STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1693

In the Matter of the Civil Commitment of: Joshua Joseph Cox

Filed March 10, 2009
Affirmed
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-MH-PR-06-985

Stephen D. Radtke, 10781 Hopkins Circle, Bloomington, MN 55420 (for appellant Cox)

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Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Halbrooks, Judge.

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

TOUSSAINT, Chief Judge

Appellant Joshua Joseph Cox challenges his commitment as a sexually dangerous person (SDP) under Minn. Stat. § 253B.185 (2006), arguing that the statute is unconstitutional, that his commitment violated his right to a jury trial, and that the district court erred in concluding that he had engaged in a course of harmful sexual

conduct, in rejecting his proposed less-restrictive alternative, and in committing appellant despite testimony about changes in his condition. Because the supreme court has established that Minn. Stat. § 253B.185 is constitutional and that there is no right to a jury trial in commitment cases and because we see no error on the part of the district court, we affirm.

D E C I S I O N

1. Constitutionality of Minn. Stat. § 253B.185 (the SDP Act)

"Minnesota statutes are presumed constitutional, and our power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). Appellant argues that the SDP Act, under which he was committed, is unconstitutional because it violates his substantive and procedural due-process rights, creates double jeopardy, and violates equal protection.

A. Substantive Due Process

An SDP is a person 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) as a result, is likely to engage in acts of harmful sexual conduct . . . ." Minn. Stat. § 253B.02, subd. 18c(a) (2006).

> We now clarify that the SDP Act allows civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to adequately control their sexual impulses, making it highly likely that they were engage in harmful sexual acts in the future.

In re Linehan, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

For commitment as an SDP, "it is not necessary to prove that the person has an inability to control the person's sexual impulses." Minn. Stat. § 253B.02, subd. 18c(b). *Linehan IV* explicitly rejected the argument that this language violated *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), and held that the statute was to be interpreted to require that a person's mental disorder "does not allow [the person] to adequately control [his] sexual impulses." *Linehan IV*, 594 N.W.2d at 876; s*ee also Kansas v. Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 870 (2002) (holding that "proof of serious difficulty in controlling behavior" is sufficient for commitment); *In re Martinelli*, 649 N.W.2d 886, 890 (Minn. App. 2002) (holding that *Linehan IV* satisfied the *Crane* standard), *review denied* (Minn. Oct. 29, 2002). Thus, appellant's substantive due process challenge lacks merit.

B. Double Jeopardy

Appellant's double-jeopardy argument has also been explicitly rejected. "The Supreme Court's reasoning [in *Hendricks*] supports our earlier ruling that the SDP Act does not contravene the Double Jeopardy . . . clause[]." *Linehan IV*, 594 N.W.2d at 871.

Appellant argues that the statute is punitive because it does not provide treatment until after a sentence has been served. But "[t]his procedure does not render the commitment statute punitive; had the person not been committed, he would still have had to serve time in the correctional facility." *Joelson v. O'Keefe*, 594 N.W.2d 905, 912 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Appellant also claims that the statute is punitive because no one committed under it has been discharged. But protection of the public is a primary purpose of SDP

commitment. *See In re Blodgett*, 510 N.W.2d 910, 914 (Minn. 1994) (holding that "compelling government interest [required to justify the state in depriving an individual of freedom] is the protection of members of the public from persons who have an uncontrollable impulse to sexually assault"). Appellant provides no support for the view that, because no one has been discharged, SDP commitment violates double jeopardy.

C. Equal Protection.

Appellant argues that commitment violates his equal protection right because others who are also a threat to public safety are not committed. But "[this] argument ignores the fact that the sexual predator poses a danger that is unlike any other." *Id.* at 917 (rejecting argument that statutory commitment violates equal protection). Thus, the supreme court has rejected appellant's three challenges to the constitutionality of the SDP Act.

D. Right to a Jury Trial

Appellant argues that his commitment hearing violated his right to a jury trial. "[T]he Minnesota Supreme Court has rejected the argument that a jury trial is required [in commitment proceedings."] *Joelson,* 594 N.W.2d at 910 (citing *State ex rel. Pearson v. Probate Court,* 205 Minn. 545, 556-57, 287 N.W. 297, 303 (1939), *aff'd* 309 U.S. 270, 60 S. Ct. 523 (1940)).

Appellant concedes that this is the present state of the law but argues that "the time is right for a renewed review of the right to jury trial in these cases." The "task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied*

(Minn. Dec. 18, 1987). This court lacks authority to reopen the issue.

2. Course of Harmful Sexual Conduct

In reviewing a civil commitment, this court reviews factual findings under a clear-error standard. *In re Civil Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

The district court found that appellant had "engaged in a course of harmful sexual conduct" as defined in Minn. Stat. § 253B.02, subd. 7a. *See* Minn. Stat. § 253B.02, subd. 18c(a)(1) (listing engagement in course of harmful sexual conduct as first element in definition of SDP). Appellant challenges this finding on the ground that two of his three victims, his stepbrother and stepsister, claimed that they were not harmed by his conduct. But "'[h]armful sexual conduct' means sexual conduct that *creates a substantial likelihood* of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2006) (emphasis added). "The presumption is not that a victim actually suffers serious emotional harm, but that the conduct creates a substantial likelihood of such harm." *Stone*, 711 N.W.2d at 837. Thus, the issue is not whether the victims suffered actual harm from appellant's conduct; the issue is whether appellant's conduct created a substantial likelihood of serious emotional harm.

One court-appointed examiner, when asked if appellant's conduct was "the type of behavior that's harmful generically?" answered, "Generically or typically, or at least a strong likelihood [that the behavior is] harmful." A second court-appointed examiner answered, "That's correct" when asked if appellant's behavior "would typically cause emotional harm and, in fact, similar behavior in [appellant's] case did cause substantial

psychological harm [to appellant's siblings]?"

The record also supports the substantial emotional harm caused to the third victim, a 13-year-old boy. The officer who interviewed the boy said: "He was very upset about what had taken place and I could see that he was very scared and upset as we spoke. At this time he was crying very hard and before we could even start, he stood up and threw up into a garbage can located in the kitchen area."

The district court's finding that appellant engaged in a course of harmful sexual conduct as defined in Minn. Stat. § 253B.02, subd. 7a(a), is not clearly erroneous.

3. Less Restrictive Alternative

An SDP is committed "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. On review, this court considers whether the district court complied with the commitment statute. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

Appellant challenges his commitment on the ground that a less-restrictive program is available, i.e., treatment at Safety Center and residence with, and supervision by, his mother and stepfather. Appellant was previously treated at Safety Center from September to November 2001, from July 2002 to February 2003, and from March 2003 to December 2005. During his treatment, he was intermittently suspended for probation and rule violations and was ultimately discharged without having completed treatment. Appellant also escaped from his stepfather's supervision in November 2002.

One examiner answered "Yes" when asked if appellant needed to complete treatment in a secure setting and noted that, when Safety Center discharged appellant, it "certainly recommend[ed] that inpatient treatment was probably a better alternative for [appellant]." This examiner was not aware of any facility that "could provide 24-hour a day secure supervision for [appellant] while [Safety Center does] the primary treatment modality."

A second examiner testified that, although there had been problems when appellant was at Safety Center and there would need to be very specific criteria for behavior that would result in appellant's discharge from Safety Center, "with some reservations," he would "be willing to consider" treatment at Safety Center and residence with appellant's mother and stepfather. This examiner told the court that a stay of commitment would be necessary for the Safety Center alternative and, when asked what he would recommend if the choice were commitment or release, said "Commitment."

Thus, while both examiners expressed the wish that there were a residential facility that could either provide treatment for appellant or accommodate him while he pursued treatment at Safety Center, they agreed that there is no such facility.[1] The statute gives appellant the opportunity to present evidence of a less-restrictive alternative, but it does not give him the right to be assigned there. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). Appellant did not "establish[]

[1] A third examiner, who testified at the review hearing, also agreed. He stated that "if there was a residential facility for [appellant] then a stay [of commitment] would be appropriate, but, unfortunately, the only residential program that we have in the state . . . will not take people on a stay of commitment."

by clear and convincing evidence that a less restrictive treatment program is available that is consistent with [his] treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1. The district court complied with the statute by committing appellant to a secure facility.

4. Claim of Changes in Appellant's Condition

At the March 2008 review hearing, appellant's mother testified about positive changes she perceived in his condition since the commitment hearing a year earlier. *See In re Linehan*, 557 N.W.2d 167, 171 (Minn. 1996) *(Linehan II*) (stating that evidence of changes in patient's condition is among items properly considered at review hearing), *vacated and remanded*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999). Appellant contends that the district court erred in committing him indeterminately despite this evidence.

But the report submitted by the Minnesota Sex Offender Program (MSOP) in October 2007 indicated that:

> Since his admission to MSOP in October 2006, [appellant] has reportedly had rule violations for problematic behaviors such as verbal abuse, taking money from other patients, possession of pornography, not wearing his identification badge, unit disruption, not maintaining hygiene, fraudulent misrepresentation, refusal to follow staff direction, and possessing various contraband. . . . There was also concern that [appellant] was engaging in sexual contact with another patient; however, [he] denied any inappropriate activity had taken place. . . .
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> . . . .
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> . . . His condition is unchanged and there is no new information that would suggest his risk to the community has diminished since the initial commitment. Hence, [he] continues to satisfy the statutory requirements as an SDP.

The examiner at the review hearing also reported that appellant continued to meet the criteria for commitment. The district court did not err in committing appellant despite his mother's testimony.

Affirmed.