STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1162

In the Matter of the Risk Level Determination of F.C.M.

Filed April 6, 2010
Affirmed
Stoneburner, Judge

Minnesota Department of Corrections
File No. 151100202962

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Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

In this certiorari appeal, relator challenges the decision of an administrative law judge (ALJ) affirming assignment of a Risk Level III to him by the Minnesota Department of Corrections. We affirm.

FACTS

In November 2006, relator F.C.M., who already had an extensive criminal history, was charged with attempted first-degree criminal sexual conduct, attempted third-degree

criminal sexual conduct and kidnapping. While those charges were pending, he was charged with two counts of felony harassment/stalking and seven counts of gross misdemeanor violation of an order for protection. Under a plea agreement, F.C.M. pleaded guilty to an amended charge of kidnapping (safe release) and one count of felony harassment/stalking. The other charges were dismissed, and he was sentenced to both a 30-month and 20-month commitment to the Minnesota Department of Corrections (DOC). While imprisoned, F.C.M. violated DOC disciplinary regulations, served more than 60 days in segregation, and had his release date extended by 30 days. F.C.M. does not dispute that the circumstances of his kidnapping conviction made him a predatory offender who is required to register under Minn. Stat. § 243.166 (2008).[1]

In March 2008, a licensed psychologist prepared a sex-offender-risk-assessment recommendation for the DOC's End-of-Confinement Review Committee (ECRC). The psychologist recommended a risk-level three, due in part to F.C.M.'s untreated chemical-dependency issues. The assessor noted F.C.M.'s extensive criminal history that began in adolescence and continued even while F.C.M. was incarcerated and his chronic consumption of drugs and alcohol.

By a split vote of the ECRC, F.C.M. was assigned a risk-level two. The ECRC warned F.C.M. that if he returned to prison for any violations related to his high-risk behaviors, especially involving drug or anger issues, another ECRC would review his

[1] A person is required to register if he is charged with an enumerated felony, including kidnapping, and is convicted of that felony or "another offense arising out of the same set of circumstances." Minn. Stat. § 243.166, subd. 1b(a)(1)(ii).

case and possibly assign a higher risk level. F.C.M. did not challenge this risk-level assignment.

F.C.M. was released from prison in August 2008 on intensive supervised release (ISR) and was admitted to a work-release program. By September 2, 2008, F.C.M. had received two major write-ups for rule violations, and on September 3, his ISR agent filed a restructure report with the DOC's Hearings and Release Unit (HRU). F.C.M. received four more violations by September 18 and was terminated from the work-release program. The program manager opined that F.C.M. is a "very violent person" and a "danger to society."

On September 30, the HRU revoked F.C.M.'s release and imposed 150 days in prison. In October 2008, another licensed psychologist prepared a sex-offender risk-assessment recommendation for the ECRC and recommended a risk-level three. In a subsequent meeting with the ECRC, F.C.M. denied uncharged allegations in a 2006 police report that he had attempted to rape a woman (P.A.T.), and he denied that he had sexually assaulted B.L.D. in the incident that led to the November 2006 criminal-sexual-conduct and kidnapping charges. F.C.M. stated that he had been sexually active with B.L.D., but asserted that the altercation with B.L.D. did not involve sexual misconduct and occurred when B.L.D. tried to steal his drugs. The ECRC, by unanimous vote, assigned a risk-level three.

In February 2009, F.C.M. was again released and admitted to the work-release program. By March 7, 2009, he had received four major and four minor incident reports including leaving the program without his GPS tracking system. He was terminated from

the program. On the same day, he threatened to assault a corrections officer. After a violation report was filed, HRU revoked F.C.M.'s release and required him to serve the balance of his sentence.

In May 2009, F.C.M. contested his risk-level assignment in an administrative hearing. F.C.M. argued that because he denies ever having committed a sexual offense, the assessor erred in using the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R) to assess his risk level. F.C.M. asserted that if another assessment tool had been used, his risk level would be lower. F.C.M. challenged the assessor's and ECRC's determination that he is a sex offender, arguing that the determination was based solely on unproven allegations in police reports and the November 2006 criminal complaint.

At the hearing, F.C.M. again denied sexually assaulting B.L.D. or anyone else and asserted that sex with B.L.D. was consensual. F.C.M. said he fought B.L.D. and choked her when she tried to run out of his apartment with some of his drugs. F.C.M. said he did not remember what he did to B.L.D. except in "bits and pieces," and he did not remember what he said to police who were investigating the incident with B.L.D. F.C.M. said he blacks out and does things he does not remember. He admitted violating the order for protection by slapping the woman who had obtained the order for protection. He admitted not wanting to participate in treatment while in prison.

Dr. Donn Nelson, the psychologist who performed F.C.M.'s last risk assessment, testified that the MnSOST-R is the tool used by the DOC for risk-level assessments for offenders who have sex-related convictions. DOC uses the "Level of Service Inventory – Revised" (LSI-R) if the offender does not have a sex-related conviction. The risk

assessor decides which tool to use. The risk assessor relies on available written data and the best description of the offense. Nelson considered that F.C.M. was charged with a sex offense against B.L.D. and the description of the offense contained in the criminal complaint to conclude that F.C.M.'s crime was sex-related, making the MnSOST-R appropriate to evaluate F.C.M.'s risk level. F.C.M. scored a +10 on the MnSOST-R, placing him at a presumptive risk-level three.

Nelson testified that the MnSOST-R score is only one factor considered in recommending a risk level. In this case, he noted four special concerns about F.C.M.: (1) numerous unsuccessful drug treatment interventions and history of relapse; (2) history of supervision failures and pronounced unwillingness to cooperate with release authorities; (3) history of severe violence; and (4) unlikely availability of stable living arrangement. Nelson testified that there were no mitigating factors that lessen F.C.M.'s risk.

The ALJ affirmed the ECRC's risk-level-three assessment, concluding that the MnSOST-R was the appropriate tool for evaluating F.C.M., but that even without the MnSOST-R, application of statutory risk factors to F.C.M.'s history supports a risk level three. The ALJ specifically found F.C.M.'s account of his crime involving B.L.D. not credible, largely because his "materially inconsistent versions about what occurred . . . impeach his credibility and the probative value of his testimony." This certiorari appeal followed.

D E C I S I O N

On certiorari appeal, this court will affirm the decision of an ALJ unless the relator's substantial rights have been prejudiced because the decision was made on unlawful procedure, affected by an error of law, or otherwise unsupported by substantial evidence. Minn. Stat. § 14.69 (2008); *In re Risk Level Determination of S.S.*, 726 N.W.2d 121, 124 (Minn. App. 2007), *review denied* (Minn. Mar. 28, 2007).

"Questions of statutory interpretation are reviewed de novo. But a reviewing court affords substantial deference to an administrative agency's interpretation of its own rules and regulations. If an administrative agency's authority is questioned, a reviewing court independently reviews the enabling statute." *In re Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 353 (Minn. App. 2002) (citations and quotation omitted), *review denied* (Minn. May 14, 2002).

I. The ECRC's procedures were lawful.

It is undisputed that F.C.M. was convicted of a predatory offense subjecting him to the predatory offender notification act.[2] But F.C.M. asserts that the ECRC procedures in assigning a risk level fell below the "floor" set by the act.

Under this broad assertion, F.C.M. first argues that the law requires that an offender's risk level be based on risk-assessment scales that calculate likelihood of

[2] F.C.M. was convicted of kidnapping, which is listed as one of the offenses that requires registration as a predatory offender under Minn. Stat. § 243.166, subd. 1b(a)(1)(ii). F.C.M.'s conviction arose out of the same circumstances as the charge of criminal sexual conduct, also mandating registration under subdivision 1b(a)(iii). "[P]redatory offender" is defined in the notification statute as "a person who is required to register as a predatory offender under section 243.166." Minn. Stat. §244.052, subd 1(5) (2008).

"reoffense," and because he never was proved to have committed a sex offense, he cannot logically be assessed for "reoffense." Therefore, F.C.M. asserts, the ECRC erred by applying the MnSOST-R to him because it is designed to measure risk of reoffending sexually and the conclusion that he offended sexually is based solely on contested hearsay statements contained in the complaint.[3] But the ALJ specifically found F.C.M.'s version of the events related in the complaint not credible, leaving the allegations in the complaint essentially uncontested. Minn. Stat. § 14.60 (2008), gives agencies authority to consider and give probative effect to evidence commonly accepted by reasonable prudent persons in the conduct of their affairs. Such evidence includes hearsay. *See Lee v. Lee*, 459 N.W.2d 365, 369 (Minn. App. 1990) (stating that ALJ may admit all evidence that possesses probative value, including hearsay, if it is the type of evidence on which reasonable prudent persons are accustomed to rely in the conduct of their serious affairs), *review denied* (Minn. Oct. 18, 1990). We conclude that the assessor's reliance on charges against F.C.M. and the complaint's description of the incident as a basis to determine which assessment tool to employ does not fall beneath any procedural "floor" imposed by the predatory offender notification statute.

We also find no merit in F.C.M.'s argument that consideration of the allegations in the complaint deprived him of the opportunity to meaningfully be heard. F.C.M. was

[3] F.C.M. relies on *In re Risk Level Determination of C.M.*, 578 N.W.2d 391 (Minn. App. 1998), to argue that use of hearsay evidence to determine his risk level denied him due process. But the *C.M.* court criticized the dissemination of hearsay to the public, not the use of hearsay to support a risk-level determination. *Id.* at 398.

repeatedly heard by the ECRC and had ample opportunity to address the incident involving B.L.D. and all other matters relating to his risk-level assessment.

F.C.M.'s argument that the ECRC's decision should have been based on factual findings that were reached only after the ECRC actually tested the state's evidence against something resembling an evidentiary standard implies procedures not mandated by the notification act, and does not support F.C.M.'s position that the ECRC's procedures fell below any requirements in the act.[4]

II. The ECRC's decision is supported by substantial evidence.

An agency decision may be reversed if unsupported by substantial evidence. Minn. Stat. § 14.69. Substantial evidence has been defined as "(1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

In an appeal from a risk-level assignment, the offender bears the burden of proving by a preponderance of the evidence that the ECRC's risk-level determination was erroneous. Minn. Stat. § 244.052, subd 6(b) (2008). In determining an offender's risk level, the ECRC is to consider the risk-assessment scale referenced in Minn. Stat.

[4] Significantly, F.C.M. does not challenge the adequacy of the risk-assessment report he received as required by Minn. Stat. § 244.052, subd. 3(f) (2008) (stating that the committee shall prepare a risk-assessment report which "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision"). The report in this case only implicitly states the reasons underlying the decision, but because F.C.M. did not challenge this report in the review hearing, we do not address its adequacy.

§ 244.052, subd. 2 (2008), and the risk factors set out in Minn. Stat. § 244.052, subd. 3(g) (2008). Minn. Stat. § 244.052, subd. 3(d)(i) (2008). We have recognized that the ECRC may draw on its own experience and expertise in exercising some discretion in assigning a risk level on a case-by-case basis. *R.B.P.*, 640 N.W.2d at 355.

In this case, F.C.M.'s risk level was evaluated on two occasions by different licensed psychologists and each psychologist recommended a risk-level three. F.C.M. did not challenge the first assessment or recommendation and did not challenge the assignment of a risk-level two. That assignment was accompanied by an admonition that continued violations and return to prison might result in a higher risk-level assignment. The record fully supports the conclusion of the second assessor and the ALJ that a risk-level-three assignment is not based solely on the MnSOST-R, but is also supported by substantial evidence of other risk factors. The record contains substantial evidence of F.C.M.'s lengthy criminal history, use of violence, commission of serious offenses, substantial number of prior offenses and victims, non-response to treatment efforts, history of substance abuse, failure to succeed at and disruptive behavior in community support programs, lack of stable living arrangements, and the absence of any mitigating factors. We conclude that there is ample evidence in the record to support the assignment of a risk-level three.

III. F.C.M.'s due-process argument is unpersuasive.

F.C.M. relies on *In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 396–99 (1998), to support his argument that the predatory-offender-notification act is unconstitutional as applied to him because it offends fundamental notions of due process

to notify a community of an offender's presence when the offender has not been convicted of an offense that caused him to be the subject of notification. But, unlike C.M., F.C.M. *was* convicted of an offense that caused him to be the subject of notification. Additionally, the liberty interest implicated in *C.M.* that triggered a due-process analysis involved an immunity provision in the notification act that appeared to preclude a common-law defamation action against any governmental entity that released false information in the course of community notification. *Id*. at 397–98. The legislature subsequently amended the notification statute to provide that immunity applies "only to disclosure of information that is consistent with the offender's conviction history." 2000 Minn. Laws ch. 311, art. 2, § 12, at 205. F.C.M. has not alleged or demonstrated that any information about him that affects a liberty interest will be disseminated due to his risk-level-three assignment. His due-process argument is without merit.

F.C.M. was convicted of a predatory offense. The DOC is required to assign a risk level to him. F.C.M. has failed to demonstrate any of the circumstances that would lead us to reverse or modify the decision of the ALJ affirming the assignment of a risk-level three.

Affirmed.