STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0346

In the Matter of the Civil Commitment of: Joshua Phillip Ellringer.

Filed July 29, 2008
Affirmed
Kalitowski, Judge

Olmsted County District Court
File No. 55-PR-07-6158

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Considered and decided by Peterson, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

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

KALITOWSKI, Judge

Appellant Olmstead County (the county) challenges the district court's order denying its petition to commit respondent Joshua Phillip Ellringer as a Sexually Dangerous Person (SDP). The county argues that the district court erred as a matter of law in concluding that it failed to prove by clear and convincing evidence that (1) respondent's behavior satisfied the statutory standard for "harmful sexual conduct" as

required under the SDP law and (2) respondent was "highly likely" to engage in future acts of harmful sexual conduct as defined in the SDP statute. We affirm.

D E C I S I O N

A sexually dangerous person (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 [future] acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2006). The district court may order commitment as an SDP if the county proves the need for civil commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006).

We will affirm the district court's findings of fact justifying commitment unless they are clearly erroneous and we defer to the district court on matters of credibility. Minn. R. Civ. P. 52.01. Due regard is given to the district court's opportunity to judge the credibility of the witnesses, particularly "[w]here the findings of fact rest almost entirely on expert opinion testimony." *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986); *see also In re Kellor*, 520 N.W.2d 9, 12 (Minn. App. 1994), *review denied* (Minn. Sept. 28, 1994). But whether the district court's factual findings satisfy the statutory criteria for civil commitment presents a question of law, which we review de novo. *See In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

I.

The county argues that the district court clearly erred in finding that it failed to prove by clear and convincing evidence that respondent's behavior satisfied the statutory standard for "harmful sexual conduct" as required under the SDP law. We disagree.

Harmful sexual conduct is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2006). The Minnesota Commitment and Treatment Act (Act) establishes a rebuttable presumption that conduct is harmful sexual conduct when a person engages in conduct described by the statutes defining criminal sexual conduct in the first, second, third, or fourth degrees. *Id.*, subd. 7a(b) (2006). The Act also establishes the same rebuttable presumption for conduct described by 18 other enumerated statutes when the conduct "was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal." *Id.*

A course of harmful sexual conduct is a sequence of acts, each creating a substantial likelihood of serious harm. *In re Stone*, 711 N.W.2d 831, 836-38 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Incidents establishing the course of conduct need not be recent, and the court may consider conduct that did not result in a criminal conviction. *In re Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). This standard does not require that the conduct cause actual physical or emotional harm, so long as there is a substantial likelihood that such harm will be caused. *Id.*

Rebuttable Presumption in Minn. Stat. § 253B.02, subd. 7a(b)

The county first contends that the district court erred as a matter of law by not applying the rebuttable presumption in Minn. Stat. § 253B.02, subd. 7a(b), to respondent's case because respondent's prior conduct was similar to the conduct described in both Minn. Stat. § 609.582, subd. 1 (2006), burglary in the first degree, and

Minn. Stat. § 609.749, subds. 3, 5 (2006), harassment and stalking. The district court here concluded that respondent's case did not trigger the rebuttable presumption because respondent's behavior did not result in his conviction of one of the enumerated offenses and, moreover, did not constitute the type of sexually motivated behavior that the Act was designed to control.

In support of its determination that the rebuttable presumption did not apply to respondent's case, the district court cited our decisions in *Stone*, 711 N.W.2d at 838 and the unpublished case of *In re Lentz*, No. A07-670, 2007 WL 2770417, at *4 (Minn. App. Sept. 25, 2007). Additionally, the district court cited *In re Rodriguez* for its conclusion that respondent's behavior was "simply not the kind of behavior the commitment statute was designed to control." 506 N.W.2d 660, 662-63 (Minn. App. 1993) (cautioning against overbroad interpretations of statutory language that would encompass every type of sexual deviance), *review denied* (Minn. Nov. 30, 1993).

The county argues that the district court erred in applying *Stone* and *Lentz* in support of its conclusion that respondent's behavior was insufficient to trigger the statute's rebuttable presumption because he was not convicted of any of the offenses enumerated in the statute. We agree with the county that it is well established that the SDP law is concerned with behavior beyond that which results in criminal convictions. *See Ramey*, 648 N.W.2d at 268; *In re Jackson*, 658 N.W.2d 219, 226 (Minn. App. 2003), *review denied* (Minn. May 20, 2003); *see also Stone*, 711 N.W.2d at 837. But here, the district court's memorandum recognized that its analysis of the harmful-sexual-conduct prong should take into consideration "both conduct for which the offender was convicted

and conduct that did not result in a conviction." In addition, the record indicates that the district court reviewed evidence of respondent's conduct beyond those incidents that resulted in his conviction, and although it found it to be motivated by sexual impulse it concluded that the record lacked clear and convincing evidence that respondent's conduct amounted to the equivalent of one of the offenses enumerated in the statute. After reviewing the district court's analysis, we cannot say that the district court erred as a matter of law in concluding that respondent's behavior failed to invoke a rebuttable presumption under Minn. Stat. § 253B.02, subd. 7a(b).

Importantly, even if the district court did err in concluding that respondent's conduct was insufficient to trigger the rebuttable presumption in Minn. Stat. § 253B.02, subd. 7a(b), the record indicates that based on the testimony of one of the court-appointed experts, Dr. Wilson, the district court implicitly determined that there was sufficient evidence in the record to effectively rebut any presumption that respondent's behavior constituted harmful sexual conduct.

Sufficiently Sexual Behavior

The county argues that the district court erred as a matter of law by concluding that respondent's conduct was not sufficiently sexual to satisfy the statutory standard of harmful sexual conduct because the SDP law requires respondent's behavior to include a violent or "touch" sexual offense. Because this argument misconstrues the district court's findings, we disagree.

In its memorandum, the district court agreed with the county's argument that nonviolent, but sexually harmful, behavior is within the reach of the SDP law. But the

court went on to explain that respondent's behavior was distinguishable from the nonviolent behavior discussed in the caselaw cited because it failed to involve or be directed at another person. *See In re Martin*, 661 N.W.2d 632, 634-35 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003); *In re Clements*, 440 N.W.2d 133, 134 (Minn. App. 1989), *review denied* (Minn. June 21, 1989); *In re Peterson*, No. A07-681, 2007 WL 247890, at *1-*6 (Minn. App. Sept. 4, 2007). And the evidence presented at trial supported the district court's finding that, although respondent's behavior was motivated by a sexual fetish, it was not outwardly directed at another individual. The record shows that although respondent fixated on individual women and then burglarized their homes in order to steal their undergarments, he went to great lengths to avoid interacting with his burglary victims. One of the court-appointed examiners opined that respondent engaged in "a course of conduct that is sexual in nature," rather than a course of "harmful sexual conduct" as required under the SDP statute, and testified that she "couldn't say that there's a substantial likelihood that future victims are going to suffer serious emotional harm." And the record indicates that respondent's only violent offenses occurred when he was a juvenile and lacked any sexual component. Based on this evidence, we conclude that the district court did not err as a matter of law in concluding that respondent's avoidant behavior was insufficient to satisfy the SDP statute's standard of harmful sexual conduct.

Serious Harm Suffered

The county asserts that the district court erred as a matter of law by concluding that the SDP law requires evidence that respondent's victims actually suffered serious emotional harm. Again, this argument misstates the district court's findings.

Both respondent's brief and the district court's memorandum cite the correct statutory standard for "harmful sexual conduct," stating that "harmful sexual conduct" only requires evidence showing a substantial likelihood that serious physical or emotional harm will be inflicted. Minn. Stat. § 253B.02, subd. 7a(a). Applying this standard, the district court determined that, because respondent's current behavior did not cause his victims harm "any different than the kind of harm suffered by any other burglary victim where some item of personal property is stolen," and the evidence was "ambiguous as to whether [r]espondent's behavior is likely to escalate," it could not conclude that there was a substantial likelihood that respondent's behavior would cause his victims serious physical or emotional harm. Minn. Stat. § 253B.02, subd. 7a(a). This conclusion is supported by the expert testimony of Dr. Wilson, who opined that respondent's behavior was not sufficiently harmful. Although there is evidence in the record that would support an opposite conclusion on the harmfulness issue, we defer to the district court's ability to judge the credibility of competing experts. *See* Minn. R. Civ. P. 52.01; *Joelson*, 385 N.W.2d at 811.

In sum, we conclude that the district court did not clearly err in finding that the county failed to prove by clear and convincing evidence that respondent's behavior

satisfies the statutory standard for "harmful sexual conduct" as required by Minn. Stat. § 253B.02, subd. 7a(a).

II.

The county contends that the district court clearly erred in concluding that it failed to prove by clear and convincing evidence that respondent is "highly likely" to engage in future acts of harmful sexual conduct. We disagree.

The third factor in assessing a candidate for classification as an SDP is whether, as a result of the offender's course of misconduct and mental disorders or dysfunctions, the offender is "likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). The statutory phrase "likely to engage in acts of harmful sexual conduct" means that the person is "highly likely" to engage in harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan II*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867, 878 (Minn. 1999). In *Linehan I* the supreme court set forth six factors for the district courts to balance when determining whether a person is likely to reoffend:

> (a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used

> violence in the past; and (f) the person's record with respect to sex therapy programs.

518 N.W.2d at 614 (addressing psychopathic-personality commitment); *see Linehan II*, 557 N.W.2d at 189 (concluding these guidelines developed in the context of the Psychopathic Personality Commitment Act apply to the later-developed SDP Act).

The county argues that the district court erred by relying solely on the base-rate-statistics factor in determining whether respondent is highly likely to reoffend. We disagree. The court made extensive findings based on the court-appointed examiners' testimony and their detailed reports. And, contrary to the county's argument, the experts did not rely primarily on statistics; their reports indicate that all *Linehan* factors were addressed and formed part of their analyses.

With regard to demographic characteristics, both examiners noted that respondent has an increased risk of reoffending because he is male. And although Dr. Marshall opined that respondent's age of 25 years did not lower his risk, Dr. Wilson stated that, since respondent would be 26 years old by the time of his release, age might constitute a slight mitigating factor. In addressing the second *Linehan* factor, history of violence, both court-appointed examiners testified that respondent's juvenile and adult criminal records evidenced a history of violence, but differed in their opinions as to whether respondent's prior offenses should be classified as violent sexual offenses. Recognizing that none of respondent's prior offenses involved any element of violence or even intentional contact with his victims, Dr. Wilson opined that respondent's offenses did not constitute violent sexual offenses. Addressing the base-rate-statistics factor, Dr. Marshall

relied on actuarial instruments and determined that respondent presented a moderate-to-high likelihood of reoffending. In contrast, Dr. Wilson testified that the forensic risk-assessment tools typically relied on to predict recidivism and escalation of offender behavior were of limited utility as applied to respondent because respondent's past behaviors did not amount to "harmful sexual conduct," the requisite baseline for such tests.

In addition, both examiners recognized that respondent is prone to feeling stressed and has a limited ability to cope appropriately with environmental stressors he would face if he were released into the community. And both acknowledged that the environment and support network to which respondent would be released are similar to those situations and contexts in which he has previously offended. Finally, regarding the treatment-record factor, both examiners recognized that respondent completed sex-offender treatment as a juvenile, reoffended afterwards, and then attended, but failed to complete, all phases of adult sex-offender treatment.

Ultimately, the district court's conclusion that there is not clear and convincing evidence that respondent is highly likely to reoffend was based on its evaluation of the witnesses' credibility. And we give due regard to the opportunity of the district court to judge the credibility of witnesses. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). In reaching its conclusion here, the district court found the testimony of Dr. Wilson to be more credible than the testimony of Dr. Marshall.

Adopting the expert opinions of Dr. Wilson, the court made detailed findings regarding the *Linehan* factors that it deemed determinative, stating that: (1) although

respondent has some history of nonsexual aggression, his sexual offenses involved fetishism with no aggressive behavior, conduct that does not amount to "harmful sexual conduct" as defined by the SDP statute and (2) there is no evidence that respondent's behavior is escalating, as the risk-assessment instruments utilized by Dr. Marshall to predict the likelihood of respondent's behavior escalating are not designed to predict behavior in those individuals who have never committed a violent sexual offense.

Based on the evidence in the record and the deference we afford to the district court's determinations regarding witness credibility, we conclude that the district court did not commit clear error in determining that there was not clear and convincing evidence that respondent is likely to engage in future acts of harmful sexual conduct.

Affirmed.