STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0502

In the Matter of the Civil Commitment of:
William Joseph Eggert.

Filed September 15, 2009
Affirmed
Johnson, Judge

Blue Earth County District Court
File No. 07-PR-08-136

Kenneth R. White, 325 South Broad Street, Suite 203, Mankato, MN 56001 (for appellant)

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Considered and decided by Johnson, Presiding Judge; Kalitowski, Judge; and Connolly, Judge.

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

JOHNSON, Judge

Blue Earth County petitioned the district court to have William Joseph Eggert civilly committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP). The district court granted the petition. Eggert's primary argument on appeal is that he did not engage in a course of harmful sexual conduct, which is a necessary predicate to commitment as an SDP. He also argues that his commitment violates the prohibition against double jeopardy and his right to substantive

due process, that his proposed treatment is unlawful, and that his attorney in the district court rendered ineffective assistance. We affirm.

FACTS

In January 2008, when Eggert was due to be released from a correctional facility, the county petitioned the district court to commit him as an SDP and a sexually psychopathic personality (SPP). While the petition was pending, the district court appointed two psychological examiners, Dr. Linda Marshall and Dr. Mary Kenning.

Dr. Marshall interviewed Eggert and conducted psychological tests. She diagnosed Eggert with paraphilia, not otherwise specified; antisocial personality disorder; and chemical dependency. She determined that, based on a comprehensive risk assessment, "Eggert continues to pose a high risk for sexual violence relative to other sex offenders incarcerated." She concluded that Eggert meets the criteria for an SDP but does not meet the criteria for an SPP.

Dr. Kenning interviewed Eggert and relied on the results of the psychological tests conducted by Dr. Marshall. Dr. Kenning diagnosed Eggert with antisocial personality disorder and alcohol and cocaine dependency. She determined that Eggert meets the criteria for an SDP but, like Dr. Marshall, concluded that Eggert does not meet the criteria for an SPP.

The district court conducted an evidentiary hearing on four days in May and June of 2008. The district court heard testimony from, among others, the two psychologists, Eggert, and four persons with first-hand knowledge of Eggert's prior criminal offenses. The district court, like the psychologists, relied on four criminal offenses committed by

Eggert over the course of more than 20 years and determined that Eggert engaged in a course of harmful sexual conduct. Those four incidents are as follows.

J.I., July 1987: When Eggert was 18 years old, he had a sexual relationship with a 15-year-old girl who was approximately 32 months younger. The relationship began when Eggert was 17 years old and J.I. was 15. The district court specifically found that the relationship was consensual, between boyfriend and girlfriend, and well known to J.I.'s mother. After J.I.'s father reported the relationship to law enforcement, Eggert was charged with third-degree criminal sexual conduct. He pleaded guilty in the Waseca County District Court and was sentenced to 18 months of probation. In this case, Eggert argued to the district court that his sexual conduct toward J.I. was not "harmful," as required by the SDP statute. The district court found that the girl was harmed because she became pregnant.

E.A.J., June 1995: When Eggert was 26 years old, he had a sexual relationship with an 18-year-old woman, E.A.J. When E.A.J. broke off the relationship, Eggert became upset and threatened to harm the woman's parents. Eggert made a statement to one of E.A.J.'s friends that he was going to get a gun so as to cause E.A.J.'s parents to allow him to continue dating E.A.J. Eggert was charged with, among other things, two counts of felony harassment and stalking of E.A.J.'s parents, one count of gross misdemeanor harassment and stalking of E.A.J., harassing telephone calls, one count of terroristic threats toward E.A.J., and one count of terroristic threats toward E.A.J.'s father. A Blue Earth County jury found Eggert guilty of harassment of E.A.J.'s parents and making terroristic threats toward E.A.J.'s father. Eggert received concurrent

sentences of 25 months of imprisonment for the terroristic-threats conviction and one year of imprisonment for the harassment conviction.

E.G., May 1998: When he was 30 years old, Eggert physically assaulted a homosexual man, E.G. Eggert and a friend met E.G. at a bar and ostensibly made plans with him to have a sexual encounter in a motel room. E.G. left the bar to retrieve money from his nearby apartment and returned to the bar. As the three men left the bar together, Eggert and his friend assaulted E.G. by hitting and kicking him multiple times. Eggert was charged with simple robbery for the theft of E.G.'s money and third-degree assault. A Nicollet County jury convicted him of both offenses. Eggert was sentenced to 48 months of imprisonment for the simple-robbery conviction, and the assault conviction was vacated. At the civil-commitment hearing, E.G. testified that Eggert initiated the conversation about engaging in sexual activity and presented himself in a manner consistent with being homosexual. But there was no finding by the district court that Eggert actually intended to engage in sexual conduct with E.G. and no finding that his beating of E.G. was motivated by sexual impulses.

K.L.M., Summer 2002: When he was 34 years old, Eggert engaged in a coercive sexual relationship with a 13-year-old girl, K.L.M., whose family lived next door. Eggert took the girl fishing on a number of occasions, and he provided her with alcohol on each fishing trip. During the various fishing trips, Eggert engaged in various forms of sexual contact with K.L.M. He kissed her, touched her breasts, digitally penetrated her vagina, and penetrated her vagina with his penis on multiple occasions. Eggert's sexual contact with K.L.M. stopped when K.L.M.'s mother became suspicious and confronted Eggert,

who denied inappropriate conduct. In November 2004, when K.L.M. was 15 years old, she reported the incidents to the police. Eggert was charged with two counts of third-degree criminal sexual conduct in the Le Sueur County District Court. He pleaded guilty to one count, and the other count was dismissed. He was sentenced to 55 months of imprisonment. He began serving his sentence in July 2005.

In September 2008, the district court issued findings of fact, conclusions of law, and an order for initial commitment. The district court found, by clear and convincing evidence, that Eggert engaged in a course of harmful sexual conduct based on the four offenses, that he suffers from sexual or personality disorders that constitute mental disorders, that "it is highly likely that Eggert will engage in further harmful sexual conduct," that he is in need of treatment, and that MSOP is capable of meeting Eggert's treatment needs and the requirements of public safety. The district court ordered that Eggert be committed as an SDP and ordered that the first treatment report be filed with the district court within 60 days. In January 2009, after a review hearing, the district court issued an order in which it found that Eggert's situation had not changed in any way relevant to the determination that he is an SDP and ordered him to be committed indeterminately as an SDP. Eggert appeals.

D E C I S I O N

Eggert challenges the district court's order on four grounds: (1) that the district court erred by finding that he engaged in a course of harmful sexual conduct; (2) that his commitment is unconstitutional; (3) that MSOP's treatment plan for him is unlawful; and (4) that he received ineffective assistance of counsel in the district court.

I. Course of Harmful Sexual Conduct

Eggert first argues that the district court erred by finding that he engaged in a course of harmful sexual conduct. The state must prove the facts necessary for commitment by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2008). We apply a clearly erroneous standard of review to the district court's factual findings. Minn. R. Civ. P. 52.01; *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). We apply a *de novo* standard of review to the question whether given facts satisfy the statutory criteria for commitment. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

An SDP is a person who "(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 term "harmful sexual conduct," as used in the first prong of the definition of an SDP, "means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008). A conviction of criminal sexual conduct in the first, second, third, or fourth degree creates a rebuttable presumption of a substantial likelihood of serious physical or emotional harm. Minn. Stat. § 253B.02, subd. 7a(b) (2008). In addition, a conviction of any of 19 other enumerated offenses (including terroristic threats and harassment and stalking) may give rise to the same presumption "[i]f the conduct was motivated by the person's sexual impulses or was part of a pattern of behavior that had criminal sexual conduct as a goal." *Id*. A "course" of harmful sexual conduct exists if a person has engaged in a succession or sequence of actions

constituting harmful sexual conduct. *In re Commitment of Stone*, 711 N.W.2d 831, 837 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

On appeal, Eggert does not challenge the district court's findings that he suffers from a mental disorder and is likely to engage in harmful sexual conduct in the future. Rather, he focuses on the finding that he engaged in a course of harmful sexual conduct. More specifically, he argues, first, that he did not engage in "harmful sexual conduct" with respect to J.I., E.J., or E.G. and, second, that the conduct toward K.L.M. (which he concedes was harmful sexual conduct), cannot, by itself, constitute a "course" of harmful sexual conduct.

We begin our analysis by reviewing the findings arising from Eggert's sexual relationship with E.A.J., which presents evidence of harmful sexual conduct that is stronger than the evidence relating to J.I. or E.G. The district court found that Eggert's conduct toward E.A.J. and her parents, which gave rise to his criminal convictions of harassment and stalking and making terroristic threats, was harmful sexual conduct. The district court applied a statutory presumption of a likelihood of serious physical or emotional harm by finding that "Eggert's conduct relating to EAJ and her family resulting in his conviction was a result of his desire to exercise power and control over EAJ [so that] he could continue his sexual relationship with her and satisfy his sexual desires."

As a threshold matter, we first consider whether Eggert's criminal conduct toward E.A.J.'s family is within the statutory definition of "harmful sexual conduct." Eggert was not convicted of criminal sexual conduct but, rather, was convicted of harassment and

stalking and making terroristic threats. In *In re Commitment of Martin*, 661 N.W.2d 632 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003), this court held that criminal harassment and stalking, even if not sexual in nature, nonetheless may constitute harmful sexual conduct. Martin stalked and harassed two women who had rebuffed his sexual advances. *Id*. at 635-37. He broke into the first woman's home multiple times, during which time he kept a loaded pistol, a hunting knife, a rope, and a whip in his car. *Id*. at 635. Martin unlawfully took court documents relating to the second woman, during which time he kept a loaded shotgun, a set of handcuffs, and a roll of duct tape in his car. *Id*. at 636. This court held that Martin had engaged in a course of harmful sexual conduct even though he never sexually assaulted either woman. *Id*. at 638. We reasoned that Martin committed a criminal offense listed in section 253B, subdivision 7a, and that his admitted sexual attraction to the victims meant that his offenses were "motivated by sexual impulses." *Id*. In light of *Martin*, Eggert's criminal conduct toward E.A.J.'s family may constitute "harmful sexual conduct" even though he was not convicted of criminal sexual conduct.

Eggert contends that the evidence does not support the district court's finding that his conduct toward E.A.J.'s parents was motivated by sexual impulses. But a friend of Eggert testified at the criminal trial that Eggert was angered by E.A.J.'s parents' efforts to end the sexual relationship between their daughter and Eggert and that he engaged in criminal conduct toward her parents for the purpose of causing the parents to cease their interference. This evidence supports the district court's finding that Eggert sought to "continue his sexual relationship with [E.A.J.] and satisfy his sexual desires," and the

district court's finding satisfies the statutory requirement that criminal conduct be "motivated by the person's sexual impulses." Minn. Stat. § 253B.02, subd. 7a(b).

Even if the statutory presumption were not triggered, there is abundant evidence in the record capable of proving "a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a). E.A.J. testified that, at the time of Eggert's threats, she had fear and that she continues to have fear and sleeps with a knife under her pillow when she is home alone. Dr. Marshall testified that Eggert's conduct toward E.A.J. was likely to be harmful because he caused her trauma and manipulated her. Similarly, Dr. Kenning testified that E.A.J. likely was very frightened due to her experience with Eggert.

Eggert also contends that his conduct relating to E.A.J. and her family does not satisfy the statutory criteria because there was no evidence of a likelihood of harm to E.A.J. but, rather, only evidence of harm to other members of her family. For the reasons stated in the previous paragraph, this contention fails because the evidentiary record contains evidence of a likelihood of harm to E.A.J. Furthermore, the statute does not require that any particular person experience harm or a likelihood of harm; the statute requires proof of "a substantial likelihood of serious physical or emotional harm *to another*." Minn. Stat. § 253B.02, subd. 7a(a) (emphasis added). The fact that the statutory presumption of likelihood of harm arises from certain criminal offenses indicates that, when determining whether there is evidence of likelihood of harm, it is appropriate to consider the victims of those criminal offenses. Eggert was convicted of harassing and stalking E.A.J.'s parents and making terroristic threats to E.A.J.'s father.

Section 253B, subdivision 7a, does not require that the person who was a victim of a crime specified in the second sentence of subdivision 7a(b) be the person who was the object of the sexual impulses.

Thus, the district court did not err by concluding that the incident involving E.A.J. constitutes harmful sexual conduct. In light of Eggert's concession that he engaged in harmful sexual conduct toward K.L.M., the evidence of Eggert's conduct toward E.A.J. and K.L.M. is sufficient to establish a "course" of harmful sexual conduct. *See In re Stone*, 711 N.W.2d at 837. In light of that conclusion, it is unnecessary to consider whether Eggert engaged in harmful sexual conduct toward J.I. or E.G.

Thus, the district court did not err by finding that Eggert is an SDP and by ordering him to be civilly committed.

II. Constitutionality

Eggert argues that he was committed in violation of the constitutional prohibition against double jeopardy and his right to substantive due process. *See* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. In response, the state argues that Eggert may not pursue this argument on appeal because he did not raise it in the district court. The state is correct. Eggert did not make such an argument in the district court and, thus, has not properly preserved the issue for appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582-84 (Minn. 1988) (holding that issues not presented to district court are forfeited on appeal). We nonetheless note that the supreme court has squarely rejected essentially the same arguments based on double jeopardy and substantive due process. *See In re Linehan*, 594 N.W.2d 867, 871-72, 876 (Minn. 1999) (*Linehan IV*). In addition, this court recently

held that a substantive due process challenge is premature at the time of commitment. *In re Civil Commitment of Travis*, 767 N.W.2d 52, 59 (Minn. App. 2009).

III. Treatment Plan

Eggert argues that the officials responsible for the MSOP program intend to administer a penile plethysmograph and a sexual-history polygraph examination to him as part of his treatment and that such actions would be unlawful. In response, the state again argues that Eggert may not pursue such an argument on appeal because he did not raise it in the district court. The state again is correct. Eggert did not make these arguments in the district court, nor did he attempt to establish that he could make these arguments in the district court. Thus, he has not properly preserved them for appeal. *See Thiele*, 425 N.W.2d at 582-84.

IV. Assistance of Counsel

Eggert argues that he received ineffective assistance of counsel in the district court. In commitment cases, this court applies the caselaw concerning ineffective assistance of counsel in criminal cases. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). To establish ineffective assistance of counsel, a person must prove, first, "that his counsel's representation 'fell below an objective standard of reasonableness' and," second, "'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

We apply a *de novo* standard of review. *State v. Blom*, 682 N.W.2d 578, 623 (Minn. 2004).

Eggert contends that his counsel in the district court was ineffective in four ways. First, he contends that his trial counsel unreasonably failed to clarify the purposes of the admission of an exhibit, a letter written by J.I. In light of our conclusion that the evidence relating to E.A.J. and K.L.M. is sufficient to establish a course of harmful sexual conduct, without consideration of the evidence relating to J.I., Eggert cannot prove that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates*, 398 N.W.2d at 561 (quotations omitted).

Second, Eggert contends that his trial counsel unreasonably failed to challenge the constitutionality of the SDP statute. As stated above in part II, the appellate courts of Minnesota previously have rejected similar arguments. Thus, Eggert cannot "prove that his counsel's representation fell below an objective standard of reasonableness" or that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotations omitted).

Third, Eggert contends that his trial counsel unreasonably failed to challenge the prospective administration of certain tests as part of Eggert's treatment at MSOP. When arguing that issue on appeal, Eggert did not cite any authority providing direct support for his challenge to the prospective actions. Eggert also has not established that the issue could have been raised in the district court as part of the commitment proceedings. *Cf. Travis*, 767 N.W.2d at 59. Thus, Eggert cannot "prove that his counsel's representation fell below an objective standard of reasonableness" or "that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." *Gates*, 398 N.W.2d at 561 (quotations omitted).

Fourth and finally, Eggert contends that his trial counsel unreasonably failed to present additional evidence at the review hearing in December 2008. Eggert has identified only one specific type of evidence that he asserts should have been offered: evidence to correct a minor error in a treatment report. But the error -- whether Eggert was convicted of harassing E.A.J. as opposed to her parents -- is not consequential. In our analysis of the issue in part I, we considered the records of the criminal case, which reveal that Eggert was convicted of harassing E.A.J.'s parents. Thus, Eggert cannot "prove that his counsel's representation fell below an objective standard of reasonableness" or "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quotations omitted).

In sum, Eggert did not receive ineffective assistance of counsel in the district court.

Affirmed.