STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2005

In the Matter of the Civil Commitment of:
James John Rud

Filed May 31, 2011
Affirmed
Minge, Judge

Scott County District Court
File No. 70-PR-08-14829

Kevin J. Wetherille, James P. Conway, Jaspers, Moriarty & Walburg, P.A., Shakopee, Minnesota (for appellant Rud)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, St. Paul, Minnesota; and

Patrick Ciliberto, Scott County Attorney, Shakopee, Minnesota (for respondent State of Minnesota)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

MINGE, Judge

Appellant challenges his indeterminate civil commitment as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP) arguing that he proved by clear and convincing evidence that a less-restrictive alternative was available. In the alternative, he argues that Minn. Stat. § 253B.185 (2010) is unconstitutional as applied to

him because the less-restrictive-treatment option is illusory. Because we conclude that the district court did not err in finding that appellant's proposed less-restrictive alternative failed to satisfy the requirements of public safety, we affirm.

FACTS

Appellant James Rud is 54 years old. Rud pleaded guilty to his first offenses in 1978 for intentionally touching two children's genitals. Two years later, he pleaded guilty to fourth-degree criminal sexual conduct related to two other children. In 1984, Rud pleaded guilty to committing first-degree criminal sexual conduct against ten children and the prosecutor dismissed six other related charges. He was sentenced to 480 months in prison.

Prison records introduced at trial show that shortly after Rud was incarcerated he expressed an interest in sex-offender treatment. However, Department of Corrections (DOC) staff noted that he was a low priority candidate due to the length of his sentence. A few years later, DOC staff suggested that he consider entering a sex-offender treatment program. Although Rud briefly participated in sex-offender treatment, he only made limited progress. He declined further participation, saying he would enroll in treatment before release.

In June 2009, near the end of his prison sentence, Scott County petitioned to civilly commit Rud as a SDP and SPP to a secure facility in the Minnesota Sexual Offender Program (MSOP). A civil-commitment trial was held on the petition. Three mental health professionals evaluated Rud and testified about alternatives that would be less restrictive than the secured facilities of MSOP. Rud also presented evidence about

multiple housing and treatment options. The district court rejected the treatment alternatives proposed by Rud and ordered him committed to MSOP as an SDP and SPP. On appeal, Rud does not contest his designation as an SDP and SPP.

D E C I S I O N

I.

The first issue is whether Rud proved the availability of a less-restrictive-alternative treatment program consistent with Minn. Stat. § 253B.185. When a person has been civilly committed as an SDP or SPP, "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(d). With persons adjudicated as SDP, the paramount concern is public safety. The burden is clearly on Rud as the SDP to establish that the proposed less-restrictive treatment program meets that public safety requirement. *Id.* "In reviewing whether the least restrictive treatment program that can meet the patient's needs has been chosen, an appellate court will not reverse a district court's finding unless clearly erroneous." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

The district court found that Rud did not present sufficient evidence that a treatment program, consistent with the needs of public safety, would accept him. Specifically, the district court found that "[p]ublic safety requires more than knowing [Rud's] location; it requires controlling who he comes in contact with and what he is doing. Without personal supervision 24 hours a day, 7 days a week, this is not possible."

The record indicates that although Rud mainly offended against children he already knew, he also offended against other children within as little as 30 minutes of meeting them. Rud admits grooming many of his victims by giving them gifts, money, and candy, as well as taking them to the movies, bowling, and shopping. There is evidence that he blackmailed victims into submitting to and not reporting abuse with threats of being taken away from their family and of physical harm.

Rud also demonstrated little progress or improvement while in prison. On several occasions during his prison term, Rud was found in possession of material with pedophiliac themes, including pictures of women and children in underwear, and material promoting child molestation. In 2006, Rud was terminated from the prison sex-offender-treatment program because of a sexually explicit letter that he sent to an out-of-state inmate that gave general descriptions about how he had offended against children. DOC staff also found letters from November 2008 through June 2009 that contained graphic descriptions of sexual acts between Rud and a fellow prisoner. The district court found that, "even though [the letters] are related to an adult sexual relationship, [they] describe that relationship in such a way that it was high risk for Rud to possess those letters. It is clear from the letters that the letter writer intended to fuel Rud's sexual fantasies about children." Rud was also found to have engaged in sexual conduct with several other inmates, including while in sex-offender treatment.

The three mental health professionals who testified agreed that Rud would require significant monitoring and checks. Dr. James Alsdurf stated that Rud needs "an intense, well-structured program" that can provide 24-hour-a-day monitoring in a secured setting

and that he has an "extremely high risk to re-offend." He stated that a halfway house and GPS monitoring would address some of his concerns about Rud but noted that monitoring is not necessarily adequate because "some people take off their [GPS] bracelets." Alsdurf ultimately recommended placement at MSOP.

Dr. James Gilbertson testified that Rud would need external checks and monitoring at all times "until he reached a point where he could internalize controls." To achieve that, Gilbertson said that for five to ten years Rud would need a residence with daily checks, curfew, and a proven procedure for locating him within 24 to 72 hours.

The third professional, Warren Mass, testified at Rud's request. Mass stated that outpatient treatment would be possible if a series of conditions were met:

(1) Housing with 24-hour on-duty supervision
(2) Being in DOC's Intensive Supervised Release (ISR) program for the maximum period
(3) GPS monitoring
(4) An escort to and from treatment
(5) A court order restricting contact with children
(6) Periodic polygraph examinations
(7) Random urinalyses
(8) Attendance at a chemical dependency support program.

Maas testified that Rud would need this type of structured, supervised environment for approximately five years. The only program of which Maas was aware that provided that level of structure that would accept someone for five years is MSOP.

Rud did not identify any placement that would be a sufficiently secure facility. All programs that he proposed are halfway houses that allow access to the community. For example, one proposed treatment facility allows access to the community for up to two hours before being required to check in. While a five-year stay at such a facility is

theoretically possible, the record indicates the typical stay is for only a few months. The district court was told that, although GPS monitoring would also be available if Rud was released on ISR, the longest ISR has had an offender on GPS monitoring is 90 days.

Here, the record indicates that Rud has a long history of luring victims, lying to adults to gain access to victims, concealing past offenses, and offending against children within as little as 30 minutes after meeting them. Dr. Alsdurf testified that Rud has an extremely high risk of reoffending and that if he did, "it would be a complete catastrophe." Rud recognized that he had a 60% chance of reoffending. Rud's history in prison also shows limited commitment to any treatment program, with significant violations throughout his treatment and the inability to refrain from having material that is inconsistent with his efforts to address his condition. Based on this record, we conclude that the district court did not clearly err in determining that the placement alternatives proposed by Rud would not meet the requirements of public safety and that the only available program consistent with public safety is MSOP.

II.

The second issue is whether Minn. Stat. § 253B.185 is unconstitutional as applied to Rud because it places the burden on him to establish a less-restrictive alternative and because the less-restrictive-treatment option is illusory. Rud argues that it is impossible for him to meet this burden of proof and that due process requires that the state have the burden of providing the least-restrictive facility and proving the necessity of committing one to a secured facility. Whether a statute is constitutional is a question of law subject to de novo review. *In re Blilie*, 494 N.W.2d 877, 881 (Minn. 1993).

The Minnesota Supreme Court has found that the SDP act does not violate substantive due process rights. *In re Linehan*, 594 N.W.2d 867, 872-76 (Minn. 1999). This court has also found that requiring the proposed patient to prove a less-restrictive alternative does not unconstitutionally shift the burden of proof. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). We decline to revisit the question of whether this burden-shifting statute is unconstitutional on its face.

With respect to Rud's as-applied challenge to the constitutionality of the burden-shifting clause of the statute, we note that Rud's appeal raises the question of whether a treatment program was available or feasible that would meet his treatment needs and the requirements of public safety. Even if he was accepted into an existing treatment program and funding was available to finance his participation in that program, Rud has not shown that any program short of MSOP would adequately meet the requirements of public safety. Professionals concluded that Rud requires treatment for 5-10 years and there is a serious risk of reoffending if he is allowed into the community without direct supervision. Halfway houses and various forms of electronic monitoring are not adequate to protect the public from the risks of Rud reoffending. The only program that can provide such protection is a secure, locked facility such as MSOP. As for Rud's argument that his constitutional liberty rights require that the state establish a suitable, less-restrictive program, Rud has not placed on the record evidence of the nature, cost, and efficacy of any such program. The courts will not undertake an abstract consideration of possible programs. There is no evidence of any existing government or

private-sector program less restrictive than MSOP and appropriate for Rud's condition. Rud has not shown that the lack of such a program makes the SDP statute unconstitutional as applied to him.

We conclude that (1) the district court's finding that no less-restrictive alternative is available that satisfies the requirements of public safety is not clearly erroneous, and (2) no meritorious constitutional challenge is presented.

Affirmed.

Dated: