STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1564

In the Matter of the Civil Commitment of:

Bradley Wayne Foster.

Filed January 15, 2008
Affirmed
Dietzen, Judge

St. Louis County District Court
File No. 69HI-PR-06-37

Todd E. Deal, 202 Fourth Street South, P.O. Box 1253, Virginia, MN 55792 (for appellant Bradley Wayne Foster)

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

Melanie S. Ford, St. Louis County Attorney, Patricia I. Shaffer, Assistant County Attorney, 403 Government Services Center, 320 West Second Street, Duluth, MN 55802 (for respondent St. Louis County)

Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

DIETZEN, Judge

Appellant challenges his commitment as a sexually-dangerous person and a sexual-psychopathic personality, arguing that the findings are clearly erroneous and that Minn. Stat. § 253B.18, subd. 2 (2006), violates his constitutional right to due process of law. We affirm.

FACTS

Appellant Bradley Wayne Foster was born in December 1970 and was 36 years old at the time of the commitment hearing. The petition for commitment alleges that appellant had a chaotic family history, including being severely abused sexually throughout his childhood.

A. Prior History

In February 1990, appellant, who was 19 years of age, was convicted of one count of third-degree criminal sexual conduct for sexually assaulting J.J.B., a 13-year-old female stranger. Appellant observed J.J.B. walking on the street and invited her into his house. When she returned later, appellant provided her with alcohol and then forcibly raped her.

In January 1991, appellant, who was 20 years of age, was convicted of fourth-degree criminal sexual conduct for sexually assaulting J.G., a 19-year-old female. While J.G. was at his apartment, appellant grabbed her and then forcibly removed her clothes and put his fingers inside her vagina. She made him stop and had him take her home.

In March 1991, appellant was convicted of second-degree criminal sexual conduct for sexually assaulting M.M., an 11-year-old female. While M.M. was at appellant's residence, he provided her with alcohol, and then touched her breasts and vagina over her clothing and told her he wanted to have sex with her. M.M. slapped appellant and locked herself in the bathroom. Later that month, appellant violated his probation by furnishing alcohol to a minor and received an executed sentence of 36 months.

In June 1993, appellant, who was 22 years of age, was convicted of one count of second-degree criminal sexual conduct for sexually assaulting T.M.S. and D.J.D. and received an executed sentence of 54 months. While incarcerated, appellant participated in the Sex Offender Risk Reduction Program at MCF-St. Cloud for about one year, and then entered the Moose Lake Sex Offender Treatment Program.

In October 1996, appellant was released from the Department of Corrections and was admitted to a work-release program. Over the next several years, appellant participated in various sex-offender treatment programs with some measure of success, particularly regarding his use of alcohol.

In 2001, appellant was convicted of felony theft and received an executed sentence of 23 months. Appellant was released in December 2002, but his release was restructured two times for having contact with minor females at his mother's house. His parole was later revoked for possession of sexually explicit materials, failure to comply with house arrest, and use or possession of intoxicants.

Appellant was released in May 2005, but his parole was revoked four months later for having contact with two minor females. Appellant was incarcerated until the time of the filing of the petition for commitment.

During his 2005 incarceration, appellant was admitted to the sex-offender treatment program at MCF-Lino Lakes. The initial assessment report concluded that:

> Mr. Foster appears to be a patterned sex offender. His convictions include furnishing alcohol to minors and then molesting them against their will. He continued the assaults although the victims were yelling at him to stop and significantly resisting. His offenses indicate planning, aggressiveness, and a total disregard for the victims. It

> appears that Mr. Foster has a strong attraction to minor females.

The report indicated that appellant had a MnSOST-R total score of +11, "suggesting a very high likelihood of reoffending."

After the commitment petition was filed, appellant was seen by Dr. Paul Reitman and Dr. John Austin, who are both psychologists. Each conducted a review of the court and treatment records of appellant, a clinical interview with appellant, and submitted a written report. In addition, Dr. Reitman conducted psychological testing and compared those results with appellant's previous test results.

B. The Hearing

Appellant's civil commitment trial was held over three days in early 2007. At trial, Dr. Reitman testified that appellant met the statutory criteria of a sexual-psychopathic personality (SPP) and a sexually-dangerous person (SDP). Dr. Austin refused to make a determination as to whether appellant met the definition of an SPP, and concluded that appellant was not highly likely to reoffend and, therefore, was not an SDP. The district court found that appellant met the criteria for commitment as both an SPP and an SDP and initially committed appellant to the Minnesota Sex Offender Program in St. Peter.

A 60-day review hearing for purposes of final commitment determination was held in May 2007. Subsequently, the district court filed its findings of fact, conclusions of law, and order, concluding that appellant continued to meet the statutory criteria of an SDP and an SPP, and ordered his indeterminate commitment. This appeal follows.

D E C I S I O N

A petition for civil commitment under the Minnesota Commitment and Treatment Act must be supported by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2006). On appeal, we review the evidence in the light most favorable to the district court's conclusion. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). We review a district court's commitment-related findings for clear error. *See* Minn. R. Civ. P. 52.01. The determination of whether the findings meet the statutory requirement for civil commitment is a question of law, which we review de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I)*.

I.

An SDP is defined as a person who (1) has engaged in a course of sexually harmful conduct; (2) suffers from a sexual, personality, or other mental disorder; and (3) is likely to engage in future acts of sexually harmful conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2006). In addition, there must be some finding that the person is unable to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*). The third statutory factor requires that the petitioner prove that the person is "highly likely" to engage in acts of harmful sexual conduct in the future. *In re Linehan*, 557 N.W.2d 171, 180 (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). In *Linehan I*, the supreme court set forth six factors that must be considered by the district court in determining whether a person is "highly likely" to reoffend:

> (a) the person's relevant demographic characteristics (*e.g.*, age, education, etc.); (b) the person's history of violent behavior (paying particular attention to recency, severity, and frequency of violent acts); (c) the base rate statistics for violent behavior among individuals of this person's background (*e.g.*, data showing the rate at which rapists recidivate, the correlation between age and criminal sexual activity, etc.); (d) the sources of stress in the environment (cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner); (e) the similarity of the present or future context to those contexts in which the person has used violence in the past; and (f) the person's record with respect to sex therapy programs.

518 N.W.2d at 614 (addressing psychopathic-personality commitment); *see Linehan III*, 557 N.W.2d at 189 (applying these factors to the determination of future harm for commitment as an SDP).

Essentially, appellant limits his challenge to the district court's determination that he is highly likely to reoffend, arguing that there is not clear and convincing evidence to support the conclusion. While Dr. Austin and Dr. Reitman both considered the *Linehan I* factors, they reached different conclusions, with Dr. Reitman concluding that appellant is highly likely to reoffend. The district court credited Dr. Reitman's testimony as more persuasive on the ground that "Dr. Austin lacked the benefit of recent psychological testing and data concerning [appellant's] ongoing sexual desires towards female children." We agree. The record shows that appellant has an ongoing attraction to minor females and has not shown an ability to avoid contact with them. Appellant has not functioned well in an unstructured environment without a high degree of supervision.

Appellant suggests that his lack of sexual reoffense since 1993 shows that he is not highly likely to sexually reoffend. The district court concluded that the length of time

since his last sexual offense is not persuasive because appellant lacked the opportunity to reoffend due to his incarceration and the high degree of supervision by his parole and probation officers when he was in the community. We agree.

During the six-and-one-half years that he was in the community, appellant had seven probation violations. The court credited Dr. Reitman's testimony that appellant was in his "sexual cycle" during his probation violations by having contact with minors and using drugs and/or alcohol. Further, the court found that the time periods between appellant's release into the community and subsequent violations were progressively shorter and shorter, indicating that appellant's problems are escalating. The record supports the findings of the district court.

Finally, appellant argues that his participation in sex offender treatment programs and his reoffense prevention plan show that he is not highly likely to sexually reoffend. We disagree. Dr. Reitman concluded that appellant remains an "untreated sex offender" who continues to require intensive treatment. The district court's determination that appellant is highly likely to sexually reoffend is supported by the record.

II.

An SPP is defined as follows:

> [T]he 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). In order to commit a person as an SPP, the petitioner must show by clear and convincing evidence that the person (1) has engaged in a habitual course of misconduct in sexual matters; (2) has an utter lack of power to control sexual impulses; and (3) is, therefore, dangerous to others. *In re Kindschy*, 634 N.W.2d 723, 732 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001).

Appellant challenges the second and third factors. Appellant first contends that the evidence is insufficient to support the district court's conclusion that he has an utter lack of power to control his sexual impulses. Specifically, appellant argues that he has not engaged in sexual misconduct since 1993, and that recent testing has shown a marked improvement of his mental condition.

To determine whether a person utterly lacks power to control sexual impulses, a district court must consider a number of factors, which include the nature and frequency of the sexual assaults, the degree of violence used, the relationship between the offender and the victims, the offender's attitude, mood, medical and family history, and psychological and psychiatric testing results. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). The court may also consider the offender's refusal of treatment opportunities and the offender's 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); whether the offender does not believe that his behavior is a problem and whether the offender has started exerting control over his own behavior, *In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995); and the lack of sex-offender treatment or successful completion in a sex-offender program and the 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), *review denied* (Minn. Oct. 27, 1994).

The district court set forth eleven findings supporting its conclusion that appellant has an utter lack of power to control his sexual impulses, which included, among others, that appellant is "unable or unwilling to abstain from having contact with minors," that those contacts have included the use of alcohol or drugs which are "triggers" of appellant's sexual offenses, that appellant is "quite open about having deviant sexual thoughts and interests involving children," and that appellant lacks "completion of sexual offender treatment."

Appellant argues that the district court's finding that he is dangerous to others is clearly erroneous. A person is dangerous to others "when the person's pattern of sexual misconduct (1) creates a substantial likelihood of serious physical or emotional harm to others, and (2) is likely to recur because of an utter lack of power to control sexual impulses." *Kindschy*, 634 N.W.2d at 732.

The district court found that appellant's past sexual conduct creates a substantial likelihood of serious physical or emotional harm to others. The district court credited Dr. Reitman's and Dr. Austin's testimony that appellant's past sexual conduct would have left at least one of the victims very traumatized, and that it likely caused significant psychiatric disorders, posttraumatic stress disorder, depression, anxiety, poly drug abuse, and physical harm. The district court credited Dr. Reitman's testimony that appellant utterly lacks the ability to control his sexual impulses and that appellant is highly likely to

reoffend. The district court's determination is supported by clear and convincing evidence.

III.

Appellant argues that the 60-day-review-hearing process required by Minn. Stat. § 253B.18, subd. 2 (2006), violates substantive due process under the Fourteenth Amendment to the United States Constitution and article I, section 7 of the Minnesota Constitution. Specifically, appellant contends that the 60-day review process does not afford sufficient time between the date of initial commitment and the date of the review hearing for any substantive treatment to have been undertaken that may have had the effect of changing the initial determination of the trial court. We review constitutional challenges to statutes de novo. *State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). When evaluating the constitutionality of a statute, this court is to afford the statute a presumption of validity. *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Accordingly, we will declare a statute unconstitutional only when absolutely necessary, and then only with great caution. *Id.* The party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute is unconstitutional. *Id.*

Because this issue was not presented to or considered by the district court, it is not properly before this court and may be dismissed. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). But even if we did reach this issue, we would conclude that it lacks merit.

First, the Minnesota Supreme Court has upheld the constitutionality of the SDP statute under a substantive due process challenge. *Linehan III*, 557 N.W.2d at 184-86.

The court has also upheld the constitutionality of the psychopathic personality statute, a precursor of the current SPP statute. *Blodgett*, 510 N.W.2d at 916 ("So long as civil commitment is programmed to provide treatment and periodic review, due process is provided.").

Second, appellant misconstrues the purpose of the 60-day review hearing. The purpose of the 60-day review hearing is to "allow[] the district court to consider the views of the treatment facility before issuing a final commitment order" and to "allow[] the district court to consider whether changes in the patient's condition render further commitment as an SDP inappropriate." *In re Linehan*, 557 N.W.2d 167, 170 (Minn. 1996) (*Linehan II*), *vacated and remanded on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997). Appellant was afforded a meaningful opportunity to avoid the loss of his liberty at the initial commitment hearing. During the review hearing, the district court considered the views of the treatment facility and heard testimony from the treatment facility's psychologist. Thus, we conclude that appellant's due process rights were not violated.

Affirmed.