STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2170

In the Matter of the Civil Commitment of:
Benjamin Robert Harroun.

Filed April 14, 2009
Affirmed
Harten, Judge*

Blue Earth County District Court
File No. 07-PR-07-2938

Lori Swanson, Attorney General, Scott E. Haldeman, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Harten, Judge.

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

HARTEN, Judge

Appellant challenges the order for his civil commitment, claiming that the evidence is insufficient to support the district court's findings that he is "highly likely to"

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

reoffend and that there is no less-restrictive alternative to commitment. Because sufficient evidence supports the district court's determinations that appellant is highly likely to reoffend and that no less-restrictive alternative to commitment is available to appellant, we affirm.

FACTS

Appellant Benjamin Robert Harroun was born in 1985. In 1999, he was adjudicated delinquent on a charge of first-degree criminal sexual conduct after sexually abusing a 34-month-old boy. Appellant was placed on indefinite probation and required to register as a sex offender. In 2004, he pleaded guilty to a charge of failure to register; in 2005, his sentence was stayed and he was placed on probation for two years.

In May 2006, appellant was charged with first-degree criminal sexual conduct, second-degree criminal sexual conduct, and failure to register as a sex offender after he sexually abused a four-year-old girl. He was sentenced for second-degree criminal sexual conduct to 33 months' imprisonment with execution stayed on condition that he serve 365 days in jail; his sentence for failure to register was one year and one day—eight months in jail and the remainder on supervised release.

Before his scheduled release date, respondent Blue Earth County filed a petition to commit appellant as a sexually dangerous person (SDP). In April 2008, he was committed as SDP to the Minnesota Sex Offender Program (MSOP). In October 2008, following a 60-day review hearing, his commitment was made indeterminate. He challenges his commitment, arguing that the findings that he is highly likely to reoffend and that no less-restrictive alternative is available for him are unsupported by sufficient

evidence and that the determination that no less-restrictive alternative is available is clearly erroneous.

D E C I S I ON

1. Sufficiency of the Evidence

Appellant concedes that he meets the first two requirements for SDP commitment: engaging in a course of harmful sexual conduct and manifesting a sexual, personality or other mental disorder. *See* Minn. Stat. § 253B.02, subd. 18c (2008) (setting out criteria for SDP commitment). Appellant challenges the conclusion that he meets the third criterion: i.e., that he is highly likely to engage in acts of harmful sexual conduct. *See id.*; *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (requiring high likelihood of engaging in acts of harmful sexual conduct). This court reviews de novo whether there is clear and convincing evidence to support a finding that an individual satisfies the third requirement. *Linehan*, 557 N.W.2d at 179.

Appellant argues that there is not clear and convincing evidence because "each of the [psychological] examiners acknowledged that appellant's risk level was sufficiently low that alternatives to commitment to the MSOP . . . were appropriate." This argument mischaracterizes the evidence provided by the examiners.

On the first day of the commitment trial, one examiner testified that appellant met the criteria for commitment to a secure facility in part because he denied that he had committed the May 2006 abuse of a four-year-old girl and also because he needed treatment. Appellant requested and was granted a polygraph examination that evening, which he failed. He then requested a meeting with the two examiners, during which he

admitted that he must have committed the 2004 abuse and that he needed treatment, both of which he had previously denied.

The examiner subsequently testified:

> [I]t seems as a result of the polygraph that [appellant] is taking a closer look at himself and his behavior. He indicated that he was shocked at the results of the polygraph . . . [w]hen I had first initially interviewed him in October, he was quite adamant that this [i.e., the May 2006 abuse] did not happen and now he's thinking that it possibly did happen . . . . [H]e told us that he needed therapy and he wanted some help.

When asked whether her recommendation would have changed if appellant had expressed this view at her initial interview with him the previous October, the examiner replied, "I would have seem him as much more amenable to treatment or if he's admitting he has a problem and he wants help, I probably would have not supported this Petition [for appellant's SDP commitment]." Appellant relies on this testimony to support his argument that he is not highly likely to reoffend.

But the testimony must be considered in conjunction with the testimony that immediately followed it.

> Q. Yesterday when [appellant] testified on the stand, under oath, did you hear him accepting responsibility or showing insight into his offending?
> A. I did not.
> Q. As a result of your conversation with [appellant], have you changed your opinion as to . . . whether or not[,] based on the testing that you did, he is highly likely to reoffend?
> A. I have not changed my opinion.
> Q. Do you believe that [appellant] can do out-patient—regular out-patient sex offender treatment in the community?
> A. No.

> Q. Would you still consider [appellant] to be an untreated sex offender?
> A. Yes.
> Q. Do . . . any of the actuarial instruments that you scored [appellant] on change as a result of the statements that he made to you in this ten minute conversation you had with him this morning?
> A. No.

Thus, contrary to appellant's assertion, this examiner did not say that an alternative to commitment to the MSOP program would be appropriate for him.

A second examiner was also asked if, based on her discussion with appellant after his polygraph test, her opinion had changed as to whether he was highly likely to reoffend. She answered, "Well, he still has two offenses. He still has the diagnoses he's had and he still has the same actuarial scores. So, no." Thus, both examiners agreed that appellant meets the "highly likely to reoffend" criterion.

The second examiner also testified that appellant requires treatment in a residential program and that Alpha House, the only residential program in the state, is not an alternative because it "[could not] take [appellant] if he were civilly committed." The examiner testified that Alpha House could not screen appellant for intake, review his records, or meet him; that no space had been reserved for him at Alpha House; nor did he have a place in any other treatment program. When asked,

> [g]iven that [appellant] is the subject of a civil commitment Petition, given that both you and [the other examiner] have opined that he meets the standards for civil commitment as a sexually dangerous person and given that [appellant's Intensive Supervised Release (ISR)] agent has indicated that she will not place him at Alpha House and Alpha House has not screened him and there is no bed there. . . . Would you

> consider Alpha House to be a realistic, available treatment alternative for [appellant] at this time?

the examiner answered, "If those are the only conditions, I wouldn't."

An individual who meets the SDP criteria must be committed to a secure treatment facility unless he is able to establish "by clear and convincing evidence that a less restrictive treatment program is available that is consistent with the [his] treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1 (2008). The examiners agreed that appellant meets the SDP criteria, and their testimony fails to establish by clear and convincing evidence that a less-restrictive treatment program is available for him.

2. Changed Circumstances

The MSOP treatment report prepared for the 60-day hearing indicated that appellant: (1) "continues to satisfy the statutory requirements as a SDP"; (2) remains unchanged and was not involved in treatment groups; (3) has a poor prognosis because of his high risk to reoffend and impulsivity; (4) continues to need "long-term, comprehensive sex offender specific treatment"; (5) is not a viable candidate for placement at Alpha House and is best suited to MSOP; and (6) continues to be a danger to the community.

Between his temporary commitment on 22 April 2008 and the 60-day hearing on 25 July 2008, appellant chose to execute his sentence in another matter and was returned to the Department of Corrections (DOC). This resulted in appellant having a ten-year

conditional release period that could possibly fund treatment at Alpha House. Appellant claims that treatment at Alpha House constitutes a less-restrictive alternative.

Alpha House is an unlocked facility in a residential area. The district court found "that Alpha House is not an appropriate setting for [appellant] to undergo treatment, particularly considering his high risk for reoffense, need for intense supervision, potential danger to the public, and speculation on [his] acceptance into the [Alpha House] program." A district court's finding that there is no less-restrictive alternative will not be reversed unless it is clearly erroneous. *In re Dirks*, 530 N.W.2d 207, 211 (Minn. App. 1995).

At the 60-day review hearing, appellant introduced as his witnesses his ISR agent and one of the examiners. The state called the other examiner. None of the evidence they presented indicated that appellant no longer needs treatment or that, because appellant is on conditional release, he will receive funding for treatment at Alpha House. Nor did any evidence indicate that appellant has been or would be accepted for treatment there. When asked how long appellant would have funding for Alpha House while on ISR, appellant's ISR agent said funding was not guaranteed. She also said that a patient could walk out of the facility, that there are no security guards, and that she would have no ability to track appellant's location during the day.

The examiner whom appellant called as a witness testified that (1) she did not consider appellant likely to commit an offense if he were at Alpha House; (2) she continued to regard Alpha House as an appropriate placement; (3) she assumed appellant

would be returned to prison if he were terminated from the Alpha House program; and (4) she had not read the MSOP treatment report.

The examiner whom the state called testified that: (1) she agreed with the treatment report; (2) she had not noticed any changes in appellant's condition when she reviewed the reports and treatment information; (3) she considered MSOP to be the appropriate placement for appellant; (4) she did not know how DOC funding for treatment at Alpha House was managed; (5) she knew appellant had signed a treatment contract but had not "seen anything beyond that"; (6) appellant's ISR was not the equivalent of therapy; (7) appellant's previous failures to register would be relevant to his being a risk to the community; and (8) she had not changed her opinion that appellant should be committed as a SDP.

Absent persuasive evidence either that appellant no longer requires treatment or that appropriate treatment in a less-restrictive facility is actually available to him, the district court did not err in finding that there was no less-restrictive alternative.

Affirmed.

Dated:

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James C. Harten, Judge