STATE OF MINNESOTA
IN COURT OF APPEALS
A09-126

In the Matter of the Civil Commitment of:
Kenneth Parks.

Filed July 28, 2009
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-MH-PR-07-177

Lisbeth J. Nudell, 3228 Holmes Avenue South, Minneapolis, MN 55408 (for appellant)

Lori Swanson, Attorney General, Nathan A. Brennaman, Assistant Attorney General, 445 Minnesota Street, Suite 900, St. Paul, MN 55101, and

Susan Gaertner, Ramsey County Attorney, Beth Sullivan, Assistant County Attorney, Ramsey County Government Center-West, 50 West Kellogg Boulevard, Suite 560, St. Paul, MN 55102, and

Elizabeth C. Henry, 155 Wabasha Street, Suite 110, St. Paul, MN 55107, (for respondent)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

ROSS, Judge

Kenneth Parks challenges the district court's order indeterminately committing him as a sexually dangerous person. Parks argues that the district court erred by failing to make detailed findings of fact in its initial commitment order, that the district court

erred by failing to consider new evidence that Parks presented at the 60-day review hearing, and that the evidence is insufficient to support a finding that he is a sexually dangerous person. Because the district court's findings are not clearly erroneous and because the findings support the conclusion that Parks is a sexually dangerous person, we affirm.

FACTS

Kenneth Parks was convicted in 1999 of second-degree criminal sexual conduct for sexually abusing a 10-year-old girl in 1998 while Parks was 17 years old. The 1999 conviction is Parks's only felony sex-crime conviction. But by his own admission, from 1993 until he was incarcerated in 1999, Parks sexually abused approximately 16 children on at least 36 occasions. His victims ranged from 3 to 15 years old and included both boys and girls. Parks detailed many of his offenses at his commitment hearing.

Parks explained that he would offer to babysit for his friends and relatives with the sole purpose of molesting their children. On one occasion, when Parks was 14 years old, he babysat a relative's five-year-old twin boys. Once he gained the boys' parents' trust and he was alone with them, he made the boys perform oral sex on him. He did this several times over the course of four or five months.

When Parks was 13 or 14 years old, he babysat his sister's 6-year-old daughter. He was unsupervised with her. Parks tried to anally penetrate her with his penis. Parks also admitted to beastiality. He tried to anally penetrate his dog with his penis on several occasions. Parks said that most of his sexual misconduct occurred after he had smoked marijuana and that marijuana sexually excited him.

Parks pleaded guilty to second-degree criminal sexual conduct in 1999, and he received a 43-month prison sentence that was stayed provided that he commit no similar offenses, that he participate in and complete sex offender treatment, that he register as a predatory sex offender, and that he have no unsupervised contact with juveniles. But Parks consistently violated the terms of his probation and has never completed a sex-offender treatment program. After his conviction in 1999, Parks has spent almost all of his life in a "structured, supervised setting without children—either residential sex offender treatment, prison, or a halfway house." He spent only 258 days on conditional release and each time he was released, he was rearrested for absconding. Every time he was rearrested, he tested positive for marijuana.

Parks's sentence was set to expire in November 2007. In March 2007, Ramsey County filed a petition to commit Parks as a sexually dangerous person or sexual psychopathic personality. The district court held a commitment hearing in October 2007. Parks and three psychologists testified at the hearing and the district court received over 1,000 pages of reports and exhibits detailing Parks's criminal and sexual history and the psychologists' opinions of his dangerousness. The psychologists' opinions differed regarding Parks's level of dangerousness, but all agreed that Parks should be committed.

Dr. Zeller testified that he believed Parks to be sexually dangerous. Dr. Donchenko opined that although Parks had engaged in a course of harmful sexual conduct and had a mental or personality disorder, his mental disorder did not prevent him from controlling his sexual impulses. Dr. Meyers did not interview Parks, but he

reviewed the other experts' diagnoses and Parks's history and opined that Parks meets the criteria of a sexually dangerous person.

In February 2008, the district court concluded that Parks is a sexually dangerous person and ordered him to be committed. In July 2008, the district court held a 60-day review hearing. The report from the Minnesota Sex Offender Program recommended that Parks remain committed because it found that his condition had not changed since his initial commitment and that he needed treatment. Parks presented an independent psychological report and testimony from Michael Farnsworth, a doctor of forensic psychiatry. Dr. Farnsworth agreed that Parks's condition had not changed since his initial commitment, but he opined that more tests were required to identify Parks's specific mental or personality disorder and to determine whether Parks is a sexually dangerous person. The district court accepted Farnsworth's report and listened to his testimony, but it concluded that Parks was a sexually dangerous person and issued an indeterminate commitment order. This appeal follows.

D E C I S I O N

Parks challenges the district court's order of indeterminate civil commitment. He argues that the district court's findings of fact in the initial-commitment order are clearly erroneous or insufficient. He also contends that the district court abused its discretion by not making findings or by not considering the "new and useful" evidence that Parks presented at the 60-day review hearing. We first address Parks's argument related to the sufficiency of the evidence, and then we address his specific challenges regarding the district court's findings.

In civil commitment appeals, this court is limited to examining whether the district court complied with the commitment statute and determining whether the district court's findings support its conclusions of law. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). We review the record in the light most favorable to the decision and defer to the district court's credibility determinations. *Id*. The district court's factual findings will be affirmed unless they are clearly erroneous. *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). But whether the supported factual findings and the record provide clear and convincing evidence to sustain the district court's legal conclusion that the statutory requirements for commitment were and continue to be met is a question of law, which we review de novo. *In re Civil Commitment of Martin*, 661 N.W.2d 632, 638–39 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003).

I

Parks contends that the evidence is insufficient to show that he is a sexually dangerous person. To support commitment of a sexually dangerous person, the state must show by clear and convincing evidence that the person (1) engaged in a prior course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction that does not allow the person to adequately control his or her sexual impulses; and (3) as a result, is highly likely to engage in future harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008); *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 873–74, 876 (Minn. 1999). Harmful sexual conduct is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008).

Course of Harmful Sexual Conduct

The district court concluded that the state "demonstrated by clear and convincing evidence that [Parks] has engaged in a course of harmful sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." The record supports the district court's conclusion.

A "course" is defined as "a systematic or orderly succession; a sequence." *In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Sept. 17, 2002). The record shows that Parks engaged in a series of sexual assaults. He sexually molested approximately 16 children of both genders when they were between the ages of 3 and 15. He victimized some on multiple occasions. His assaults spanned the six years before his conviction. They ended only when one of his victims, a 10-year-old girl, reported Parks after he put his penis in her mouth and tried to force it into her vagina. This led to his conviction in 1999. That Parks has only one conviction for criminal-sexual conduct does not prevent the conclusion that he engaged in a course of harmful sexual conduct. "[T]he course of conduct need not consist solely of convictions, but may also include conduct amounting to harmful sexual conduct, of which the offender was not convicted." *Id*. The commitment statute focuses on behavior, not convictions. *In re Monson*, 478 N.W.2d 785, 789 (Minn. App. 1991). And by his own account, Parks's sexual misconduct constituted a series of abuses until his incarceration finally prevented him from contacting children.

Parks's course of conduct was also "harmful." There is a rebuttable presumption that second-degree criminal sexual conduct "creates a substantial likelihood that a victim

will suffer serious physical or emotional harm." Minn. Stat. § 253B.02, subd. 7a(b) (2008). Parks presented no evidence to rebut this presumption. And as the district court accurately observed, "In addition to the presumption of harm . . . the record also establishes actual harm." The mother of Parks's 10-year-old victim, for example, reported that her daughter became depressed and was being treated with anti-depressant medication. Clear and convincing evidence shows that Parks engaged in a course of harmful sexual conduct.

Manifests a Sexual, Personality, or Other Mental Disorder

The district court concluded that the state proved by clear and convincing evidence that Parks "manifested a sexual, personality, or other . . . [dis]order or dysfunction." The district court stated that Parks "did not contest" this element. On appeal, Parks argues that the record shows "no proof of any current mental disorder." Parks is incorrect. Although the record may contain some conflicting evidence about *which* assortment of mental disorders Parks has, clear and convincing evidence shows that he has a mental disorder.

The three psychologists who testified at Parks's initial commitment hearing characterized Parks as a pedophile and opined that he also has personality disorders. Dr. Zeller diagnosed Parks with "Axis I: [p]araphilia; pedophilia; cannabis abuse in remission in a controlled environment." Dr. Donchenko diagnosed Parks with "[Axis] I: Pedophilia, Nonexclusive Type, Sexually attracted to females." Although Dr. Meyers did not personally interview Parks, he reviewed Parks's records and diagnosed him with "Axis I: Pedophilia, mixed sexually attracted to both [genders], non-exclusive."

The experts agreed that Parks has personality disorders, although their diagnoses were not identical. Zeller diagnosed Parks with "Axis II: Mixed personality disorder with avoidant features." Meyers diagnosed Parks with "Axis II: Antisocial Personality Disorder." Other cases have held that when an offender has been diagnosed with an antisocial personality disorder, the second prong of the sexually dangerous person statute is satisfied. *See, e.g.*, *Linehan IV*, 594 N.W.2d at 878 (upholding offender's commitment as a sexually dangerous person in which the offender "suffer[ed] from Axis II antisocial personality disorder"). Clear and convincing evidence establishes that Parks has a personality or mental disorder.

It appears that Parks's main argument arises from Dr. Farnsworth's report and testimony at the 60-day review hearing that Parks does not meet the second prong of the sexually-dangerous-person statute. Regarding whether Parks has a sexual, personality or other mental disorder, Farnsworth noted, "I depart significantly from the previous examiners in not finding sufficient evidence to diagnose Mr. Parks with Pedophilia, non-exclusive type." Farnsworth opined that more tests were needed to determine whether Parks can be classified as a pedophile or to identify his specific mental disorder. We are not persuaded by Parks's contention that Farnsworth's report and testimony undermine the district court's conclusion that Parks has a mental disorder.

Parks's contention fails for two reasons. First, Dr. Farnsworth agreed with the other experts that Parks has an antisocial personality disorder. Farnsworth noted that "much of Mr. Parks's sexual behavior may be the product of his antisocial personality" rather than a specific sexual disorder. In *Linehan IV*, the supreme court affirmed an order

for commitment under the sexually-dangerous-person statute when the experts had diagnosed the offender with antisocial personality disorder. 594 N.W.2d at 878. Second, Farnsworth's disagreement about a pedophilia diagnosis is not significant. The standard is not whether a person is a diagnosed pedophile, but whether clear and convincing evidence shows that an offender has a sexual, personality, or other mental disorder. Four different experts agreed that Parks has a mental or personality disorder. Parks's argument that the record contains no proof that he has a mental or personality disorder fails.

Highly Likely to Engage in Future Harmful Sexual Conduct

The third prong of the sexually dangerous person statute requires the state to prove by clear and convincing evidence that the offender's mental disorder makes it "highly likely" that he will engage in future harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a)(3); *Linehan IV*, 594 N.W.2d at 873–74, 876. Parks argues that the record lacks clear and convincing evidence to show that he is highly likely to engage in future harmful sexual conduct.

District courts should consider six factors to determine whether a person is highly likely to engage in future harmful sexual conduct: (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 or participation in sex treatment programs. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 614 (Minn. 1994). The district court specifically addressed four of the six "*Linehan*

factors" in the initial commitment order, and it concluded that Parks was highly likely to reoffend.

The district court found that Parks's history of violent behavior included "36 sexual offenses against 16 or more children." This finding is supported by Parks's testimony and admissions. The record also shows that Parks has been convicted of various crimes, including second-degree criminal sexual conduct, several burglaries, thefts, a fifth-degree assault, and obstructing legal process. Since his criminal-sexual-conduct conviction in 1999, Parks has violated probation every time he was released—in 2000, 2002, 2003, and 2004. He absconded from Alpha House and the Eden residential program. Each time he was caught, he tested positive for marijuana, the drug that he perceives to provoke his sexual impulses and that he used when he engaged in sexual misconduct. Parks's history of criminal behavior supports the finding that he is highly likely to reoffend.

The district court also considered that Parks's scores on actuarial assessments place him in "the highest category of likelihood for recidivism." The experts' reports and testimony confirm that Parks's test results place him in a range highly likely to reoffend. Parks scored a "six" on the "STATIC 99," indicating a high risk of reoffending. On the MnSOST-R, Parks scored an "eight," which also places him in the category of high risk to reoffend. Dr. Meyers testified that Parks displays characteristics associated with a high risk of reoffending, especially the fact that Parks is not gender-specific when choosing victims. The actuarial statistics support the conclusion the Parks is highly likely to reoffend.

Parks's record in sex-offender-treatment programs is poor. He has never completed treatment. The experts uniformly characterize Parks as an untreated sex offender. Dr. Meyers's report, which the district court incorporated into its findings, notes that "Pedophilia is not known to 'go into remission' on its own." Dr. Meyers opined that Parks needs to complete sex offender treatment to lower his level of dangerousness to the community. Parks's treatment history supports the conclusion that he should be civilly committed to receive treatment.

The district court did not make specific factual findings regarding Parks's demographic characteristics or the sources of stress in Parks's environment and how those factors bear on his likelihood of reoffending. A district court "should consider" all six of the *Linehan* factors "if such evidence is presented." *Id*. The *Linehan* factors must be "balanced" to predict future dangerousness under the sexually dangerous person act. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 189 (Minn. 1996), *vacated & remanded*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd*, 594 N.W.2d 867 (Minn. 1999). It does not appear that any materially significant evidence was presented on these factors in this case. And because the four factors that the district court specifically addressed weigh so heavily in favor of the conclusion that Parks is highly likely to reoffend, it is impossible to imagine how the two unaddressed factors could outweigh the bases for the district court's conclusion. Most significantly, Parks has not explained how these factors might be considered against his commitment. At oral argument, Parks's lawyer was unable to identify any evidence in the record that suggests that the two unaddressed factors would even bear on Parks's commitment. The inability is understandable because, based on our

review of the record, the unaddressed factors would seem to say nothing against Parks's commitment. Although the district court ordinarily should invite evidence bearing on all six factors, based on the record before us, no probative evidence was presented regarding the undiscussed factors, and we conclude that the omission does not require reversal of Parks's commitment.

On balance, we hold that clear and convincing evidence supports the district court's finding that Parks is highly likely to reoffend.

II

Parks argues that the district court's findings of facts are insufficient or clearly erroneous because they are a "mere recitation of the testimony and exhibits" and therefore "cannot provide a basis upon which [this court] can make a meaningful review." This argument is not compelling.

A district court's factual findings might be deficient if they merely recite or summarize the testimony and make it unclear how the district court reached its decision. *In re Welfare of M.M.*, 452 N.W.2d 236, 239 (Minn. 1990). But that is not the situation here. Parks's attorney points to excerpts of the district court's findings to contend that the district court merely recited testimony of the witnesses. But a review of all findings and the entire order shows that Parks's presentation was selective; the district court did not merely recite and summarize the testimony. The district court made specific findings regarding Parks's past conduct and how that conduct bears on the necessary elements for commitment under the statute. The district court noted Parks's admissions regarding his past sexual conduct and his probation violations and found that his conduct

"demonstrates the strength of his sexual impulses and his inadequate control over them." Because the district court did not merely recite and summarize testimony and because its findings track the statutory requirements, Parks's argument that the factual findings are insufficient fails.

III

Parks argues finally that the order for commitment should be reversed because the district court erred by not considering Dr. Farnsworth's "new and useful" testimony and by failing to exercise its "mandatory discretion" at the 60-day review hearing. We are not persuaded.

At the review hearing the district court should consider "(1) the statutorily required treatment report; (2) evidence of changes in the patient's condition since the initial commitment hearing; and (3) such other evidence as in the district court's discretion enhances its assessment of whether the patient continues to meet the statutory criteria for commitment." *In re Linehan (Linehan II)*, 557 N.W.2d 167, 171 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011, 1185 S. Ct. 596 (1997), *aff'd* 594 N.W.2d 867 (Minn. 1999). But the focus of the 60-day review hearing is to determine whether there is "evidence of changes in the patient's condition since the initial commitment hearing." *Id.* The goal is not to reassess whether the underlying standards for commitment are met. *Id.* Parks's argument that the district court failed to exercise its "mandatory discretion" suggests a mistaken view that the district court must reevaluate the original bases for commitment.

The transcript from the 60-day review hearing reveals that the district court appropriately considered Dr. Farnsworth's report and testimony. The district court admitted Farnsworth's report into evidence, listened to his testimony, and questioned Farnsworth directly to clarify his testimony. The following exchange between Farnsworth and the district court is particularly relevant because it sums up Farnsworth's testimony, exposes Farnsworth's actual basis of concern, and shows that the district court considered the testimony carefully:

> THE COURT: I have a couple questions. I understood your testimony to be that, although a program existed at one point that focused on treatment, I think you characterized the current State approach as broken, is that accurate?
>
> DR. FARNSWORTH: Yes. It's emphasizing at this point on sort of more of a correctional approach, where security is highly emphasized, I think at the cost of treatment.
>
> THE COURT: And I think you've also said that the State could devise and adopt a treatment-oriented program, but the State has failed to do so, is that right?
>
> DR. FARNSWORTH: Right. The biggest component that I think is missing is really having an option to place those individuals in settings other than the most secure setting. Just as creating hospitals that only had Intensive Care Units may not be helpful for people who have general medical illnesses. We have outpatient clinics, we have partial hospitalizations, we have all sorts of other varieties of services to meet those needs, and I think this population needs something like that.
>
> THE COURT: And then if I understand correctly in this environment of civil commitment that this Court now sits, that the Court has virtually no community-based option and the civil commitment itself is something you've described as potentially a lifelong commitment that may not provide programming tailored to diagnosis, arriving at a prognosis and devising an intervention that would be specific to Mr.

> Parks and help with a young man addressing his issues, is that correct?
>
> DR. FARNSWORTH: That's correct. You have a difficult dichotomous choice here. It's either to let him go at posing a risk to the community without knowing exactly what that risk is versus committing him to an uncertain future in the Sex Offender Program that may not meet his needs.
>
> THE COURT: So, basically, the Court and Mr. Parks have been set up for failure, is that fair?
>
> DR. FARNSWORTH: In my opinion, yes.
>
> THE COURT: Okay. I want you to know that that's how I see this, and I appreciate your testimony. Thank you.

This apparently candid exchange contradicts Parks's suggestion by showing that the district court considered Dr. Farnsworth's report and testimony.

Parks also argues that by disagreeing with Dr. Farnsworth's opinion at the review hearing, the district court erred in issuing the indeterminate commitment order. Specifically, Parks argues that Dr. Farnsworth is "by far the most qualified and experience[d] examiner," and because Dr. Farnsworth testified that he could not accurately diagnose Parks without more tests to determine the extent of his mental disorders and evaluate his dangerousness, Parks does not qualify for commitment. But because the focus of the 60-day review hearing is to determine whether there is "evidence of changes in the patient's condition since the initial commitment hearing" and not to reassess whether the underlying standards for commitment are met, *id.*, Parks's argument fails. Dr. Farnsworth agreed that Parks's condition had not changed since the review hearing. And because the other experts, including the doctors who observed Parks in the

commitment setting, recommended that Parks should remain in commitment so that he could receive treatment, the district court had a sufficient basis not to follow Dr. Farnsworth's recommendation. One expert's opinions that more tests need to be performed before committing Parks and that the state's commitment system is flawed are not compelling in this context and do not render the district court's findings clearly erroneous.

Affirmed.