STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1080

In the Matter of the Civil Commitment of: John Jerry Cermak

Filed November 10, 2009
Affirmed
Stauber, Judge

Scott County District Court
File No. 70PR075823

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Considered and decided by Stauber, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

STAUBER, Judge

Appellant John Jerry Cermak appeals his initial and indeterminate commitment to treatment in the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). Because clear and convincing evidence supports the district court's findings, we affirm.

FACTS

Appellant is currently 57 years old and has a history of engaging in sexual activity with young children, including family members. In 1974, appellant began sexually assaulting his daughters A.C. and C.C. on a regular basis, and would often force his wife to participate in the abuse. At the time, the daughters were both under the age of six. Later, during a four-year period in the late 1970s and early 1980s, appellant sexually abused A.C. and C.C. and his brother James Cermak's three young children through his participation in an incestuous "game" involving other family members, including appellant's wife, James, James's wife, and appellant and James's parents.

"The game," as it was called by family members, was similar to spin the bottle. When the bottle stopped spinning, the person the bottle was pointing at could select any other adult or child to engage in sexual activity that included oral, vaginal, and anal sex. The children, who ranged in age from four to nine years old, were forced to participate and appellant or James would spank them if they refused. The brothers also took nude photographs of the children in sexually explicit poses. Although other adult family members participated, appellant and James were the primary instigators of the game. The family played the game approximately thirty to forty times during the four-year period. Beginning in 1979, appellant and James also forced J.W.C., an 11-to-12-year-old male who delivered James's newspapers, to participate in the game and pose for sexually explicit photographs.

In 1981, appellant and James sexually assaulted and took explicit photographs of K.L.W., an unrelated 11-to-12-year-old male, at a motel.

Appellant was later charged with multiple counts of first- and second-degree criminal sexual conduct for his role in the abuse of his children, James's children, J.W.C. and K.L.W. As part of a plea agreement, appellant pleaded guilty to six counts of first-degree criminal sexual conduct and received consecutive sentences for each count totaling 480 months. At the plea hearing, appellant admitted to all of the allegations and acknowledged that he needed treatment. Appellant later participated in a psychological evaluation as part of his presentence investigation. Appellant was diagnosed as having personality disorder, dependent type, and pedophilia. During the evaluation process, appellant admitted to having sexual contact with at least five victims, including two of his children, two of James's children, and K.L.W. However, shortly after being sentenced, appellant began to deny most of the abuse allegations. He claimed that he pleaded guilty at his lawyer's behest and would only admit to sexually abusing and taking explicit photographs of K.L.W.

In October 2000, while appellant was incarcerated, a fellow inmate, M.P.C., reported to prison authorities that he was one of appellant's victims. M.P.C. testified at the commitment trial that appellant molested him on multiple occasions in 1981 when he was four years old. Like appellant's other victims, M.P.C. described playing a game like spin the bottle that involved sexual activity between adults and minors. As part of its initial commitment order, the district court found that appellant had molested M.P.C. and that appellant's actions constituted first-degree criminal sexual conduct.

Over the course of his incarceration, appellant did not participate in sex-offender treatment. Appellant occasionally requested or was recommended for participation in

such treatment, but after being accepted into a program, appellant would either decline the invitation or enroll for only a short time before quitting. In 2006, appellant's request to participate in treatment was denied because he had previously refused treatment and denied committing the offenses that led to his incarceration.

In 2006 and 2007, appellant participated in at least three sex-offender assessments. Appellant received scores of five, seven, and nine on the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R). Scores of five and seven indicate a moderate risk of reoffense, and a score of nine reflects a high risk of recidivism. Shortly before appellant became eligible for release, the End-of-Confinement Review Committee (ECRC) assigned appellant a risk level of three, which also indicates a high risk of sexual reoffense.

In April 2008, the state filed a petition seeking to civilly commit appellant as an SDP and SPP, and a civil commitment trial was held. Two court-appointed examiners testified at trial. The first examiner, Dr. Peter Meyers, diagnosed appellant with polysubstance dependence, in remission; pedophilia, sexually attracted to both, non-exclusive type; and antisocial personality disorder. After weighing the relevant commitment factors, Dr. Meyers opined that appellant met the criteria for commitment as both an SDP and SPP and indicated that appellant could not be safely released into the community because he was in need of sex-offender treatment and supervision in a secure setting.

Dr. James Gilbertson served as the second court-appointed examiner and was chosen by appellant. Dr. Gilbertson diagnosed appellant with pedophilia, nonexclusive

type, predominantly intrafamilial form, and personality disorder, NOS, passive, dependent, and avoidant features. Dr. Gilbertson opined that it was "arguable" whether appellant satisfied the criteria for commitment as an SDP or SPP. Dr. Gilbertson explained that his use of the term "arguable" meant that appellant may or may not qualify for commitment, depending upon which relevant factors the court found more persuasive. With respect to the SDP designation, Dr. Gilbertson expressed some reservations about whether appellant was likely to engage in future acts of harmful sexual conduct, but did identify several criteria that would support such a finding. With respect to the SPP criteria, Dr. Gilbertson concluded that appellant may or may not qualify as a SPP because it was arguable whether he is dangerous, whether his sexual misconduct is habitual, and whether he exhibits an utter lack of power to control his sexual impulses. Dr. Gilbertson discussed the possibility of granting appellant intensive supervised release (ISR), but noted that any disposition that would require sex-offender treatment would likely be futile because appellant continues to deny that he abused his victims.

Appellant testified that he had never engaged in sexual abuse of any of the alleged victims, but admitted that he took sexually explicit photographs of his children and his brother's children. Appellant also acknowledged that he had not participated in sex-offender treatment during his incarceration.

On December 1, 2008, the district court found that appellant met the criteria for SDP and SPP and ordered that he be initially committed to MSOP–St. Peter. Following appellant's initial commitment, a 60-day review hearing was held. The district court received into evidence a treatment report from MSOP indicating that appellant continued

to meet the criteria for classification as an SDP and SPP and was an appropriate candidate for MSOP treatment. The report further noted that appellant continued to deny sexual abuse of his victims and would require intensive, long-term, inpatient treatment to address pedophilia and antisocial personality disorder. Dr. Chad Nelson was appointed as a review-hearing examiner at appellant's request. Dr. Nelson suggested that placing appellant on ISR might be a viable option, but he also noted that appellant presented a high risk of reoffense, exhibited a moderate level of psychopathy, and continued to deny abusing his victims.

On April 29, 2009, the district court indeterminately committed appellant as a SDP and SPP, finding that the statutory requirements for civil commitment continued to be met and that placement at MSOP–St. Peter was the most appropriate and least restrictive alternative available to appellant. This appeal follows.

D E C I S I O N

Appellant argues that the evidence does not support the district court's conclusion that he satisfies the requirements for commitment as an SDP and SPP and claims that less restrictive alternatives existed. "We review de novo whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). We defer to the district court's findings of fact, and we will not reverse those findings unless they are clearly erroneous. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But whether the evidence is sufficient to meet the statutory requirements for commitment is a question of law. *In re Martin*,

661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). This court defers to the district court's role as factfinder and its ability to judge the credibility of witnesses. *Ramey*, 648 N.W.2d at 269. "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *Thulin*, 660 N.W.2d at 144 (quotation omitted).

I.

To support commitment of a person as an 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 highly likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008); *In re Linehan (Linehan III)*, 557 N.W.2d 171, 189 (Minn. 1996) (requiring high likelihood of engaging in acts of harmful sexual conduct for SDP commitment), *vacated on other grounds*, 552 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). Of the three necessary criteria, appellant challenges only the district court's finding that he is highly likely to reoffend.

In assessing whether an individual is highly likely to engage in acts of harmful sexual conduct, courts consider: (1) relevant demographic characteristics; (2) history of violent behavior; (3) base rate statistics for those with the individual's background; (4) sources of stress in the individual's environment; (5) the similarity of the individual's future context to the context in which he engaged in harmful sexual conduct in the past; and (6) the individual's record in sex-therapy programs. *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994).

The district court addressed each of the *Linehan I* factors in its initial commitment order and found that appellant is highly likely to reoffend. The court relied primarily on Dr. Meyers's testimony and report. Dr. Meyers opined that appellant is highly likely to reoffend because (1) his untreated pedophilia and continued denial of sexual abuse increases his risk of reoffending and statistics suggest that pedophiles are more likely to reoffend in their later years than other sexual offenders; (2) his scores on a variety of actuarial and structured clinical tests suggest a high risk of recidivism; (3) he would be under considerable stress if he were released because he would be required to register as a sex offender and participate in ISR; and (4) he has no treatment record, has not established an effective relapse prevention plan, and continues to deny his victim pool.

The court also noted that appellant (1) has a history of violent behavior, including physical abuse of his wife and children; (2) has an inadequate support system and continues to associate with his father and brothers; and (3) "would be returning to a similar situation to that in which he lived prior to his most recent incarceration."

In challenging this finding, appellant relies upon the testimony of Dr. Gilbertson. Dr. Gilbertson agreed that the evidence could support a finding that appellant is highly likely to reoffend but suggested that it was also possible to conclude that he might not pose such a high risk. Specifically, Dr. Gilbertson testified that the likelihood of reoffense by a pedophile like appellant, whose sexual attraction is not limited solely to children, may decrease as the offender ages. Dr. Gilbertson also opined that the group persuasion and dynamics within the Cermak family that led to some of the abuse would no longer be present because the family unit is no longer intact. We agree that some of

Dr. Gilbertson's testimony could support a finding that appellant is unlikely to reoffend. But the district court ultimately found Dr. Meyers's conclusions more credible, and we defer to a district court's credibility determinations on appeal. *See In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (stating that due regard shall be given to the opportunity of the district court to judge the credibility of witnesses); *In re Brown*, 414 N.W.2d 800, 803 (Minn. App. 1987) (stating that the district court is in the best position to evaluate the credibility of evidence and testimony). Accordingly, the district court did not commit clear error in concluding that appellant is highly likely to reoffend.

II.

Next, appellant argues that the district court clearly erred in determining that he met the criteria for commitment as an SPP. A petitioner must prove by clear and convincing evidence that the standards for commitment as an SPP are met. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). An SPP is defined as the

> existence in any person of such conditions of emotional instability, or impulsiveness of behavior, or lack of customary standards of good judgment, or failure to appreciate the consequences of personal acts, or a combination of any of these conditions, which render the person irresponsible for personal conduct with respect to sexual matters, if the person has evidenced, by a habitual course of misconduct in sexual matters, an utter lack of power to control the person's sexual impulses and, as a result, is dangerous to other persons.

Minn. Stat. § 253B.02, subd. 18b (2008). The district court must find: (1) a habitual course of misconduct involving sexual matters; (2) an utter lack of power to control sexual impulses; and (3) dangerousness to others. *Linehan I*, 518 N.W.2d at 613. The psychopathic personality "excludes mere sexual promiscuity" and "other forms of social

delinquency." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). The personality, however, "is an identifiable and documentable violent sexually deviant condition or disorder." *Id.*

a. Habitual course of misconduct in sexual matters

Appellant first contends that the state failed to prove by clear and convincing evidence that he engaged in a habitual course of sexual misconduct. Specifically, appellant claims that his actions were not habitual.

In concluding that appellant had engaged in a habitual course of sexual misconduct, the court relied primarily on Dr. Meyers's testimony. Dr. Meyers testified that appellant's multiple victims and sexual contacts over a period of several years constituted a habitual course of sexual misconduct. Dr. Gilbertson agreed that appellant had engaged in a course of harmful sexual conduct but concluded that appellant's conduct was not habitual. He explained that the clinical definition of habituation requires the consideration of three factors: repetition, similar behavior, and resistance to change or redirection. Although he believed that the first two factors were met, he testified that the third factor was not satisfied because appellant had not had an opportunity to display any control in the community due to the fact that he had been incarcerated for the past 28 years.

Appellant contends that the district court should have adopted Dr. Gilbertson's opinion. But, again, the district court's conclusion amounts to a credibility determination in favor of Dr. Meyers that will not be disturbed on appeal. *See Ramey*, 648 N.W.2d at 269 (stating that this court defers to the district court's credibility determinations on

appeal). Moreover, the district court explicitly rejected Dr. Gilbertson's testimony, finding that "[t]he fact that [appellant] has not had a chance to demonstrate change in the community does not change the fact that his course of harmful sexual conduct was habitual in the first instance." This determination comports with the statutory language, which contemplates a *prior* course of habitual sexual misconduct, rather than present or future behavior. *See* Minn. Stat. § 253B.02, subd. 18b (stating that SPP exists if, among other criteria, the person *has* evidenced a habitual course of misconduct in sexual matters). Thus, the district court did not err when it concluded that appellant has engaged in a habitual course of sexual misconduct, even though it occurred over thirty years ago.

b. Utter lack of power to control sexual impulses

Appellant next argues that respondent failed to prove by clear and convincing evidence that he utterly lacks power to control sexual impulses. In considering this element, the district court must weigh several significant factors: (1) "the nature and frequency of the sexual assaults"; (2) "the degree of violence involved"; (3) "the relationship (or lack thereof) between the offender and the victims"; (4) "the offender's attitude and mood"; (5) "the offender's medical history and family"; (6) "the results of psychological and psychiatric testing and evaluation"; and (7) any factors "that bear on the predatory sex impulse and the lack of power to control it." *Blodgett*, 510 N.W.2d at 915.

Dr. Meyers concluded that appellant is utterly incapable of controlling his sexual impulses. In arriving at this conclusion, Dr. Meyers cited several factors that tended to suggest that appellant historically lacked control over his sexual impulses, including

(1) multiple acts of sexual misconduct over a relatively short time; (2) offenses against a large victim pool that included relatives and strangers; (3) physically beating and threatening victims who did not comply with his sexual demands; (4) offenses against victims who trusted him or were groomed to gain their trust; (5) failing to accept responsibility for his behavior; (6) maintaining a support system that includes family members who also participated in the abuse; and (7) a family history of abusing children.

Several other factors indicate an utter lack of control, including appellant's treatment refusal, lack of a relapse-prevention plan, and belief that no problem exists. *See In re Pirkl*, 531 N.W.2d 902, 907 (Minn. App. 1995) (noting that refusal of treatment and lack of relapse-prevention plan indicate utter lack of control), *review denied* (Minn. Aug. 30, 1995); s*ee also In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995), *review denied* (Minn. May 16, 1995) (finding that lack of treatment and belief that no problem exists can indicate utter lack of control); *In re Bieganowski*, 520 N.W.2d 525, 529-30 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994).

Appellant relies on Dr. Gilbertson's testimony that it is arguable whether appellant has an utter lack of power over his sexual impulses. Dr. Gilbertson agreed that several of the factors suggest that appellant is unable to control his impulses. But he also opined that the group dynamics of the familial abuse may have been the catalyst for appellant's sexual misconduct and noted that the family unit was no longer intact. The district court rejected this testimony, observing that appellant, on several occasions, abused his victims without other adult family members present. Because this finding hinges on a credibility determination,and because the record contains sufficient evidentiary support, the district

court did not clearly err in finding that appellant has an utter lack of control over his sexual impulses.

c. Dangerousness to others

To determine whether an offender is dangerous to others, the district court must consider the same factors enumerated in *Linehan I* for determining whether an offender is highly likely to reoffend. *Linehan I*, 518 N.W.2d at 614. In other words, if a person is highly likely to reoffend, he is also dangerous. As discussed above in our analysis of the SDP criteria, appellant is highly likely to reoffend if released. Accordingly, appellant is also dangerous to others. Because the record contains clear and convincing evidence that appellant meets the criteria for commitment as an SPP, the district court did not err in initially and indeterminately committing appellant.

III.

Appellant argues that the district court erred in finding that there is no less-restrictive alternative to commitment available to him. If a district court finds that an offender is an SDP or SPP, the court must commit the person to a secure treatment facility "unless the patient establishes by clear and convincing evidence that a less-restrictive treatment program is available that is consistent with the patient's treatment needs and the requirements of public safety." Minn. Stat. § 253B.185, subd. 1. This court will not reverse a district court's findings on the propriety of a treatment program unless its findings are clearly erroneous. *Thulin*, 660 N.W.2d at 144.

The district court adopted Dr. Meyers's testimony that no less restrictive alternatives exist because appellant requires sex-offender treatment and supervision in a secure setting.

Relying on the testimony of Dr. Gilbertson and Dr. Nelson, appellant claims that ISR is an available, less restrictive alternative that would meet the requirements of public safety. But Dr. Gilbertson testified that ISR was only a viable option if appellant was not found to meet the standards for commitment as an SDP or SPP. And Dr. Gilbertson also acknowledged that any disposition requiring sex-offender treatment would be futile. Based on this testimony, the court found that it would be more appropriate to attempt treatment in a secure facility where the public would not be at risk. In rejecting Dr. Nelson's testimony that ISR might be a viable long-term treatment option, the court noted that "[n]othing ha[d] changed" since the initial commitment and that appellant had failed to produce any evidence concerning the appropriateness and availability of alternative placements. Because the district court's explanation for refusing to adopt Dr. Gilbertson's and Dr. Nelson's recommendations is supported by the record, we must affirm its decision.

Appellant also expresses frustration with the legislature's decision to place the burden of establishing a less restrictive alternative on the offender. He seems to claim that he made a good-faith effort to explore alternative treatment options, but was unsuccessful. We acknowledge that the burden of establishing a less-restrictive alternative is an onerous one for a patient like appellant, who has been removed from society for almost 30 years and is unfamiliar with rehabilitative treatment programs. But

whether it is appropriate to place the burden of proof on the patient is a policy argument that must be addressed to the legislature.

IV.

Finally, appellant seems to suggest that the district court adopted the state's evidence and allegations contained in the commitment petition verbatim without independently evaluating the evidence. This argument is akin to suggesting that the district court adopted proposed findings without exercising independent thought. "[T]he verbatim adoption of a party's proposed findings and conclusions of law is not reversible error per se." *Bliss v. Bliss*, 493 N.W.2d 583, 590 (Minn. App. 1992), *review denied* (Minn. Feb. 12, 1993). Verbatim adoption may, however, raise "the question of whether the [district] court independently evaluated each party's testimony and evidence." *Id.* We review the district court decision to determine "if the record supports the findings and shows the [district] court conscientiously considered all the issues." *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 292 (Minn. App. 1987), *review denied* (Minn. May 5, 1988).

Appellant claims that the district court failed to independently review the evidence because it disregarded much of the evidence favorable to him in the record and instead adopted less compelling evidence that supported the state's view. Appellant notes that the district court failed to mention evidence that police and prosecutor Kathleen Morris used suggestive interview techniques and developed close relationships with appellant's young victims during their criminal investigation. He also contends that if the district court had properly considered the evidence, it would not have adopted Dr. Meyers's opinions because he (1) conducted only a short interview of appellant in preparation for

the trial; (2) failed to mention data, research, and test scores that were favorable to appellant; (3) created at least the appearance of impropriety by having lunch with the state's attorney during a recess from his testimony during the commitment trial; and (4) had been criticized by a district court in a previous commitment case for seemingly advocating on behalf of the state while testifying.

We agree that this evidence, if adopted as fact, would raise serious questions about appellant's guilt and qualification for commitment. But just because the evidence was not adopted or mentioned in the district court's findings does not entitle appellant to relief. By failing to mention this evidence and declining to adopt appellant's theory of the case, the district court implicitly found the state's evidence more credible. *See Ramey*, 648 N.W.2d at 269. Moreover, our review of the state's commitment petition shows that the district court adopted only some of the allegations contained therein. Because the district court independently evaluated the evidence and because the district court's findings are supported by the record, we affirm.

Affirmed.