STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2264

In the Matter of the
Civil Commitment of:
Jon Harlan Brewer.

Filed May 5, 2009
Affirmed
Crippen, Judge[*]

Ramsey County District Court
File No. 62-MH-PR-07-596

Jon Harlan Brewer, 100 Freeman Drive, MSI Unit, St. Peter, MN 56082 (pro se appellant)

Susan Gaertner, Ramsey County Attorney, Stephen P. McLaughlin, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102; and

Elizabeth Chase Henry, Assistant County Attorney, 155 S. Wabasha Street, Suite 110, St. Paul, MN 55107 (for respondent)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and Crippen, Judge.

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

CRIPPEN, Judge

In this pro se appeal, Jon Harlan Brewer challenges his civil commitment as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP), asserting

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

three previously determined constitutional issues and arguing that he was denied effective assistance of trial counsel. We affirm.

FACTS

Respondent Ramsey County filed a petition with the district court to commit appellant as an SDP and an SPP. After a trial, the district court made detailed findings of fact and concluded that appellant satisfied the requirements of commitment as both an SDP and an SPP. After the required 60-day review hearing, the district court concluded that appellant continued to satisfy the SDP and SPP commitment requirements and ordered him committed indeterminately. This appeal follows.

D E C I S I O N

1.

Appellant argues that the civil commitment statute violates his constitutional rights of due process and equal protection, and the prohibition against double jeopardy.

Respondent contends that appellant waived these arguments by failing to raise them to the district court. But in a motion filed in November 2007, appellant moved to dismiss the civil commitment petition because committing him "violates his rights to due process, equal protection, a jury trial, and his right against double jeopardy." The district court denied appellant's motion the same day. Therefore, the issues were raised before the district court and are not waived on appeal.

Respondent accurately contends that appellant failed to give proper notice to the attorney general of these constitutional challenges. Although a party challenging the constitutionality of a statute is required by Minn. R. Civ. App. P. 144 to notify the

attorney general of the challenge, the rule is not an absolute bar to considering the constitutional issues. *See Elwell v. County of Hennepin*, 301 Minn. 63, 73, 221 N.W.2d 538, 545 (1974) (choosing to address a constitutional question despite lack of notice to the attorney general). We choose to address appellant's constitutional challenges because they are not novel.

The constitutionality of a statute is a question of law, which we review de novo. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997); *In re Linehan* (*Linehan II*), 544 N.W.2d 308, 316 (Minn. App. 1996), *aff'd* (*Linehan IV*), 594 N.W.2d 867, 878 (Minn. 1999). The judicial power to declare an act of the legislature unconstitutional is exercised with extreme caution and only when absolutely necessary. *Behl*, 564 N.W.2d at 566 (quotation omitted).

Appellant's challenges to the civil commitment statute have been raised before and found wanting. The Minnesota Supreme Court has rejected substantive due-process challenges to both the SDP statute, *Linehan IV*, 594 N.W.2d at 872–76, 878, *aff'g In re Linehan* (*Linehan III*), 557 N.W.2d 171, 184 (Minn. 1996), *after vacatur and remand sub nom. Linehan v. Minnesota*, 522 U.S. 1011, 118 S. Ct. 596 (1997), and the psychopathic-personality (PP) statute, a precursor of the current SPP statute, *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994). In the same line of cases, the supreme court rejected equal-protection challenges. *Linehan III*, 557 N.W.2d at 186–87 (SDP statute); *Blodgett*, 510 N.W.2d at 916–17 (PP statute). Although an individual has served his criminal sentence, civil commitment does not constitute double jeopardy. *Linehan IV*, 594 N.W.2d at 871–72 (SDP statute); *Call v. Gomez*, 535 N.W.2d 312, 319–20 (Minn. 1995)

(PP statute) (stating civil commitment is remedial and its purpose is treatment, not punishment). Because we cannot overturn established supreme court precedent, *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998), we reject appellant's constitutional arguments.

2.

A proposed commitment patient has the right to counsel, who must "consult with the person prior to any hearing" and serve as "a vigorous advocate on behalf of the person." Minn. Stat. § 253B.07, subd. 2c (2008); *cf.* U.S. Const. amend. VI (providing right to counsel in criminal cases).

We apply the same standards to ineffective-assistance claims in commitment proceedings as we do in criminal proceedings. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). To prevail, the claimant must show both that "counsel fail[ed] to exercise the diligence of a reasonably competent attorney under similar circumstances" and that "counsel's actions so undermined the hearing as to prejudice the result." *Id.*; *cf. State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (setting forth comparable two-prong test in criminal context). There is a "strong presumption" that counsel's performance fell within the wide range of reasonableness and "[p]articular deference is given to the decisions of counsel regarding trial strategy." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

Appellant alleges more than a dozen deficiencies as the basis of his ineffective-assistance claim. None of the claims has merit, but we examine them briefly.

Appellant argues his attorney coerced, manipulated, or intimidated him into waiving various hearings. Much of this communication is alleged to have occurred outside the record on appeal and is therefore unreviewable. Matters in the record reveal an experienced attorney offering his client advice but deferring to the client's decision.

Appellant lists various arguments and objections he believes his attorney should have made. These are trial strategy decisions we are not to second-guess. He also alleges that he and his attorney did not get along or share a common vision. But appellant does not demonstrate that curing these alleged failures would have changed the result.

Appellant argues his attorney failed to counsel him regarding letters sent by unidentified persons to law-enforcement authorities in another state where he is wanted for violating his parole. The record does not contain the letters, but it does contain a copy of an e-mail from the foreign jurisdiction indicating it would not initiate extradition proceedings until appellant was released from civil commitment. Appellant's trial counsel unsuccessfully moved to dismiss the petition, arguing that it was illogical to commit appellant to a treatment program when he was facing release to correctional authorities.

Appellant claims his attorney misrepresented to the district court that appellant had waived his right to a hearing. Although appellant cites broadly to the entire record to support this claim, it is not apparent when this alleged misrepresentation occurred. Even if this act occurred and could be labeled as outside the wide range of reasonableness, appellant has not shown how he has been prejudiced by it. The record reflects a full consideration by the district court.

Finally, appellant takes issue with his attorney's failure to agree with him about certain grounds for an appeal—grounds that appellant does not himself assert here. But an attorney "is not required to file an appeal . . . if, in the opinion of counsel, there is an insufficient basis for proceeding." Minn. Spec. R. Commitment & Treatment Act 9.

Affirmed.