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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0288**

In the Matter of the Civil Commitment of:

Michael Anthony Lee,
a/k/a Michael Anthony Lee, Jr., a/k/a Martin Anthony Lee.

**Filed August 4, 2009
Affirmed
Schellhas, Judge**

Dakota County District Court
File No. 19-P5-07-010883

James C. Backstrom, Dakota County Attorney, Jennifer L. Jackson, Assistant County Attorney, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Joe C. Dalager, Thuet, Pugh, Rogosheske & Atkins, Ltd., 222 Grand Avenue West, Suite 100, South St. Paul, MN 55075 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Larkin, Judge; and Muehlberg, Judge.*

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his civil commitment as a sexually dangerous person, arguing that (1) his commitment is not supported by clear and convincing evidence and (2) the evidence presented at his 60-day review hearing was insufficient to find that

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

appellant continued to meet the statutory criteria for commitment as a sexually dangerous person. We affirm.

FACTS

Appellant Michael Anthony Lee, age 24, was born on August 20, 1984. In 2002 appellant, then age 18, began a sexual relationship with a 13-year-old female, S.A.Y., who acknowledged that the sexual intercourse, which occurred 7 to 12 times, was consensual.

In June 2004 appellant entered the ADAP Chemical Dependency Day Treatment Program at Regions Hospital but was discharged after one week after he was caught fraternizing with an adult female patient and admitted that he kissed, fondled, and digitally penetrated her.

In December 2004 appellant pleaded guilty to third-degree criminal sexual conduct for forcibly raping a 13-year-old female, T.P.G. The district court stayed imposition of appellant's sentence, placed him on probation, ordered him to complete sex offender treatment program and to register as a sex offender as needed, and ordered him to serve 180 days in jail.

In April 2005 the Minnesota Department of Corrections (DOC) classified appellant at a Level 3 risk level for sexual reoffense.

In May 2005 Dakota County petitioned the district court to commit appellant as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). Dr. Roger Sweet conducted appellant's SDP/SPP evaluation and concluded that committing

appellant was “premature and unnecessary.” In July 2005 the district court denied the petition for civil commitment.

In March 2006 appellant pleaded guilty to third-degree criminal sexual conduct for his 2002 sexual conduct with S.A.Y. and was sentenced to 28 months in prison, with credit for 555 days served. In April 2006 appellant was released to Damascus Way Reentry Center. He was terminated from the center in June 2006 for having contact with a minor and was returned to prison in late June 2006. In September 2006 appellant was released to 180 Degrees residential treatment program, but his release was revoked in December 2006. In May 2007 appellant was again released to Damascus Way Reentry Center, but his release was revoked for failing to comply with electronic surveillance and he was returned to prison in June 2007 to complete residential programming. Appellant was rereleased on August 21, 2007.

In August 2007, after appellant successfully challenged his sentence for his conviction of third-degree criminal sexual conduct before this court, the district court re-sentenced appellant to 28 months’ imprisonment stayed, 15 years’ probation, 5 years’ conditional release, completion of a chemical dependency evaluation, and no contact with S.A.Y. In September 2007 appellant was arrested for failure to register as a predatory sex offender.

In November 2007 Dr. Sweet completed a SDP/SPP prepetition assessment on appellant and recommended appellant’s commitment as a SDP.

In December 2007 Dakota County petitioned the district court to civilly commit appellant as a SDP and a SPP. Later in December 2007 appellant was committed to

Minnesota Correctional Facility (MCF)-St. Cloud due to his pending charge of failure to register as a predatory sex offender.

In January 2008 appellant was admitted to the Minnesota Sex Offender Program (MSOP)-St. Peter. In February 2008 Dr. James Gilbertson completed a psychological/risk assessment of appellant in district court, recommending that appellant not be civilly committed. Drs. Sweet and Gilbertson testified at appellant's initial commitment hearing on February 25, 2008. On March 25, 2008, the district court initially committed appellant to MSOP-St. Peter as a SDP, "subject to a final determination pursuant to Minn. Stat. § 253B.18, subds. 2 and 3." The district court ordered MSOP to file a treatment report with the court within 180 days of appellant's initial commitment. Dr. Deanna Nelson filed that treatment report.

On November 6 and December 2, 2008, the district court conducted appellant's review hearing, taking judicial notice of all evidence admitted at appellant's initial commitment hearing and its March 25, 2008 order and receiving into evidence: (1) the MSOP report; (2) Dr. Nelson's curriculum vitae; and (3) appellant's MSOP records. Additionally, the district court heard testimony from Drs. Sweet, Gilbertson and Nelson.

On December 17, 2008, the district court found that the statutory requirements for civil commitment as a SDP continued to be met, indeterminately committed appellant as a SDP, and ordered continued placement at the MSOP. This appeal follows.

DECISION

I.

Appellant argues that his civil commitment as a SDP is not supported by clear and convincing evidence. We disagree.

The district court may civilly commit a person under the Minnesota Commitment and Treatment Act if the state proves the need for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2008). Findings of fact by the district court will be upheld by the appellate court if they are not clearly erroneous. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). “Where the findings of fact rest almost entirely on expert testimony, the trial court’s evaluation of credibility is of particular significance.” *Joelson*, 385 N.W.2d at 811. This court will not reweigh the evidence. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 189 (Minn. 1996), *vacated on other grounds*, 552 U.S. 1011, 118 S. Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999). But whether the evidence is sufficient to demonstrate the statutory requirements for civil commitment is a question of law subject to de novo review. *In re Linehan (Linehan I)*, 518 N.W.2d 609, 613 (Minn. 1994); *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

Appellant argues that there is insufficient evidence to conclude that he should be committed as a SDP because Drs. Sweet and Gilbertson, who testified in district court, differed in their opinions regarding whether appellant met the “highly likely standard” for reoffending required for civil commitment.

To support commitment of a SDP, the state must show by clear and convincing evidence that the person: (1) has engaged in a course of harmful sexual conduct; (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008). The state is not required to prove an inability to control sexual impulses but must show that the person has an existing disorder or dysfunction that results in inadequate impulse control, making it highly likely that the person will reoffend. *See id.*, subd. 18c(b) (2008) (stating that inability to control impulses is not required); *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876 (Minn. 1999) (requiring high likelihood of recidivism).

Appellant does not challenge the first two prongs of Minn. Stat. § 253B.02, subd. 18c(a)—whether appellant has engaged in a course of harmful sexual conduct and whether appellant has manifested a sexual, personality, or other mental disorder or dysfunction. And upon review of the record, we conclude that these prongs are satisfied by clear and convincing evidence. Rather, appellant challenges the third prong of Minn. Stat. § 253B.02, subd. 18c(a)—likely to engage in acts of harmful sexual conduct.

To affirm a finding that appellant is likely to engage in further harmful sexual conduct, the evidence must be sufficient to support a determination that it is “highly likely” that appellant will engage in this conduct. *Linehan IV*, 594 N.W.2d at 876. To make the determination, the district court should consider six factors: (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. *Linehan I*, 518 N.W.2d at 614.

Here, the district court addressed each of the *Linehan I* factors in its initial commitment order by summarizing the findings of Drs. Sweet and Gilbertson and found that appellant was highly likely to reoffend. Appellant argues that the district court erred in finding credible Dr. Sweet's opinion that appellant should be committed and in failing to find credible Dr. Gilbertson's "more thorough review, discussion and opinion," which suggested appellant should not be committed. We disagree. The district court has broad discretion to make credibility determinations, and we will not reweigh the evidence. *Linehan III*, 557 N.W.2d at 189.

After addressing each *Linehan I* factor and specifically finding that appellant was likely to reoffend under each factor, Dr. Sweet opined that appellant was dangerous to the public and could not be safely released back into the community. Dr. Gilbertson testified about the *Linehan I* factors and opined that appellant did not meet the criteria for civil commitment as a SDP or a SPP. But Dr. Gilbertson acknowledged that appellant: (1) was a 23-year-old unmarried male with a high libido; (2) was unemployed and homeless; (3) had never lived on his own; (4) was lacking a high school diploma or a GED; (5) had never been in a committed relationship; (6) had never completed sex offender or chemical dependency treatment; (7) had been involved in assaultive behavior; (8) had an actuarial score that places him in a high-risk tier for sexual reoffense; (9) was

impulsive and lacked an ability to remove himself from situations that may have prompted opportunities for the loss of sexual control; and (10) remained an untreated sex offender, and acknowledged the fact that completion of sex-offender treatment reduces the risk of sexual reoffense.

Although Dr. Gilbertson opined that appellant's environment may increase his overall risk for criminal involvement, he concluded that it will not increase the risk for appellant's sexual involvement. Dr. Gilbertson also testified that "[appellant] appears more like sex offenders who are managed within the [DOC] versus those more patterned deviant types for whom civil commitment appears to be the remedy consistent with public safety." But our review of Dr. Gilbertson's testimony reveals that it supports a conclusion that appellant can be considered likely to reoffend under the *Linehan I* factors. Additionally, appellant's history of probation violations, including contact with a minor and failure to complete residential treatment, and his failure to register as a sex offender undercut Dr. Gilbertson's conclusion.

While the district court considered the opinions of both Drs. Sweet and Gilbertson, the district court found "the clinical opinion of Dr. Sweet credible and persuasive." The district court is in the best position to evaluate the credibility of evidence and testimony. *In re Brown*, 414 N.W.2d 800, 803 (Minn. App. 1987). Due regard shall be given to the opportunity of the district court to judge the credibility of witnesses. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). Here, in reaching its conclusion, the district court found the testimony of the expert who opined that appellant is highly likely to reoffend to be more credible than the testimony to the contrary. Moreover, there is evidence in the

record supporting the conclusion that appellant is highly likely to reoffend. The district court did not err in concluding that there is clear and convincing evidence that appellant is highly likely to reoffend.

Because the district court did not err in concluding that appellant engaged in a course of harmful sexual conduct, manifested a personality disorder, and is highly likely to engage in further acts of harmful sexual conduct, we hold that appellant's commitment is supported by clear and convincing evidence.

II.

Appellant argues that insufficient evidence was presented at his review hearing for the district court to find that he continued to meet the statutory criteria for commitment as a SDP. We disagree.

The facility where an offender is initially committed is required by statute to submit a "treatment report" to the district court within 60 days of commitment. Minn. Stat. § 253B.18, subd. 2(a) (2008). 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." *In re Linehan*, 557 N.W.2d 167, 171 (Minn. 1996) (*Linehan II*), *vacated and remanded*, 118 S. Ct. 596 (1997).

Appellant challenges whether the 60-day review hearing afforded him the ability to show a change in circumstances, arguing (1) the treatment report by the MSOP was deficient because it did not address the criteria for commitment and (2) the MSOP report was "merely an endorsement of the trial court's order without a substantial review of [a]ppellant."

The Minnesota Commitment and Treatment Act states that the MSOP report must address the “criteria for commitment” by providing the following information:

- (1) the respondent’s diagnosis;
- (2) the respondent’s present condition and behavior;
- (3) *the facts, if any, that establish that the respondent continues to satisfy the statutory requirements for commitment;*
- (4) a description of treatment efforts and response to treatment by the respondent during hospitalization;
- (5) the respondent’s prognosis;
- (6) the respondent’s individual treatment plan;
- (7) an opinion as to whether the respondent is in need of further care and treatment;
- (8) an opinion as to the program or facility best able to provide further care and treatment, if needed;
- (9) an opinion as to whether respondent is dangerous to the public or himself.

Minn. Spec. R. Commitment & Treatment Act 23(d) (emphasis added). Appellant asserts the MSOP report states that the “findings of fact pertaining to his sexual behavior and related diagnosis support the commitment,” without further elaboration, and that this statement was insufficient to address all of the criteria for commitment under rule 23(d). But the MSOP report specifically addressed each of the nine criteria and specifically stated that the documents available for review at the time the report was written included “the Findings of Fact, Conclusions of Law and Order for Commitment as a SDP, signed by the [district court] on March 15, 2008,” which elaborated on the findings supporting appellant’s commitment. We conclude that the report adequately addressed the criteria for commitment.

Regarding appellant’s argument that the MSOP treatment report is “merely an endorsement of the trial court’s order without a substantial review of [a]ppellant,” the

statute on its face only requires that a treatment report be provided to the district court. *See* Minn. Stat. § 253B.18, subd. 2(a) (“A written treatment report shall be filed by the treatment facility with the committing court within 60 days after commitment.”); *see also In re Janckila*, 657 N.W.2d 899, 902 (Minn. App. 2003) (“In reviewing a commitment, we are limited to an examination of whether the district court complied with the requirements of the commitment act.”). Here, the MSOP report sufficiently and specifically addressed each factor regarding appellant’s commitment, as required by rule 23(d).

Because the MSOP specifically addressed each of the nine factors required under rule 23(d), we hold that there was sufficient evidence provided at appellant’s review hearing to find that he continued to meet the statutory criteria for commitment as a SDP.

Affirmed.