STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1312, A08-1551

In the Matter of the Civil Commitment of:
Jacob Karl Rask

Filed February 26, 2009
Affirmed
Toussaint, Chief Judge

Houston County District Court
File No. 28-PR-08-81

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Considered and decided by Toussaint, Chief Judge; Ross, Judge; and Connolly, Judge.

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

TOUSSAINT, Chief Judge

Appellant Jacob Karl Rask challenges the orders initially and indeterminately committing him to treatment in the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). His

separate appeals from the two orders have been consolidated by this court. Because the district court did not err in admitting evidence and because clear and convincing evidence in the record supports the determination that appellant meets the standards for commitment, we affirm.

D E C I S I O N

On appeal from a civil commitment order, this court's review is limited to determining whether the district court complied with the civil commitment act and whether the commitment is justified by findings based on evidence presented at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). This court defers to the district court's findings of fact and will not reverse those findings unless they are clearly erroneous. *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law that this court reviews de novo. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

I.

Appellant argues that the district court improperly considered unreliable evidence to support its findings regarding his acts of sexual misconduct. While appellant acknowledged at the commitment hearing that he committed two acts of sexual misconduct, he denied any other acts of misconduct and denied having made certain statements admitting to having committed those other acts, which were reported in the documents presented at the hearing. Appellant claims that the district court's findings on

these other acts are derived from reports completed by third parties without first-hand knowledge of the events and that many of the allegations of other sexual misconduct were taken out of context in a treatment setting.

In a civil commitment proceeding, the district court "may admit all relevant, reliable evidence, including but not limited to the respondent's medical records, without requiring foundation witnesses." Minn. Spec. R. Commitment & Treatment Act 15; *see also In re Civil Commitment of Williams*, 735 N.W.2d 727, 732 (Minn. App. 2007) (stating that district court did not abuse its discretion by admitting documents containing "statements that were generated closely in time to the events they describe," and that "include the accounts of first-hand witnesses, the victims"), *review denied* (Minn. Sept. 26, 2007).

Appellant asserts that no victims or treatment providers testified at the commitment hearing regarding the various documents and reports. But the district court specifically found that appellant's denials about the sexual contact with his stepbrother and with a male peer at a treatment facility were not credible. This court gives great deference "to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. Appellant's admissions were made in treatment and were reported in the records from those providers, who would have had no apparent reason to fabricate the admissions. Under these circumstances, we cannot conclude that this evidence was unreliable or that the district court otherwise abused its discretion in considering it as part of the record.

II.

Minnesota law defines an SPP as

> the 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 (2008).

A. Habitual Course of Misconduct in Sexual Matters

Appellant argues that the state failed to prove by clear and convincing evidence that he engaged in a habitual course of sexual misconduct because his two criminal-sexual-conduct convictions do not form a pattern. Appellant claims that, because the two offenses are separated by a number of years and are not so numerous, they cannot be considered a systematic or orderly succession or sequence.

But appellant acknowledges that a habitual course of misconduct in sexual matters can be established by showing similar incidents of misconduct or incidents that form a pattern. *See In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). Both court-appointed examiners opined that appellant's offenses meet the definition of habitual sexual misconduct. The first examiner explained that habitual conduct is "repetitive, unfolds in the same behavioral form, and is resistant to change" and opined that appellant's offenses meet this definition. The second examiner emphasized that appellant's offenses were committed "over a four year period of time

despite very significant intervention efforts" and that appellant reoffended because he did not think he would get caught. The district court did not clearly err in finding the examiners' opinions regarding appellant's habitual course of harmful sexual conduct to be credible and persuasive.

B. Utter Lack of Power to Control Sexual Impulses

Appellant argues that the two offenses for which he was convicted were not impulsive and asserts that they occurred because he had "little or no knowledge of any proper boundaries or appropriate sexual conduct." He argues that the evidence fails to establish he has an "utter lack of power to control" his sexual impulses.

Appellant further argues that although he has an extensive disciplinary record while incarcerated, none of the violations involved inappropriate sexual conduct, a fact that demonstrates he can control his sexual impulses. Appellant finally claims that a careful review of the *Blodgett* factors shows that he can control his sexual impulses. *See In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). But the district court made detailed findings on each of the *Blodgett* factors that are accurate, based on the record, and are not clearly erroneous. The district court did not clearly err in determining that appellant lacks the ability to control his sexual impulses.

C. Dangerous to Others Without Finding of Violent Sexual Behavior

Appellant argues that the state failed to prove he is dangerous to others because his sexual offenses did not involve physical force or violence. He insists that none of his victims suffered any form of physical injury and that, while the court-appointed examiners testified that appellant's victims likely suffered harm, no evidence was

introduced that either of his victims suffered any form of mental harm. Appellant cites a series of cases that he claims required a showing that a person is likely to commit *violent* sexual assaults in order to demonstrate that the person is dangerous to others and thus meets the SPP criteria. *See, e.g., In re Robb*, 622 N.W.2d 564, 571 (Minn. App. 2001) ("[B]ehavior that makes a person 'dangerous to other persons' as required by the [SPP] statute is limited to violent sexual assaults that create a substantial likelihood of serious physical or mental harm being inflicted on the person's victims."), *review denied* (Minn. Apr. 17, 2001).

But, as the state counters, appellate decisions since *Robb* have retreated from *Robb*'s interpretation of the harmfulness standard, which required that "serious mental harm must mean greater mental harm than would be expected in a sexual assault." In *In re Preston*, this court disagreed with the decision in *Robb* and recognized that it would be "absurd to hold that because less force was needed to subdue an extremely young victim, the assault was non-violent." 629 N.W.2d 104, 113 (Minn. App. 2001). In *In re Kindschy*, this court followed *Preston* and examined whether the character and nature of the offender's sexual assaults justified finding that he was "substantially likely to cause serious physical and emotional harm" and therefore dangerous to others under the SPP statute. 634 N.W.2d 723, 732 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001).

Here, both examiners testified regarding the harm likely to be caused by appellant's acts. Their testimony and opinions relate not only to the harm caused by sexual assault in general but also to the harm caused by appellant as it related to his victims. The second examiner emphasized that the evidence established that appellant

barricaded the door during the offense leading to his first conviction and that the victim, who had some developmental limitations, claimed that she could not yell for help because appellant had covered her mouth. The examiner further emphasized that the evidence showed that appellant's victim for his second conviction, who was five years younger than appellant at the time of the offense, which took place in her bedroom, had trust and fear issues following the offense. The district court did not clearly err in determining that clear and convincing evidence establishes appellant's dangerousness so as to meet the criteria for commitment under the SPP statute.

III.

An SDP is one 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) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2008).

A. Course of Harmful Sexual Conduct

"Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008). Appellant acknowledges that his first- and fourth-degree criminal sexual conduct convictions create a rebuttable presumption that the conduct "creates a substantial likelihood that a victim will suffer serious physical or emotional harm." *Id*., subd. 7a(b) (2008). But he argues that his two offenses do not constitute a "course" of harmful sexual conduct, which is defined as a "systematic or orderly succession; a sequence." *In re Civil Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied*

(Minn. June 20, 2006).

Both examiners agreed that appellant has engaged in a course of harmful sexual conduct, and the district court found these opinions credible and supported by the evidence. The first examiner emphasized that appellant's two offenses were orchestrated in a similar fashion, were impulsive, and were repeated. The second examiner emphasized that appellant committed his offenses against vulnerable victims and that he committed his offenses early in life, despite interventions. Clear and convincing evidence supports the district court's determination that appellant's offenses constitute a course of harmful sexual conduct because they were committed in a similar manner, across time, and were undeterred by consequences or other interventions.

B. Recognized Mental Disorder

Appellant acknowledges that he has been diagnosed with antisocial personality disorder, which qualifies as a mental disorder for purposes of SDP commitment. *See In re Linehan*, 594 N.W.2d 867, 877-78 (Minn. 1999) (*Linehan IV*). But he challenges this diagnosis, claiming that it fails to predict that he will act out sexually when his only convictions occurred when he was an immature teenager. Appellant notes that he was not diagnosed with antisocial personality disorder until the commencement of these proceedings.

But appellant's disorders are directly related to his sexual offending. Although both examiners testified that it was not yet clear whether appellant had a specific paraphilia, both opined that he is unable to adequately control his sexual impulses due to his antisocial personality disorder and narcissistic features. The second examiner

testified that appellant lacks customary standards of good judgment and gets angry when he is challenged to follow rules. The first examiner testified that appellant is impulsive and that he easily justifies and rationalizes what he does, has almost no insight into his problems, and feels victimized by the system. These opinions adequately support the district court's finding that appellant "suffers from sexual or personality disorders that constitute mental disorders."

C. Highly Likely to Reoffend

Appellant argues that the state failed to prove by clear and convincing evidence that he is highly likely to reoffend. When determining the likelihood of future harmful conduct in an SDP commitment, six factors are to be considered: (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) sources of stress in the offender's environment; (5) the similarity of present or future contexts to past contexts in which the offender used violence; and (6) the offender's record of participation in sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

Appellant claims that he never used force, violence, or persuasive grooming behaviors, and that his risk of reoffending as an adult is low. The district court made detailed findings on each of the *Linehan* factors based on the opinions and testimony of the examiners, who opined that appellant is highly likely to reoffend. The district court did not clearly err in determining that appellant meets the criteria for commitment as an SDP.

IV.

Appellant challenges his commitment to MSOP on the ground that it is not the least-restrictive alternative. He argues that he should have the opportunity to complete department of corrections sex-offender treatment in prison. This court reviews a district court's determination of the least-restrictive alternative under the clearly-erroneous standard. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

"Under the current statute, patients 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." *Kindschy*, 634 N.W.2d at 731 (emphasis in original). The statute provides that

> 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). When considering treatment alternatives, a court may consider such factors as the need for security, whether the offender needs long-term treatment, and what type of treatment is required. *See In re Pirkl*, 531 N.W.2d 902, 910 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995) ; *Bieganowski*, 520 N.W.2d at 531.

Appellant points to testimony from both examiners that only one person has moved into a transition program since the inception of MSOP in the 1990s but that the person was later returned to MSOP. Appellant also points to the second examiner's testimony that, if appellant were accepted, the examiner would not object to placement of appellant in department of corrections programs at Rush City or Lino Lakes.

Appellant argues that, considering these facts, "only the most serious and heinous offenders should be committed to [MSOP]," which is essentially a life sentence for persons who are civilly committed.

But both examiners agreed that MSOP was the most appropriate program to meet appellant's needs. Appellant was terminated once from the department of corrections sex-offender treatment and was refused entry a second time. He has presented no evidence to show that he could gain admission to a department of corrections residential program at this point in time. Based on the testimony presented by two examiners that no less-restrictive alternative is available, the district court did not clearly err in committing appellant to MSOP.

Affirmed.