STATE OF MINNESOTA
IN COURT OF APPEALS
A09-945

In the Matter of the Civil Commitment of: Michael Joseph Ponicki

Filed November 17, 2009
Affirmed
Toussaint, Chief Judge

Anoka County District Court
File No. 02-PR-07-452

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

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Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Hudson, Judge.

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

TOUSSAINT, Chief Judge

Appellant Michael Joseph Ponicki challenges his indeterminate commitment as a sexually dangerous person (SDP), arguing that the evidence does not support the conclusion that he is highly likely to reoffend and that the SDP Act is unconstitutional.

Because substantial evidence supports the district court's conclusion that appellant is highly likely to reoffend and because Minnesota appellate court decisions have previously rejected appellant's constitutional challenges, we affirm.

D E C I S I O N

1. Evidentiary Support

This court reviews an indeterminate SDP commitment to "determine if the evidence as a whole presents substantial support for the district court's conclusions." *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*), *vacated & remanded*, 552 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd*, 594 N.W.2d 867 (Minn. 1999) (*Linehan IV*). District court findings are reviewed for clear error. *Id.* at 190.

Statutory criteria for indeterminate SDP commitment are that an individual (1) "has engaged in a course of harmful sexual conduct," (2) "has manifested a sexual, personality, or other mental disorder or dysfunction," and (3) is highly likely to reoffend. Minn. Stat. § 253B.02, subd. 18c(a)(1)(3) (2008); *Linehan IV*, 594 N.W.2d at 876 (requiring high likelihood of recidivism). Appellant challenges only the district court's conclusion that he is highly likely to reoffend.

In assessing whether an individual meets the SDP commitment criterion of being highly likely to engage in acts of harmful sexual conduct, courts consider: (a) relevant demographic characteristics; (b) history of violent behavior; (c) base rate statistics for those with the individual's background; (d) sources of stress in the individual's environment; (e) the similarity of the individual's future context to the context in which

the individual engaged in harmful sexual conduct in the past; and (f) the individual's record in sex therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*).

Appellant was examined by a court-appointed examiner (the court's examiner) and an examiner appointed at appellant's request (appellant's examiner). Both examiners discussed the *Linehan* factors in their reports. The court's examiner answered "Yes" when asked whether appellant is highly likely to engage in future acts of harmful sexual conduct and noted that appellant's "victim pool has been substantially larger than the single offense for which he was convicted in 2003"; that appellant "suffers from Pedophilia as well as other Paraphilias. . . . diagnoses . . . associated with a higher risk of sexual re-offense"; that appellant "has an underlying Personality Disorder that evidences features of callousness, self-importance, antisocial thinking - - [also] personality characteristics associated with a higher risk of re-offense"; that appellant "is a partially treated sexual offender" who "has not yet adequately demonstrated his relapse prevention programming in a transitional setting"; that appellant's "support group is rather limited," his previous offending occurred "while he had an intact family, was working, had a home, and was unknown by law enforcement personnel," and he will have "significantly reduced social support" when he returns to the community; and that "[t]he strength of [appellant's] sexual drive is somewhat alarming. . . . [His s]exuality became an almost exclusive coping mechanism."

Appellant's examiner stated that "it is my opinion that [appellant] is highly likely to engage in future acts of harmful sexual conduct" and considered each of the six *Linehan* factors. He found that appellant "shows protective demographic characteristics" and is "currently successful in sex offender treatment" which "positively influences his risk for sexually re-offending"; that appellant "has not shown a level of violence";[1] that appellant's "actuarial risk instruments are moderate[] to low" but that appellant's risk level was "increased to highly likely based on the number of victims he has, that he has not yet completed treatment, and he needs to have intensive supervision once released"; that "stress in the environment would likely be moderate for [appellant] if he were placed in the community" and he "would have familial support"; that there is no similarity of present or future conflicts to those in which appellant used violence in the past, and that appellant "was discharged unsuccessfully from Alpha House in 2005" but "has been improving significantly in treatment at the DOC-ML SOTP [Department of Corrections-Moose Lake Sex Offender Treatment Program]."

Appellant relies on the actuarial tests' indication that he has a moderate-to-low likelihood to reoffend. But the reports and testimony of both examiners explained why appellant's actuarial scores are not dispositive.

The court's examiner testified:

[1] But elsewhere in appellant's examiner's report he noted that appellant admitted to "rubbing his penis on and ejaculated in the vagina of a three-month-old girl, giving and receiving oral sex from an eight-month-old girl, threatening to kill a 10-year-old boy if he didn't give [appellant] oral sex, [and] blindfolding and tying the hands of a young boy in order to be sexual with him." Arguably, these acts indicate a level of violence.

> [T]he actuarial risk scores are . . . generally based upon the number of actual convictions . . . .
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> He's had one conviction and perhaps 34 other victims that he disclosed in treatment with children as young as 3 months to 13 years of age, males and females. Children he took in his car off the street and took them away to sexually offend against them. So when you see the sexual offense history, those low actuarials really become an under estimate.
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> And . . . [you] have to take a look at his offense style, his broad victim pool. . . . He's brazen enough to take [children] off the street to transport them to a different area or to go in their own home . . . and attempt to sexually assault a young boy in his own bedroom, a neighbor . . .
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> A high sexual drive or a preoccupation with sexuality [sic]. A certain cleverness that has been identified in his sexual assault cycle where he studied children almost in an obsessive fashion so he could determine whether or not they were going along with him . . . and then what he could do differently to gain compliance and cooperation.
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> So as you read his sexual assault cycle, you see someone who is markedly bright, operated with a great degree of stealth, planning, grooming, also brazen, and engaged in extremely high risk behavior but was never detected . . . . So with all of that, those are the factors that convinced me that . . . he's at high risk.
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> And then when you find that he is sexually deviant and you do find that he has antisocial characteristics, all of that, those totality of factors, convince me that he's at very high risk to reoffend unless treatment is available. And that risk is higher than would be generated by the mechanical score drawn from the actuarials.

Appellant's examiner testified:

> The dynamic [*Linehan*] factors clearly raise the risk assessment compared to the actuarials. . . .
>
> One [factor] is that if [appellant is] in the community, his support system right now . . . is his mother and . . . there's concern about that because of her past minimizing of his sexual offending. [Appellant] does appear to have a positive support relationship with the son. . . . but he doesn't want his father to reoffend. And his son also said any sign that [appellant] was

> deviating from his parole plan, he would turn him in.[2] So, in that regard, social influences are kind of weak . . . .
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> The second [factor] is . . . the need for [appellant] to be scrutinized to make sure that he still doesn't have any kind of an emotional identification with children. . . . [I]n his relapse prevention plan has he been able to identify . . . in the past when [he] was lonely or when [he] was dejected or when [he] was angry that is when [he] became aroused or looking for children[.]

Appellant's examiner answered "Absolutely" when asked if he believed that appellant met the criteria for a determination that he is SDP. Thus, the fact that the actuarial tests gave appellant a moderate-to-low likelihood of recidivism did not preclude the district court's conclusion that appellant meets the "highly likely to reoffend" criterion for SDP.

2. Constitutionality of SDP Statute

"Minnesota statutes are presumed constitutional, and [this court's] power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989). "The party challenging a statute has the burden of demonstrating beyond a reasonable doubt a violation of some provision of the Minnesota Constitution." *Id.*

A. Substantive Due Process

"Under [*In re*] *Blodgett* [510 N.W.2d 910 (Minn. 1994)], the SDP Act is sufficiently narrow to satisfy strict scrutiny as applied to Linehan." *Linehan III*, 557

[2] Appellant's relationship with his son is problematic. In about 2001, appellant's son, then 21, was accused of abusing a child. Appellant let his son be blamed for this abuse without revealing to the authorities or the child's parents that he himself had actually abused the child. Appellant's son learned the truth about the incident after appellant's arrest. He testified that, after learning about it, he "was angry and frustrated and felt betrayed" and had no contact with appellant for some time.

N.W.2d at 182. Appellant urges this court to adopt the dissent in *Blodgett*, which argues that the psychopathic personality statutes are not sufficiently narrowly tailored to satisfy strict scrutiny. *See Blodgett*, 510 N.W.2d at 918 (Wahl, J., dissenting). But appellant offers no support for the implicit view that this court is free to adopt a dissent rather than a holding of a supreme court case.

Appellant also argues that *Linehan III* is distinguishable because in *Linehan III* alternative treatment options were not at issue. But alternative options are not at issue here either. The court's examiner testified that the hypothetical alternative options he mentioned in his report were not available to appellant and "[w]ithout those other options then I would say that he would continue to need residential treatment very much like he has now at [DOC-ML SOTP]." Appellant's examiner testified that, "Sadly, if the type of group home [that could provide sufficient supervision for appellant] is not available . . . then the only other alternative is a commitment to DHS as [SDP]."

Moreover, even if there were an alternative option, appellant has no right to placement in it. *See In re Senty-Haugen*, 583 N.W.2d 266, 269 (Minn. 1998) (concluding that there is no requirement for SDP commitment to be least restrictive alternative); *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) ("patients have the *opportunity* to prove that a less-restrictive treatment program is available, but they do not have the *right* to be assigned to it") *review denied* (Minn. Dec. 19, 2001). Appellant's substantive due process argument is without merit.

B. Equal Protection

Appellant argues that the SDP Act violates his right to equal protection because it singles sexual offenders out from other criminals. Again, this court has addressed and rejected the argument:

> The legislature had sufficient basis to conclude that interests in public protection and treatment would be reasonably served by a distinction between sexually dangerous persons with and without mental disorders. First, the legislature has concluded that applying civil commitment to those with mental disorders helps isolate sexually dangerous persons most likely to harm others in the future.
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> . . . .
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> Second, the state's interest in treating sexual predators is served by confining the scope of the SDP Act to those with mental disorders.
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> . . . .
>
> [T]he SDP Act's classification is sufficiently justified by *Blodgett* [510 N.W.2d at 917] and the reasonable connection between a proposed patient's mental disorder and the state's interests in public protection and treatment.

Linehan III, 557 N.W.2d at 186-87.

C. Void for Vagueness

Appellant argues that the interpretation of the SDP Act in *Linehan IV*, 594 N.W.2d at 876, requiring that, for SDP commitment, an individual be unable to "adequately control" his sexual impulses, is void for vagueness. But "[t]aken in the larger context of the holding of *Linehan IV*, the meaning of the phrase 'adequate control' is clear; an offender's history of harmful sexual conduct and a high likelihood of future dangerousness, coupled with a mental illness or dysfunction, demonstrates that an

offender will find it difficult to control behavior." *In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (rejecting argument that "adequate control" language is void for vagueness), *review denied* (Minn. Sept. 17, 2002). Again, appellant's argument has been rejected.[3]

D. Double Jeopardy

Appellant argues that the "SDP statute operates as a sentencing statute grafted onto the civil commitment process" and thus violates the prohibition against double jeopardy. The Minnesota Sex Offender Program (MSOP), whether conducted in a correctional facility or in a treatment facility, necessarily restricts those in the program for the protection of MSOP staff and others in the program. *See* Minn. Stat. § 253B.185, subd. 7 (2008) (providing that MSOP may limit participants' rights "as necessary to maintain a therapeutic environment or the security of the facility or to protect the safety and well-being of patients, staff, and the public."). But this similarity of MSOP in a treatment center to MSOP in a correctional facility does not equate treatment centers to correctional facilities, which is the basis of appellant's double jeopardy argument.

E. Jury Trial

Finally, appellant argues that his SDP commitment proceeding violated his right to a jury trial. But a respondent in a civil commitment proceeding has no right to a jury trial

[3] Appellant also implicitly argues that the opinions of expert examiners should be disregarded if they conflict with an individual's scores on actuarial tests because the opinions are subjective and void for vagueness. Appellant provides no legal support for this allegation, and this court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).

State ex rel. Pearson v. Probate Court, 205 Minn. 545, 557, 287 N.W. 297, 303(1939); *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Substantial evidence shows that appellant meets the statutory criteria for indeterminate SDP commitment, and appellant's constitutional challenges are without merit.

Affirmed.