STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1561

In the Matter of the Civil Commitment of:
Aaron Lee Emberland.

Filed February 27, 2012
Affirmed
Johnson, Chief Judge

Kandiyohi County District Court
File No. 34-PR-11-84

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant Aaron Lee Emberland)

Jennifer K. Fischer, Kandiyohi County Attorney, Amy J. Isenor, Shane D. Baker, Assistant County Attorneys, Willmar, Minnesota (for respondent county)

Considered and decided by Johnson, Chief Judge; Halbrooks, Judge; and Worke, Judge.

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

JOHNSON, Chief Judge

Kandiyohi County petitioned the district court for the involuntary civil commitment of Aaron Lee Emberland on the basis of mental illness. Emberland was disruptive during his commitment hearing, interrupting the proceedings more than 40 times. During two of those interruptions, Emberland requested permission to represent himself. But Emberland

walked out of the courtroom before the district court ruled on his requests to represent himself. On appeal, Emberland challenges the district court's manner of excusing him from the hearing and the absence of a ruling on his requests to represent himself. We affirm.

FACTS

Emberland's civil commitment arises directly from an incident that occurred on July 22, 2011. Emberland caused a disturbance at a pharmacy in the city of Willmar by demanding medications for which he did not have prescriptions. Law enforcement officers apprehended him and brought him to Rice Memorial Hospital, which referred him to the Annandale Community Behavioral Health Hospital, which placed him in protective care on a mental-health watch. It appears from the record that the incident at the pharmacy was only one of several incidents in 2010 and 2011 by which Emberland's mental-health issues became known to the Kandiyohi County Family Services department.

Four days after the incident at the pharmacy, Kandiyohi County petitioned the district court for Emberland's civil commitment. On the same day, the district court appointed an attorney, Sarah Klaassen, to represent Emberland.

The district court held a commitment hearing on August 9, 2011. The county's first witness was Timothy Tinius, a licensed psychologist. Tinius testified that Emberland had exhibited symptoms indicative of psychosis or paranoid schizophrenia and that his condition poses a substantial likelihood of physical harm to Emberland or others. Tinius recommended commitment.

Emberland interrupted the proceedings more than 40 times during Tinius's testimony. At one point, Emberland interrupted Tinius's testimony in mid-sentence and

stated, "Your Honor, I want [to] fire my lawyer and be my own." The court responded to Emberland by saying: "Please be quiet. We'll get back to you in a minute." At another point, Emberland interrupted Tinius's testimony by stating: "Your Honor, I want to fire my lawyer . . . and object. Your Honor, I object." The district court did not immediately respond to the second interruption.

After counsel for the county and Emberland had finished their respective examinations of Tinius, the district court excused Tinius from the witness stand and proceeded to engage counsel in a discussion concerning the exhibits that had been entered into evidence during Tinius's testimony. Emberland interrupted that discussion as well. The transcript states as follows:

> THE COURT: I have Dr. Tinius's --
>
> MR. EMBERLAND: Your Honor, I'd like to remove myself --
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> THE COURT: -- report and I have the Pre-Petition Screening Report.
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> MR. EMBERLAND: I'm removing myself as well. I can't deal with this.
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> THE COURT: Mr. Emberland you have the right to be at the hearing. I encourage you to remain here.
>
> MR. EMBERLAND: No. I don't want to. I just got better. I'm starting to get straight and they're starting to threaten me with medicines. It's caused great fear in me. I can't deal with their actions. I can't cope with them.
>
> THE COURT: All right. So are you choosing to waive the appearance?
>
> MR. EMBERLAND: Yes.

> THE COURT: All right. Mr. Emberland is leaving. The Court also notes that he's been a strong distraction during the proceedings because he's been unable to refrain from speaking. He's been speaking over the testimony of other witnesses. It is appropriate that if he wants to waive his appearance that it be allowed.

After Emberland had departed the courtroom, the county moved to proceed by default, without further testimony. Emberland's counsel resisted the motion and asked the district court to proceed with the hearing in Emberland's absence. The district court denied the county's default motion and proceeded with the hearing.

The county also called a psychiatrist, who testified that Emberland suffers from paranoid schizophrenia, psychosis not otherwise specified, delusional and tangential thought processes, and an inability to make judgments. The psychiatrist recommended commitment. Emberland's court-appointed counsel cross-examined both of the state's witnesses. Emberland's court-appointed counsel called one witness, a social worker, who testified about Emberland's history with the mental-health division of the Kandiyohi County Family Services department. The county's counsel and Emberland's court-appointed counsel delivered closing arguments. Emberland never reentered the courtroom.

In a written order filed the same day as the hearing, the district court found that Emberland is mentally ill, as defined by Minn. Stat. § 253B.02, subd. 13 (2010), and ordered him committed to the custody of the commissioner of human services for an initial period of six months. Emberland appeals.

D E C I S I O N

Emberland does not challenge the district court's findings or conclusions on the substance of the county's petition or the sufficiency of the evidence to support the district court's findings and conclusions. Rather, Emberland's appeal is confined to two procedural challenges to the hearing. First, Emberland argues that the district court erred by not permitting him to represent himself *pro se*. Second, Emberland argues that the district court erred by allowing him to leave the courtroom without informing him of certain rights. We will address Emberland's two arguments in reverse order.

I. Departure from Hearing

Emberland argues that the district court erred by permitting him to leave the courtroom without first informing him that he possessed the right to attend the hearing, the right to testify at the hearing, and the right to present evidence at the hearing.

The general subject matter of Emberland's argument is governed by a statute that permits a district court to excuse a proposed patient from a commitment hearing in certain circumstances: "The court, on its own motion or on the motion of any party, may exclude or excuse a proposed patient who is seriously disruptive or who is incapable of comprehending and participating in the proceedings." Minn. Stat. § 253B.08, subd. 5(b) (2010).

In this case, Emberland effectively moved to excuse himself from the hearing by initiating his own departure from the courtroom. After Emberland asked to be excused, and apparently as he was walking out of the courtroom, the district court stated that Emberland had been "a strong distraction during the proceedings because he's been unable to refrain

from speaking [by] speaking over the testimony of other witnesses." The district court further stated, "It is appropriate that if he wants to waive his appearance that it be allowed." The district court's statements in response to Emberland's implied motion to be excused are sufficient to satisfy the requirements of section 253B.08, subdivision 5(b). Furthermore, the district court's findings are amply supported by the record. Emberland caused significant disruptions on numerous occasions with his unsolicited interruptions.

Emberland's challenge is less about the district court's decision to excuse him from the hearing and more about receiving notice of his rights to attend the hearing, to give testimony, and to present other evidence. In a civil commitment proceeding, the district court must give a proposed patient at least five days' notice that a hearing will be held on a commitment petition and at least two days' notice of the date and time of the hearing. Minn. Stat. § 253B.08, subd. 2. The district court also must give a proposed patient notice of his or her right to attend the hearing and to testify at the hearing. Minn. Stat. § 253B.08, subd. 3. Emberland has not identified a statute imposing a duty on a district court to advise a proposed patient of the right to present evidence other than the proposed patient's own testimony, and we are not aware of any such duty.

In this case, the district court gave these required notices to Emberland in writing in an "Order for Confinement and Notice of Hearing," which is dated July 26, 2011. That document states that the "persons served are entitled to be present at the hearing, and . . . to give testimony." The district court file contains a certificate of personal service, which indicates that Emberland was served with this notice on the day it was issued. The district court file also indicates that Emberland received a second written notice with identical

language three days later. In addition, the district court reminded Emberland of his right to attend the hearing as he left the courtroom. Thus, the district court satisfied its statutory duty to inform Emberland of his right to attend the commitment hearing and to testify. The district court was not obligated to repeat the notice concerning Emberland's right to testify.

Thus, the district court did not err when it permitted Emberland to be excused from the commitment hearing without giving him additional notices of his right to testify.

II. Self-Representation

Emberland argues that the district court erred by refusing to allow him to represent himself at the commitment hearing. Emberland contends that the district court's refusal to permit him to proceed *pro se* violated both statutory and constitutional rights to self-representation.

A. Preservation of Alleged Error

Before addressing the substance of Emberland's arguments, we must consider whether the alleged error has been properly preserved. The pertinent portions of the transcript reveal that the district court did not actually deny Emberland's request to represent himself but simply deferred action on it until an appropriate time. Emberland twice made an explicit statement of his desire to release his court-appointed counsel and proceed *pro se*, but each time he did so during the testimony of the county's first witness. The district court acknowledged the first request and stated its intention to consider it later. A district court has broad discretion in managing the order of events during an evidentiary hearing and in determining the appropriate time in which to entertain a party's oral motion. *See, e.g.*, *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006) (stating that district courts "are

vested with broad discretion in deciding matters of courtroom procedure"). Caselaw emphasizes the fundamental principle that, in a civil case, an appellate court should not find reversible error on an issue unless the district court had a fair opportunity to address the issue. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

In this case, the district court did not have a fair opportunity to rule on Emberland's motion for leave to represent himself. When Emberland made his first request, the county was conducting its direct examination of Tinius. When Emberland made his second request, Tinius still was on the witness stand, under redirect examination. A district court is not required to suspend an evidentiary hearing immediately upon a party's request to proceed *pro se*, especially when the party has interrupted the opposing party's presentation of evidence, and even more so when the witness on the stand is a third party. *See State v. Richards*, 552 N.W.2d 197, 205 (Minn. 1996) (stating that "self-representation is not a license to disrupt, obstruct, or otherwise impede the trial proceedings"); *see also* Minn. R. Evid. 611(a). When Tinius's testimony was completed, the district court was in the midst of identifying the exhibits that had been introduced into evidence, which is a good practice generally, to ensure that a clear record is established. Before the district court had completed that task, however, Emberland apparently rose and walked out of the courtroom. The district court admirably had the presence of mind to quickly consider and apply the requirements of section 253B.08, subdivision 5(b), as discussed above in part I. The district court should not be faulted if it did not fully consider Emberland's request for self-representation in the short time before Emberland's actual departure from the courtroom.

Thus, Emberland has not properly preserved his argument that the district court erred by refusing to allow him to represent himself at the commitment hearing. His failure to properly preserve the argument is a sufficient ground for denying appellate relief on this issue. Nonetheless, we will proceed to consider the substantive arguments made by Emberland's appellate counsel.

B. Statutory Argument

The starting point for Emberland's argument concerning his alleged right of self-representation in a civil commitment hearing is the following provision of the Minnesota Commitment and Treatment Act:

> A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed. In all proceedings under this chapter, the attorney shall:
>
> (1) consult with the person prior to any hearing;
>
> (2) be given adequate time and access to records to prepare for all hearings;
>
> (3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and
>
> (4) be a vigorous advocate on behalf of the person.

Minn. Stat. § 253B.07, subd. 2c (2010).

In its responsive brief, the county cites this court's opinion in *In re Irwin*, 529 N.W.2d 366 (Minn. App. 1995), *review denied* (Minn. May 16, 1995), in which we rejected a similar argument and concluded that the petitioner did not have a right, either by statute or

rules of court, to represent himself. *Id.* at 371. We reached that conclusion by relying on Minn. Stat. § 253B.03, subd. 9 (1996), and rule 3.01 of the Minnesota Rules of Civil Commitment and a comment accompanying the rule. *Id.* At oral argument, Emberland's counsel pointed out that both of these authorities no longer exist. That is so. Section 253B.03, subdivision 9, has been repealed. 1997 Minn. Laws ch. 217, art. 1, § 118, at 2183. Also, the Minnesota Rules of Civil Commitment have been repealed in their entirety and replaced by the Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act. *Promulgation of Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act*, No. C4-94-1646 (Minn. Nov. 10, 1999) (order).

Notwithstanding the repeal of the statute and the rule on which *Irwin* was based, the conclusion in *Irwin* is not infirm. The language of the 1996 version of section 253B.03, subdivision 9,[1] is substantially the same as the language of the current version of section 253B.07, subdivision 2c, which is quoted above. In fact, the legislature enacted the current statute at the same time that it repealed the former statute. 1997 Minn. Laws ch. 217, art. 1, §§ 43, at 2155; 118, at 2183. Likewise, the language of the rule on which the *Irwin* court

[1]The former statute provided as follows: "A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint counsel to represent the proposed patient if neither the proposed patient nor others provide counsel. Counsel shall be appointed at the time a petition is filed pursuant to section 253B.07. Counsel shall have the full right of subpoena. In all proceedings under this chapter, counsel shall: (1) consult with the person prior to any hearing; (2) be given adequate time to prepare for all hearings; (3) continue to represent the person throughout any proceedings under this charge unless released as counsel by the court; and (4) be a vigorous advocate on behalf of the client." Minn. Stat. § 253B.03, subd. 9 (1996).

relied, rule 3.01 of the former rules of civil commitment,[2] is similar to the corresponding rule that presently governs civil commitment proceedings, which provides as follows:

> Immediately upon the filing of a petition for commitment or early intervention the court shall appoint a qualified attorney to represent the respondent at public expense at any subsequent proceeding under this chapter. The attorney shall represent the respondent until the court dismisses the petition or the commitment and discharges the attorney.
>
> The respondent may employ private counsel at the respondent's expense.

Minn. Spec. R. Commit. & Treat. Act 9.

In *Irwin*, we stated, "Neither the statute nor the rules gives appellant the right to represent himself." 529 N.W.2d at 371. That statement still is true. Section 253B.07, subdivision 2c, consists of four sentences, none of which confer on a proposed patient the right to represent himself or herself. The first sentence merely states the proposed patient's right to counsel. The second sentence requires the district court to appoint counsel if the proposed patient is unrepresented. The third sentence governs the timing of the appointment of counsel. And the fourth sentence imposes a standard of care on appointed counsel. Nothing in the statute states expressly, or even suggests, that a proposed patient has a right to represent himself or herself during a commitment proceeding. Likewise, nothing in rule 9

[2]The former rule provided as follows: "The court shall appoint counsel for respondent immediately upon the filing of a petition, and shall assure that representation is available to respondent throughout the proceeding in accordance with these Rules." Minn. R. Civ. Commit. 3.01. Comment B to former rule 3.01 provided, "It is the intention of the Rule that respondent not be permitted to waive the right to representation in accordance with these Rules." *Id.*, cmt. B.

confers on a proposed patient the right to represent himself or herself at a commitment hearing.

Thus, consistent with our conclusion in *Irwin*, we conclude that Emberland did not have a statutory right to represent himself at his commitment hearing.

C. Constitutional Argument

Emberland also asserts that he has a constitutional right of self-representation at a commitment hearing such that the district court's ruling, or lack of a ruling, on his request to represent himself deprived him of constitutional rights. Emberland's appellate counsel acknowledges that neither the United States Supreme Court nor the Minnesota Supreme Court has recognized such a right. He nonetheless urges this court to apply to this civil commitment proceeding the right of self-representation that is possessed by defendants in criminal cases. *See Martinez v. Court of Appeal of California*, 528 U.S. 152, 154, 120 S. Ct. 684, 687 (2000); *Faretta v. California*, 422 U.S. 806, 807, 95 S. Ct. 2525, 2527 (1975). He cites cases from other jurisdictions that have so held. *See In re Dennis D.*, 707 N.E.2d 667, 669-70 (Ill. App. Ct. 1999); *In re Detention of J.S.*, 159 P.3d 435, 440 (Wash. Ct. App. 2007); *In re Condition of S.Y.*, 457 N.W.2d 326 (Wis. Ct. App. 1990).

We are naturally disinclined to recognize a right in the United States Constitution that never has been recognized by either the United States Supreme Court or the Minnesota Supreme Court. *See generally Beaulieu v. Minnesota Dep't of Human Servs.*, 798 N.W.2d 542, 549-50 (Minn. App. 2011), *review granted* (Minn. July 19, 2011). Furthermore, the reasons expressed by the United States Supreme Court for recognizing the right of self-representation in criminal trials do not appear to be present in civil commitment

proceedings. The Supreme Court has held that the text of the Sixth Amendment limits its application to criminal trials and precludes its application to criminal appeals, *Martinez*, 528 U.S. at 160, 120 S. Ct. at 690, which, by itself, suggests that the right should not be extended to civil commitment proceedings. Similarly, the Supreme Court has relied on historical evidence of a right of self-representation at the time of the founding, *id.* at 156-59, 120 S. Ct. at 688-90, but Emberland has not presented any such historical evidence relating to civil commitment proceedings. The Supreme Court also has noted that the basic principle of individual autonomy might support a right of self-representation in criminal proceedings pursuant to the Due Process Clause, *id.* at 161-63, 120 S. Ct. at 690-92, but the Court's analysis assumed a "knowing and intelligent waiver," *id.* at 156, 120 S. Ct. at 688. Emberland has not presented a due process analysis. Thus, Emberland has not persuaded us to interpret the United States Constitution to provide for a right of self-representation at a civil commitment proceeding.[3]

Even if we were to look to the caselaw recognizing a constitutional right of self-representation in criminal trials, Emberland would not prevail, for at least two reasons: first, he did not make a clear and unequivocal request to represent himself and, second, he did not make a timely request. "When a criminal defendant asks to represent himself, the court must determine (1) whether the request is clear, unequivocal, and timely, and (2) whether

[3]Emberland has made a generic "constitutional" argument, without mentioning the Minnesota Constitution or citing any of its particular provisions. Thus, no further analysis of his constitutional argument is necessary. Nonetheless, it is worth noting that we also are naturally disinclined to interpret the Minnesota Constitution in a manner not supported by prior interpretations of the Minnesota Supreme Court. *See State v. Rodriguez*, 738 N.W.2d 422, 431-32 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008).

the defendant knowingly and intelligently waives his right to counsel." *State v. Blom*, 682 N.W.2d 578, 613 (Minn. 2004) (quotation omitted). Emberland's request for self-representation was not clear and unequivocal because he walked out of the courtroom before obtaining a ruling, thus indicating that he changed his mind after his earlier statements of his desire to represent himself. Also, Emberland's request for self-representation was not timely because he waited until the hearing was underway. A criminal defendant seeking self-representation is required to make the request in a timely manner, which generally means no later than the "beginning of trial." *State v. Christian*, 657 N.W.2d 186, 193-94 (Minn. 2003); *see also Blom*, 682 N.W.2d at 613. If a criminal defendant makes a self-representation motion in the middle of trial, the district court has considerable discretion "to balance the defendant's right of self-representation against the potential for disruption and delay." *Christian*, 657 N.W.2d at 193-94. For the reasons stated above in part I, we would conclude, if necessary, that the district court did not abuse its discretion by acquiescing in Emberland's self-initiated departure from the courtroom without making an express ruling on his request for self-representation.

Thus, the district court did not err by not allowing Emberland to represent himself at the commitment hearing.

Affirmed.