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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2049**

In the Matter of the Civil Commitment of:
David James Jannetta.

**Filed March 11, 2008
Affirmed
Crippen, Judge***

Hennepin County District Court
File No. 27-MH-PR-06-1222

Michael J. Biglow, 895 Tri Tech Center, 331 Second Avenue South, Minneapolis, MN 55401 (for appellant David James Jannetta)

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Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent Minnesota Department of Corrections)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Crippen, Judge.

UNPUBLISHED OPINION

CRIPPEN, Judge

Appellant challenges his commitment as a sexually dangerous person, arguing that the evidence is insufficient to support the commitment, that the district court erred in

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

committing him to the Minnesota Sex Offender Program, that the Minnesota Sexually Dangerous Person Act conflicts with his constitutional right to due process, and that he should have been given an opportunity to challenge the validity of the Minnesota Sex Offender Program at his commitment review hearing. We affirm.

FACTS

Beginning in May 1980, appellant David James Jannetta sexually abused 10 to 17 young boys over a two-year time period. Appellant was found guilty of two counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. He was sentenced to two consecutive 43-month sentences and was given another 20-month sentence, stayed; he was also placed on ten years' probation to follow the prison term.

Appellant was incarcerated, and a prison psychologist recommended treatment. He objected to participating in therapy, but was told that he had to seek treatment or he would have a structured placement upon release. He was transferred to a facility for treatment, but then refused treatment. In December 1987, appellant was released on parole to a halfway house in Minneapolis, where he again was to receive treatment; appellant refused. His parole was revoked, and he returned to prison until his sentence expired in the spring of 1990.

In the spring of 1991, appellant sexually abused two teenage boys. In 1992, he was charged and pleaded guilty to one count of third-degree criminal sexual conduct and one count of fifth-degree criminal sexual conduct. The court sentenced appellant to 108 months in prison, stayed, and placed him on probation for 15 years, with a one-year jail

sentence, on the requirement that he participate in and complete residential sex offender treatment.

In March 2000, A.P., an acquaintance of appellant's, alerted Minneapolis police to some of appellant's actions, including his admission to A.P. that he had recently had oral sex with a minor boy. Minneapolis police searched appellant's house and seized more than 2,000 pornographic images, more than 90% of which was child pornography. On May 12, 2000, appellant pleaded guilty to one count of possession of child pornography; the sentence for which revoked the probation on his 1992 conviction, executed the 108-month sentence which had been stayed in 1992, and included an additional 36 months.

Appellant began serving his sentence in May 2000, and in March 2005, the sexually-dangerous-person review team referred his case to the county attorney. As his supervised release date of March 16, 2006, drew near, appellant repeatedly asked officials to extend the date until the end of his sentence, March 16, 2009, to avoid any sort of supervision once released. Officials explained that his release was not discretionary. But as a result of prison infractions, his release date was changed to March 8, 2007.

In December 2006, the state petitioned for civil commitment of appellant as a sexually dangerous person and a sexually psychopathic personality. The court appointed psychologist Nadia Donchenko, Psy.D., to examine appellant. At appellant's request, Thomas Alberg, Ph.D., was appointed as the second examiner. At the commitment hearing, Dr. Donchenko testified that she initially was not sure if appellant met the highly-likely-to-reoffend criteria, but after reviewing the evidence, was certain he did.

Dr. Donchenko and Dr. Alberg both opined that appellant satisfied the criteria for commitment as a sexually dangerous person, but just missed meeting the criteria for commitment as a sexual psychopathic personality. The district court found their opinions credible.

In an order dated June 20, 2007, the district court issued its findings of fact, conclusions of law, and order for commitment, committing appellant to the Minnesota Sex Offender Program. Following the 60-day evaluation, the district court ordered appellant's indeterminate commitment.

D E C I S I O N

1.

Appellant first argues that there is insufficient evidence to support a finding that he is a sexually dangerous person, requiring indefinite civil confinement. A district court may civilly commit a person under the Minnesota Commitment and Treatment Act if the state proves the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006). Findings of fact by the district court will be upheld by the appellate court if they are not clearly erroneous. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). “Where the findings of fact rest almost entirely on expert opinion testimony, the [district court’s] evaluation of credibility is of particular significance.” *Joelson*, 385 N.W.2d at 811. This court will not reweigh the evidence. *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*), judgment vacated and remanded for reconsideration, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999). But whether the evidence was sufficient to demonstrate

the statutory requirements 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*); *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

A sexually dangerous person is a person 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) as a result, is likely to engage in acts of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a) (2006). The state is not required to prove an inability to control sexual impulses, but must show that the person has an existing disorder or dysfunction that results in inadequate impulse control, making it highly likely that the person will reoffend. *Id.*, subd. 18c(b) (2006) (stating that inability to control impulses is not required); *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*) (requiring high likelihood of recidivism).

Appellant does not dispute the district court’s finding that he engaged in a course of harmful sexual conduct, the first factor under Minn. Stat. § 253B.02, subd.18c(a). But he disputes that he has shown a sexual, personality, or other mental disorder or dysfunction, and he disputes the district court’s finding that he is likely to engage in future acts of harmful sexual conduct.

A. Sexual, Personality, or Other Mental Disorder or Dysfunction

A person committed as sexually dangerous must “ha[ve] manifested a sexual, personality, or other mental disorder or dysfunction.” Minn. Stat. § 253B.02, subd. 18c(a)(2). Appellant argues that the district court erred when it found clear and convincing evidence of his mental disorder, but both Dr. Donchenko and Dr. Alberg

found appellant to have a mental disorder that satisfies the requirement of *Linehan IV* that his mental disorder “does not allow [him] to adequately control [his] sexual impulses.” 594 N.W.2d at 876. Dr. Donchenko found that appellant was suffering from various mental disorders: pedophilia, which is manifested in his course of sexual attraction to pubescent and prepubescent males; paraphilia, which is manifested in his actual sexual proclivities with children; and a personality disorder, which, she determined, was apparent in appellant’s isolation and inability to form consensual relationships with adults. Dr. Donchenko also testified that each disorder was a recognized mental disorder. Similarly, Dr. Alberg diagnosed appellant as affected by pedophilia, narcissistic personality disorder, and antisocial personality disorder.

The district court found the doctors’ testimony regarding appellant’s mental disorders credible; it adopted the examiners’ conclusions and found the evidence was clear and convincing that appellant suffered from a sexual or personality disorder, which renders him unable to control his sexual impulses. The conclusion of the district court is supported by testimony and the record. *See Joelson*, 385 N.W.2d at 811 (“Where the findings of fact rest almost entirely on expert opinion testimony, the [district court’s] evaluation of credibility is of particular significance.”).

B. Likelihood of Engaging in Future Acts of Harmful Sexual Conduct

Appellant disputes the district court’s finding that he is likely to engage in future harmful sexual conduct. The third factor in assessing a candidate for classification as a sexually dangerous person is whether, as a result of the offender’s course of misconduct and mental disorders or dysfunctions, the offender is “likely to engage in acts of harmful

sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a)(3). When reviewing this determination, an appellate court must find that it is “highly likely” that a person will engage in further harmful sexual conduct. *Linehan IV*, 594 N.W.2d at 876. A district court should consider six factors when determining whether an offender is highly likely to reoffend, including: (1) the offender’s demographic traits; (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. *Linehan I*, 518 N.W.2d at 614.

Appellant argues that the record is not clear and convincing, failing to show it is “highly likely that he will engage in future harmful sexual conduct,” but the district court had ample evidence to support its finding that appellant was likely to offend again, including testimony by both Dr. Donchenko and Dr. Alberg, who, based on their separate evaluations of the *Linehan I* factors and various actuarial tools, found that appellant was highly likely to engage in acts of harmful sexual conduct in the future. In particular, both doctors noted his disturbing trend of returning to his offense cycle or “behavior chain” even after considerable time in prison and at least some sex-offender treatment. The district court accordingly found that the fact that appellant “was apparently on his way to sexually reoffending in 2000, after completing sex offender treatment and while on probation, demonstrates that treatment and supervision in the community are not sufficient to satisfy the requirements of public safety.” In light of the record, the district

court's finding that appellant was highly likely to engage in further harmful sexual conduct is justified by the evidence.

2.

Appellant challenges his commitment to the Minnesota Sex Offender Program, arguing that an intensive supervised release would be appropriate for him. If a district court finds an offender is a sexually dangerous person, the court must commit the person to a secure treatment facility unless the offender shows by clear and convincing evidence that a less-restrictive treatment program is available that meets the offender's treatment needs and does not threaten public safety. Minn. Stat. § 253B.185, subd. 1 (2006). The burden of showing a less-restrictive alternative is upon the person to be committed. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

Appellant offered no evidence of another less-restrictive treatment facility that was available to accommodate him and still meet the public safety requirements. Dr. Donchenko testified that the Minnesota Sex Offender Program would be appropriate, and while another program may also be appropriate, she did not know of any that would accept appellant. And Dr. Alberg echoed that conclusion when he testified that he would support a stay of commitment, if it were available, but that if appellant were to be treated in the community, he would need a group home with a structured residential program that monitored appellant's whereabouts. He knew of no such programs that had agreed to accept appellant.

The district court's finding that appellant must be committed to the sex-offender program was appropriate, considering appellant's failure to demonstrate the existence of another suitable facility that would accept him.

3.

Appellant argues that commitment under the sexually-dangerous-person law, as interpreted in *Linehan IV*, violates his right to substantive due process because the law is contrary to the United States Supreme Court's decisions in *Kansas v. Crane*, 534 U.S. 407, 122 S. Ct. 867 (2002) and *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), as well as to *State ex rel. Pearson v. Probate Court*, 205 Minn. 545, 287 N.W. 297 (1939), *aff'd*, 309 U.S. 270 (1940). He asserts that the *Linehan IV* standard for commitment law "dilutes the traditional *Hendricks-Pearson* inability to control test."

"Evaluating a statute's constitutionality is a question of law." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). Accordingly, this court's review is de novo. *Id.* "[W]e proceed on the presumption that Minnesota statutes are constitutional." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000).

"[S]ubstantive due process protects individuals from 'certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them.'" *Linehan IV*, 594 N.W.2d at 872 (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990)) (other quotation omitted). In the case of civil commitment, Minnesota's sexually-dangerous-person and psychopathic-personality statutes are a "product of a delicate balancing between the legitimate public concern over the danger

posed by predatory sex offenders and the fundamental right of those persons committed to live their lives free of physical restraint by the state.” *Hince v. O’Keefe*, 632 N.W.2d 577, 580 (Minn. 2001) (quotation omitted). “In determining whether a civil commitment law violates substantive due process, a court will subject the law to strict scrutiny, placing the burden on the state to show that the law is narrowly tailored to serve a compelling state interest.” *Linehan IV*, 594 N.W.2d at 872 (citing *Linehan III*, 557 N.W.2d at 181).

Appellant argues that the sexually-dangerous-person statute is unconstitutional in light of the United States Supreme Court’s decisions in *Hendricks* and *Crane*. *Hendricks* did not require a showing of total or complete lack of control, instead requiring that there must be an abnormality or disorder that makes it “difficult, if not impossible, for the person to control his dangerous behavior.” 521 U.S. at 358, 117 S. Ct. at 2080. *Crane* clarified the *Hendricks* degree of inability to control that a state must show to support a civil commitment, and held “that there must be proof of serious difficulty in controlling behavior.” 543 U.S. at 413, 122 S. Ct. at 870. We have previously held that the Minnesota sexually-dangerous-person statute is well within the constitutional boundaries set forth in *Crane*. See *In re Martinelli*, 649 N.W.2d 886, 890 (Minn. App. 2002) (holding that a commitment ordered upon proof of “lack of control” is appropriate because it comports with the “serious difficulty” standard announced in *Crane*), *review denied* (Minn. Oct. 29, 2002); *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 266-67 (Minn. App. 2002) (holding a commitment predicated on proof of inability to adequately control his sexual impulses comported with *Crane*), *review denied* (Minn. Sept. 17, 2002). In light of that caselaw, appellant’s argument fails.

Appellant also argues that the sexually-dangerous-person law is at odds with the Minnesota precedent set forth in *Pearson*, but his argument again fails. In *Pearson*, our supreme court interpreted the Psychopathic Personality Commitment Act to require proof of an utter inability to control sexual impulses. *Pearson*, 205 Minn. at 555, 287 N.W.2d at 302. But in *Linehan IV*, the court noted that “[n]owhere in the SDP Act did the legislature set forth the ‘utter inability test.’ However, the legislature stated that ‘it is not necessary to prove that the person has an inability to control [his or her] sexual impulses.’” 594 N.W.2d at 875 (quoting Minn. Stat. § 253B.02, subd. 18c(b) (alteration in original)). The court held that “the provision in subdivision 18c(b) . . . should be read very narrowly, as in the *Linehan III* decision, to mean only that the state does not need to prove that a person meets the *Pearson* utter inability standard, thus differentiating the SDP Act from the PP Act or its successor statute, the SPP Act.” *Id.*

Appellant briefly suggests that the sexually-dangerous-person law in Minnesota, construed in *Linehan IV*, also violates *Crane* because it allows the state to civilly commit someone who would just be a “typical criminal recidivist.” But the Eighth Circuit Court of Appeals disposed of that contention in *Linehan v. Milczark*, holding “[t]he SDP Act standard, as narrowed by the Minnesota Supreme Court in *Linehan IV* therefore adequately distinguishes between the typical recidivist and the dangerous sexual offender and complies with substantive due process requirements.” 315 F.3d 920, 927 (8th Cir. 2003).

4.

Finally, appellant asserts that the district court improperly barred him from presenting evidence showing there is no effective treatment available to him at the Minnesota Sex Offender Program, and as a result “there was no hope for discharge making his confinement not only punitive and non-therapeutic but also unconstitutional.” He suggests that he has not received valuable treatment at the program thus far and wanted to offer ten exhibits at the review hearing. The district court allowed only the parts of the exhibits that addressed other issues.

Difficulties in treatment do not render a civil commitment unconstitutional. *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994). “So long as civil commitment is programmed to provide treatment and periodic review, due process is provided.” *Id.* Appellant’s contention fails in light of this caselaw. Furthermore, a committed person may not assert that his right to treatment was denied until he is actually deprived of treatment. *In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984), *review denied* (Minn. Sept. 12, 1984). Therefore, to the extent that appellant claims that he was denied effective treatment at the Minnesota Sex Offender Program, his argument is premature and need not be addressed. *See 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).

Affirmed.