STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0070

In the Matter of the Civil Commitment of:
James Phinn Shannon.

Filed May 19, 2009
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 27-MH-PR-05-975

Michael C. Hager, 301 Fourth Avenue South, Suite 270, Minneapolis, MN 55415 (for appellant)

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Considered and decided by Klaphake, Presiding Judge; Hudson, 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 his commitment as a sexually dangerous person (SDP), claiming that the district court erred in finding that he is highly likely to reoffend and that Minn. Stat. § 253B.02, subd. 18c (2008) (defining SDP), is unconstitutional as applied to

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

him. Because we see no clear error in the district court's finding on the likelihood of reoffending, and because Minnesota caselaw has previously addressed and rejected appellant's constitutional challenges, we affirm.

FACTS

Appellant James Phinn Shannon, now age 61, had an extensive criminal history prior to his first conviction for first-degree criminal sexual conduct in 1989.[1] He was charged with first-degree criminal sexual conduct for physically assaulting and raping a young woman who was visiting his home as a friend of his daughter and was sentenced to 90 months in prison. In February 1994, he was released on Intensive Supervised Release (ISR). In April 1994, he received a stolen handgun and was indicted by a federal jury as a felon in possession of a firearm. In December 1995, he was cited for driving under the influence of alcohol; his blood alcohol level was found to be .12 percent. In June 1996, he was sentenced to a year in prison for this offense.

A month earlier, in May 1996, appellant, while intoxicated, violently physically and sexually assaulted a woman he found sleeping in an apartment that he visited to settle a drug debt. After being arrested, appellant kicked out the window of the police car. As a result of this incident, appellant entered an *Alford* guilty plea to first-degree criminal sexual conduct and was sentenced to 153 months, the maximum allowed by the plea

[1] He was convicted of second-degree manslaughter in 1968, of simple assault and aggravated assault in 1974, of aiding an offender to avoid arrest and of obstructing legal process in 1976, and of first-degree burglary in 1989. He also pled guilty to possessing a pistol without a permit in 1981 and to second-degree assault in 1988.

agreement. This sentence ran concurrently with the 120 month sentence he received in December 1996 after pleading guilty in federal court to possession of a stolen firearm.

Appellant's conduct in prison was also problematic. A prison report prepared in June 2004 indicated that appellant had more than 60 discipline offenses, some of which involved abusive, threatening, or assaultive behavior. In October 2005, he groped a female inmate. In December 2005, after his release from federal incarceration, he entered the Minnesota Sex Offender Program (MSOP), where he insulted and assaulted other patients. In January 2006, staff had to restrain appellant with handcuffs and shackles after a violent confrontation. By July 2008, appellant's infractions included threatening to stab another inmate, hitting inmates with his cane, punching an inmate, and trying to bite another inmate and staff members. Although appellant agreed to participate in sex offender treatment, his disciplinary record prevented him from entering the program.

In September 2005, the Department of Corrections (DOC) petitioned to commit appellant as SDP.[2] Following trial and a review hearing, appellant was found to be SDP and was committed to MSOP for an indeterminate period. Appellant challenges his commitment, asserting that the district court erred in finding him highly likely to reoffend and that Minn. Stat. § 253B.02, subd. 18c, is unconstitutional as applied to him.

[2] The petition also sought to commit appellant as a sexual psychopathic personality (SPP), but that allegation was later dropped.

D E C I S I O N

1. High Likelihood to Reoffend

SDP commitment requires a finding, supported by clear and convincing evidence, that an individual is highly likely to engage in future acts of harmful sexual conduct. Minn. Stat. §§ 253B.02, subd. 18c (2008) [253B.18, subd. 1(a)];[3] *In re Linehan*, 557 N.W.2d 171, 179 (Minn. 1996) (*Linehan III*), *vacated and remanded*, 552 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999) (*Linehan IV*). The finding must be affirmed if it is not clearly erroneous; the record must be examined in the light most favorable to the findings, and this court will not reweigh the evidence. *Linehan III*, 557 N.W.2d at 189; *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995).

Factors to consider in determining whether there is a high likelihood to reoffend include: (1) demographic characteristics; (2) history of violent behavior; (3) base rate statistics for violent behavior among those with the person's background; (4) sources of stress in the person's environment; (5) similarity of the person's context to the contexts in which he has previously offended; and (6) record in sex therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*). Two examiners, one appointed by the court (the court examiner) and the other selected by appellant (appellant's examiner), analyzed appellant in relation to these factors before the trial; at appellant's request, a third examiner (the review examiner) examined him before the review hearing.

[3] Appellant concedes that he meets the other statutory criteria, i.e. engaging in a course of harmful sexual conduct and manifesting a sexual, personality or other mental disorder or dysfunction. *See* Minn. Stat. § 253B.02, subd. 18c.

Regarding demographic characteristics, the court examiner believed that appellant, who was already age 49 at the time of his second sexual offense, was an exception to the general principle that age lowers the risk of reoffense. Appellant's examiner did not think appellant's age "moderates anything at all." The review examiner found that neither appellant's age nor his physical disabilities would reduce his risk of reoffense and noted that appellant lacks both a "fundamental understanding of his sexual offending cycle" and a relapse prevention plan. Appellant does not refute any of the examiners' conclusions. This factor supports the finding that appellant is highly likely to reoffend.

As to history of violent behavior, appellant points out that he has been in a long-term relationship with a woman with no allegations of assault or coerced sex. But, during the course of this relationship, appellant committed sexual offenses against other women. The relationship clearly has not served as a deterrent. Moreover, appellant's record shows that, when released from prison and even in confinement, appellant has a propensity to engage in violent behavior. Appellant's examiner testified that "when [appellant is] out of prison, he tends to reoffend rather quickly" and that appellant, then age 58, still had "a tendency to attack people and be violent with people." The court examiner testified that appellant has "never been able to check himself with anger or sexual assaults . . . here he's in a highly structured controlled facility, and yet he can't control himself, can't control his anger." The review examiner reported:

> [I]t is my opinion that [appellant's] aggressive sexual behavior is more a manifestation of his anger and antisocial personality characteristics. He bears the typology of the anger rapist whose gratuitous violence is not so much the expression of sexuality but of anger and rage.

> [Appellant's] social, offense and correctional history clearly indicate that of a career criminal with marked antisocial and, more particularly, psychopathic features.
>
> I see these emerging as the predominant risk to re-offense and not some specific quest to satisfy some sexual deviance.

Accordingly, appellant's violent behavior not only supports but, in the view of this examiner, causally relates to a high likelihood of reoffense.

Concerning base rate statistics, appellant claims that the examiners "grossly overestimated [his] risk factors" because they depended "on the assessment of non-sexual offenses." But, as the review examiner reported, appellant's non-sexual offenses result from his inability to control anger and rage, which was in itself a cause of the sexual offenses. Each of the other examiners used the same actuarial tests and achieved the same results. The court examiner testified, "[A]ll of [the actuarial tables] suggest [appellant] is highly likely to reoffend" and "while [appellant] does have a high likelihood on all the actuarial tables, it's the clinical interview and looking at other risk factors that overwhelmingly, in my opinion, suggest that he has an incredibly high risk to sexually and criminally reoffend."

Appellant claims that, because one instrument gave him a 52% likelihood of reoffense within 15 years, his likelihood is only "somewhat greater than a coin flip." But that instrument also placed appellant in the highest risk category, and two other instruments placed his likelihood at 80% and 64%.

Regarding sources of stress, appellant argues that his age and his health issues are very different now. Appellant has physical problems: he is blind in one eye, has a seizure disorder, and walks with a limp. But appellant's examiner testified that appellant "still

continues to act out, he's acted out in prison, he's acted out in the community. I don't think his physical limitations have stopped him in any way." The court examiner agreed with the conclusion that appellant's "physical problems did not significantly reduce his potential to reoffend." In the preliminary order for commitment, the district court noted that

> the incident . . . in which [appellant] had an altercation with staff at MSOP and the incident in which he slapped a male inmate . . . demonstrate that [appellant] continues to be sufficiently physically able to act violently against others, particularly those who are weaker than he.

Thus, appellant's physical condition, like his age, does not diminish the likelihood of reoffense.

As to the similarity of appellant's context if he were released to the context in which his criminal behavior occurred, appellant asserts that he would have the support of his significant other, his family, and his friends. But, when he committed the most recent rape and assault, appellant was living with the same person to whom he would return if released—a person who had no reasonably responsible reaction to appellant's behavior problems.[4] This factor also comports with a high likelihood of reoffense.

Appellant does not address the final factor, history of treatment. As appellant's examiner and the court examiner both testified, appellant has not had sex offender treatment, does not think he needs treatment, and has no relapse prevention plan. The

[4] This person testified that she knew appellant was drinking in violation of his parole conditions but did not inform the parole agent, that she knew appellant had committed his first assault and rape while he was drunk, and that she had removed drugs and drug paraphernalia from their house in anticipation of the arrival of the police. Thus, she attempted to conceal his violations rather than to prevent them.

facts that appellant committed both rapes while drunk, used alcohol in the past when released from prison, and said he intends to use it again when he is released, further sustains a high likelihood of reoffense.

The district court's finding that appellant is highly likely to reoffend is supported by clear and convincing evidence and is not clearly erroneous.

2. Constitutionality of Statutes

Appellant argues that Minn. Stat. § 253B.02, subd. 18c, (defining SDP) is unconstitutional as applied to him because it violates substantive due process and equal protection, is void for vagueness, constitutes double jeopardy, and deprives him of his right to a jury trial.[5] Minnesota statutes are presumed constitutional, and this court's "power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). Appellate courts have already addressed and rejected appellant's arguments.

a. Substantive Due Process

Appellant argues that Minn. Stat. § 253B.02, subd. 18c, is insufficiently narrowed under *Linehan III*, 557 N.W.2d at 181. But "[t]he SDP Act standard, as narrowed by the Minnesota Supreme Court in *Linehan IV*, . . . adequately distinguishes between the typical recidivist and the dangerous sexual offender and complies with substantive due process requirements." *Linehan v. Milczark*, 315 F.3d 920, 927 (8th Cir. 2003); *see also*

[5] Appellant alleges that Minn. Stat. § 253B.02, subd. 7a (defining "harmful sexual conduct") is also unconstitutional but he provides no support or analysis for this allegation, and therefore, we do not address it. *See Ganguli v. University of Minn.*, 512 N.W.2d 918, 919-20 n.1 (Minn. App. 1994) (noting that this court declines to address allegations unsupported by legal analysis or citation).

In re Blodgett, 510 N.W.2d 910, 916 (Minn. 1994) (holding that the analogous psychopathic personality statute "does not violate substantial due process").[6]

b. Equal Protection

Linehan III, 557 N.W.2d at 186-87, rejected this equal protection argument, holding that the SDP statute does not violate equal protection. *See also State ex rel Pearson v. Probate Court*, 309 U.S. 270, 274-75, 60 S. Ct. 523, 526 (1940) (holding that state legislatures are free to restrict those whose danger to the community is deemed to be greatest). Appellant states that "*Pearson* simply repeats popular prejudice and is devoid of any authority for denying an equal protection claim" but he offers no support for his implication that Supreme Court precedent is not binding on this court. Appellant's equal protection claim is without merit.

c. Void for Vagueness

Appellant argues that Minn. Stat. § 253B.02, subd. 18c, is void for vagueness because of the "broad language regarding failure to 'adequately control' sexual impulses." The phrase "adequately control" does not appear in Minn. Stat. § 253B.02, subd. 18c, but occurs in a paraphrase of the statute:

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

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[6] In light of this holding, appellant's reliance on the dissent in *Blodgett* is unpersuasive, as is his reliance (in his reply brief) on *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986) (holding that a program that would not cure pedophilia but could enable a pedophiliac with antisocial personality to progress to the point where he could enter a program to treat his pedophilia satisfied his statutory and constitutional rights to adequate treatment).

Linehan IV, 594 N.W.2d at 876 (emphasis added). Appellant's argument has previously been rejected by this court: "[When] it seems highly likely that [a person] will engage in harmful sexual conduct, given his current mental disorders, past course of harmful sexual conduct, and difficulty in controlling his sexual impulses, the lack of adequate control standard is not vague as applied to [that person]." *In re Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002), *review denied* (Minn. 17 Sept. 2002). Analogously, the standard is not vague as applied to appellant.

d. Double Jeopardy

Appellant argues that, because he was incarcerated following his conviction for both rapes, his commitment violates double jeopardy. But the supreme court "conclude[d] that the SDP Act is facially civil and is not so punitive in purpose or effect [as] to trigger the federal constitutional prohibitions against . . . double jeopardy." *Linehan III*, 557 N.W.2d at 189 (rejecting the view that commitment under the SDP Act is punishment). Appellant also argues that commitment fails to provide treatment. To assert this argument, appellant must show that he has actually been deprived of treatment. *See In re Martenies*, 350 N.W.2d 470, 472 (Minn. App. 1984) ("[A] person may not assert his right to treatment until he is actually deprived of that treatment."), *review denied* (Minn. 12 Sept. 1984). Appellant has not shown that he was deprived of treatment; on the contrary, the record indicates that he claims that he does not need treatment.

e. Jury Trial

Appellant argues that he was deprived of a jury trial.[7] This argument lacks merit. "[T]he Minnesota Supreme Court has rejected the argument that a jury trial is required." *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999) (citing *State ex rel Pearson v. Probate Court,* 205 Minn. 545, 556-57, 287 N.W. 297, 303 (1940), *aff'd*, 309 U.S. 270, 60 S. Ct. 523 (1940)), *review denied* (Minn. 28 July 1999). Appellant's argument that Minnesota should require a jury trial because some other states do provide jury trials is also without merit. *See Poole v. Goodno*, 335 F.3d 705, 710 (8th Cir. 2003) ("[T]he Minnesota state court decision declining to grant a jury trial in [a commitment] case is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court)."

The district court's finding that appellant meets the "highly likely to reoffend" criterion for SDP commitment is not clearly erroneous, and appellant's constitutional challenges to the SDP statute lack merit.

Affirmed.

[7] Because appellant raises this issue for the first time on appeal, it is not properly before us. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that an appellate court will not generally consider matters not presented to and considered by the district court). We address it in the interest of completeness.