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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0395

In the Matter of the Civil Commitment of:
Robert James Tolbert.

Filed August 26, 2008
Reversed and remanded
Johnson, Judge

Olmsted County District Court
File No. 55-PR-07-6067

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Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Olmsted County petitioned to have Robert James Tolbert committed as a sexually dangerous person. The district court found that Tolbert is a sexually dangerous person but also found that a less-restrictive alternative was available, namely, a sexual-offender

treatment program of the department of corrections. Thus, the district court revoked Tolbert's supervised release and ordered that he be confined in a correctional facility and receive sex-offender treatment in the department's existing treatment program. The county appealed, and the commissioner of corrections intervened. Both the county and the commissioner argue that the district court did not have authority to revoke Tolbert's supervised release and to order his re-imprisonment at a correctional facility. We agree and, therefore, reverse and remand to the district court with instructions to enter an order committing Tolbert.

FACTS

Between the ages of 15 and 31 years old, Tolbert was convicted of several drug-related offenses, two criminal-sexual-conduct offenses, and the offense of failure to register as a sexual offender. The district court record is somewhat unclear as to the details of these prior convictions and Tolbert's history of incarceration, but it appears that he has spent much of his adolescence and adulthood in prisons in Illinois and Minnesota.

Two of Tolbert's prior convictions provide the most relevant background. Tolbert's first instance of criminal sexual conduct occurred in Illinois in 1991, when he was 15 years old and sexually assaulted his four-year-old female cousin. He was charged as an adult and subsequently pleaded guilty to four charges. He was incarcerated in Illinois for several years. In 2001, when Tolbert was 24 years old, he sexually assaulted a 15-year-old girl in Rochester. He was charged with third-degree criminal sexual conduct, and he entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S. Ct. 160, 167-68 (1970), and *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). In

2006, after a delay in sentencing due to his imprisonment on other charges in Illinois, he was sentenced to 33 months of imprisonment at a Department of Corrections (DOC) facility.

On May 2, 2007, the DOC designated Tolbert as a Level 3 sex offender. Tolbert's release was scheduled for August 15, 2007. On June 28, 2007, the county commenced involuntary civil-commitment proceedings in Olmsted County District Court, seeking to have Tolbert committed to the Minnesota Sex Offender Program (MSOP). On August 6, 2007, the district court found probable cause to confine Tolbert pending the resolution of the civil-commitment proceedings.

A trial was held on December 13, 2007. Linda Marshall, Ph.D., and Paul Reitman, Ph.D., independent examiners, testified that, in their opinions, Tolbert meets the applicable criteria for civil commitment as a sexually dangerous person (SDP). Both also agreed that, based on the treatment options available to Tolbert, there is no less-restrictive treatment alternative. Wanda Berg, supervisor of Olmsted County's intensive-supervised-release unit, testified that Tolbert could not receive treatment in a DOC facility unless he were to violate the terms of his supervised release.

On February 19, 2008, the district court issued findings of fact, conclusions of law, and an order for judgment in which it found that the county proved by clear and convincing evidence that Tolbert is an SDP. The district court also found by clear and convincing evidence that a less-restrictive treatment program is available for Tolbert within a DOC facility. The district court further found that, because Tolbert had not completed sex-offender programming, he had violated the conditions of his supervised

release. The district court thus ordered Tolbert into the custody of the commissioner of corrections for placement in a DOC facility for the purpose of receiving and completing sex-offender programming. The district court also retained jurisdiction over the matter and ordered the commissioner or his designee to make progress reports to the district court every six months. Furthermore, the district court stated that MSOP is "not a treatment program" and that its facilities "are not treatment facilities" but, rather, are "detention facilities." The county appeals. The commissioner of corrections was granted leave to intervene.

D E C I S I O N

In petitioning for civil commitment under the Minnesota Commitment and Treatment Act, the county must prove the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006). The district court's factual findings are reviewed under a clear-error standard. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). If, however, a finding of fact is controlled or influenced by an error of law, it will be set aside. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Whether the facts satisfy the statutory standard for civil commitment is a question of law subject to de novo review. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

Section 253B.02, subdivision 18c(a), defines an SDP as a person who: (1) engaged in a course of harmful sexual conduct; (2) manifests 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(a) (2006). A sexually dangerous person is

subject to civil commitment only if the person's disorder or dysfunction does not allow adequate control over sexual impulses and makes it highly likely that the person will reoffend. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

The district court found that the county proved by clear and convincing evidence that Tolbert "meets the statutory criteria and satisfies the statutory standards for involuntary civil commitment as a Sexually Dangerous Person." Neither Tolbert nor the county nor the commissioner challenges that finding. The central issue on appeal is whether the district court had authority to revoke Tolbert's supervised release and to order his re-imprisonment in a DOC facility as a less-restrictive alternative. A secondary issue is whether the district court erred by finding that MSOP is not a treatment program but, rather, a detention facility.

I. Revocation of Supervised Release

Under the Minnesota Commitment and Treatment Act, after a person is found to be an SDP, a district 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 (2006). The burden of showing a less-restrictive alternative is on the person to be committed. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). An appellate court will not reverse a district court's findings as to the least-restrictive treatment program unless the finding is clearly erroneous. *In re Thulin*, 660 N.W.2d 140,

144 (Minn. App. 2003); *In re Kellor*, 520 N.W.2d 9, 12 (Minn. App. 1994), *review denied* (Minn. Sept. 28, 1994).

To determine whether the district court erred in finding that a less-restrictive alternative is available, we must consider whether the district court had authority to revoke Tolbert's supervised release and order his commitment to a DOC facility. The county and the commissioner argue that the commissioner has the exclusive authority to revoke supervised release and to re-imprison a former inmate who has violated supervised release.

The statute granting authority to the commissioner to revoke supervised release states, in relevant part,

> If an inmate violates the conditions of the inmate's supervised release imposed by the commissioner, the commissioner may:
>
> (1) continue the inmate's supervised release term, with or without modifying or enlarging the conditions imposed on the inmate; or
>
> (2) revoke the inmate's supervised release and reimprison the inmate for the appropriate period of time.

Minn. Stat. § 244.05, subd. 3 (Supp. 2007). As the supreme court has stated, the commissioner of corrections has "broad statutory authority . . . to control the release and re-incarceration of individuals." *State v. Schwartz*, 628 N.W.2d 134, 138 (Minn. 2001) (citing Minn. Stat. § 243.05, subds. 1, 2 (2000)). An inmate who is on supervised release "is and remains in the legal custody and under the control of the commissioner, subject at any time to be returned to a facility of the Department of Corrections established by law

for the confinement or treatment of convicted persons and the parole rescinded by the commissioner." Minn. Stat. § 243.05, subd. 1(b) (2006). The statutory scheme gives the commissioner the authority to determine conditions for supervised release, Minn. Stat. §§ 243.05, subd. 2, 244.05, subd. 6 (2006), as well as the duty to impose sanctions for violations of supervised release, Minn. Stat. § 244.05, subds. 3 (Supp. 2007), 6 (2006). In addition, the commissioner is charged with setting conditions on the programming provided to an inmate while the person is confined within a correctional facility. Minn. Stat. §§ 241.01, subd. 3a (b), 244.03 (2006).

Neither the supreme court nor this court has considered whether a district court properly may revoke an offender's supervised release and order re-imprisonment in a correctional facility. The appellate courts, however, have considered challenges to the commissioner's revocation of an offender's supervised release and re-imprisonment. In *Schwartz*, the appellant argued that the commissioner's authority to revoke supervised release usurps and interferes with the powers of the judiciary so as to violate the separation of powers provision in the Minnesota Constitution. 628 N.W.2d at 139-40 (citing Minn. Const. art. III, § 1). In holding that the commissioner's authority "does not impede the court's sentencing authority," the supreme court differentiated between sentencing and the revocation of supervised release. *Id.* at 140-41. Specifically, the court stated, "The commissioner's subsequent revocation and re-incarceration decision does not alter the sentence of the court or impose a new sentence, but merely executes a condition within the parameters set by the court for appellant's commitment to the commissioner." *Id.* at 140 (citing *Morrissey v. Brewer*, 408 U.S. 471, 480, 92 S. Ct.

2593, 2600 (1972) (stating that because parole "arises after the end of the criminal prosecution" and is supervised by an administrative agency, individual is not guaranteed same rights as during criminal prosecution)).

More recently, in *Kachina v. State*, 744 N.W.2d 407 (Minn. App. 2008), this court rejected an argument that the DOC's decision to place the appellant on intensive supervised release with special conditions was an unauthorized modification of his sentence. *Id*. at 408. This court explained, "The DOC, not the court, revokes supervised release if the offender violates any of the conditions of supervised release" because "[t]he legislature has explicitly granted authority over supervised release to the DOC." *Id*. at 409 (citing Minn. Stat. § 244.05, subd. 3(2)). There is no provision in the applicable statutes or in the caselaw that gives a district court any role in the revocation of supervised release, except to conduct judicial review of a revocation that has been ordered by the commissioner. *See Schwartz*, 628 N.W.2d at 141 n.3. Thus, the district court did not have authority to revoke Tolbert's supervised release and order his re-imprisonment at a DOC facility.

The district court also found, based on the testimony of Drs. Marshall and Reitman and Ms. Berg, that Tolbert is ineligible for placement at Alpha House, a treatment facility for sexual offenders, because that facility does not accept Level 3 offenders or persons with a history of violence. Thus, neither of the two less-restrictive alternatives that were considered by the district court is available. At oral argument, Tolbert's attorney was unable to identify any other potential less-restrictive alternatives, thus obviating any need for further consideration of this issue on remand. Therefore, the district court's

conclusion that a less-restrictive treatment program is available to Tolbert is clearly erroneous.

On a related note, the county argues that the district court erred by continuing Tolbert's commitment and reserving the right to review reports on Tolbert's status and progress. The county contends that the practical effect of the district court's order is to stay the commitment order. We agree. Because we have determined that the district court erred in finding that a less-restrictive treatment program is available, there is no basis for continuing the commitment. *See* Minn. Stat. § 253B.095, subd. 1(d) (2006) (providing requirements for issuing stay of commitment order).

II. Treatment or Detention

Included in the district court's findings of fact was a finding that "no patient has ever been discharged from confinement after having been committed as [SDP]." The district court also found that "the sex offender treatment program offered by the Minnesota Sex Offender Program is not a treatment program" and that "the Minnesota Sex Offender Program facilities are not treatment facilities" but, rather, "are simply detention facilities."

The county challenges the district court's order on this point. The county construes the district court's ruling to be a determination that Tolbert's right to substantive due process has been, will be, or may be violated. We do not construe the district court's order to have reached such a result. There is no mention of the law of substantive due process in the district court's conclusions of law. The district court made findings concerning "detention" but did not articulate any legal conclusion or any form of

relief that necessarily flows from those findings. The challenged language is a free-standing finding of fact that is not moored to any principle of law or to any particular disposition and, thus, is without any legal effect. In short, the challenged findings are nothing more than dicta.

Tolbert, however, argues that his commitment to the MSOP would violate his right to substantive due process. But Tolbert did not raise this issue in the district court. As a result, the district court did not conduct any legal analysis of the issue. Tolbert's failure to raise the issue in the district court constitutes a waiver of that issue on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582-84 (Minn. 1988). Therefore, we do not consider the issue.

On remand, the district court shall order Tolbert's commitment in a manner consistent with the relief sought by the county's petition.

Reversed and remanded.