STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1058

In the Matter of the Civil Commitment of:
James Ellis Warbington.

Filed March 3, 2009
Affirmed
Halbrooks, Judge

Winona County District Court
File No. 85-PR-06-3099

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Charles MacLean, Winona County Attorney, 171 West 3rd Street, Winona, MN 55987 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Kalitowski, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

On appeal from an order indeterminately committing appellant as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), appellant contends that the civil commitment (1) is based on insufficient evidence, (2) violated his substantive due-process rights and his protection against double jeopardy, and

(3) violated his procedural due-process rights. Because we conclude that there is clear and convincing evidence that appellant meets the statutory criteria for civil commitment and because appellant's constitutional rights were not violated, we affirm.

FACTS

Appellant James Ellis Warbington, now 38 years old, was born on February 3, 1971. Appellant reported witnessing sexual activity between his mother and different men when he was a child and was present when his mother was stabbed during a drug deal. Appellant's mother died from a heroin overdose when he was seven years old. Although appellant did not graduate from high school, he did earn a GED.

When appellant was 18, he sexually offended with a 16-year-old girl. Appellant stated that he kissed her, groped her breasts, and manipulated her into removing her clothes. While appellant was doing this, the victim resisted and kept saying "no" and "stop." Appellant was not prosecuted for this offense.

While attending college in La Crosse, Wisconsin, appellant used manipulation, coercion, aggression, and force to have sexual contact with six to seven heavily intoxicated victims. Appellant later stated that "6 of [his victims] were clearly rapes." Appellant was not prosecuted for any of these offenses.

On October 16, 1992, when he was 21, appellant raped an 18-year-old female victim, A.M.R. A.M.R. reported that she had been introduced to appellant by a friend earlier in the day and then saw appellant at a bar later in the evening. At one point, A.M.R. stepped outside of the bar, and appellant approached her. During their conversation, appellant repeatedly tried to kiss A.M.R., which she refused. Appellant

took A.M.R. to his cousin's car, ostensibly to retrieve an item from the vehicle. Appellant again tried to kiss A.M.R., and she refused. When A.M.R. tried to get out of the vehicle, appellant forced her back into it. Appellant forced A.M.R. into the back seat and pinned her down with the weight of his body. A.M.R. screamed for appellant to get off of her and stop. Appellant forcibly removed A.M.R.'s pants, tearing her zipper and underwear, and penetrated her vagina with his penis. Appellant stopped when his cousin knocked on the car window, and A.M.R. then pushed her way out of the vehicle. Appellant was subsequently charged with one count of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct. Appellant pleaded guilty to third-degree criminal sexual conduct and was given a stayed sentence with 15 years of probation.

As part of the sentence relating to his offense against A.M.R., appellant participated in sex-offender treatment at the McGuire Center in 1993 and 1994. Appellant was terminated from treatment in July 1994 for consuming alcohol and disclosing confidential treatment information. In 1995, appellant was readmitted to the McGuire sex-offender-treatment program but was suspended in April 1996 for failing to meet his financial obligations and for dishonesty.

At age 25, appellant sexually assaulted an unidentified 16-year-old victim. Both appellant and the victim had consumed alcohol to a state of intoxication, and appellant forced the victim to engage in sexual contact. Appellant was not prosecuted for this offense. At his commitment trial, appellant testified, "In my mind, I wasn't doing anything wrong [because] I thought probation was too strict."

In September 1996, appellant was committed to the commissioner of corrections for 54 months for violating probation. Although it was recommended that appellant receive sex-offender treatment, he did not complete treatment.

On September 3, 1999, appellant, then 28, raped 20-year-old B.S.F. Appellant was acquainted with B.S.F. through a mutual friend. On the night of the sexual assault, appellant convinced B.S.F. to come to his apartment to talk about his problems with his girlfriend. Appellant began to consume alcohol. When he started to kiss B.S.F., she pushed him away. Appellant convinced B.S.F. to go lie on his bed. While they were lying on the bed, appellant tried to lift up B.S.F.'s shirt, but B.S.F. pushed him away. Appellant then closed the bedroom door, laid on top of B.S.F., held her arms down, and told her that they were going to have some fun. B.S.F. told appellant to stop and that she wanted to leave, but appellant kept restraining her. Appellant pulled down B.S.F.'s pants and performed oral sex on her. Appellant then penetrated B.S.F. digitally and with his penis. During the assault, B.S.F. was crying and telling appellant to stop. Appellant was charged with one count of third-degree criminal sexual conduct; he pleaded guilty to an amended charge of fourth-degree criminal sexual conduct and was sentenced to 39 months in prison.

While he was on supervised release, appellant attended sex-offender treatment at Project Pathfinders. But he was terminated from treatment after three sessions for failing drug tests and being unable to meet his financial obligation.

In December 2003, appellant's supervised-release agent reported that appellant had violated seven conditions of his release, including failure to complete sex-offender

treatment. Appellant was subsequently admitted into the Minnesota Correctional Facility at Lino Lakes and assigned to sex-offender treatment. Appellant's participation and cooperation in the program were inconsistent. But in November 2006, appellant graduated from the sex-offender-treatment program.

In 2006, respondent retained Roger Sweet, Ph.D., L.P., and Peter Marston, Ph.D., L.P., to determine whether appellant met the statutory criteria for commitment as an SDP and an SPP. Based on an independent review of appellant's records, Dr. Sweet concluded that appellant meets the criteria for commitment as an SDP and an SPP. Dr. Marston opined that appellant meets the criteria for commitment as an SDP.

On October 3, 2006, respondent petitioned for civil commitment, requesting that appellant be committed as an SPP and an SDP. Minn. Stat. §§ 253B.02, subds. 18b, 18c; .18; .185 (2006). The district court appointed Rosemary S. Linderman, Psy.D., L.P., to serve as the first court-appointed examiner and subsequently appointed John V. Austin, Ph.D., at appellant's request. Following a three-day hearing, the district court ordered appellant's initial commitment to the Minnesota sex-offender program as an SDP and an SPP.

In preparation for the subsequent 60-day review hearing, appellant requested and the district court appointed Paul Reitman, Ph.D., L.P., as an examiner. Dr. Reitman testified that appellant continued to meet the criteria for civil commitment as an SDP and an SPP. Appellant sought to admit evidence that challenged his commitment based on an alleged lack of treatment and the politics of the treatment program. The district court denied admission of the evidence on relevancy grounds. The district court ordered

appellant's commitment as an SDP and an SPP for an indeterminate period. This appeal follows.

D E C I S I O N

I.

Appellant contends that the evidence is insufficient to commit him as an SDP and an SPP. The 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 not be reversed unless clearly erroneous. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). Due regard must be given to the opportunity of the district court to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01; *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Id*. This court will not reweigh the evidence. *In re Linehan* (*Linehan III*), 557 N.W.2d 171, 189 (Minn. 1996), *vacated on other grounds sub nom. Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand sub nom. In re Linehan (Linehan IV)*, 594 N.W.2d 867 (Minn. 1999). But "[w]e review de novo whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

A. SDP

Minn. Stat. § 253B.02, subd. 18c, provides that

> (a) A "sexually dangerous person" means a person who:
>
> (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.
>
> (b) For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses.

Appellant challenges the district court's determinations that he "engaged in a course of harmful sexual conduct" and is "likely to engage in acts of harmful sexual conduct."

1. Course of Harmful Sexual Conduct

Subdivision 7a of section 253B.02 defines "harmful sexual conduct" as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." When a person is convicted of criminal sexual conduct in the third or fourth degree, there is a rebuttable presumption that the conduct that resulted in the conviction satisfies the definition in subdivision 7a. Minn. Stat. § 253B.02, subd. 7a(b) (2006). In defining "course of harmful sexual conduct," this court has stated that "course" is defined by its ordinary meaning, which is "a systematic or orderly succession; a sequence." *In re Civil Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). A course of conduct is not limited to "convictions, but may also include conduct amounting to harmful sexual conduct, of which the offender was not convicted." *Id.*

Dr. Linderman, whose opinions were found to be credible and persuasive by the district court, opined that appellant engaged in a course of harmful sexual conduct based on appellant's two convictions of criminal sexual conduct and the estimated 6–7 other victims with whom appellant admitted using coercion, aggression, and force in order to achieve sexual contact. The contact included nonconsensual fondling and oral and vaginal sex. Dr. Linderman specifically noted the duration of appellant's offense history—beginning in approximately 1989 and persisting to "contact with potentially vulnerable victims as recently as 2003"—and testified that appellant's victims likely suffered both physical and emotional harm, including feelings of helplessness and personal violation, shame, depression, anxiety, self-loathing, and destroyed trust. That opinion is supported by B.S.F.'s victim statement, where she stated that she experienced physical distress, sleeplessness, nightmares, loss of appetite, and feelings of paranoia and fear as a result of appellant's sexual assault of her.

Dr. Austin did not offer an opinion as to whether or not appellant meets the statutory criteria for commitment under either the SDP or the SPP standard. And we note that the district court commented several times in its order on Dr. Austin's lack of credibility as an expert in this matter. Speaking specifically to appellant's failure to introduce evidence to rebut the presumption of harm that arises under Minn. Stat. § 253B.02, subd. 7a(b), the district court found that

> Dr. Austin's testimony on this point and [his] minimization of the harmfulness of [appellant's] LONG history of sexual assaults significantly decreased his credibility to the Court. . . . Dr. Austin's opinion, where he gave one, is not credible or persuasive, particularly as it relates to the notion of harm,

> given his continuing misapplication and misstatement of the law in this area despite having the relevant statutory language and case law brought to his attention in the past.

Dr. Reitman also noted the methodological flaws in Dr. Austin's report and his misstatements of the literature in regard to whether or not an examiner can give an opinion as to "whether or not an individual causes serious physical and emotional harm to a victim if they rape them. The literature is quite clear that sexual traumatization has a very high likelihood of causing psychological trauma as well as physical trauma." Based on this record, the district court did not clearly err in finding that appellant engaged in a course of harmful sexual conduct as defined by the statute.

2. Likely to Engage in Acts of Harmful Sexual Conduct

Appellant also argues that the district court clearly erred in finding that he is likely to engage in acts of harmful sexual conduct. We disagree. The Minnesota Supreme Court has stated that the following factors should be considered when analyzing whether an individual is likely to engage in future harmful sexual conduct:

> (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.

In re Linehan (*Linehan I*), 518 N.W.2d 609, 614 (Minn. 1994).

Based on psychological and actuarial test results and her application of the *Linehan* factors, Dr. Linderman opined that appellant is likely to engage in acts of harmful sexual conduct. Appellant's MMPI-2 test results showed a significant elevation on scale 4—an indication that appellant is impulsive, resentful, and rebellious, and has difficulty generally accepting rules, regulations, and authority. His placement in group Delta of the Megargee Typology indicates that appellant

> is above average for socially deviant behaviors and attitudes, hostile peer relations as well as conflict with authorities and below average for positive response to supervision, academic and vocational programming[, with p]ossible problem areas [including] difficulties with alcohol or substance abuse, manipulating or exploiting other inmates, and family problems or alienation from family.

Appellant's score of 33 on the PCL-R indicates that he is a clinical psychopath; addressing this score, Dr. Linderman stated that psychopathy is correlated with violent recidivism. Appellant's score of 5–8 on the Sex Offender Needs Assessment Rating reflects a moderate to high risk for sexual reoffense.

Considering the first *Linehan* factor, Dr. Linderman testified that appellant's gender, unstable work history, and unclear chemical-dependency problems suggest a high risk to reoffend sexually. Regarding the second factor, Dr. Linderman noted appellant's history of two rape convictions, his admission that he raped 6–7 other victims and coerced 12–15 other females into sexual contact, appellant's multiple assault charges—both in and out of prison, and other acts of violence. According to Dr. Linderman, appellant has a heightened risk of reoffense based on base-rate statistics. With respect to

the fourth factor, Dr. Linderman noted that appellant's "list of triggers is so extensive that it would appear impossible for him to avoid reoffending when some of the triggers for his offense cycle include his being told 'no' or someone criticizing him." Analyzing the fifth factor, Dr. Linderman stated that the similarity of appellant's past and future environments supports a finding of a high likelihood that appellant will reoffend. Appellant testified that he would have no job and would be living with a woman with whom he has a long history of a failed relationship. Finally, regarding the sixth factor, the district court noted that appellant "was considered to have completed the [sex-offender treatment] program [SOTP] despite the numerous notations of his inconsistent performance and questions about whether he had integrated or internalized what he had learned." But Dr. Linderman noted that appellant engaged in manipulative and intimidating behavior within a week of his completion of SOTP. She further testified that appellant has a gift for manipulation and that despite treatment, he has never matched his actions to his words. The district court did not clearly err in its finding that appellant is likely to engage in harmful sexual conduct. Because the district court's determination that appellant satisfies the criteria for commitment as an SDP is supported by clear and convincing evidence, we affirm.

B. SPP

Appellant contends that the district court erred in determining that clear and convincing evidence supports his commitment as an SPP. An SPP is defined 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. The statute requires that the district court find (1) a habitual course of misconduct in sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness. *Id*.; *see also Linehan I*, 518 N.W.2d at 613 (stating that the psychopathic-personality statute requires a showing of these three factors). "While excluding mere sexual promiscuity, and other forms of sexual delinquency, a psychopathic personality is an identifiable and documentable violent sexually deviant condition or disorder." *In re Preston*, 629 N.W.2d 104, 110 (Minn. App. 2001) (quotation omitted). Appellant challenges the district court's determinations that he has evidenced a habitual course of misconduct and an utter lack of power to control his sexual impulses.

1. Habitual Course of Misconduct

When examining the element of "habitual course of misconduct in sexual matters," this court examines the similarities between the incidents of sexual activity. *In re Bieganowski*, 520 N.W.2d 525, 529–30 (Minn. App. 1994) (discussing the district court's finding that the appellant had a habit of "grooming" his victims before becoming sexually active with them), *review denied* (Minn. Oct. 27, 1994). Because the experts' opinions support the district court's finding that appellant has demonstrated a habitual

course of misconduct in sexual matters, we conclude that the district court did not clearly err. As the district court found:

> Dr. Linderman opined and testified that [appellant's] course of harmful sexual conduct was habitual given the recurring pattern he engaged in with his victims. According to Dr. Linderman, [appellant's] conduct began by targeting younger women, many of whom he did not know very well, and "using his sociability and charm to interact with [them], say[ing] what they want[ed] to hear, manipulat[ing] them as well as coerc[ing] them into having sex with him and/or his getting them intoxicated, making them vulnerable to his sexual gratification." Also significant to Dr. Linderman was that his offense history endured from approximately 1989 and "persist[ed] to onward contact with potentially vulnerable victims as recently as 2003."

In addition, Dr. Sweet noted that while under supervision, appellant violated his conditions of release seven times, including continuing to approach women and being dishonest about his actions.

2. Utter Lack of Power to Control

To determine whether an individual exhibits an utter lack of control over his sexual behavior, we review the following factors: (1) the nature and frequency of the sexual assaults; (2) the degree of violence involved; (3) the relationship (or lack thereof) between the offender and the victims; (4) the offender's attitude and mood; (5) the offender's medical and family history; (6) the results of psychological and psychiatric testing and evaluation; and (7) such other factors that bear on the predatory sexual impulse and the lack of power to control it. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). We may also consider the offender's refusal of treatment opportunities; the lack of a relapse-prevention plan, *In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995), *review*

denied (Minn. Aug. 30, 1995); the presence of "grooming" behavior; and the failure of the offender to remove himself from similar situations, *Bieganowski*, 520 N.W.2d at 530.

We conclude that the district court did not clearly err in its finding that appellant has demonstrated an utter lack of power to control his sexual behavior. With respect to the *Blodgett* factors, Dr. Linderman opined that the violent nature of appellant's sexual assaults supports the determination that he has an utter lack of power to control his sexual impulses. His victims were either strangers or women he had recently met. They were vulnerable due to being under the influence of alcohol. And appellant himself testified that he used coercion, manipulation, and force to achieve sexual contact. Dr. Linderman further opined that appellant has an attitude of entitlement and callousness that caused him to see his victims as objects. As the district court noted, this opinion is supported by appellant's testimony that he assaulted A.M.R., even though he was on probation at the time, because he thought that he could get away with it. Finally, appellant's results on the psychological tests administered support the district court's finding. Because the record contains clear and convincing evidence to support appellant's commitment as an SPP, we affirm.

II.

Appellant contends that his substantive due-process rights and the prohibition against double jeopardy were violated by his civil commitment. Because these arguments have been considered and rejected by the Minnesota Supreme Court in prior cases, we do not find them to be persuasive.

The Minnesota Supreme Court upheld the constitutionality of the SDP statute against a substantive due-process challenge. *Linehan IV*, 594 N.W.2d at 872-76, 878, *affirming Linehan III*, 557 N.W.2d at 184, *after vacatur and remand sub nom. Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596. The supreme court 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.").

The Minnesota Supreme Court also addressed the argument that because an individual has served his sentence for the criminal-sexual-conduct convictions, his civil commitment constitutes double jeopardy. *Linehan IV*, 594 N.W.2d at 871-72 (addressing double-jeopardy challenge to SDP statute); *Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (addressing double-jeopardy challenge to psychopathic-personality statute), *review denied* (Minn. July 28, 1999). Civil commitment does not implicate double jeopardy because it is remedial, and its purpose is treatment rather than punishment. *Call*, 535 N.W.2d at 320.

III.

Appellant argues that his procedural due-process rights were violated when the district court prevented him from presenting certain evidence at his 60-day review hearing. We review a constitutional challenge de novo. *State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). But the decision "whether to admit or exclude evidence is within the district court's discretion and will be reversed only if the court has clearly abused its discretion." *Ramey*, 648 N.W.2d at 270.

The evidence at a 60-day review hearing is limited to "(1) the statutorily required treatment report; (2) evidence of changes in the patient's condition since the initial commitment hearing; and (3) such other evidence as in the district court's discretion enhance[s] its assessment of whether the patient continues to meet statutory criteria for commitment." *In re Linehan (Linehan II)*, 557 N.W.2d 167, 171 (Minn. 1996), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997). An individual subject to commitment "may not challenge every aspect of the initial commitment order, but is limited to offering evidence that is relevant to a change in his condition or rebuts a new determination of the treatment facility." *Id.* at 170–71.

Appellant does not argue that the admissible-evidence standards established in *Linehan II* violate procedural due process. Instead, appellant contends that his proffered evidence was admissible under *Linehan II* and that the district court's refusal to admit the evidence violated procedural due process. But appellant concedes that all of the proffered evidence related to possible future treatment options for him and not to treatment that appellant has received. The treatment options for a committed individual and other general evidence about the Minnesota civil commitment system are not relevant to an SDP/SPP commitment determination. *See* Minn. Stat. § 253B.02, subds. 18b–18c. The only evidence that is relevant is that which specifically relates to the proposed committee and his classification as an SDP or SPP. We therefore conclude that the district court did not abuse its discretion by denying admission of the proffered evidence.

Affirmed.