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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0394

In the Matter of the Civil Commitment of: Peter Gerard Lonergan

Filed August 5, 2008
Affirmed
Connolly, Judge

Dakota County District Court
File No. P1-06-8170

Peter Gerard Lonergan, OID #134611, c/o Minnesota Correctional Facility, 7600 – 525th Street, Rush City, MN 55069 (pro se appellant)

James C. Backstrom, Dakota County Attorney, Pauline M. Halpenny, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Considered and decided by Connolly, Presiding Judge; Toussaint, Chief Judge; and Ross, Judge.

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

CONNOLLY, Judge

Appellant challenges an order for his civil commitment as a sexually dangerous person (SDP) as defined in Minn. Stat. § 253B.02, subd. 18c(a) (2006). Specifically, appellant contends that the district court erred in several evidentiary decisions and in failing to dismiss the petition. We affirm.

FACTS

On May 2, 1984, appellant Peter Lonergan pleaded guilty to two counts of aggravated robbery. Five days after being sentenced for aggravated robbery, appellant was charged with one count of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree. Appellant pleaded guilty to criminal sexual conduct in the second degree involving appellant's sister-in-law's eight-year-old daughter. He was sentenced to a term of 30 months in prison. Appellant served approximately two years and was released on June 10, 1987. Though he continues to deny the allegations, during interviews with court examiners, appellant appeared to take responsibility for the offense, stating he was very intoxicated. On March 29, 1988, appellant was again charged with criminal sexual conduct in the second degree involving his three-year-old daughter. However he was acquitted after a doctor testified he had prescribed treatment for the child that directed appellant to apply medication to her vaginal area.

On December 10, 1991, appellant was charged with criminal sexual conduct in the first degree in Dakota County involving the 8-year-old son of appellant's cousin. The trial ended in a hung jury, and a new trial was ordered. At the conclusion of the second jury trial, appellant was found guilty of criminal sexual conduct in the first degree and sentenced to a term of 268 months in prison.

In 2003, appellant filed a motion for postconviction relief which was denied by the district court. This decision was affirmed on appeal. *Lonergan v. State*, No. A03-453 (Minn. App. Feb. 17, 2004). In 2006, appellant brought a second postconviction relief

motion seeking a correction or reduction of his sentence. The motion was denied by the district court and the decision was affirmed on appeal. *State v. Lonergan*, No. A05-525 (Minn. App. Feb. 21, 2006).

Appellant's 1991 conviction for criminal sexual conduct was for incidents involving one child. However in a pretrial hearing, the district court found that there was clear and convincing evidence to conclude that appellant had sexual contact with two other children. This evidence was later admitted at trial. During the course of that trial, further evidence was presented suggesting appellant had sexual contact with at least six other children ranging in age from three to approximately fifteen. Appellant continues to deny all allegations of any sexual misconduct.

During appellant's incarceration for his 1985 conviction, he was screened for sex offender needs assessment, but refused treatment and refused to attend any sexual assault education and assessment programs. In 1996, appellant again refused to engage in any sex offender treatment program, and as such, cannot meet the criteria for referral to the Minnesota Sex Offender Treatment program.[1]

On April 9, 1992, appellant was evaluated by a psychologist who gave him a DSM-IV diagnosis of "psychopathic personality disorder, pedophile" stating that appellant appeared to be "neither a beginner at this type of activity nor does he have any restraint." Appellant's file was reviewed on May 3, 2006 by Dr. Jeremy Britzius who referred appellant for civil commitment specifically noting his history of severe violence

[1] Such programs require the admission of sexual conduct prior to voluntary enrollment.

and sadistic characteristics. After Dr. Britzius's review, appellant was referred to the risk assessment committee, which gave him a level III assessment.

In order to determine whether a petition for civil commitment should be filed, the Dakota County Attorney requested a prepetition assessment by Dr. Roger Sweet. Dr. Sweet concluded that appellant

> does meet the criteria for a Sexually Dangerous Person petition noting that he has engaged in a course of harmful sexual conduct, as evidenced by his two felony sex convictions involving separate victims, and specifically noting that his most recent conviction involved multiple acts of particularly sadistic sexual abuse on an 8 year old male he was babysitting. Dr. Sweet also noted that [appellant] has the necessary diagnosis to support commitment and . . . a review of the *Linehan* factors, places [appellant] in the "highly likely" category.

Dr. Sweet was later retained by the state to provide an independent review during the hearing, though he was not authorized to interview appellant directly.

On August 24, 2006, the state then filed a petition for civil commitment of appellant as both a "Sexually Dangerous Person" (SDP) and a "Sexual Psychopathic Personality" (SPP) as defined by Minn. Stat. § 253B.02, subds. 18b and 18c (2006). After a preliminary hearing held on September 7, 2006, appellant was found to present a "very serious risk to public safety," requiring secure confinement, and the district court ordered that he be confined until the final hearing. After initially refusing to be interviewed, the court's first examiner, Dr. James Gilbertson interviewed appellant on September 7, 2007. Prior to hearing any expert testimony, appellant objected to the district court's jurisdiction over the matter, and brought a motion to dismiss. This motion was denied.

At the hearing, Dr. Gilbertson "testified that [appellant] does exhibit impulsiveness of behavior, lack of customary standards of good judgment and a failure to appreciate his personal acts, all of which cause him to act irresponsibly." He further testified "that [appellant] is a dangerous untreated sex offender and that the Minnesota Sex Offender Program (MSOP) is the only viable option suitable for [appellant]."

Appointed at the request of appellant, Dr. John Austin was the second examiner to interview him. The court found that

> Dr. Austin provided a diagnosis of sexual disorder, as well as chemical dependency and a personality disorder. Dr. Austin also indicated that since [appellant] has acted out on his sexual impulses in a manner that has been harmful to others . . . [appellant's] disorder does not allow him to adequately control his sexual impulses . . . Dr. Austin stated that he believed the way which [appellant] would live his life if released would be similar to the way he lived his life in the past.

The court further found that "Dr. Austin did not make an opinion regarding whether he supported civil commitment of [appellant] as a 'Sexually Dangerous Person' or a 'Sexual Psychopathic Personality.'"

After all testimony was heard, the district court found both Dr. Gilbertson's and Dr. Sweet's opinions to be "credible and persuasive with respect to the criteria necessary for a SDP commitment. The court [found] [their] opinions credible but not clear and convincing with respect to the criteria necessary for a SPP commitment, specifically the requirement that [appellant] demonstrate an utter lack of power to control his sexual impulses."

Near the end of appellant's case, appellant also wished to call additional witnesses who were not on his counsel's witness list. Appellant, speaking for himself, sought to

call his girlfriend at the time of his conviction, Kathy White, and her two children, in an effort to impeach his earlier criminal conviction. The district court denied that request. The district court determined, after hearing testimony from three expert witnesses, that appellant was "highly likely . . . [to] engage in further harmful sexual conduct," that he "exhibited sexually deviant behavior towards young children and lacks insight into his behavior or need for treatment." The district court went on to say that appellant, "as an untreated sex offender, does not have a valid relapse prevention plan because he does not think he has a problem," and "will continue to engage in similar behavior in the future," and "is dangerous to other persons." The court then, "*initially* committed [appellant] as a 'Sexually Dangerous Person' to the Minnesota Sex Offender Program." This appeal follows.

D E C I S I O N

Under Minnesota law, a person may be civilly committed as a "sexually dangerous person" when he,

> (1) has engaged in a course of harmful sexual conduct as defined in subdivision 7a;
> (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 as defined in subdivision 7a.

Minn. Stat. § 253B.02, subd. 18c(a) (2006). Subdivision 7a defines 'harmful sexual conduct' as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2006).

In a civil commitment case regarding a SPP or SDP, an appellate court will uphold the court's findings of fact regarding the elements of commitment if they are not clearly erroneous. *In re Preston,* 629 N.W.2d 104, 110 (Minn. App. 2001). Whether the evidence is sufficient to meet the standards for commitment is a question of law reviewed de novo. *In re Linehan,* 518 N.W.2d 609, 613 (Minn. 1994). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (quotation omitted).

I. The district court did not err in determining that it had proper jurisdiction to hear appellant's petition for civil commitment as a sexually dangerous person.

Appellant argues that the district court's probate division did not have jurisdiction to rule on the petition for his civil commitment. Jurisdiction, whether subject matter or personal, is a question of law, which is reviewed de novo. *Johnson v. Murray*, 648 N.W.2d 664, 670 (Minn. 2002) (subject matter); *Wick v. Wick*, 670 N.W.2d 599, 603 (Minn. App. 2003) (personal).

Petitions for SPP and SDP commitments are governed by Minn. Stat. § 253B.185, subd. 1 (2006). "The petition is to be . . . filed with the committing court of the county in which the patient has a settlement or is present." *Id.* It appears that the last address of appellant prior to his conviction was in Dakota County, Minnesota. This case for civil commitment was properly filed in Dakota County as statutorily required.

The Minnesota Supreme Court recently addressed the issue of subject matter jurisdiction in an SPP/SDP case holding that the district court did not lose subject-matter

jurisdiction to consider the petition when it did not hold a timely hearing. *In re Commitment of Giem*, 742 N.W.2d 422, 430 (Minn. 2007); *see also In re Commitment of Beaulieu*, 737 N.W.2d 231, 237 (Minn. App. 2007) ("As a general rule, state courts have subject matter jurisdiction over civil commitments").

The focus of appellant's argument is his misunderstanding that probate court is a separate and distinct court from district court. The district court's authority to hear this matter, is therefore, not only supported by the district court's findings of fact, but clearly set forth under Minnesota law. Minn. Stat. §§ 253B.07, .18, .185 (2006).

II. Appellant did not receive prejudicially ineffective assistance of counsel during the hearing.

During the course of the hearing, five witnesses were called, three of whom were experts who testified as to the psychological condition of appellant, with the other two offering testimony regarding the availability of potential future support for appellant if he were released. At the close of the hearing, appellant sought to call additional witnesses beyond those called by his attorney, specifically his previous girlfriend, Kathy White, and her two children. Appellant's purpose in calling these witnesses is somewhat unclear, though from the transcript it appears that appellant wanted to "impeach at least one jury verdict, and perhaps the court's finding of clear and convincing evidence in a couple other cases." After a strong suggestion by the district court that calling these witnesses would serve no purpose, appellant chose to follow the course of his counsel and not call those witnesses. Appellant now argues that counsel's choice to not call those witnesses was prejudicial and demonstrated ineffective assistance of counsel. In the alternative,

appellant claims that the suggestion by the district court not to call such witnesses amounted to a violation of his Sixth Amendment and due process rights.

The standard for evaluating the adequacy of counsel in criminal cases applies to civil commitment hearings. *In re Dibley,* 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987); *In re Cordie,* 372 N.W.2d 24, 28 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985). While this argument has been raised in SPP/SDP cases, they were unpublished opinions. In order to prove ineffective assistance of counsel, an appellant must prove counsel's "representation 'fell below an objective standard of reasonableness.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington,* 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). There also exists a strong presumption that counsel's performance was reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

First, appellant raised constitutional arguments, but they may not be reviewed because the matter was not argued and considered in the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). While there is an exception to this rule where required in the interest of justice, and when issues were implied in the district court, that exception does not apply here. *Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982).

Second, appellant also contends that his counsel was ineffective by allowing a false record to remain uncorrected, permitting exhibits to be admitted containing false information, having a lack of familiarity with the case, and failing to call appropriate

witnesses.[2] However, appellant's counsel made a motion to dismiss based on the false nature of the record which was later denied, and counsel also called and challenged witnesses regarding the tests and studies conducted by the expert witnesses. Further, trial counsel's choice of witnesses is beyond appellate review because they "represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Appellant has failed to show how his counsel's assistance fell below an objective standard of reasonableness. It was made clear to him by the district court both at the opening and the close of the hearing that he would have the opportunity to represent himself if he chose, but he decided to retain his counsel. Though appellant has a right to counsel in civil commitment cases, "[a]n indigent defendant does not have the unbridled right to be represented by the attorney of his choice." *State v. Worthy*, 583 N.W.2d 270, 278 (Minn. 1998). Appellant did not receive ineffective assistance of counsel in this case.

III. The district court did not abuse its discretion by admitting certain exhibits regarding appellant's prior criminal trial and conviction, or relying upon that evidence in its denial of the motion to dismiss.

Appellant has maintained throughout his incarceration and his civil commitment hearing that he is innocent of the crimes for which he was convicted. Evidence produced during his criminal trial by victims, acquaintances, and professionals refer to the criminal

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[2] These allegedly false records are the trial records from appellant's two convictions for criminal sexual conduct.

sexual conduct for which he was eventually convicted. Appellant contends that because he is innocent, these acts could not have occurred, and therefore any evidence referring to those acts must be false. According to appellant, because the experts who testified in the civil commitment hearing used the transcript from his first trial to determine the nature of his behavior, the conclusions of those experts must also be false.

Appellant also argues that the district court must have been aware of the false nature of this evidence, and should not have allowed that evidence to be admitted during the hearing, and should have granted appellant's motion to dismiss because the state's petition relied upon this allegedly false evidence.

A. Admission of evidence regarding appellant's prior criminal trial and conviction

This court will review the district court's decision to admit evidence based on an abuse of discretion standard. *Kroning v. State Farm Auto Ins. Co*., 567 N.W.2d 42, 45-46 (Minn. 1997). In a civil commitment proceeding, the district court shall "admit all relevant evidence at the [commitment] hearing. The court shall make its determination upon the entire record pursuant to the Rules of Evidence." Minn. Stat. § 253B.08, subd. 7 (2006). There further exists a presumption of admissibility in commitment cases. *In re Morton*, 386 N.W.2d 832, 835 (Minn. App. 1986). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401.

The documents appellant claims are false are transcripts of sworn trial testimony from his previous trial. Any evidence regarding his previous sexual conduct would clearly be relevant to experts in making a proper evaluation of appellant, as well as in the court's determination of whether grounds exist for commitment. Former testimony by an unavailable declarant is "not excluded by the hearsay rule . . . if the party against whom the testimony is now offered . . . had an opportunity . . . to develop the testimony by direct, cross, or redirect examination." Minn. R. Evid. 804(b)(1). No objection to the previous record as hearsay was made at the hearing, and is therefore waived. *Thiele,* 425 N.W.2d at 582. The district court did not abuse its discretion by allowing testimony from appellant's prior trial into evidence.

B. Reliance upon evidence for the denial of a motion to dismiss

At the opening of the hearing appellant made a motion to dismiss the case because it would be based upon allegedly false and inaccurate information. The district court took the motion under advisement in order to move on to the hearing of testimony, but later denied the motion to dismiss. Appellant argues that the district court abused its discretion by denying the motion.

On an appeal from an order, this court can review "any order affecting the order from which the appeal is taken." Minn. R. Civ. App. P. 103.04. Because a ruling on a motion to dismiss would directly affect the final order, the review of the order denying the motion to dismiss is within the scope of review of the appeal from the commitment.

Appellant argues that the motion to dismiss should have been granted because the petition for his civil commitment relies upon his prior conviction which contains false

information. However, a "person convicted of a crime may not attack a valid criminal conviction in a subsequent civil proceeding." *Noske v. Friedberg*, 670 N.W.2d 740, 744 (Minn. 2003). Moreover, appellant provides no support for his argument that the district court erred in failing to grant the motion. On appeal, "error is never presumed. It must be made to appear affirmatively before there can be reversal. Not only that, but the burden of showing error rests upon the one who relies upon it." *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997) (quoting *Midway Ctr. Assoc. v. Midway Ctr., Inc.,* 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975)), *review denied* (Minn. Oct. 31, 1997). Therefore the district court did not abuse its discretion by denying appellant's motion to dismiss.

IV. The district court did not deny the right of appellant to call additional witnesses.

At the close of the hearing, appellant sought, independent of his counsel, to call additional witnesses. The only witnesses named by appellant to be called were his ex-girlfriend and her two children. Appellant's only grounds for calling these witnesses was that "[appellant's ex-girlfriend's daughter] has actually made a statement that I molested her . . . and she would come in and testify that I never molested her." The district court explained the futility of such an argument and informed appellant that if he wished to call these witnesses over his lawyer's objection, he could discharge his attorney, appear pro se, and then call his witnesses. Appellant decided to retain the aid of counsel.

Appellant argues that the district court denied him the right to call additional witnesses. This is a mischaracterization of the action taken by the district court. Because

appellant's counsel did not call additional witnesses, and appellant refused to dismiss his attorney and call the witnesses himself, the district court did not deny him anything.

Appellant's brief now further contends that he wished to call additional witnesses who would provide evidence of "employment opportunities, family support, [and] non-family support." Appellant never identified these witnesses during the hearing, nor does he name them in his brief. This court will generally not consider matters not argued and considered in the court below. *Thiele,* 425 N.W.2d at 582. This issue is thus waived on appeal.

V. The district court did not abuse its discretion by denying appellant's motion for dismissal without detailed reasoning.

Prior to the hearing, appellant's case had been continued three times, delaying the hearing by more than a year. Appellant's motion to dismiss was brought almost immediately once the hearing began. He was permitted to include a memorandum of law and allowed to speak in support of his motion. For the sake of judicial efficiency, the district court took the motion under advisement, proceeded with the hearing, and denied the motion in its final order. Appellant now argues that the district court was required to provide detailed reasons to support its decision to deny appellant's original motion to dismiss, as well as a separate evidentiary hearing for the particular motion.

Appellant provides no authority to support his argument that a separate hearing and statement of reasoning is required for a ruling on a motion to dismiss. Assignment of error in a brief based on mere assertion and not supported by argument or authority is

waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997).

Affirmed.