexual assaults and the degree of violence involved.” *Id.* (citing *In re Blodgett*, 510

N.W.2d 910, 915 (Minn. 1994)). Commitment as a PP was warranted if “a pedophile’s pattern of sexual misconduct is of such an egregious nature that there is a substantial likelihood of serious physical or mental harm being inflicted on the victims.” *Id.* This court has applied *Rickmyer* when interpreting the SPP statute. *See In re Preston*, 629 N.W.2d 104, 113 (Minn. App. 2001); *Robb*, 622 N.W.2d at 571.

Johnson contends that the evidence does not satisfy the SPP statute because it does not satisfy the second requirement of *Pearson*, that he has an utter lack of power to control his sexual impulses, or the third requirement of *Pearson*, that he is likely to inflict serious physical or mental harm on future victims. With respect to the third requirement, Johnson contends that his prior sexual misconduct was not egregious enough and not violent enough to satisfy the SPP statute. To support his argument, Johnson relies on *Rickmyer* and *Robb*. In each of those cases, a district court’s commitment order was reversed because the appellant’s prior sexual misconduct was not egregious enough to justify commitment as a PP or SPP. *Rickmyer*, 519 N.W.2d at 190; *Robb*, 622 N.W.2d at 572. In response, the county relies on this court’s opinions in *Preston* and *In re Kindschy*, 634 N.W.2d 723 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). In each of those cases, a district court’s order for commitment as an SPP was affirmed. *Kindschy*, 634 N.W.2d at 732; *Preston*, 629 N.W.2d at 113. The manner in which the parties have framed the issue requires this court to compare and contrast the facts of this case with the facts of these four cited cases.

In *Rickmyer*, the appellant had at least five convictions of criminal sexual conduct and several uncharged offenses involving indecent exposure, fondling, and spanking of

young boys, some between the ages of eight and ten. 519 N.W.2d at 189. The supreme court concluded that the record did not establish that the appellant had “inflicted or [was] likely to inflict serious physical or mental harm on his victims” and that his “unauthorized sexual ‘touchings’ and ‘spankings,’ while repellent, [did] not constitute the kind of injury, pain, or ‘other evil’ that is contemplated by the [PP] statute.” *Id.* at 190.

In *Robb*, the appellant engaged in sexual contact with at least 15 boys between the ages of 10 and 15 years. 622 N.W.2d at 566-67. He grabbed and fondled the boys’ genitals, performed fellatio on them, masturbated them, and caused the boys to masturbate him. *Id.* The appellant in *Robb* sexually abused at least one of his victims 10 to 15 times. *Id.* at 567. Nonetheless, this court reversed the appellant’s commitment as an SPP, noting that his behavior was more similar to the behavior exhibited in *Rickmyer*. *Robb*, 622 N.W.2d at 572.

In *Preston*, the appellant engaged in over 100 incidents of impermissible sexual contact, including oral contact and vaginal penetration, with eight different victims between the ages of four and twelve. 629 N.W.2d at 107-08, 113. He victimized at least one of the girls as many as 60 times. *Id.* This court affirmed the appellant’s commitment as an SPP, concluding that “[t]here can be no question that this pattern of behavior is so egregious so as to create the ‘substantial likelihood of physical or mental harm.’” 629 N.W.2d at 113 (quoting *Rickmyer*, 519 N.W.2d at 190).

Finally, in *Kindschy*, the appellant engaged in repeated oral and anal sex with boys and girls between the ages of five and seventeen. 634 N.W.2d at 726-27. He often accompanied his assaults with threats of violence. *Id.* This court affirmed the appellant’s

commitment as an SPP, concluding that the appellant's "sexual assaults involved much more than [the] spanking, fondling, masturbation, and indecent exposure" involved in *Rickmyer* and *Robb*. *Id.* at 732. We concluded by stating that "the character and nature of [the appellant's] assaults alone justify a finding that [the appellant] is substantially likely to cause serious physical and emotional harm and is, therefore, dangerous to others within the meaning of" the SPP statute. *Id.*

In this case, Johnson habitually touched the vaginal areas of eight young girls who were generally between the ages of five and twelve. In almost every instance, Johnson touched his victims only over their clothing. Johnson did not engage in oral contact with his victims' genitalia and did not engage in penetration. In this way, Johnson's sexual misconduct appears to approximate the severity of the sexual misconduct in *Rickmyer*, see 519 N.W.2d at 189, and is less egregious than the sexual misconduct in the other three cases cited by the parties, see *Robb*, 622 N.W.2d at 566-67; *Preston*, 629 N.W.2d at 107-08; *Kindschy*, 634 N.W.2d at 732. In addition, with respect to six of his eight victims, Johnson engaged in sexual misconduct on only one occasion. Johnson did not engage in repeated offenses against his victims over long periods of time, as was true of the appellants in all four cases cited by the parties. See *Rickmyer*, 519 N.W.2d at 189; *Robb*, 622 N.W.2d at 567; *Preston*, 629 N.W.2d at 107-08; *Kindschy*, 634 N.W.2d at 727.

On the whole, Johnson's sexual misconduct is no more egregious than the sexual misconduct in *Rickmyer* and is less egregious than the sexual misconduct in *Robb*. In each of those two cases, commitment as a PP or an SPP was reversed on appeal. Given that commitment as an SPP was not warranted in *Robb*, it is not warranted in this case.

The *Preston* and *Kindschy* cases do not support an affirmance in this case because Johnson's sexual misconduct is less egregious than the sexual misconduct at issue in both of those cases.

Thus, we conclude that Johnson's pattern of prior sexual misconduct is *not* of "such an egregious nature that there is a substantial likelihood of serious physical or mental harm being inflicted on the victims." *Rickmyer*, 519 N.W.2d at 190. Therefore, the district court erred by committing Johnson as an SPP. In light of this conclusion, we need not consider Johnson's argument that the evidence does not satisfy the second requirement of *Pearson*, that he has an utter lack of power to control his sexual impulses, or his argument that the evidence does not satisfy the third requirement of *Pearson* on the ground that his sexual misconduct was not sufficiently violent.

II. SDP

Johnson also argues that the district court erred by ordering his commitment as an SDP. An SDP 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 (2010).

Johnson does not challenge the first two requirements of the SDP statute. Rather, he focuses his challenge on the third requirement, that a person is "highly likely [to] engage in harmful sexual acts in the future." *In re Commitment of Stone*, 711 N.W.2d 831, 840 (Minn. App. 2006) (quoting *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999))

(*Linehan IV*)), *review denied* (Minn. June 20, 2006). To determine whether a person is “highly likely” to reoffend, a district court 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 of participation in sex-therapy programs.

Id. (citing *Linehan I*, 518 N.W.2d at 614).

The district court analyzed each of the six *Linehan I* factors. The district court found that the third, fourth, fifth, and sixth factors indicate that Johnson is highly likely to reoffend. The district court put the most emphasis on the third factor by reciting extensive and detailed evidence offered by the two examiners concerning the tests they had administered to Johnson and the actuarial tools they used to determine the likelihood that he will reoffend.

Johnson contends essentially that the district court erred in two ways: first, by failing to put proper emphasis on the second factor and, second, by misanalyzing the fifth factor.

With respect to the second *Linehan I* factor, Johnson asserts that his prior incidents of sexual misconduct “did not include any penetration, threats, coercion, or otherwise violent acts.” The district court did not make any findings that are necessarily inconsistent with Johnson’s contention. The district court noted Lovett’s testimony that Johnson engaged in aggressive behavior during childhood and adolescence but has not

engaged in violence since then. The district court refrained from making any finding as to whether this factor affects the probability that Johnson will reoffend. It appears that the second factor either did not influence the district court's finding that Johnson is highly likely to reoffend or tended to persuade the district court that Johnson was *not* highly likely to reoffend. Johnson cannot demonstrate that the district court erred in its analysis of the second factor.

With respect to the fifth *Linehan I* factor, Johnson contends that the district court erred by failing to place sufficient emphasis on the evidence that he has been in a long-term relationship with a woman, has conducted himself in a responsible manner in their intimate affairs, and is engaged to be married to her. The district court referred to this evidence but reasoned that it increased the risk that Johnson would reoffend. The district court stated: "Johnson's relationship with his fiancé is not a protective factor because he sexually abused at least two victims while he was in that relationship with her. Nothing has changed from when he was last in the community and offended." The district court did not commit clear error by finding that this part of the evidentiary record supports the conclusion that Johnson is highly likely to reoffend.

As stated above, Johnson does not challenge the district court's findings regarding the other *Linehan I* factors. Johnson does not identify any particular reasons why the district court committed clear error by relying on its findings on the six factors or by reaching the ultimate finding that Johnson is highly likely to reoffend. Thus, the district court did not err by committing Johnson as an SDP.

Affirmed in part, reversed in part.