STATE OF MINNESOTA
IN COURT OF APPEALS
A10-18

In the Matter of the Civil Commitment of: Robert Lee Lueck

Filed September 28, 2010
Affirmed
Connolly, Judge

Itasca County District Court
File No. 31-PR-08-3446

Terrence P. Duggins, The Duggins Law Firm, LLC, St. Paul, Minnesota; and

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Lori Swanson, Attorney General, Scott Haldeman, Assistant Attorney General, St. Paul, Minnesota; and

John J. Muhar, Itasca County Attorney, Grand Rapids, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Wright, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges his civil commitment on the bases that (1) the record does not contain clear and convincing evidence that he is highly likely to engage in future acts of harmful sexual conduct; (2) he demonstrated that a less restrictive alternative exists to his commitment; and (3) commitment to the Minnesota Sex Offender Program (MSOP) is

unconstitutional as applied to him because evidence in the record shows that the MSOP cannot meet his "intensive" therapeutic needs. Because we conclude that there is clear and convincing evidence to support the conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct, appellant has not demonstrated that a less restrictive alternative to commitment is available, and appellant's constitutional argument is without merit, we affirm.

FACTS

Appellant Robert Lee Lueck appeals his indeterminate commitment following an initial involuntary commitment as a sexually dangerous person (SDP).

Appellant's History

Appellant is 37 years old and was born in Grand Rapids. Appellant's parents divorced when he was approximately three years old, and his mother remarried when he was about seven. Appellant has no siblings. Appellant has hemophilia and, as a result, has received numerous blood transfusions, from which he eventually contracted hepatitis B and HIV. Appellant currently has a healthy immune system. Appellant has four children of his own and last saw them in 1999.

Appellant's Sex Offenses

In April 1992, when appellant was 19, he sexually assaulted A.L.M., who was 15 years old. While appellant did not know A.L.M.'s age when they first had sex, he continued having sex with A.L.M. after learning how old she was. Appellant knew having sex with A.L.M. was illegal, but continued to do so. In May 1992, when A.L.M.'s mother found out, she notified law enforcement and appellant was arrested and

charged with third-degree criminal sexual conduct. Appellant pleaded guilty and received a stay of adjudication for 2 years, a 60-day jail sentence, and a $755 fine.

In June 1992, after his arrest for conduct involving A.L.M. but before his plea, appellant began dating B.J.J. Appellant was 19 and B.J.J. was 14; appellant knew B.J.J.'s age. Beginning in July and continuing into September 1992, appellant sexually assaulted B.J.J. numerous times and admitted to having sex with B.J.J. the day he reported to jail to serve his sentence for conduct involving A.L.M. Appellant claimed that B.J.J. knew about his HIV and hepatitis-B status, but pressured him into having sex. Appellant was worried about transmitting the diseases to B.J.J., but the two had unprotected sex. B.J.J. became pregnant around August 1992 and, when she told her doctor that appellant was the father, the doctor reported appellant to law enforcement. Appellant was charged with and pleaded guilty to third-degree criminal sexual conduct. Appellant received a stay of execution of his felony sentence, six months in jail, and probation. In 1993, appellant married B.J.J. with the consent of B.J.J.'s mother. Appellant and B.J.J. have three children together. They later divorced.

In 1995, when appellant was 22 years old, he sexually assaulted R.A.J., age 4, by touching her vagina under her clothing. R.A.J. was appellant's sister-in-law. At the time, appellant, B.J.J., and their children resided in a home with B.J.J.'s mother and her children, including R.A.J. The assaults occurred in the living room when other children were present and all involved appellant sticking his hand down R.A.J.'s pants and touching her genitals. The abuse continued for three years. B.J.J.'s mother reported the conduct to law enforcement, and appellant was charged with both first- and second-

degree criminal sexual conduct. The matter proceeded to a jury trial in September 1999, along with charges involving conduct with J.M.L., detailed below.

In 1996 and continuing into 1997, appellant, then ages 23 to 24, sexually abused J.M.L. approximately ten times by touching her vaginal area. J.M.L. is appellant's daughter and was three and four years old when the abuse occurred. Appellant subsequently conceded that he "penetrated" J.M.L. within the statutory definition. The abuse occurred when J.M.L. visited appellant, who was living with two other individuals at the time. Appellant was charged with both first- and second-degree criminal sexual conduct.

Appellant was tried for the conduct involving both R.A.J. and J.M.L. at the same time. At the trial, appellant denied that he had inappropriately touched either child. Appellant was convicted of one count of second-degree criminal sexual conduct as to R.A.J. and both first- and second-degree criminal sexual conduct with respect to J.M.L. Appellant was sentenced to prison for 51 and 122 months for his offenses against R.A.J. and J.M.L., respectively. This court affirmed appellant's convictions. *State v. Lueck*, No. C8-99-2169, 2000 WL 1486563, at *1-2 (Minn. App. Oct. 10, 2000), *review denied* (Minn. Dec. 12, 2000). Appellant sought postconviction relief and the district court denied his petition, which was also affirmed by this court. *Lueck v. State*, No. A05-688, 3 (Minn. App. Feb. 7, 2006) (order op.), *review denied* (Minn. Apr. 26, 2006).

Appellant's Confinement & Opportunities for Treatment

Appellant has been in and out of correctional facilities since 1992 as a result of his offenses and probation violations. In 1998, appellant was assigned a risk level of one and

was placed on supervised release, which included, among other things, complying with outpatient sex offender programming and/or support programming as directed by his supervising agent. In 1999, a psychologist recommended that appellant receive sex-offender treatment. In 2002, corrections staff determined that appellant did not meet the criteria to enter the MSOP, but noted that this did not "preclude the need for general sex offender treatment." Because of the limited number of openings in the general treatment program at the Lino Lakes facility, appellant was transferred to the Moose Lake facility.

In 2003 and 2004 annual reports, appellant's program review team continued to direct appellant to comply with sex-offender programming, noting that appellant was willing to comply with treatment. In 2005, appellant was interviewed for possible admission into the treatment program at Lino Lakes. Although indicating that he was willing to participate, appellant continued to deny his offenses against R.A.J. and J.M.L. and was not admitted into the program. In 2006, corrections staff charged appellant with mandated treatment failure/refusal. Appellant admitted the violation and his incarceration was extended by 30 days. In 2008, appellant was assigned a risk level of two.

Initial Commitment Proceedings

In 2007, the SPP/SDP Review Committee forwarded appellant's case to a psychologist. Based on the psychologist's findings, the committee forwarded appellant's case to the state for review. The state petitioned for appellant's commitment as an SDP and a sexual psychopathic personality (SPP) in 2008, but later dismissed its SPP request.

As to meeting the criteria for commitment as an SDP, appellant conceded that the only issue in dispute was his likelihood of reoffending in the future.

Appellant was evaluated by three psychologists: the court-appointed examiner, Dr. Chad Nelson, Ph.D., L.P.; the state's examiner, Dr. James Alsdurf, Ph.D., L.P.; and appellant's examiner, Dr. Paul Reitman. Appellant did not call Dr. Reitman to testify and, therefore, information about Dr. Reitman and information developed by Dr. Reitman was not admitted at trial. Dr. Alsdurf did not interview appellant, but relied upon the transcript of Dr. Reitman's interview with appellant and Dr. Reitman's report in developing his own opinions. Among other evidence, the district court heard testimony from Drs. Nelson and Alsdurf and received both of their reports.

Appellant testified on his own behalf at the commitment hearing. Appellant testified that he had not received any sex-offender treatment; did not know what his triggers might be; did not know what his abuse cycle was; and did not have a relapse-prevention plan. Appellant did state that he "ha[d] every intention of entering a treatment program" and that he "need[ed] to learn some things so that [he] can develop these skills not to offend again." Appellant testified that he had the support of friends and family.

Both Dr. Nelson and Dr. Alsdurf reported that appellant met the statutory criteria for commitment as an SDP. Both psychologists appeared to agree that appellant's demographic characteristics, considering primarily age and gender, did not increase his risk of reoffense.[1] The psychologists also agreed that, while appellant did not have a

[1] While both psychologists opined that males are generally more likely to reoffend, Dr. Nelson said he did not place much weight on gender because roughly 50% of the

history of violence, his conduct had been emotionally harmful to the individuals involved.

The psychologists also testified about a number of actuarial tools used to generate base rate statistics regarding appellant's likelihood to reoffend. Using the Static-99 measure, Dr. Nelson reported that appellant would have a 12% risk of reoffending over 5 years, 14% over 10 years, and 19% over 15 years. Dr. Alsdurf opined that it was significant that appellant is "in the group of individuals who would be considered child molesters, and the base rates on that are probably somewhere in the 50 percentile." Both psychologists concluded that appellant's Static-99 score placed him at a moderate to low risk to reoffend. Both psychologists also applied the Hare Psychopathy Checklist-Revised (PCL-R II). While the psychologists reached slightly different scores, they both opined that appellant did not meet the criteria for full psychopathy. The psychologists also evaluated appellant using the Sexual Violence Risk-20 (SVR-20) assessment. The SVR-20 is more of an assessment guide than an actuarial tool. Dr. Nelson placed appellant in the moderate-risk category, while Dr. Alsdurf placed appellant in the moderately high category.[2]

As to appellant's ability to cope with stresses in his environment, Dr. Nelson opined that being a risk-level-two offender would place "a lot of stress naturally on an individual with everything that they have to follow and people they have to report to."

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population is male, and, when asked if appellant's demographics increased his chance of reoffense, Dr. Alsdurf responded, "I would say it doesn't lessen it."

[2] Notably, Dr. Alsdurf testified that he improperly included a history of physical harm and intimidation in the SVR-20 assessment. The district court took notice of the correction.

Dr. Nelson also stated that, based on appellant's own testimony, stress had played a significant role in his behavior, and that this was a "fairly significant factor." Dr. Alsdurf opined that the stress on appellant "would be quite substantial." Dr. Alsdurf also opined that appellant appears to be somewhat motivated to manage his stress based on "how fair and how honest" he was with the evaluator, and that he "was quite impressed with that actually," noting it is "an unusual presentation."

As to the similarity of present and future contexts to those in which appellant has offended in the past, Dr. Nelson testified that appellant "is still minimizing his behavior to some extent, he doesn't have insight into his cycle of offending, [and has] no relapse prevention plan." Dr. Nelson opined that appellant "[l]ack[ed] insight into his cycle of offending primarily because he hasn't been in any kind of treatment." Dr. Alsdurf testified that appellant would be returning to a similar context in which his prior offenses occurred and that this "keeps [appellant's] risk fairly strong."

Regarding appellant's treatment record, Drs. Nelson and Alsdurf observed that appellant has not participated in or completed any type of sex-offender treatment. Dr. Nelson opined that appellant needs "formal intensive sex offender treatment," but that he did not believe the treatment needed to take place in a secure setting. Dr. Nelson also stated that he believed appellant could receive adequate treatment at the MSOP. Dr. Nelson believed that the least restrictive alternative to confinement would be appellant's release with sex-offender treatment and the added safeguards of intensive supervised release. Dr. Alsdurf testified that appellant seems to now understand that he needs treatment. Dr. Alsdurf also testified that he believed appellant was a danger to the

public and that "he is highly likely to reoffend until he does what he needs to do which is to be in extensive sex offender treatment." Dr. Alsdurf stated that appellant needs "[r]esidential inpatient treatment that allows for a range of assessment to really verify that he's understanding, integrating the treatment principles that he needs to integrate." Dr. Alsdurf believed that the MSOP was the only program he was aware of that could meet appellant's treatment needs.

The district court concluded that there was clear and convincing evidence to support appellant's commitment as an SDP. The district court also concluded that the state has "prove[n] by clear and convincing evidence that [appellant] is in need of treatment and that the [MSOP] is capable of meeting [appellant's] treatment needs and the requirements of public safety." The district court also determined that appellant "has not presented any evidence that there is a less restrictive treatment program available that is consistent with his needs and the requirements of public safety and for which [appellant] would be eligible." The district court ordered appellant's civil commitment as an SDP and the MSOP's filing of a treatment report with the district court within 60 days.

Sixty-Day Review & Indeterminate Commitment

The MSOP subsequently filed its 60-day evaluation with the district court. As to appellant's SDP status, the report indicated that appellant's condition has not changed since his initial commitment. The report also indicated that appellant is in need of further care and treatment and that the MSOP appears to be the least restrictive setting available for treatment. Appellant's prognosis was "considered extremely guarded due to his lack of prior sex offender treatment and his lack of insight into his sexual offending." The

report also indicated that there has been no significant change that would suggest that appellant's risk to others has lowered since the initial commitment.

The district court conducted a review hearing. The district court found that the MSOP report supported appellant's indeterminate commitment as (1) appellant continued to meet the statutory requirements for commitment as an SDP; (2) there was no significant change in appellant's risk to others; and (3) the MSOP "is the least restrictive setting in which further care and treatment can be administered." The district court also found that appellant was in need of further care and treatment and ordered that appellant be indeterminately committed to the MSOP as an SDP. This appeal follows.

D E C I S I O N

I. Clear and convincing evidence supports the district court's conclusion that appellant was "highly likely" to reoffend.

The state must prove the need for civil commitment by clear and convincing evidence. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). This court "review[s] the district court's factual findings under a clear-error standard." *Id.* However, the "district court's conclusions regarding whether the record supports, by clear and convincing evidence, the requirements of the SDP statute are questions of law that we review de novo." *In re Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). Notably, "[w]here the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

An individual is considered to be an SDP if 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) (2008). Harmful sexual conduct is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." *Id.*, subd. 7a(a) (2008). Appellant concedes that he satisfies the first two elements of the SDP statute and only argues that the evidence was insufficient to conclude that he is likely to engage in future acts of harmful sexual conduct.

The Minnesota Supreme Court has interpreted Minn. Stat. § 253B.02, subd. 18c(a)(3) as requiring the probability of future harmful sexual conduct to be "highly likely" in order to commit a person as an SDP. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*). When considering the probability of future harmful sexual conduct, the district court analyzes six factors, known as the *Linehan* factors:

> (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.

Stone, 711 N.W.2d at 840 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)). Drs. Nelson and Alsdurf both included an analysis of the *Linehan* factors in

their respective reports and testified to them in the initial commitment proceedings. We now consider each factor in turn.

1. Demographic Characteristics

The district court concluded that appellant's demographic factors do not reduce his likelihood of reoffending. Drs. Nelson and Alsdurf both testified that males are more likely to reoffend. However, Dr. Nelson stated that he did not place much weight on gender and did not believe appellant's age was a risk factor. Dr. Alsdurf's testimony suggests this factor was neutral for appellant when he testified that appellant's demographics did not decrease his chance of reoffending. Overall, this factor is neutral regarding appellant's probability of future harmful sexual conduct.

2. History of Violent Behavior

On this factor, the district court concluded that appellant "does not have a history of physically violent behavior, but both doctors agree that [appellant's] conduct has a high likelihood of causing emotional harm to his victims." As the state correctly points out, Dr. Nelson did consider emotional harm to be a risk factor for appellant. But the state also asserts that "Dr. Alsdurf testified that sexual penetration of three to five-year-old children is inherently violent." This is not correct. When asked by the state whether he "consider[ed] penetration offenses against four-year-old children inherently violent," Dr. Alsdurf responded that he "would consider sexual violence violent." Appellant is correct that Dr. Alsdurf did not believe this was a significant risk factor for appellant.

Harmful sexual conduct can be conduct that results in only emotional harm and both psychologists agreed that appellant's conduct has been emotionally harmful to the

individuals involved. *See* Minn. Stat. § 253B.02, subd. 7a(a). This factor is supported by clear and convincing evidence in the record and supports the district court's conclusion that appellant is highly likely to commit future acts of harmful sexual conduct.

3. Base-Rate Statistics

Appellant asserts that "[t]his subfactor appears to show [that he is] either a 'moderate-low' or 'moderate-high' likelihood to reoffend, depending upon which statistical study was employed or which witness interpreted them." Appellant asserts that "[n]o expert placed [him] in the highly-likely-to-reoffend range using the various base rate statistics." Appellant is correct in that his base-rate statistics generally showed a moderate risk of reoffense. Both Dr. Nelson and Dr. Alsdurf concluded that appellant's Static-99 score reflected a moderate risk of reoffense. Although information in the record shows that the psychologists reached different conclusions as to appellant's risk for sexual violence under the SVR-20, their findings overall reflect that appellant is a moderate risk for sexual violence. The district court was cognizant of the nature of the psychologists' findings, noting that both the Static-99 and SVR-20 tests showed appellant was moderately likely to reoffend. Therefore, this factor weighs against commitment as, overall, the base-rate statistics suggest appellant was moderately likely, but not highly likely, to reoffend.

4. Sources of Stress in the Offender's Environment

Here, the district court concluded that appellant was subject to sources of stress "which predispose him to cope with stress in a sexually assaultive manner. [Appellant] copes with stress in a negative manner, as demonstrated by his past behavior." The

district court observed that "[i]f released, [appellant] will face additional stressors, including pressure from the community in which he will reside as a sex offender, stress due to frustration with interpersonal relationships, loneliness, and misreading relationships." Appellant himself testified that he was under a lot of stress from marital problems and that he "believe[d] that [he] was looking for a way to cope" when the conduct with R.A.J. occurred. Dr. Nelson opined that this was a "fairly significant factor," based on appellant's own testimony. Both psychologists agreed that appellant would be under a significant amount of stress if released. Accordingly, this factor weighs in favor of appellant's confinement and the district court's conclusion that appellant is highly likely to commit future acts of harmful sexual conduct as he does not know what his triggers might be and does not have a relapse-prevention plan.

5. Similarity of the Present or Future Context to Contexts in Which the Offender Used Violence in the Past

On this factor, the district court concluded that appellant's release under the current circumstances would place him in a similar situation in which he has offended in the past. Similar to the previous factor, the district court observed that appellant "has not developed a relapse plan that would provide sufficient controls on his conduct to prevent additional sexual assaultive incidents." Dr. Nelson focused on appellant's lack of insight into his behavior, attributing it to the fact that appellant has not participated in a treatment program. Dr. Nelson also stated that appellant still minimized his behavior "to some extent" and did not have a relapse-prevention plan. Dr. Alsdurf observed that appellant would be returning to a similar context in which his prior offenses occurred, the only

difference being restrictions on appellant's access to children, and opined that this return to similar circumstances keeps appellant's risk "fairly strong." Thus, this factor weighs in favor of appellant's confinement and the district court's conclusion that appellant is highly likely to commit future acts of harmful sexual conduct.

6. Offender's Record of Participation in Sex-Therapy Programs

Appellant himself concedes that this factor is not in his favor, noting that "[b]oth doctors considered the absence of sex offender treatment to be noteworthy and unfavorable." Indeed, the district court concluded that appellant's lack of treatment "supports an increased likelihood to reoffend." Dr. Nelson testified that appellant "has the potential to be dangerous and that without supervision and treatment that he's at a greater risk." Similarly, Dr. Alsdurf testified that appellant "is highly likely to reoffend" until he participates in extensive treatment. This factor is the strongest in favor of committing appellant as an SDP and in support of the district court's conclusion that appellant is highly likely to engage in future acts of harmful sexual conduct.

The district court concluded that clear and convincing evidence showed appellant was highly likely to commit future acts of harmful sexual conduct under Minn. Stat. § 253B.02, subd. 18c(a)(3). We agree. Both psychologists ultimately concluded that appellant met the statutory definition of an SDP. Although some evidence in the record suggests that appellant's risk of reoffense was moderate, both Dr. Nelson and Dr. Alsdurf highlighted appellant's lack of treatment and opined that, without appropriate treatment, appellant is highly likely to reoffend. After receiving appellant's 60-day review report from the MSOP, the district court concluded that appellant's condition had not changed

since his initial commitment, and that appellant continues to meet the statutory criteria for commitment as an SDP. And appellant does not appear to challenge these findings, outside his objection to the initial commitment.

While a line-by-line analysis of the *Linehan* factors shows that two factors are neutral or weigh against appellant's commitment and four factors more strongly support the determination that appellant is highly likely to engage in future harmful sexual conduct, the task of sorting out expert opinions and balancing the factors is left to the district court. *See In re Pirkl*, 531 N.W.2d 902, 910 (Minn. App. 1995) (stating it was the job of the district court to weigh the experts' varying opinions and the *Linehan* factors as to whether the evidence was sufficient to support commitment as a psychopathic personality), *review denied* (Minn. Aug. 30, 1995). The district court specifically credited the psychologists' findings in this case, and the psychologists agreed that appellant's lack of treatment places him at a greater risk of reoffense.

II. Appellant has not met his burden to demonstrate that a less restrictive alternative to his commitment exists.

Appellant next argues that he sufficiently demonstrated that a less restrictive alternative exists to his commitment to the MSOP. Appellant asserts that the Upper Mississippi Mental Health Center (UMMHC) would provide sufficient outpatient treatment.

When a person has been civilly committed as an SDP, "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 (2008). Minnesota law "does not require that commitments be made to the least-restrictive treatment program." *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). "[P]atients 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." *Id.* The district court concluded that appellant "has not presented any evidence that there is a less restrictive treatment program available that is consistent with his needs and the requirements of public safety and for which [appellant] would be eligible," and that "[n]o less restrictive treatment program exists that can meet [appellant's] needs and provide sufficient protection for society." We agree.

Three treatment programs were discussed at appellant's initial commitment hearing: Alpha House, UMMHC, and the MSOP.[3] A supervisor with the intensive-supervised-release unit, Dr. Nelson, and Dr. Alsdurf all testified that Alpha House would likely not admit appellant because it was a Hennepin County program, which was not appellant's county of commitment, and did not admit individuals under stays of commitment or full commitments. Although there was a plan to enroll appellant at UMMHC if he was placed on intensive supervised release, Dr. Nelson testified that he knew UMMHC treated sex offenders, but he did not know much about the program. Dr. Alsdurf testified that he did not consider UMMHC to be intensive treatment and opined:

[3] Dr. Nelson also briefly mentioned a fourth, Project Pathfinders, but he testified that he did not know much about the program.

> I would consider it structured treatment. Because as I see intensive treatment has a wider range to it. It has frankly—I don't think the program itself would consider itself to be intensive treatment.
>
> [Appellant] is in a specific classification of high risk sex offenders by way of history, by way of diagnosis, by way of behavior. Those folks are resistant to treatment, they are resistant to change, and they are high risk. I would doubt that there is anybody at [UMMHC] that would fit into this classification.

In contrast, both Dr. Nelson and Dr. Alsdurf believed appellant needed intensive treatment and that the MSOP could adequately meet his treatment needs.

In arguing that UMMHC would provide a suitable, less-restrictive treatment option, appellant mischaracterizes Dr. Alsdurf's testimony regarding the MSOP and appellant's treatment needs. While appellant argues that the MSOP "does not meet with Dr. Alsdurf's own view as to what intensive treatment should be," and that "Dr. Alsdurf did not level any such criticism at the [UMMHC program]," this argument is contradicted by the record. Dr. Alsdurf opined that appellant needs "[r]esidential inpatient treatment that allows for a range of assessment to really verify that he's understanding, integrating the treatment principles that he needs to integrate," and that he is "not aware of any outpatient program that has the facility, the staff, the methods for accomplishing . . . what he needs to accomplish to keep this community safe." Furthermore, Dr. Alsdurf testified that he did not believe treatment at UMMHC was sufficient. Although acknowledging that the MSOP is not without its faults and that no one has left the MSOP program, Dr. Alsdurf believed that the MSOP was the only place that appellant could receive the

treatment he needed. It does not appear that appellant presented any additional evidence regarding possible treatment options.

While other facilities were discussed with the corrections department and presented to the district court at trial, both psychologists testified that appellant could receive adequate treatment through the MSOP. We conclude that appellant has not met his burden to show by clear and convincing evidence that a less restrictive treatment program is available. *See* Minn. Stat. § 253B.185, subd. 1 (placing burden of establishing the existence of a less restrictive treatment program on the patient).

III. Appellant's commitment to MSOP is constitutional on an as-applied basis.

Finally, appellant constitutionally challenges his commitment, "asserting that the absence of an appropriate treatment plan at MSOP converts his commitment to a secure facility from a therapeutic one to a public safety one more akin to criminal punishment." Returning to Dr. Alsdurf's testimony, appellant again argues that the treatment available at the MSOP does not meet his intense therapeutic needs.

First, appellant is not claiming that he is not receiving treatment or that the treatment he has received is inadequate. *See, e.g., In re Wicks*, 364 N.W.2d 844, 847 (Minn. App. 1985) ("Generally, the right to treatment issue is not reviewed on appeal from a commitment order."), *review denied* (Minn. May 31, 1985); *In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) ("The treatment of patients is properly raised before a hospital review board and not before the committing court."); *see also In re Commitment of Travis*, 767 N.W.2d 52, 58 (Minn. App. 2009) (listing cases where right-to-treatment argument was deemed premature). Second, both Dr. Nelson and Dr. Alsdurf

testified that the MSOP would be able to provide adequate treatment to appellant. Finally, appellant's constitutional argument relies on the same mischaracterization of Dr. Alsdurf's testimony previously discussed. Dr. Alsdurf specifically testified that he was unaware of any outpatient facility that was suitable for appellant and that the MSOP was the only Minnesota program he was aware of that could meet appellant's treatment needs. We therefore conclude that appellant's constitutional argument is entirely without merit.

Affirmed.