STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0910

In the Matter of the Civil Commitment of:
Samuel Ivory Cox, a/k/a Frederick Marcell Brown,
Chris Jenson, Chris Jensen, James I. Rucker;
Legal Name: Tishawn Tyrese Terius Brent.

Filed January 20, 2009
Affirmed
Huspeni, Judge[*]

Ramsey County District Court
File No. 62-MH-PR-07-22

Richard J. Cohen, 190 Midtown Commons, 2334 University Avenue, St. Paul, MN 55114 (for appellant Samuel Ivory Cox)

Susan Gaertner, Ramsey County Attorney, Elizabeth C. Henry, Assistant County Attorney, 155 Wabasha Street South, Suite 110, St. Paul, MN 55107 (for respondent state)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Huspeni, Judge.

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

HUSPENI, Judge

On appeal from his indeterminate commitment as a sexual psychopathic personality (SPP), appellant argues that (1) the district court erred by refusing to revoke his supervised release and ordering his return to prison rather than ordering his civil

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

commitment; (2) the district court abused its discretion by denying his request for a one-year continuance; (3) the district court abused its discretion by denying his request for a new trial based on his contention that he was not allowed to choose his second examiner; (4) the trial judge should have been removed; (5) he received ineffective assistance of counsel; and (6) the evidence was too remote in time to support his commitment. We affirm.

FACTS

Appellant Samuel Ivory Cox, a/k/a Frederick Marcell Brown, Chris Jenson, Chris Jensen, James I. Rucker; Legal Name: Tishawn Tyrese Terius Brent, has been convicted of two sexual felonies. In 1999, he was convicted of third-degree criminal sexual conduct after he exposed his penis, demanded oral sex, anally raped a 14-year-old female, and threatened to kill her if she screamed. Appellant was sentenced to 48 months in prison.

In 2001, appellant was convicted of first-degree criminal sexual conduct for acts he committed in 1998—sexually assaulting a then-six-year-old boy and his then-eight-year-old sister, and threatening her if she did not cooperate. Shortly before his scheduled release for his 1999 conviction, appellant was charged with two counts of first-degree criminal sexual conduct. In June 2002, he pleaded guilty to one count of first-degree criminal sexual conduct, admitted the facts of both counts, and was sentenced to 146 months in prison.

Appellant was also alleged to have committed sexual offenses that were not charged. In late December 1998, a 16-year-old girl alleged that appellant attempted to

have sex with her and when she refused, he put his penis into her vagina, ejaculated, and then attempted to put his penis in her anus. She did not immediately report the incident because appellant knew where she lived and threatened to kill her if she told anyone what had happened. Appellant admitted to having sex with the 16 year old, but claimed it was consensual. In mid-January 1999, a female friend of the 16 year old told police that appellant attempted to put his hands up her blouse and down her pants, but she successfully evaded his advances.

Appellant has been continuously incarcerated since May 24, 1999. In January 2007, a petition was filed for his commitment as a sexual psychopathic personality (SPP) and/or sexually dangerous person (SDP). In June 2007, the district court found that appellant is a SPP and a SDP and ordered his initial commitment for a 60-day evaluation. The court then issued an order, finding that clear and convincing evidence showed that appellant has demonstrated a habitual course of misconduct in sexual matters. Following several continuances, the 60-day hearing was held on February 22, 2008. In April, the district court found that appellant continues to meet the criteria of a SPP and a SDP and that no evidence indicated any significant change in appellant's condition since his commitment. The district court ordered appellant's indeterminate commitment, and this appeal follows.

D E C I S I O N

Revocation of Supervised Release

Appellant was about to begin supervised release when the state filed the commitment petition. Months into the proceedings, appellant moved the district court to

revoke his supervised release and permit him to return to prison to serve the remainder of his sentence. Appellant argues that the district court erred when it denied his request. But he provides no support for this argument.

After a person is found to be a SPP and a SDP, a district 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 (2006). The district court committed appellant to the Minnesota Sexual Offender's Program (MSOP) and denied appellant's request to revoke his supervised release and be returned to prison to complete his sentence rather than be civilly committed. An appellate court will not reverse a district court's findings as to the least-restrictive treatment program unless the finding is clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003); *In re Kellor*, 520 N.W.2d 9, 12 (Minn. App. 1994), *review denied* (Minn. Sept. 28, 1994).

In *Kachina v. State*, 744 N.W.2d 407, 409 (Minn. App. 2008), this court explained that, "[t]he DOC, not the court, revokes supervised release" because "[t]he legislature has explicitly granted authority over supervised release to the DOC." The district court does not have authority to revoke supervised release. In fact, the district court's only role in the revocation of supervised release is to conduct judicial review of a revocation that has been ordered by the commissioner. Thus, the district court did not err in denying appellant's motion to revoke his supervised release and order his re-imprisonment.

One-year Continuance

In June 2007, the district court found that appellant is a SPP and a SDP and ordered his commitment for a 60-day evaluation. In September, appellant moved for a one-year continuance. Although this motion was denied, the 60-day review hearing was continued several times for various reasons. Ultimately, the 60-day review hearing was held in February 2008.

Two statutes are implicated in the proceedings conducted here. Minn. Stat. § 253B.18, subd. 2(a) (2006), directs that a written treatment report must be filed within 60 days after commitment and requires the district court to hold a hearing within 14 days after receiving the report to make a final determination whether the committed person remains dangerous to the public. The court may, with the agreement of the county attorney and the patient's attorney, continue the review hearing for up to one year. Minn. Stat. § 253B.18, subd. 2(b)(2).

Appellant argues that he was prejudiced because a continuance for one year was not afforded him, and he was, therefore, not granted enough time to show that he was amenable to treatment. The decision whether to grant a motion for a continuance is within the district court's discretion and will not be reversed absent an abuse of discretion. *Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). The party seeking the continuance must show that it was prejudiced as a result of the denial; that is, that the denial affected the outcome of the trial. *In re Muntner*, 470 N.W.2d 717, 719 (Minn. App. 1991), *review denied* (Minn. Aug. 2, 1991); *Weise v. Comm'r of Pub. Safety*, 370 N.W.2d 676, 678 (Minn. App. 1985).

Appellant fails to show that he was prejudiced. Appellant's 60-day review hearing occurred nearly eight months after his initial commitment. He received several continuances of the statutorily mandated 60-day hearing. Additionally, the county did not agree to a one-year continuance, which is required under the statute in order for the continuance to be granted. Moreover, appellant fails to show that the district court's denial affected the outcome. Appellant was evaluated by Dr. Linderman, his selected examiner, in January 2008. Dr. Linderman determined that there had been no significant change in appellant's condition and that he should receive treatment at MSOP. Thus, six months after appellant's initial commitment nothing had changed. The district court did not abuse its discretion in denying appellant's request for a longer continuance.

New Trial

After the petition was filed, the district court appointed counsel for appellant. Soon after, the district court appointed the first examiner and appointed a second examiner at appellant's attorney's request. The examiners conducted their examinations simultaneously. Thereafter, appellant moved the district court for new counsel, arguing that his attorney failed to consult with him regarding the choice of the second examiner. Appellant also moved for a new trial, based on his assertion that his rights were violated when the examiners conducted their evaluations simultaneously. The district court denied both motions.

On appeal appellant cites three bases upon which he claims he should have been granted a new trial. We note initially that under Minn. R. Civ. P. 59.01, a new trial may be granted for several reasons, including: any irregularity in the proceedings that

deprived the moving party of a fair trial. Because the district court is in the best position to determine whether irregularities have tainted a trial, it has discretion to grant a new trial. *See Lake Superior Ctr. Auth. v. Hammel, Green & Abrahamson, Inc.*, 715 N.W.2d 458, 479 (Minn. App. 2006) (stating that because the district court has discretion to grant a new trial, an appellate court will not disturb the decision absent a clear abuse of that discretion), *review denied* (Minn. Aug. 23, 2006).

With regard to his request for a new attorney, we note that appellant first requested a new attorney in March 2007. His attorney was discharged in August, and a new attorney appointed in September. Nonetheless, appellant argues that he should have been granted a new trial because his request for a new attorney was not immediately granted. The district court ruled early in the proceedings, however, that appellant is not entitled to his choice of a court appointed attorney. We agree with that determination. *See* Minn. Stat. § 253B.07, subd. 2c (2006) (stating that the patient has a right to representation and that the court must appoint a qualified attorney). Second, the district court discharged appellant's attorney in August 2007 and appointed new counsel in September after appellant (1) inundated the court with motions for new counsel, (2) attempted to remove the district court judge for failing to appoint new counsel, (3) filed a complaint with the Minnesota Board of Professional Responsibility against his counsel, and (4) attempted to file a civil complaint against the district court judge and his counsel. Appellant's new counsel had six months to prepare for appellant's 60-day review hearing. Therefore, appellant's request for new counsel was ultimately granted in a timely fashion, and his new attorney was provided with adequate time to prepare for the 60-day review hearing.

Appellant next argues that a new trial was necessary because he should have been allowed his choice of a second examiner and the examiners should not have been allowed to conduct their evaluations simultaneously. After a commitment petition is filed, the district court must appoint an examiner and inform the proposed patient of his right to an independent second examiner. Minn. Stat. § 253B.07, subd. 3 (2006). If requested, the commitment statute requires the court to appoint an examiner of the patient's choosing. *Id.*

Appellant relies on *In re Hellerud*, 497 N.W.2d 286 (Minn. App. 1993), to support his argument. But it is unclear how this case supports appellant's argument because the court addressed the timeliness of a patient's request for a second examiner. *Hellerud*, 497 N.W. 2d at 286. Timeliness is not the issue here. Appellant appears to argue that the second examiner to be chosen by appellant under the statute was in fact chosen by appellant's attorney without consultation between counsel and client. We stress the necessity of such consultation. *See* Minn. Stat. § 253B.07, subd. 2c(1) (2006). The record does not reveal the extent of such consultation. Regardless, appellant fails to show who he would have chosen or why his counsel made a poor choice, or that he did not agree with his counsel's choice in examiner other than the fact that the second examiner recommended appellant's commitment. Additionally, appellant offers no support as to why two examiners must conduct examinations at different times. It may be argued that conducting examinations simultaneously is practical and also allows two examiners to evaluate the patient in a single setting. While appellant's suggestion that he should be able to review an initial report before deciding on whether to request a second

examination may have merit, especially if the first report were to decline to recommend commitment, here the first examiner recommended commitment, as did the second. Finally, the court granted appellant's later request for yet another examiner. This request was granted after appellant was able to review two reports—those of the first two examiners. Appellant chose Dr. Linderman, who conducted her examination months after the first two examinations. Dr. Linderman also recommended appellant's commitment. There is no basis for granting a new trial in response to appellant's argument regarding the selection of the second examiner or timing of the second examination.

Appellant's final argument for a new trial appears to be that he is entitled to a new trial because he attempted to comply with the requirements of the DOC. Appellant's attempts at complying with the DOC's requirements, however, do not provide a basis for granting a new trial. *See generally*, Minn. R. Civ. P. 59.01 (grounds for a new trial: irregularity in the court proceedings, misconduct of prevailing party or jury, accident or surprise, newly discovered material evidence, excessive or insufficient damages, errors of law occurring at trial, decision not supported by the evidence or that is contrary to law). Therefore, the district court did not abuse its discretion in denying appellant's request for a new trial based on any attempt appellant made to comply with DOC requirements.

Removal of Judge

After the district court denied several of appellant's motions, appellant sought to remove the district court judge, claiming bias. The Chief Judge of District Court found that appellant made no affirmative showing of bias stemming from an extra-judicial

source and denied the motion. Appellant argues that his motion should have been granted. Under Minn. R. Civ. P. 63.03:

> A judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer.

Whether a district court complied with Minn. R. Civ. P. 63.03 is a question of law, which we review de novo. *Citizens State Bank of Clara City v. Wallace*, 477 N.W.2d 741, 742 (Minn. App. 1991).

Appellant's argument regarding bias is based on issues previously addressed: denial of his request for a second examiner, denial of his motion for a continuance, and denial of his motion for a new trial. Based upon our resolution of those issues earlier in this opinion, we see no error on the part of the Chief Judge in refusing to remove the district court judge conducting these proceedings.

Ineffective Assistance of Counsel

Appellant also argues that he received ineffective assistance of counsel because his first attorney failed to consult with him regarding the appointment of the independent examiner and failed to follow his instructions to file an interlocutory appeal.

In deciding whether an individual received ineffective assistance of counsel in a commitment proceeding, this court applies the same standards set forth in criminal proceedings. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). Representation is inadequate "if counsel fails to exercise the diligence of a reasonably competent attorney under similar circumstances." *Id.* "Even if

counsel's representation is less than perfect, the result of a hearing or trial will be set aside only if counsel's actions so undermine the hearing process that the result is prejudiced." *In re Cordie*, 372 N.W.2d 24, 29 (Minn. App. 1985), *review denied* (Minn. Sept. 26, 1985). The claimant must "demonstrate that counsel's representation fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003).

Appellant offers scant evidence to suggest that his first counsel's representation was inadequate. Mindful of our caution earlier that counsel should assure that adequate consultation between attorney and client occur, appellant provides no support that his counsel failed to consult with him on the selection of the second examiner. It is entirely possible that in retrospect appellant did not like the selection of the second examiner because that examiner recommended that appellant met the criteria for a SPP and a SDP and should be civilly committed. But the other two examiners, one of whom was apparently chosen by *appellant himself*, made the same recommendation. Thus, appellant fails to show that his first counsel's selection of an examiner, even if without input from appellant, undermined the hearing process so as to cause appellant prejudice.

Appellant also argues that his counsel was inadequate because she failed to follow his instructions to file an interlocutory appeal with this court. It appears that appellant is referring to an appeal of the June order for initial commitment for a 60-day evaluation. On August 30, 2007, the Clerk of the Appellate Courts received a pro se notice of appeal. Appellant indicated his wish to challenge an order that committed him, but failed to

provide a copy of the order or judgment. On September 6, 2007, this court dismissed the appeal and gave appellant until September 24, 2007, to have his appeal reinstated. There is nothing in the record regarding appellant's request to his attorney to file an appeal from that June order. Additionally, appellant's counsel was discharged on August 28, 2007. Appellant filed his pro se notice of appeal on August 30, 2007. And appellant did not seek to have the appeal reinstated, despite the fact that he had a new attorney appointed on September 14, 2007. Appellant fails to show how he was prejudiced by his first attorney's alleged error in not following his instruction to file an interlocutory appeal, and his ineffective-assistance-of-counsel claim fails.

Evidence

Finally, appellant argues that the district court abused its discretion in admitting evidence of alleged offenses that were too remote in time to support his commitment. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion. On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003) (citations omitted).

Clear and convincing evidence is required to support an individual's commitment as a SPP and a SDP. Minn. Stat. §§ 253B.18, subd. 1(a) (2006), 253B.185, subd. 1 (2006). "Clear and convincing requires more than a preponderance of the evidence, but less than proof beyond a reasonable doubt." *State v. Johnson*, 568 N.W.2d 426, 433 (Minn. 1997) (quotation omitted). Appellant contends that *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994), supports his argument because in that case the supreme court

stated that in predicting whether a proposed SDP poses a threat of harm depends in part on whether there is a large gap of time between the petition and the proposed patient's last sexual misconduct. In *In re Pirkl*, this court rejected arguments that certain offenses were too remote to be considered as part of habitual behavior because the defendant had been in prison the last nine years and did not have the opportunity to commit sexual assaults. 531 N.W.2d 902, 909 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995).

Appellant had been continuously incarcerated since May 24, 1999. He was first sentenced to 48 months in prison after pleading guilty to third-degree criminal sexual conduct in 1999. He was then sentenced in June 2002, while still serving his 48-month sentence, after he pleaded guilty to first-degree criminal sexual conduct for sexually assaulting two children in 1998. The two uncharged events occurred in December 1998 and January 1999. These two incidents also involved minors. Thus, appellant's charged and uncharged offenses occurred in the summer of 1998, December 1998, January 1999, and May 1999. These uncharged incidents occurred between the two charged incidents and, therefore, show habitual behavior. Additionally, none of the incidents are too far removed in time from the petition that was filed in January 2007, given the fact that appellant has been incarcerated since 1999 and has not had any opportunity to engage in sexual offenses. The district court did not abuse its discretion in admitting the evidence.

Affirmed.