STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0896

In the Matter of the Civil Commitment of: Timothy John Lincoln

Filed November 18, 2008
Affirmed
Toussaint, Chief Judge

Wright County District Court
File No. 86-PR-06-2080

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Thomas N. Kelly, Wright County Attorney, Wright County Government Center, 10 Second Street Northwest, Buffalo, MN 55313 (for respondent State of Minnesota)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Worke, Judge.

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

TOUSSAINT, Chief Judge

Timothy John Lincoln appeals the district court order indeterminately committing him to treatment in the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). Because (1)

clear and convincing evidence supports the district court's indeterminate commitment order, (2) the district court's determination that MSOP is the least-restrictive treatment alternative is not clearly erroneous, and (3) the district court did not err in denying appellant's motion to dismiss the commitment proceeding as violating various constitutional protections, we affirm.

D E C I S I O N

I.

"We review de novo whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). On appeal from a commitment order, we defer to the district court's findings of fact, and we will not reverse those findings unless they are clearly erroneous. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law. *In re Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

This court defers to the district court's role as factfinder and its ability to judge the credibility of witnesses. *Ramey*, 648 N.W.2d at 269. "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144 (quotation omitted).

1. SDP Commitment

A district court will commit a person as an SDP under the Minnesota Commitment and Treatment Act if the petitioner proves that the person meets the criteria for

commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), 253B.185, subd. 1 (2006). An SDP is one 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) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2006). The SDP statute requires a showing that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

a. Appellant has engaged in a course of harmful sexual conduct.

"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). There is a rebuttable presumption that conduct described in the statutes defining criminal sexual conduct in the first through fourth degrees "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(b) (2006).

Minnesota caselaw indicates that a "course" is a "systematic or orderly succession; a sequence." *In re Stone,* 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006) (quotation omitted). The incidents establishing a course of conduct may extend over a long period. *Id.* (stating that conduct need not be recent). "An examination of whether an offender engaged in a course of harmful sexual conduct takes into account both conduct for which the offender was convicted and conduct that did not result in a conviction." *Id.* Harmful sexual conduct is not required to "be precisely the same type or demonstrate a degree of similarity." *Id.* at 839.

Here, both court-appointed examiners agreed that appellant has engaged in a course of harmful sexual conduct. The district court based its same determination on both charged and uncharged conduct, noting that appellant "introduced no evidence to rebut the presumption of harm that arises under Minn. Stat. § 253B.02, subd. 7a(b)." The record supports the district court's determination, indicating that appellant: (1) exposed his genitals to female victims on numerous occasions, causing T.M.M. serious emotional harm and causing a substantial likelihood of serious emotional harm to his remaining victims; (2) attempted sexual assault against D.E.W., causing her serious emotional harm; and (3) engaged in numerous incidents of sexual intercourse with twelve-year-old A.C., constituting third-degree criminal sexual conduct, triggering a statutory presumption of harm, and causing A.C. actual serious emotional harm.

b. Appellant manifests a sexual, personality, or other mental disorder or dysfunction.

Both examiners agreed that appellant manifests a requisite mental disorder under the SDP statute. Appellant's multiple diagnoses in the record support the district court's conclusion that he suffers from a sexual, personality, or other mental disorder or dysfunction.

c. It is highly likely that appellant will engage in future harmful sexual conduct.

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 III*), *vacated on other grounds*, 522 U.S. 1011, 118 S.Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). The supreme

court has set forth six factors to be considered in examining the likelihood of reoffense: (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) the sources of stress in the offender's environment; (5) the similarity of the present or future context to those contexts in which the offender used violence in the past; and (6) the offender's record of participation in sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*). Both examiners addressed the *Linehan I* factors:

One of the examiners noted that appellant has a "significant history of unemployment," has "never been married," and has never "had a long-term relationship with an adult partner." The examiner concluded that these facts weigh in favor of a finding that appellant is highly likely to sexually reoffend. The other examiner noted that appellant's "age and male gender place him at risk for sexual and general violence." Appellant's demographic characteristics support the district court's finding that he is highly likely to sexually reoffend.

Based on actuarial testing results, one of the examiners opined that appellant meets the criteria for placement in the "high-risk category for further sexual violence" because he is an untreated offender without insight and with a "limited understanding regarding triggers that could lead to sexual reoffense." The other examiner noted that, based on appellant's test results, he "remains at high risk for continued sexual acting out." The district court concluded that appellant "has a very high likelihood of continuing to be exploitative of others and to use them in a selfish, callous, and

interpersonally self serving manner," and that "he strongly holds values that disregard social rules, which would likely permit him to pursue an aimless and irresponsible life." The record supports the district court's finding, based on the examiners' analysis of actuarial tests and base-rate statistics, that appellant is highly likely to reoffend.

Nothing in the record indicates that appellant is properly equipped to deal with the stressors he would face if released, and in the past, he has continually turned to drugs and alcohol to cope. The record does not indicate that appellant's environment would be substantially changed if he were to be released, and appellant has admitted that he "always will have the tendency to be attracted to teenage girls." Appellant's sources of stress and the similarity of present or future context to past context support the district court's determination that he is highly likely to reoffend.

Due to appellant's past failures in sex-offender treatment, and his reported lack of insight into his dangerous behaviors, the record contains no evidence to suggest that he will follow through with treatment if released. Appellant's treatment record weighs in favor of the district court's finding of a high rate of recidivism.

Although one of the examiners did not opine that appellant was "highly likely" to reoffend, she noted that he shows "reckless disregard for the safety of others, failure to conform his behavior to social norms by repeatedly performing acts which are grounds for arrest, deceitfulness as indicated by repeated lying, consistent irresponsibility, and impulsivity." On this record, it is highly likely that, if released, appellant will reoffend by exposing himself, window peeping, or pursuing sexual relationships with underage females.

The record establishes that appellant's mental disorders impede his ability to control his sexual impulses, in accordance with both examiners' opinions, and supports the district court's conclusion that appellant meets the elements for commitment as an SDP by clear and convincing evidence.

2. SPP Commitment.

A petitioner must prove that the standards for commitment as an SPP are met by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1. A "sexual psychopathic personality" is defined by statute as

> the existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Minn. Stat. § 253B.02, subd. 18b (2006). The statute requires that the district court find: (1) a habitual course of misconduct; (2) an utter lack of power to control sexual impulses; and (3) dangerousness. *Id.; see also Linehan I*, 518 N.W.2d at 613. "While excluding 'mere sexual promiscuity,' and 'other forms of sexual delinquency,' a psychopathic personality 'is an identifiable and documentable violent sexually deviant condition or disorder.'" *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001) (quoting *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994)).

a. Appellant has engaged in a habitual course of sexual misconduct.

This element of the SPP statute "has been defined to require evidence of a pattern of similar conduct," and "does not equate to the standard of 'course of harmful sexual conduct'" used in the SDP statute. *Stone,* 711 N.W.2d at 837.

Here, both examiners agreed that appellant has engaged in a habitual course of sexual misconduct. Appellant has sexually offended only against females, both minors and adults. The record establishes a pattern of exhibitionism, sexual assault, and manipulation to achieve sexual intercourse, with a progression of boldness, and similar harm suffered by appellant's victims. The district court did not clearly err when it concluded that appellant engaged in a habitual course of sexual misconduct.

b. Appellant possesses an utter lack of power to control sexual impulses.

In determining whether an individual exhibits an utter lack of control over his sexual behavior, there are several significant factors:

> [1] the nature and frequency of the sexual assaults, [2] the degree of violence involved, [3] the relationship (or lack thereof) between the offender and the victims, [4] the offender's attitude and mood, [5] the offender's medical and family history, [6] the results of psychological and psychiatric testing and evaluation, and [7] such other factors that bear on the predatory sex impulse and the lack of power to control it.[1]

Blodgett, 510 N.W.2d at 915.

Impulsive sexual assault demonstrates a lack of control. *See Matter of Schweninger,* 520 N.W.2d 446, 450 (Minn. App. 1994), *review denied* (Minn. Oct. 27,

[1] As discussed above, the results of appellant's testing establish that he is highly likely to reoffend sexually in the future, thereby demonstrating that he will be utterly unable to control his sexual impulses.

1994) (holding that offender demonstrated control because he plotted and planned his sexual assaults and groomed his victims, "which is different from an impulsive lack of control"). Here, one of the examiners noted that appellant "has demonstrated a repetitive pattern of criminal sexual conduct," and both examiners opined that appellant acted impulsively when offending. The record indicates that appellant's sexual impulsiveness demonstrates an utter lack of control, even though appellant later groomed and manipulated A.C. to maintain his sexual relationship with her.

Without insight into his sexual problem, an offender demonstrates an utter lack of control. *In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995). One of the examiners reported that appellant has not "done anything to correct his sexual deviancy," and the other examiner stated that appellant's "low mood, hopelessness about intimacy and heterosexual relationships, and his social immaturity have contributed to his offending." The record establishes that appellant lacks insight into his sexual impulses based upon his attitude and mood, which supports a finding that he utterly lacks the power to control his sexual impulses.

Courts may also consider the offender's refusal of treatment opportunities and lack of a meaningful relapse-prevention plan. *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). And courts may consider an offender's lack of sex-offender treatment or successful completion of a sex-offender program and the offender's failure to remove himself from similar situations in which offenses occurred in the past. *In re Bieganowski*, 520 N.W.2d 525, 529-30 (Minn. App. 1994) (holding that offender's failure to avoid impulsive-behavior triggers, such as alcohol consumption,

demonstrated lack of control), *review denied* (Minn. Oct. 27, 1994).

Here, appellant lacks a relapse-prevention plan and is an untreated sex offender. One of the examiners reported that appellant has been unable to remove himself from trigger situations in the past, shown by "what experts refer to as 'high-density offenses' whereby there were multiple acts of sexual assault occurring in a relatively short period of time." When considering these factors, the district court did not clearly err in concluding that appellant utterly lacks the ability to control his sexual impulses.

c. Appellant is dangerous to the public if released.

The *Linehan I* factors discussed above in relation to the third element of the SDP statute are also considered when determining if an offender is dangerous, in relation to the third element of the SPP statute. *See Schweninger*, 520 N.W.2d at 450 (applying *Linehan I* factors to 'dangerousness' element of SPP statute). On this record, as discussed above, appellant would be dangerous to the public and highly likely to reoffend if released.[2]

Clear and convincing evidence in the record supports the district court's determination that appellant meets the elements for commitment as an SPP.

II.

Appellant challenges his commitment to MSOP on the ground that it is not the least-restrictive alternative, arguing that he should have the opportunity to complete DOC sex-offender treatment. This court reviews a district court's determination of the least-

[2] In addition, it is worth nothing that, when asked if he thought he was "sexually dangerous," appellant responded: "There is always a potential for me to sexually reoffend."

restrictive alternative under the clearly erroneous standard. *Thulin*, 660 N.W.2d at 144.

"Under the current statute, patients have the *opportunity* to prove that a less-restrictive treatment program is available, but they do not have the *right* to be assigned to it." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (emphasis in original), *review denied* (Minn. Dec. 19, 2001). The statute provides:

> 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 (2006).

Appellant cannot meet this burden as both examiners agreed that MSOP was the most appropriate program for his sex-offender treatment. Appellant claims that he should be treated in prison, but he is no longer eligible for DOC treatment due to commitment proceedings, and the record does not establish that DOC treatment would appropriately meet his treatments needs and the requirements of public safety. And appellant was already terminated once from DOC sex-offender treatment. Having heard two examiners testify that no less-restrictive alternative would be appropriate for appellant's treatment, the district court did not clearly err in committing appellant to MSOP.

III.

Appellant appears to challenge the district court's denial of his motion to dismiss the commitment proceeding as violating various constitutional protections.[3] This court

[3] As a threshold matter, appellant chose not to "belabor these currently settled issues," and therefore, did not fully brief his constitutional claims. Generally, issues not briefed on appeal are deemed waived. *In re Robb*, 622 N.W.2d 564, 574 (Minn.App.2001),

reviews constitutional challenges de novo. *State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). "[W]e are not in position to overturn established supreme court precedent." *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998).

Civil commitment does not violate the prohibition against double jeopardy because it is remedial, and its purpose is treatment rather than punishment. *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995). Because the commitment statute's justification is the state's interest in public protection and treatment rather than punishment, it cannot be cruel and unusual. *In re Martin*, 661 N.W.2d 632, 641 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). The supreme court has upheld the constitutionality of the SDP statute against a substantive due-process challenge. *In re Linehan III*, 557 N.W.2d at 184. The state constitution does not provide a jury-trial right in a civil commitment proceeding. *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). And civil-commitment proceedings do not require proof beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 432, 99 S. Ct. 1804, 1812-13 (1979).

Affirmed.

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review denied (Minn. Apr. 17, 2001). In any event, appellant's constitutional arguments are without merit.