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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1312**

In the Matter of the Civil Commitment of:
Lorenzo Thomas Sims, Jr.

**Filed December 22, 2009
Affirmed
Shumaker, Judge**

Hennepin County District Court
File No. MH-PR-08-553

Roderick N. Hale, 310 Fourth Avenue South, #1150, Minneapolis, MN 55415 (for appellant)

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Considered and decided by Shumaker, Presiding Judge; Worke, Judge; and Huspeni, Judge.*

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant argues that there is insufficient evidence to support the conclusion that he is a sexually dangerous person subject to civil commitment and that Minnesota's commitment statute is unconstitutional. We affirm.

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

FACTS

After he committed two sexually motivated offenses in the summer of 2003, Hennepin County sought to civilly commit appellant Lorenzo Thomas Sims, Jr. as a sexually dangerous person (SDP). A commitment hearing was held on November 24 and 25, 2008. Evidence submitted and considered by the district court revealed Sims's lengthy history of sexual misconduct and assaultive behavior.

As a juvenile, between the years 1997 to 1999, Sims was adjudicated delinquent in Wisconsin for three assaults and one first-degree criminal sexual conduct offense. The criminal sexual conduct offense involved Sims's attempted anal penetration of ten-year-old V.M. and touching her vagina over her underwear. During the investigation leading to Sims's conviction for assaulting V.M., police interviewed Sims's sister, nine-year-old K.S., who reported that Sims had shown, and touched her with, his "private." No charges ever arose out of these allegations, and at Sims's commitment hearing K.S. denied that he had ever molested her. As a result of these offenses, Sims was required to register as a sex offender and spend time in a juvenile correctional facility.

Sims turned 18 on September 21, 2001. Beginning in early 2002, he was charged with a series of crimes including, inter alia, disorderly conduct, a property offense, and felony theft of an automobile. Then, Sims fell out of compliance with his predatory-offender-registration obligations for approximately two years. Although he resumed compliance for a short while, a subsequent bench warrant was issued for Sims's arrest because he failed to report to his probation officer each week. Sims was arrested on the warrant on November 16, 2002, after police responded to a complaint that he had

physically assaulted his girlfriend. Sims was convicted of fifth-degree domestic assault for that offense.

In the spring of 2003, a citizen contacted police and complained that Sims was window peeping on female neighbors. While investigating the matter, police discovered that Sims was again out of compliance with his predatory-offender-registration requirements. He was later convicted of failing to notify authorities of changes in his address.

Shortly after being charged with failing to register, and while still on probation for the domestic assault conviction, Sims committed two more sexually motivated offenses. At approximately 3:30 a.m. on July 30, 2003, he broke into E.A.S.'s residence through a window and crawled on top of her as she lay sleeping in her bed. He put his hand over E.A.S.'s mouth, telling her to be quiet, and then choked her when she began to scream. Sims ripped E.A.S.'s underwear, but eventually fled. Sims was identified as E.A.S.'s assailant after his DNA was matched to a sample of blood found on E.A.S.'s bedsheet and a pair of socks left in her bedroom. He was charged with first-degree burglary, attempted first-degree criminal sexual conduct, and second-degree criminal sexual conduct. He pleaded guilty to second-degree criminal sexual conduct and was sentenced to 90 months' imprisonment.

On August 26, 2003, Sims committed another offense. At approximately 3:30 a.m., T.M.C. was awakened by the doorbell, and a short while later she heard noises outside of her bedroom. T.M.C. stayed inside her locked bedroom. Then, someone pounded on her bedroom window. When she looked outside and knocked on the

window, a man pointed at her and waved, and T.M.C. called the police. Upon investigating, police discovered that the screen from T.M.C.'s roommate's window had been removed. Police also found outside of the duplex a knife that had been taken from T.M.C.'s kitchen, and found semen on T.M.C.'s windowsill. The semen was tested and matched Sims's DNA profile. Sims was charged with two counts of first-degree burglary, one for the use of a knife. The jury found him guilty as charged on February 13, 2004.

Sims went to prison on March 17, 2004. Throughout his incarceration, his assaultive and sexually inappropriate behavior continued, resulting in numerous prison violations, time in segregation, and an increase in his sentence by 143 days. Sims was disciplined for, inter alia, disorderly conduct, abuse and harassment, sexual behavior, and assaulting other inmates. Documentation from the department of corrections (DOC) showed that Sims masturbated openly and inappropriately on a seemingly regular basis, that he physically assaulted a female officer, and had multiple physical altercations with other inmates.

Upon admission to prison, Sims reported that he was hearing voices and having hallucinations. In November of 2006, he requested counseling services and met with Dr. Matana Morin, L.P., of Psychological Services. Dr. Morin conducted a mental-health assessment of Sims, including the administration of the Wechsler Adult Intelligence Scale-Third Edition (WAIS-III). Sims scored a Full Scale IQ of 78, which placed his intellectual functioning in the "[b]orderline" range. Dr. Morin diagnosed Sims with Antisocial Personality Disorder and Borderline Intellectual Functioning.

When Sims's potential for commitment was being considered, DOC psychologist Pamela J. Freske prepared a report dated October 4, 2007. The report noted that Sims had not participated in chemical dependency or sex-offender treatment while imprisoned, had been disciplined 23 times, and had been placed in segregation 21 times. Sims informed Dr. Freske that, except for the two occasions he had been caught on camera, he had never masturbated openly in prison and had merely been "warming his hands in his pants." Sims denied ever having committed a sex offense.

Two court-appointed examiners, both of whom reviewed Sims's files and interviewed him, also testified at Sims's commitment hearing. Dr. Paul Reitman diagnosed Sims with Alcohol Dependence in remission in a controlled environment; Poly Drug Dependence in remission in a controlled environment; and Antisocial Personality Disorder. Dr. Reitman testified that he believed that Sims met the criteria for commitment as a (SDP), but thought Sims should be placed into outpatient treatment.

Dr. Thomas J. Alberg diagnosed Sims with possible Paraphilia; Alcohol Dependence in a controlled environment; Cannabis Dependence in a controlled environment; Antisocial Personality Disorder; and Borderline Intellectual Functioning. Like Dr. Reitman, he concluded that Sims met the criteria for commitment as a SDP, but disagreed that outpatient treatment was appropriate because the risk-assessment tools that he employed indicated that Sims had a 100% risk of re-offending within seven to ten years. Because Sims has a high risk for reoffending, "hasn't cooperated with supervision in the past, . . . [has] acted out even while in a structured setting, [and] hasn't given any

indication that he's willing to engage in treatment," Dr. Alberg testified to his belief that the Minnesota Sex Offender Program (MSOP) was the only option for Sims.

On January 21, 2009, the district court concluded that Sims met the statutory criteria for commitment as a SDP. The court noted that Sims "has no relapse plan, and no insight or remorse. He has never successfully completed treatment, and denies all of his sex-related offenses. He has also sexually offended while subject to supervision. There is no evidence that any outpatient sex offender program has accepted him." The district court found that Dr. Reitman's conclusions regarding Sims's amenability to outpatient treatment were "unsupported by the evidence," and committed Sims to MSOP on an interim basis.

Sims was admitted to MSOP on January 29, 2009. The district court held a review hearing on May 20, 2009, and the state submitted evidence regarding Sims's progress since his admission to MSOP. Included in this evidence was Sims's MSOP treatment report, prepared by Dr. Gary Hertog. The report stated that Sims had Axis I diagnoses of Sexual Abuse of an Adult; possible Paraphilia; Alcohol Dependence in a controlled environment; Cannabis Dependence in a controlled environment; Axis II diagnoses of Antisocial Personality Disorder; and Borderline Intellectual Functioning. Dr. Hertog commented that Sims "continues to largely deny having engaged in any type of sexually deviant behavior," and gave Sims's a "guarded to poor" prognosis for treatment. Dr. Hertog's report concluded that Sims's "condition is unchanged and there is no new information that would suggest his risk to the community has diminished since the initial

commitment. Hence, it is my opinion Mr. Sims continues to satisfy the statutory requirements as a SDP.”

The district court also received evidence that Sims did not participate in any sex-offender treatment while at MSOP and had continued to engage in violent behavior during his time there. Specifically, Sims was returned to the department of corrections on April 15, 2009, for assaultive behavior, instigating other patients to engage in violence, and initiating contact with minors contrary to his release conditions.

Finally, Sims testified at the hearing and claimed that he had a changed attitude.

The district court concluded that nothing had changed since Sims’s original commitment, that he continued to meet the requirements for commitment as a SDP, and therefore the court ordered his indeterminate commitment.

Sims appealed, arguing that the evidence does not support the conclusion that he is a SDP and that the SDP statute is unconstitutional on various grounds.

D E C I S I O N

Sufficiency of the Evidence

Sims first claims that there was insufficient evidence for the district court to conclude that he was a SDP subject to civil commitment. We review de novo whether there is clear and convincing evidence to support the conclusion that an appellant meets the statutory standards for civil commitment. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). However, we do not reweigh the evidence. *In re Linehan*, 557 N.W.2d 171, 189 (Minn. 1996) (*Linehan III*), *vacated on other grounds*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff’d on remand*, 594 N.W.2d 867 (Minn. 1999). “We review the district court’s

factual findings under a clear-error standard.” *In re Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006).

Under the Minnesota Commitment and Treatment Act, an individual may be civilly committed as a SDP if he or she has engaged in a course of harmful sexual conduct; has manifested a sexual, personality, or other mental disorder or dysfunction; and, as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008). The state must prove each of these elements by clear and convincing evidence. Minn. Stat. § 253B.18, subd. 1(a) (2008).

Sims contests the district court’s findings that he engaged in a course of harmful sexual conduct, cannot adequately control his impulses, and is highly likely to reoffend. Each contention is addressed in turn.

Course of Harmful Sexual Conduct

A “course” of sexual conduct is defined by its ordinary meaning, which is “a systematic or orderly succession; a sequence.” *In re Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (citation omitted), *review denied* (Minn. Sept. 17, 2002). This course of conduct is not limited to “convictions, but may also include conduct amounting to harmful sexual conduct, of which the offender was not convicted.” *Id.* The harmfulness aspect of the course of conduct is defined as “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” Minn. Stat. § 253B.02, subd. 7a (2008).

Sims does not really contest that he engaged in a “course” of conduct, but rather argues that his course of conduct was not harmful because “[n]one of these incidents

involved penetration and the T.M.C. incident did not involve Sims touching the victim at all.” Sims also points out that Dr. Reitman was “ambivalent” about whether he had engaged in a course of harmful sexual conduct, despite the fact that Dr. Reitman concluded that “technically” Sims had engaged in such a course.

We note at the outset that Sims provides no support for his claim that the absence of penetration or “touching” of a victim means that his conduct did not create a “substantial likelihood of serious physical or emotional harm.” In fact, the Minnesota Legislature has created a rebuttable presumption that all of Sims’s offenses for which he was convicted were harmful to his victims. *See* Minn. Stat. § 253B.02, subd. 7a(b) (2008) (first-degree criminal sexual conduct is presumptively harmful to a victim, as is a sexually motivated first-degree burglary). Sims has not successfully rebutted this presumption. Furthermore, both experts agreed that Sims engaged in a course of harmful sexual conduct. Dr. Reitman commented in his report that

[t]he psychological community overwhelmingly regards sexual assault as a trauma, contributing to severe mental illness and/or maladaptive personality development The likelihood of psychological impact to E.A.S. and T.M.S. is heightened due to: Mr. Sims breaking into their homes in the middle of the night[.] In E.A.S.’s case being physically assaulted and choked would have caused her to feel that her life or safety were in danger.

Clear and convincing evidence supports the district court’s conclusion that Sims engaged in a course of harmful sexual conduct.

Adequate Control

The second prong of the SDP determination requires a court to find that the person suffers from a mental abnormality or personality disorder that does not allow him to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 875 (Minn. 1999) (*Linehan IV*). This is in contrast with the “inability to control” standard used for determinations of sexual psychopathic personalities. Minn. Stat. § 253B.02, subd. 18(b) (2008). Here, the district court applied the correct standard in finding that Sims’s various mental illnesses prevented him from adequately controlling his sexual impulses.

Sims does not contest that he has a mental abnormality, but claims that the facts do not support a lack of control on his part because his “record is lacking recent acts of sexual impulsivity, other than allegations of masturbation in prison, he has not been accused of concealing his sexual misconduct through lying, [and] [o]utside of prison, he has a limited recent assault history other than the sexual assaults.” Essentially, Sims maintains that his conduct compares favorably to that considered in *Linehan IV*.

In assessing an individual’s control over sexual impulses for purposes of a SDP determination, the *Linehan IV* court looked to (1) recent displays of sexual impulsivity; (2) concealing of sexual misconduct; (3) recent displays of aggression while in confinement; and (4) an Axis II diagnosis of Antisocial Personality Disorder. 594 N.W.2d at 876-77. Despite Sims’s assertion otherwise, his historical and recent conduct clearly supports the conclusion that he cannot adequately control his impulses.

The evidence presented reveals that Sims has been unable to remain law-abiding or to keep the authorities informed of his whereabouts, as he is legally required to do.

Even while on supervised probation, Sims could not control his impulses and broke into the homes of two women. Furthermore, the record is replete with recent incidents in which Sims masturbated openly while incarcerated. This demonstrates that Sims continues to act out sexually, and, as Dr. Alberg noted, these incidents are “indicative of [] poor judgment [and] lack of self-control.” And, like the individual subject to commitment in *Linehan IV*, the record is clear that Sims continues to deny that he has ever committed any sexual misconduct and lies about his behavior. Sims has not ceased to display aggressive behavior since incarceration, and even threatened patients at MSOP after his initial commitment. Finally, Sims has been diagnosed by four psychologists as having Antisocial Personality Disorder, and both court-appointed experts agreed that Sims was unable to adequately control his behavior.

Clear and convincing evidence exists to support the district court’s conclusion that Sims cannot adequately control his sexual impulses.

Likelihood to Reoffend

The third factor in assessing a candidate for classification as a SDP is whether, as a result of the offender’s course of misconduct and mental disorders or dysfunctions, the offender is “likely to engage in acts of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c(a)(3). The supreme court has construed the statutory phrase “likely to engage in acts of harmful sexual conduct” to require a showing that the offender is “highly likely” to engage in harmful sexual conduct. *Linehan III*, 557 N.W.2d at 180. The district court concluded that Sims was highly likely to reoffend based on his history and

current diagnoses by the experts. We view the evidence in the light most favorable to this conclusion. *Stone*, 711 N.W.2d at 840 (citing *Linehan III*, 557 N.W.2d at 189).

A court is to consider six factors when determining if a person is highly likely to reoffend:

(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.

Stone, 711 N.W.2d at 840 (citing *In re Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*)).

Sims does not contest that the six *Linehan* factors support a finding that he is highly likely to reoffend, but rather appears to argue that there cannot be “clear and convincing evidence” that he is highly likely to reoffend because the court-appointed experts disagreed on this point.

Dr. Alberg testified unequivocally to his opinion that Sims was highly likely to reoffend. His conclusion was based upon the *Linehan* factors, Sims's unwillingness to get “any kind of sex offender treatment,” and the fact that the risk assessments employed were all “very high and they are all indicative that he's highly likely to reoffend.” Dr. Alberg also concluded that Sims was a clinical psychopath and, as such, was highly likely to reoffend.

Dr. Reitman originally concluded in his report that “Mr. Sims is highly likely to engage in future acts of harmful sexual conduct. The risk assessments suggest high likelihood, all dynamic factors suggest high likelihood of re-offending and finally he is an untreated sex offender which significantly increases his risk.” Dr. Reitman also reviewed the *Linehan* factors, all of which appeared to bolster this conclusion. However, Dr. Reitman did not agree that Sims is a clinical psychopath,¹ and at the commitment hearing appeared to retract his conclusion about Sims’s likelihood of reoffending. There, he stated that according to the static risk assessments, Sims is “obviously” highly likely to reoffend, but nonetheless felt that “in looking at his family, I feel that he should be treated on an outpatient basis I don’t think he’s highly likely.”

Sims cites *Deli v. Univ. of Minn.* for the proposition that clear and convincing evidence must be “uncontradicted, unequivocal, and intrinsically probable and credible.” 511 N.W.2d 46, 52 (Minn. App. 1994), *review denied* (Minn. Mar. 23, 1994). But *Deli* does not require that the state present undisputed evidence of each statutory element. *See id.* at 54 (stating evidence was “relatively undisputed”). Indeed, it is difficult to imagine a case where the evidence is entirely uncontradicted and unequivocal. “Clear and convincing” evidence requires “more than a preponderance of the evidence but less than proof beyond a reasonable doubt.” *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978). Clear and convincing evidence is demonstrated when the truth of the facts sought to be admitted is “highly probable.” *Id.* A district court must still resolve inconsistencies

¹ The district court’s finding that “both [experts] viewed Sims as a clinical psychopath” is therefore clearly erroneous.

in testimony by weighing the credibility of the testimony and evidence presented, and “[w]here the findings of fact rest almost entirely on expert testimony, the trial court’s evaluation of credibility is of particular significance.” *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (citation omitted).

In evaluating the experts’ opinions, the district court correctly noted that “Dr. Reitman’s confidence in the family’s ability to keep Sims from re-offending is unsupported by the evidence. Sims has reoffended despite their involvement in the past. They are unable to enforce a conditional release plan or sex offender registration.” Dr. Reitman’s own report concluded that Sims would have “minimal constructive support [if placed in the community] as he does not have a healthy support system.” It is unclear how Dr. Reitman went from concluding that Sims was without a healthy support system to the conclusion that his family, who had never kept Sims from offending before, could now decrease his likelihood of reoffending. All of the *Linehan* factors, actuarial instruments, and Sims’s ongoing inability to refrain from assaultive and sexually inappropriate behavior support the court’s conclusion that Sims is highly likely to reoffend.

In sum, both court-appointed experts ultimately agreed that Sims met the criteria for commitment as a SDP. The evidence shows that Sims has a lengthy history of harmful sexual conduct, and remains an untreated sex offender who has never admitted to a sexual offense. All of the actuarial instruments indicate that he is highly likely to reoffend. Importantly, the evidence shows that Sims’s aggressive and sexually inappropriate behavior has never ceased, even while incarcerated or under supervision.

Finally, Sims provided no evidence that any other treatment program would accept him. Therefore, we uphold the district court's legal conclusion that Sims is subject to commitment as a SDP.

Constitutional Arguments

Sims argues that the SDP statute violates his constitutional rights to due process, equal protection, and a jury trial, and his right against being placed in double jeopardy. He also alleges that the SDP statute is void for vagueness. Sims's challenges have been previously addressed by the courts and found to be without merit. *See Linehan III*, 557 N.W.2d at 182, 186-87 (stating that "under *Blodgett*, the SDP Act is sufficiently narrow to satisfy strict scrutiny as applied to Linehan," and concluding that the statute does not violate equal protection); *Linehan IV*, 594 N.W.2d at 872 (concluding that statute does not violate prohibition on double jeopardy); *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999) (holding that the Minnesota Constitution does not provide a jury-trial right in a civil commitment proceeding), *review denied* (Minn. July 28, 1999). Additionally, Sims did not raise this particular "vagueness" challenge to the district court, and we decline to address it. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts generally do not consider matters not argued to and considered by the district court). Therefore, we also affirm the district court on these issues.

Affirmed.