STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1043

In the Matter of the Civil Commitment of: Kenrick Allen Shell.

Filed May 5, 2009
Affirmed
Shumaker, Judge

Hennepin County District Court
File Nos. 27-MH-PR-06-838, 27-PR-CV-06-1

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

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

SHUMAKER, Judge

In this appeal from his indeterminate commitment as a sexually dangerous person, appellant argues that the state failed to meet its burden of proof, that the court erred in refusing to admit evidence of scientific findings on juvenile brain development, and that his constitutional rights were violated. We affirm.

FACTS

On March 19, 1999, 18-year-old appellant Kenrick Allen Shell was charged with first-degree criminal sexual conduct for touching the genitals of a 12-year-old girl and forcing her to perform oral sex on him. The victim had cerebral palsy, developmental and physical disorders, and the social skills of an "older toddler." Shell initially denied the assault, but later pleaded guilty. In August 1999, the court stayed execution of Shell's 91-month prison sentence and placed him on probation for ten years. As a condition of his probation, Shell was ordered to serve 365 days in jail and complete inpatient sex-offender treatment at Alpha Human Services (Alpha).

Shell began treatment at Alpha in April 2000. During his treatment, Shell revealed that he had committed seven sexual assaults in addition to his charged crime. He stated that at the age of 15, he used force to have sex with a 15-year-old girl and sexually abused his 14-year-old brother over the course of several months. Shell stated that he would often manipulate his brother into having sexual contact with him and that these relations were consensual less than half the time. When Shell was 17, he claimed to have participated in a gang rape of an obviously intoxicated woman. Shell said that after the rape, he blackmailed the woman. At age 18, he and a friend got a girl "high" and then took turns raping her. Also at age 18, he said he raped a friend on two occasions, pinning her down despite her pleas for him to stop. In May and June of 1999, Shell stated that he had sexual intercourse with a 13-year-old girl on 15 occasions and had the girl perform oral sex on him. Finally, Shell reported that he had participated in between two and ten

gang rapes as a member of the "Gangster Disciples," and that he would sometimes hit the woman being raped because it made him more sexually aroused.

Over the course of his two years at Alpha, Shell violated the program rules many times. More than once, he simply failed to return to Alpha for curfew; he also admitted to engaging in prohibited sexual contact, making phone calls to "tele-personal ads," viewing prohibited pornography, stealing money and other property from a resident, and going to a strip club, where he again engaged in prohibited sexual contact. Alpha terminated Shell from treatment on March 6, 2002. In his termination summary, Shell's case supervisor observed that "Shell does not appear to have benefited from treatment. He is able to 'look good' for a period of time and appear remorseful when he is caught engaging in illegal and inappropriate behavior." The supervisor considered Shell a "high risk to reoffend sexually" and noted that he lacked "the empathy most people possess that helps them refrain from engaging in behaviors that hurt other people." The Alpha supervisor concluded that "Mr. Shell is not amenable to sex offender therapy outside a secure facility."

On March 15, 2002, the district court revoked Shell's probation and executed his sentence. While imprisoned, Shell was accepted into the assessment phase of the Lino Lakes' Sex Offender Treatment Program (SOTP). The assessing doctor, who believed that Shell minimized his sexual interest in children, diagnosed Shell with Alcohol and Cannabis Dependence, Sexual Disorder Not Otherwise Specified, and Antisocial Personality Disorder. Shell was terminated from SOTP in April 2005 when he used the prison phone to relay threatening messages between an inmate and his girlfriend.

Shortly before Shell was to be released from prison in August 2006, Hennepin County petitioned for his civil commitment as either a sexually dangerous person (SDP) or a sexual psychopathic personality (SPP). The court appointed Roger Sweet, Ph.D. and, at Shell's request, Peter Meyers, Psy.D. to examine Shell for the commitment hearing. Both examiners testified that Shell met the statutory requirements for commitment as a SDP. Several witnesses testified to Shell's good character. The commitment court found that Shell fit the statutory criteria for a SDP and ordered him committed to the Minnesota Sex Offender Program (MSOP).

Sixty days later, the court revisited Shell's commitment. MSOP submitted a report, and psychologist Bruce Stewart diagnosed Shell with Paraphilia Not Otherwise Specified; Rule out Pedophilia; and Cannabis and Alcohol abuse. Dr. Stewart testified that during his time thus far at MSOP, Shell had displayed exemplary behavior, but that his risk of reoffending was not reduced. The court found that Shell continued to be a SDP, and ordered him to be committed indeterminately.

Shell appeals, arguing that the court's decision was not supported by sufficient evidence, that the court made evidentiary errors, and that his constitutional rights were violated.

D E C I S I O N

Sufficiency of the Evidence

Shell first claims that there was insufficient evidence to commit him as a sexually dangerous person. We review de novo whether there is clear and convincing evidence to support the conclusion that an appellant meets the statutory standards for civil

commitment. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). However, we do not reweigh the evidence. *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan* III), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). "We review the district court's 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), and "[w]here the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Knops*, 536 N.W.2d 616,620 (Minn. 1995).

Under the Minnesota Commitment and Treatment Act, an individual may be civilly committed as a sexually dangerous person if he or she has engaged in a course of harmful sexual conduct; has manifested a sexual, personality, or other mental disorder or dysfunction; and as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008). The state must prove each of these elements by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2008).

Both examiners testified at the commitment hearing that Shell had engaged in a course of harmful sexual conduct that was likely to result in serious physical or emotional harm to the victims. Dr. Meyers diagnosed Shell with Pedophilia, non-exclusive type, sexually attracted to both genders; Paraphilia, Not Otherwise Specified, non-consent; Alcohol Dependence; Cannabis Dependence; and Antisocial Personality Disorder. Dr. Sweet diagnosed Shell with Cannabis Dependency; Alcohol Abuse; and Antisocial Personality Disorder. Both doctors testified that these disorders cause Shell to have inadequate control over his sexual impulses, and that according to the actuarial tools

employed Shell showed either a "high" or "moderately high" likelihood of recidivism. Both examiners concluded that Shell met the requirements for commitment as a SDP, and that he should be committed to MSOP because a community-based program would not suffice to meet his needs or the requirements of public safety.

Course of Harmful Sexual Conduct

Shell challenges the court's conclusion that he engaged in a course of harmful sexual conduct, arguing that the court was required to find a habitual course of "similar incidents of misconduct or incidents that form a pattern." This is incorrect. The state "is not required to show that the incidents of harmful sexual conduct are the same or similar harmful sexual conduct." *Stone*, 711 N.W.2d at 837. Rather, a "course" of sexual conduct 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) (citation omitted), *review denied* (Minn. Sept. 17, 2002). This 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.* The harmfulness aspect of the course of conduct is defined as "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a (2008).

Essentially, Shell argues that there was insufficient evidence to support the court's finding that he engaged in a course of harmful sexual conduct because "there is no evidence of any other actual victims coming forth," and because his sexually deviant activity is not recent.

Shell self-reported eight incidents of sexual misconduct that took place over approximately four years. That conduct included forcing sex upon intoxicated adolescent girls, participating in gang rapes, manipulating his younger brother into participating in sexual activities, and taking advantage of a young disabled girl. Shell has not recanted any of these accounts, and in fact argued that his "honesty" in revealing these offenses should weigh in his favor. These victims need not testify about the harm that Shell caused them; the issue for the court was not whether such harm *actually* occurred, but whether Shell's behavior was *likely* to cause harm. Minn. Stat. § 253B.02, subd. 7a(a) (2008) (emphasis added). Dr. Meyers testified that "[I]t's clear, given his self-statements, as well as how they match up with other records, that it really is a habitual offending cycle." Dr. Meyers also gave his opinion that "classically, all of [Shell's] victims have suffered. If it's not acute stress syndrome, the potential for them to experience full-blown post traumatic stress is, indeed, I would say highly probable."

Contrary to Shell's claim, the incidents that establish a course of harmful sexual conduct need not be recent. *Stone*, 711 N.W.2d at 837. Even so, Shell's claim that he has not recently engaged in sexual misconduct is belied by the fact that, although he has been either incarcerated or under intense supervision since he was 18 years old, he has continued to engage in prohibited sexual conduct and other inappropriate behavior.

The record supports the court's conclusion that Shell engaged in a course of harmful sexual conduct.

Adequate Control

The second prong of the SDP determination requires a court to find that the person suffers from a mental abnormality or personality disorder that does not allow him to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 875 (Minn. 1999) (*Linehan* IV). This is in contrast with the "inability to control" standard used for determinations of sexual psychopathic personalities. Minn. Stat. § 253B.02, subd. 18c(b) (2008). Here, the court applied the correct standard in finding that Shell's various mental illnesses prevented him from adequately controlling his sexual impulses. The record supports this conclusion.

Both examiners testified at Shell's hearing to several mental diagnoses that prevent Shell from adequately controlling his sexual impulses. Although Shell argues that there is no "recent indication" that he cannot control his sexual impulses, that assertion is undermined by Shell's inability to refrain from prohibited sexual contact while in treatment and his *current* diagnoses of Pedophilia and Paraphilia, non-consenting. As recently as 2006, Shell revealed to Dr. Meyers that he continues to fantasize about 15- and 16-year-old girls. Dr. Meyer's also noted that Shell "reported a lot of grooming techniques," on his younger brother. The presence of "grooming" behavior, and the failure of the offender to remove himself from similar situations may be considered in assessing his lack of control. *See In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994) (discussing the "utter lack of control" standard).

There is no requirement that a commitment court have more recent information on Shell's state of mind than presented here, and ample evidence supports the conclusion that Shell has a mental abnormality preventing him from adequately controlling his sexually deviant impulses.

Likelihood to Reoffend

The third factor in assessing a candidate for classification as a SDP is whether, as a result of the offender's course of misconduct and mental disorders or dysfunctions, the offender is "likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). The supreme court has construed the statutory phrase "likely to engage in acts of harmful sexual conduct" to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *Linehan* III, 557 N.W.2d at 180. The district court concluded that Shell was highly likely to reoffend based on his history and current diagnoses by the experts. We view the evidence in the light most favorable to this conclusion. *Stone*, 711 N.W.2d at 840.

A court is to consider six factors when determining if a person is highly likely to reoffend: (1) the offender's demographic characteristics; (2) the offender's history of violent behavior; (3) the base-rate statistics for violent behavior among individuals with the offender's background; (4) the sources of stress in the offender's environment; (5) the similarity of the present or future context to those contexts in which the offender used violence in the past; and (6) the offender's record of participation in sex-therapy programs. *Stone*, 711 N.W.2d at 840 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan* I).

Shell asserts that "the court did not examine each of the criteria and particularly did not examine those which are individual as to this appellant," yet he fails to indicate which of these criteria the court failed to consider in its 20-page commitment order. While the court did not address the *Linehan* factors by name, respondent notes that the court "isolate[d] the most important factors in predicting harmful sexual conduct." Indeed, the court made findings that, *inter alia*, Shell has never completed a treatment system, is an effective liar, and gets "an adrenaline rush" from breaking rules.

Furthermore, both experts considered the *Linehan* factors in their reports and described Shell as a high risk to reoffend in their testimony. They applied various actuarial tests that placed Shell in the category of offenders who are highly likely to reoffend. For example, the "Hare scale," which has a "very high predictive validity" placed him at the "cut-off" for categorical psychopathy, which indicates that he is three-four times more likely to reoffend than the average offender. The SORAG, which measures violent recidivism in sex offenders, also placed him at 80% likely to reoffend within a ten-year period. Dr. Sweet stated that currently, "he just hasn't been able to get beyond if he wants something immediately, he doesn't care. He tends to forget that there may be some consequences for what he does." Dr. Meyer's greatest concern was that, as an "untreated sex offender . . . he does not have the full awareness of not only what his triggers are towards offense, but, more importantly, how is he going to cope with those stressors when he returns into an environment outside of high structure."

Sufficient evidence supported the court's conclusion that Shell presents a high risk to reoffend if not placed in a secure facility.

Least Restrictive Alternative

If a district court finds an offender is a SDP, it must commit the person to a secure treatment facility unless the offender shows by clear and convincing evidence that a less-restrictive treatment program is available that meets the offender's treatment needs and does not threaten public safety. Minn. Stat. § 253B.185, subd. 1 (2008). The burden of showing a less restrictive alternative is upon the person to be committed. *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001). This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Shell claims that his intensive supervised release program (ISR) is a less restrictive alternative to MSOP. But he did not offer any evidence that another less-restrictive *treatment facility* was available. ISR is not a "treatment facility." Both experts agreed that MSOP was the appropriate place for Shell. Shell made no showing that a different facility was available, and therefore the court's conclusion was not clearly erroneous.

Review Hearing

Under the umbrella of contesting his likelihood to reoffend, Shell also appears to argue that he demonstrated a "sufficient" amount of change at the review hearing so that the court was required to set him free. Sixty days after the original commitment, a court must hold a review hearing to determine whether the patient continues to be a sexually dangerous person. Minn. Stat. § 253B.18, subd. 2(a) (2008). *See also* Minn. Stat. § 253B.18, subd. 2c (2008) (setting standard for reviewing findings of mentally ill and

dangerous); Minn. Stat. § 253B.185, subd. 1 (stating that statutory provisions relating to the commitment of mentally ill and dangerous persons apply with like effect to the commitment of sexually dangerous persons).

At the review hearing, Shell's MSOP admissions psychologist testified that Shell was doing well in treatment, but that there had not been enough time for him to undergo a "significant change in his condition." Shell's treatment team reported that there were no changes in the conditions that led the court to initially find him a sexually dangerous person, that he would continue to benefit from treatment and presented a high risk of reoffending if released. He continued to carry diagnoses of Pedophilia, ADHD, Alcohol and Cannabis dependence, Paraphilia, and adult Antisocial Personality Disorder.

Shell argues that, because 60 days is too short a time period for any significant change to occur, any positive change must suffice to demonstrate that he is no longer a sexually dangerous person. This is not true. While evidence of change in a patient's condition is properly considered at a review hearing, the purpose of the hearing is to determine whether the individual continues to be sexually dangerous. *Linehan* III, 557 N.W.2d at 170-71; Minn. Stat. § 253B.18, subd. 2c. Sixty days is the amount of time that the legislature has set for the initial review, and the supreme court has affirmed the propriety of the review proceedings within such time. *Linehan* III, 557 N.W.2d at 171. Although it is not clear what circumstance would entitle a person to be released from MSOP after 60 days, Shell's good behavior does not support a conclusion that he is no longer sexually dangerous. There was sufficient evidence for the court to conclude that Shell continued to be a sexually dangerous person.

Evidentiary Challenge

Shell challenges the commitment court's refusal to take "judicial notice" of six articles he proffered about adolescent brain development. We review the district court's decision whether to admit evidence based on an abuse of discretion standard. *Kroning v. State Farm Auto Ins. Co*., 567 N.W.2d 42, 45-46 (Minn. 1997). The district court shall "admit all relevant evidence at the [commitment] hearing. The court shall make its determination upon the entire record pursuant to the Rules of Evidence." Minn. Stat. § 253B.08, subd. 7 (2008). There is a presumption of admissibility in commitment cases. *In re Morton*, 386 N.W.2d 832, 835 (Minn. App. 1986).

At the commitment proceeding, Shell asked the court to take "judicial notice" of several articles concerning adolescent brain function and development. The court refused to do so and noted that neither expert had relied on the articles or indicated familiarity with their contents or authors. Judicial notice is appropriate for facts "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Minn. R. Evid. 201(b). Scholarly articles discussing the ongoing scientific research on the adolescent brain and how it differs from the adult brain are not "sources whose accuracy cannot reasonably be questioned," and the court properly declined to take judicial notice of them.

Constitutional Arguments

Finally, Shell challenges the constitutionality of the civil-commitment statutes on several bases, all of which have been previously ruled upon by our supreme court and none of which has merit under established precedent.

Due Process

First, Shell argues that the commitment statutes violate due process because the "adequate control" standard is unconstitutionally vague. The supreme court has determined that this standard satisfies due process:

> Any vagueness in the phrase "adequately control" comes from taking it out of the larger context . . . . Taken in the large context of the holding of *Linehan IV*, the meaning of the phrase "adequate control" is clear; an offender's history of harmful sexual conduct and a high likelihood of future dangerousness, coupled with a mental illness or dysfunction, demonstrates that an offender will find it difficult to control behavior.

Ramey, 648 N.W.2d at 268.

Shell also argues that this standard does not comport "on its face" with federal law under *Kansas v. Crane* because the "adequate control" standard is not equivalent to *Crane's* "special and serious inability" to control behavior standard, and does not distinguish the typical recidivist criminal from a dangerous sexual offender. 534 U.S. 407, 122 S. Ct. 807 (2002). However, *Crane* does not require a "special and serious" inability to control behavior, but "proof of serious difficulty in controlling behavior." *Id.* at 413, 122 S. Ct. 867, 870 (2002) (citations omitted). This court has already held that *Linehan IV's* "adequate control" standard satisfies *Crane*'s due-process requirements. *In*

re Martinelli, 649 N.W.2d 886, 890 (Minn. App. 2002). Thus, Shell's substantive due-process challenge lacks merit.

Double Jeopardy

Next, Shell contends that his commitment constitutes double jeopardy. Our supreme court has already rejected this argument by holding that the SDP Act "does not involve retribution" and is remedial in nature and, thus, does not constitute double jeopardy. *Linehan IV*, 594 N.W.2d at 871-72; *see also Call v. Gomez*, 535 N.W.2d 312, 319-20 (Minn. 1995) (affirming that the civil-commitment statutes are remedial in nature and not for preventative detention purposes); *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (finding civil commitment to provide treatment and periodic review); *Minn. ex. Rel. Pearson v. Probate Court of Ramsey County*, 205 Minn. 545, 550, 287 N.W. 297, 300 (1939) (holding that psychopathic personality commitment is not for punitive purposes, but rather is remedial).

Shell also seems to argue that his commitment violates double jeopardy because no one has been discharged from MSOP. But protection of the public is a primary purpose of SDP commitment. *See Blodgett*, 510 N.W.2d at 914 (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"). Shell provides no support for the view that SDP commitment violates due process because no one has been discharged. "So long as civil commitment is programmed to provide treatment and periodic review, due process

is provided." *Id.* at 916. Shell has not alleged that he is not actually receiving treatment or being denied review. Therefore, this claim lacks merit as well.

Jury Trial

Finally, Shell claims that he was denied his right to a jury trial. We have held that the state constitution does not provide a jury-trial right in a civil-commitment proceeding. *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999), *review denied* (Minn. July 28, 1999). The Eighth Circuit has held that federal due process does not require a jury trial before a person is committed as an SDP under Minnesota law. *Poole v. Goodno*, 335 F.3d 705, 710-11 (8th Cir. 2003). 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). Consequently, we lack authority to reopen the issue.

Affirmed.