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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1420

In the Matter of the
Civil Commitment of:
Earl Buckner

Filed December 8, 2009
Affirmed in part and reversed in part
Klaphake, Judge

Hennepin County District Court
File No. 27-MH-PR-07-1209

Gregory Solum, 3300 Edinborough Way, Suite 550, Edina MN 55435 (for appellant Buckner)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, C-2000 Government Center, 300 S. 6th Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

KLAPHAKE, Judge

Appellant Earl Buckner challenges his indeterminate civil commitment as a sexual psychopathic personality (SPP) and a sexually dangerous person (SDP), arguing that the state failed to show by clear and convincing evidence that he was an SPP and that the

district court erred by committing him to the Minnesota Sex Offenders Program (MSOP) as an SDP because the goals of treatment and public safety could be met without commitment.

Because appellant failed to establish a viable alternative to commitment to MSOP, we affirm his indeterminate civil commitment as an SDP. But because the evidence supporting appellant's commitment as an SPP is conclusory and not clear and convincing, we reverse as to that basis for commitment.

D E C I S I O N

We review the district court's commitment decision de novo to determine whether the court erred as a matter of law in applying the statute. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). The district court's factual findings are reviewed for clear error. *In re Robb*, 622 N.W.2d 564, 568 (Minn. App. 2001), *review denied* (Minn. Apr. 17, 2001). The state has the burden of proving that the patient meets the standards for commitment as an SPP or SDP by clear and convincing evidence. *Id.* at 567. This court reviews the record in the light most favorable to the findings. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

Commitment as SDP

Appellant challenges his commitment as an SDP not because he does not meet the criteria for an SDP as defined in Minn. Stat. § 253B.02, subd. 18c (2008), but because he feels that commitment will not meet his treatment needs and is not necessary for public safety. Appellant argues that both his treatment needs and public safety would be better served by releasing him because he is subject to ten years of conditional release, during

which he would be closely supervised, and he is more likely to get individual treatment in the community than in the MSOP program.

In essence, appellant argues that he should be assigned to a less restrictive treatment program. Minn. Stat. § 253B.185, subd. 1 (2008) states that "the court shall commit the [SPP/SDP] 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." This is consistent with the twin goals of civil commitment, which include both treatment of the offender and protection of the public safety. *See In re Blodgett*, 510 N.W.2d 910, 914, 916 (Minn. 1994); *In re Civil Commitment of Travis*, 767 N.W.2d 52, 60 (Minn. App. 2009).

The statute places the burden on the patient to provide clear and convincing evidence that an appropriate program exists. Court-appointed experts, Dr. Roger Sweet and Dr. Thomas Alberg, were questioned about alternative available placements. Dr. Sweet stated that he had considered two other programs, Pathfinder and Alpha House, and was aware of another program through the University of Minnesota, but he concluded that appellant needed a secure program and that the outpatient program of Pathfinder did not meet this requirement. Further, Alpha House would not consider appellant because of his history.

Likewise, Dr. Alberg stated that neither Pathways nor Alpha House would accept appellant. Dr. Alberg also testified that the MSOP was working on addressing individual

treatment needs and "on having better criteria for what it takes to advance in the program." Finally, Dr. Alberg stated:

> I think a secure environment is appropriate because [appellant] has already failed sex offender treatment programming. He's indicated that he doesn't necessarily follow through with things. I think he also has shown that he's willing to act out while incarcerated. So I think he needs to be in a secure environment.

While appellant suggests that he could be appropriately monitored through the conditional release program, that affirmation does not rise to the level of clear and convincing evidence that a less restrictive treatment program is available. Appellant bears the burden of establishing this point. Minn. Stat. § 253B.185, subd. 1.

In *Travis*, this court stated that a challenge based on the right to treatment at the MSOP is not ripe for adjudication until the patient has been committed and has been deprived of treatment. 767 N.W.2d at 59. It is too early in appellant's commitment to determine if he is being deprived of his right to treatment.

Commitment as SPP

The district court determined that appellant meets the standard to be committed as an SPP. Appellant contends that the district court erred because the state failed to produce clear and convincing evidence that he engaged in violent, deviant behavior and that he utterly lacks control over his sexual impulses.

A "sexual psychopathic personality" is defined as a person, who because 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" is not responsible for his personal conduct with respect to sexual matters, and who "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 (2008).

The two court-appointed experts, Drs. Sweet and Alberg, concluded that appellant does not exhibit this utter lack of control. The district court may reject expert opinion testimony but should explain with some specificity why it rejects that evidence. *See In re Pirkl*, 531 N.W.2d 902, 908 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). Here, the court recited in a conclusory fashion that appellant meets the standards set forth in various decisions without application of the particular facts of this case to those standards. We must proceed carefully when we invoke a remedy that seeks to curtail a person's liberty interest. *See Blodgett*, 510 N.W.2d at 914 (stating that "state must show a legitimate and compelling interest to justify any deprivation of person's physical freedom"). The distinguishing factor in an SPP commitment is the utter lack of control, which must be something more than sexual promiscuity. *Id.* at 915. Having reviewed the record, we conclude that the state failed to sustain its burden of proving that appellant utterly lacked control of his sexual impulses.

Affirmed in part and reversed in part.