STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1680

In the Matter of the Civil Commitment of:
Robert Arthur Litzau, Alleged Mentally Ill

Filed March 3, 2009
Affirmed; motion granted
Toussaint, Chief Judge

Cass County District Court
File No. 11-PR-08-1690

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Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Klaphake, Judge.

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

TOUSSAINT, Chief Judge

Appellant Robert Arthur Litzau challenges the district court order committing him as mentally ill, contending that he is entitled to a new trial as a result of the ineffective assistance of trial counsel and that the evidence does not support the district court's

findings. Because appellant was not denied the effective assistance of counsel and because clear and convincing evidence supports the district court's determinations that appellant presents a substantial likelihood of harm to himself or others, we affirm. Respondent's motion to strike documents that were not part of the trial-court record, as well as references to those documents in appellant's brief, is granted.

FACTS

Appellant is currently 66 years old. In 1999, he was convicted of fourth-degree criminal sexual conduct. As a result, he is required to register as a predatory offender.

In June of 2003, appellant was charged with possessing an incendiary device and making terroristic threats after he threatened to "blow up" a residence and "kill as many police officers as possible."

After appellant was evicted from his rented home in early 2008, he lived with friends or in his vehicle, but failed to advise law enforcement of his address change. He was subsequently charged with failure to register as a predatory offender. In February 2008, law enforcement received a telephone call indicating that children reported that appellant had followed them home from school and asked them to "come with him out to the woods and stay at his cabin."

On July 9, 2008, appellant admitted himself into the emergency room at St. Cloud Hospital when he was unable to retrieve a ballpoint pen that he had inserted through his urethra into his penis for sexual pleasure. Doctors determined that the pen had ruptured appellant's bladder, and, after attempts to remove the pen with forceps failed, they advised appellant that surgery would be necessary. Appellant initially refused any form

of anesthesia, telling staff that he was a "strong man" who did not want to become "addicted" to medications. Eventually, appellant consented to general anesthetic for surgical extraction of the pen.

Following his surgery, appellant repeatedly complained about the installed drains and catheter and refused antibiotics, telling staff that he would "naturally heal" if all foreign objects were removed from his body. Because he refused antibiotics, appellant's wound became dangerously infected, and he also developed a urinary-tract infection. He claimed that hospital staff caused his infections. A doctor wrote that appellant "has no significant insight into the seriousness of his problem nor the appropriate treatment options."

Appellant was placed on a 72-hour hold due to a "[p]ossible history of schizophrenia" and "competency issues." Staff reported that appellant was "tangential" and would not disclose where he was living because "he does not want the government to find him." He stated that he "has been abused by the government since he was 8 years old," and that "police have beat him up." When asked specifically what the government had done to harass him, appellant stated "conspiracy, hate crimes, terrorism, and bullying." When a doctor later asked appellant the same question, he stated: "I can't use my mind power to discuss these things."

After the 72-hour hold expired, appellant's treating physician sought formal commitment. At the commitment hearing, appellant was present and represented by a court-appointed attorney. Appellant's attorney informed the district court that appellant agreed to stipulate to the admission of the commitment petition and its attachments and to

hospital records and examiners' reports without having the examiners testify and that appellant would offer "what he would believe the testimony would be relative to six individuals who for various reasons are not here today."

In its commitment order, the district court concluded that appellant "is a danger to himself or others and has caused physical harm to himself due to his mental illness, and presents a risk of harm to others," and "has shown that he is unable to provide himself with necessary food, clothing, shelter or medical care."

D E C I S I O N

I.

Counsel at a commitment proceeding is to be a "vigorous advocate" on behalf of the person whose commitment is sought. Minn. Stat. § 253B.07, subd. 2c(4) (2006). Appellant claims that he did not receive the effective assistance of counsel. This court assesses counsel's competence using an objective standard of reasonableness. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). In deciding whether an individual received ineffective assistance of counsel in a commitment proceeding, we apply 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). 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). There is a strong presumption that counsel's performance was reasonable. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). "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).

Appellant asserts that counsel's representation was ineffective for five reasons. First, counsel stipulated to the admission of the commitment petition, which included a criminal complaint and police-incident report, which appellant claims were "hearsay evidence." During a commitment hearing, the district court "shall admit all relevant evidence," making its determination "upon the entire record pursuant to the Rules of Evidence." Minn. Stat. § 253B.08, subd. 7 (2006). "[T]he tactical decisions of counsel to waive possible objections to matters which did not result in prejudice to their client are an insufficient basis upon which to vacate commitment orders." *Cordie*, 372 N.W.2d at 30. A trial counsel's failure to object to the admission of alleged hearsay evidence is not deficient for purposes of an ineffective-assistance-of-counsel claim where the failure to object involved trial strategy. *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007).

Second, appellant contends that his attorney was unable to cross-examine the examiners on their reports, "which would have revealed inconsistencies with the doctors at the St. Cloud Hospital." But, as previously agreed by the parties, the district court asked both court-appointed examiners whether their testimony would be consistent with their reports, and both answered affirmatively; they also stated that appellant's circumstances had not changed. Moreover, counsel is not required to cross-examine the examiners in commitment proceedings. *See* Minn. Stat. § 253B.08, subd. 5a (2006) (counsel "may . . . cross-examine witnesses, including examiners"); Minn. Stat. § 645.44,

subd. 15 (2006) (stating that "may" is permissive). Furthermore, counsel's decisions regarding cross-examination represent a matter of trial strategy that we will not review for competence. *Voorhees*, 596 N.W.2d at 255.

Third, appellant disagrees with counsel's stipulation that appellant would testify about what his witnesses would testify to if they were called at trial and argues that counsel should have requested a continuance to allow his witnesses to be present. But counsel's choice of witnesses is beyond appellate review because it is a trial tactic "within the proper discretion of trial counsel." *Id.*; *Dibley*, 400 N.W.2d at 191 ("[T]he selection of witnesses and the conduct of trial are specifically for counsel to determine."). Furthermore, nothing in the hearing transcript indicates that appellant disagreed with the decision not to call live witnesses, and the transcript suggests that appellant could not recall his proposed witnesses' last names or addresses.

Fourth, appellant contends that his trial attorney was ineffective because he failed to suggest reasonable alternatives to commitment. But appellant can point to no authority requiring his trial counsel to suggest reasonable alternatives to the district court. *See Dibley*, 400 N.W.2d at 190 ("Counsel may, unless the proposed patient opposes it, present evidence of less restrictive alternatives.").

Fifth, appellant claims that his trial attorney was ineffective because he failed to make a closing argument. But decisions regarding closing argument constitute an attorney's trial strategy and are beyond appellate review. *See Dukes v. State*, 660 N.W.2d 804, 811 (Minn. 2003). At the end of the hearing, the district court asked appellant if he wanted to make any additional statements on the record, but he declined. Counsel for the

state did not make a closing argument, and appellant can point to no authority requiring a closing argument in commitment proceedings.

Appellant's counsel's representation did not fall below an objective standard of reasonableness. Additionally, appellant has not shown that, but for his trial counsel's representation, he would not have been committed. On this record, appellant cannot show prejudice as a result of his trial counsel's representation. His ineffective-assistance-of-counsel claim is without merit.

II.

In reviewing a district court's commitment of a person as mentally ill, our review is limited to a determination of whether the district court complied with the Minnesota Commitment and Treatment Act. *In re Janckila*, 657 N.W.2d 899, 902 (Minn. App. 2003). The district court's findings of fact are accorded deference and will not be overturned unless clearly erroneous, but we review de novo whether the evidence is sufficient to satisfy the requirements of the statute. *Id.* The record is considered in a light most favorable to the district court's findings. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). When the findings rest largely on expert testimony, the district court's credibility determinations, to which we defer, are particularly important. *Id.*

Appellant argues that the "record does not support a finding that [he] knowingly intended to waive his statutory rights," including the "right to have the examiners present for cross-examination" and "the right to object to the admission of the several instances of hearsay contained in [the] petition and attachments." But appellant provides no statutory authority to support these alleged rights. Moreover, Minn. Stat. § 253B.08,

subd. 5a, provides that, if the parties agree, the opinions of court-appointed examiners may be admitted into evidence without the examiners' testimony. Appellant did not possess the rights he claims to have waived unintentionally.

III.

Appellant argues that the record does not support his mentally-ill commitment by clear and convincing evidence. A district court may commit a person if there is clear and convincing evidence that the person is mentally ill. Minn. Stat. § 253B.09, subd. 1(a) (2006). In a commitment proceeding, the district court "shall find the facts specifically, and separately state its conclusions of law." Minn. Stat. § 253B.09, subd. 2 (2006). "Where commitment is ordered, the findings of fact and conclusions of law shall specifically state the proposed patient's conduct which is a basis for determining that each of the requisites for commitment is met." *Id.*

> A person is mentally ill if the person
>
> has an organic disorder of the brain or a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or to reason or understand, which is manifested by instances of grossly disturbed behavior or faulty perceptions and poses a substantial likelihood of physical harm to self or others as demonstrated by:
>
> (1) a failure to obtain necessary food, clothing, shelter, or medical care as a result of the impairment;
>
> (2) an inability for reasons other than indigence to obtain necessary food, clothing, shelter, or medical care as a result of the impairment and it is more probable than not that the person will suffer substantial harm, significant psychiatric deterioration or debilitation, or serious illness, unless appropriate treatment and services are provided;
>
> (3) a recent attempt or threat to physically harm self or others . . .

Minn. Stat. § 253B.02, subd. 13(a) (2006).

A. Organic Brain Disorder or Substantial Psychiatric Disorder

Appellant claims that, because his self-inflicted injury was caused by sexual dysfunction, and not by mental illness, the district court's finding that he was "mentally ill" as defined by statute was not supported by clear and convincing evidence. But the record is replete with evidence indicating that appellant has "a substantial psychiatric disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment." The district court outlined appellant's behavior constituting the basis for his commitment as mentally ill and stated that it relied upon the examiners' reports, which included appellant's specific diagnoses.

The first court-appointed examiner diagnosed appellant with the "long-term mental disorders" of "paranoid schizophrenia and antisocial personality disorder" with "significant sexual dysfunctioning and a learning disability" and reported that appellant "has no insight or awareness into the seriousness and dangerousness of his behavior" and is unable "to comply with a voluntary inpatient or outpatient treatment program." The second court-appointed examiner diagnosed appellant with "schizophrenia – paranoid type, as evidenced by a long history of preoccupation with delusions of persecution." On this record, the district court's determination that appellant suffers from mental illness within the meaning of Minn. Stat. § 253B.02, subd. 13(a), is not clearly erroneous.

B. Failure to Obtain Necessities or Medical Care

The district court also found that appellant "is unable to provide himself with necessary food, clothing, shelter or medical care." Appellant contends that this finding is unsupported by evidence.

Ample evidence supports the finding as to appellant's inability to provide himself with medical care. Appellant physically harmed himself and failed to obtain necessary care. While the record may not include evidence to support the finding that appellant could not provide himself with food, clothing, or shelter, the evidence supporting the finding that he could not provide himself with medical care makes the unsupported finding that he could not provide other necessities harmless error. *See* Minn. R. Civ. P. 61 (requiring courts to disregard error or defect "which does not affect the substantial rights of the parties").

C. Harm to Self and Others

Appellant challenges the findings that he poses a threat to himself and a risk of harm to the community. Appellant's life was threatened when his self-inflicted injury became seriously infected and he refused antibiotics. He has now twice inserted objects into his penis without being able to retrieve them and is at risk for future life-threatening infections. Even if appellant merely intended to satisfy himself sexually, he is a danger to himself because of his refusal to take appropriate medications and to seek treatment. On this record, the district court's finding that appellant is a danger to himself because of self-inflicted harm and potential for future self harm is not clearly erroneous. *See In re Melcher*, 404 N.W.2d 309, 312 (Minn. App. 1987) (affirming commitment as mentally ill

where schizophrenic and delusional patient was hospitalized for attempted suicide); *In re Anderson*, 367 N.W.2d 107, 109 (Minn. App. 1985) (findings of significant weight loss and failure to provide food or medical care demonstrated self harm sufficient for commitment as mentally ill).

The first examiner opined that appellant was a danger to others because he is a "registered sex offender who is alleged to have committed another offense in February of this year," and has made "homicidal and suicide threats in the past." The second examiner concluded that appellant is dangerous to others because he "is in violation of predatory offender registration requirements." The examiners' statements support the district court's finding that appellant is a danger to others because he is a "convicted sex offender and his mental illness impacts his ability to fully comply with predatory offender registration requirements."

Also, because appellant does not perceive the effects of his obsession with a government conspiracy and his terroristic threats against law enforcement may have on other people, he meets the substantial-likelihood-of-harm standard. *See Janckila*, 657 N.W.2d at 903 (finding likelihood of harm where patient confronted strangers and "does not recognize that others perceive his behavior as threatening"); *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (finding likelihood of harm where patient feared police and "may possibly act violently in response" to persecutory delusions).

The district court's conclusion that appellant meets the statutory criteria for commitment as mentally ill was based upon clear and convincing evidence.

D. Least-Restrictive Alternative

If commitment is ordered, the district court's "findings shall also identify less restrictive alternatives considered and rejected by the court and the reasons for rejecting each alternative." Minn. Stat. § 253B.09, subd. 2 (2006). Appellant claims that "[i]t is unclear from the record whether the district court considered other reasonable alternatives to [his] commitment." But the district court wrote that it "considered alternative less restrictive placements," finding that there "is no reasonable and available alternative to involuntary commitment at this time." These findings satisfy the statutory mandate.

During commitment proceedings, a district court must make "careful consideration of reasonable alternative dispositions, including but not limited to, dismissal of petition, voluntary outpatient care, voluntary admission to a treatment facility, appointment of a guardian or conservator, or release before commitment." Minn. Stat. § 253B.09, subd. 1(a) (2006). If the district court "finds that there is no suitable alternative to judicial commitment, the court shall commit the patient to the least restrictive treatment program or alternative programs which can meet the patient's treatment needs." *Id.*

> In deciding on the least restrictive program, the court shall consider a range of treatment alternatives including, but not limited to, community-based nonresidential treatment, community residential treatment, partial hospitalization, acute care hospital, and regional treatment center services. The court shall also consider the proposed patient's treatment preferences and willingness to participate voluntarily in the treatment ordered. The court may not commit a patient to a facility or program that is not capable of meeting the patient's needs.

Id., subd. 1(b) (2006).

Appellant also argues that, because he eventually agreed to take antibiotics, he is eligible for voluntary outpatient care or monitoring. But both examiners ruled out alternative-treatment options and recommended involuntary commitment. The second examiner "considered other less restrictive alternatives such as a stay of commitment, voluntary admission to a mental health treatment facility, community residential placement, or outpatient care," but determined that "[n]one of these alternatives could provide the level of safety, supervision, and medical care that [appellant] requires." The second examiner also noted that appellant told her "that he would discontinue his current treatment if he was released from the hospital."

The record supports the district court's conclusion that involuntary treatment was appropriate due to appellant's unwillingness to participate voluntarily with psychological and medical treatment plans and his continuing untreated schizophrenia and persecutory delusions.

IV.

Respondent moves this court to strike documents that were not part of the trial-court record and references to those documents in appellant's brief. The record on appeal is limited to the "papers filed in the [district] court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. This court must strike documents included in a brief that are not part of the appellate record. *Fabio v. Bellomo,* 489 N.W.2d 241, 246 (Minn. App. 1992), *aff'd,* 504 N.W.2d 758 (Minn. 1993). This court may also strike or disregard portions of a brief that refer to or rely upon non-record documents. *See, e.g., AFSCME Council No. 14 v. Scott County*, 530 N.W.2d 218, 222-23

(Minn. App. 1995), *review denied* (Minn. May 16 & June 14, 1995). Respondent's motion to strike two documents not presented to the district court, and all references to them in appellant's brief, is granted.

Affirmed; motion granted.