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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1607**

In the Matter of the Civil Commitment of: Peter Allan aka Peter Allan George

**Filed February 23, 2010
Affirmed; motion granted
Toussaint, Chief Judge**

Otter Tail County District Court
File No. 56-PR-07-3493

Andrew R. Pearson, Bradshaw & Bryant, PLLC, Waite Park, Minnesota (for appellant Peter Allan George)

Lori Swanson, Attorney General, Matthew G. Frank, Assistant Attorney General, St. Paul, Minnesota; and

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent State of Minnesota)

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

UNPUBLISHED OPINION

TOUSSAINT, Chief Judge

Appellant Peter Allan, a/k/a Peter Allan George, challenges his indeterminate civil commitment as a sexually dangerous person (SDP) and a sexual psychopathic person (SPP). Because we conclude that there was clear and convincing evidence that appellant

meets the criteria for SDP and SPP commitment, because appellant failed to present credible evidence of a less restrictive alternative, and because he received effective assistance of counsel, we affirm; we also grant the motion of respondent State of Minnesota to strike portions of the appendix to appellant's brief as outside the record.

FACTS

On December 24, 2007, respondent filed a petition for the civil commitment of appellant, born September 16, 1956, as an SPP and an SDP. Following trial, the district court found clear and convincing evidence supporting the conclusion that appellant committed harmful sexual conduct with five victims.

The first victim was appellant's half-sister M.S., with whom he had intercourse when they lived together from 1994, when she finished high school, through 1997. The district court found clear and convincing evidence that appellant's acts towards M.S. constituted the crime of incest and harmful sexual conduct and were part of a course of harmful sexual conduct.

The second victim was R.O., a 15-year-old girl who ran away from home and spent the night with appellant, then 40, and his son. The district court found that appellant woke R.O., gave her the prescription sleep-inducing drug Ambien without her knowledge by telling her it was Tylenol, and used force or coercion to accomplish penetration and sexual intercourse. The district court concluded that appellant's conduct toward R.O. constituted first-degree criminal sexual conduct.

The third victim was appellant's adult girlfriend, L.L.B., 51, whom he sexually assaulted by putting Ambien in her drink without her knowledge and then penetrating her

with his penis. The district court found clear and convincing evidence that appellant's conduct toward L.L.B. constituted first-degree criminal sexual conduct and was harmful sexual conduct that would have a substantial likelihood of causing serious physical or emotional harm to a victim.

Otter Tail County brought criminal sexual conduct charges against appellant in regard to his conduct with both R.O. and L.L.B. These charges were dismissed because of a federal indictment charging appellant with five different counts relating to his illegal distribution of Ambien and distribution of Ambien with the intention to commit a crime of violence. In February 2000, appellant was sentenced to 108 months in federal prison.

The fourth victim was another adult girlfriend, J.L.Y., 25, who in February 1998 reported to the police that, after consuming two or three glasses of wine, she woke in the morning to find that she had no memory of events the previous night, that a lubricant she had not applied was on her vagina, and that her vaginal area was tender, which had not happened with previous consensual intercourse with appellant. J.L.Y. later recanted her report, but she testified that her recantation was not true and was the result of pressure from appellant and his family. The district court found that her testimony was credible, that appellant had given her Ambien or a similar drug without her knowledge, and that this constituted first-degree criminal sexual conduct and was harmful sexual conduct.

The fifth victim was M.L.J., 23, whom J.L.Y. introduced to appellant. In early 1998, M.L.J. was at appellant's house with J.L.Y. Appellant gave M.L.J. a glass of wine that contained Ambien or a similar drug; it caused her to feel that something was not right and she drove home. The district court found that appellant put Ambien in M.L.J.'s wine

with the intent to engage in sexual contact and concluded that, although his conduct did not create a substantial likelihood of significant harm to M.L.J., it was part of his overall course of habitual sexual misconduct.

The district court concluded that clear and convincing evidence supported appellant's commitment as both an SDP and an SPP. Appellant challenges the commitment, arguing that insufficient evidence supported the findings that he engaged in the course of harmful sexual conduct required for SDP commitment and the habitual course of misconduct in sexual matters required for SPP commitment.¹ He also argues that there is a less restrictive alternative and that he did not receive effective assistance of counsel. Respondent moves to have portions of the appendix to appellant's brief stricken as outside the record.

D E C I S I O N

1. Sufficiency of the Evidence

An appellate court's review of a judicial commitment is limited to determining whether the district court complied with the civil commitment act and whether the commitment is justified by findings based on evidence submitted at the hearing. *In re Shaefer*, 498 N.W.2d 298, 300 (Minn. App. 1993). 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). An

¹ See Minn. Stat. § 253B.02, subd. 18c (2008) (setting out criteria for SDP commitment); Minn. Stat. § 253.02, subd. 18b (2008) (setting out criteria for SPP commitment). At the commitment proceeding, appellant stipulated that the state could prove by clear and convincing evidence that he met other criteria for SDP commitment and for SPP commitment.

appellate court will uphold the district court's findings of fact unless they are clearly erroneous, Minn. R. Civ. P. 52.01.

To commit an individual as an SDP, the petitioner must prove by clear and convincing evidence that the individual "engaged in a course of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(1) (2008). "'Harmful sexual conduct' means sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008). To commit an individual as an SPP, the petitioner must show that the individual engaged in a "habitual course of misconduct in sexual matters." Minn. Stat. § 253.02, subd. 18b (2008).

Appellant argues that these requirements were not met because: (A) the state failed to prove that M.S. was appellant's blood relation and therefore was likely to suffer serious emotional harm due to the sexual contact; (B) the district court abused its discretion in crediting the inconsistent testimony of M.S., R.O., and J.L.Y.; and (C) the district court erred in including M.L.J. as a victim of harmful sexual conduct.

A. Appellant's Incest with M.S.

Appellant argues that no evidence shows he and M.S. are half-siblings, but the only evidence to the contrary was appellant's own testimony that M.S. had once denied that they were related. The district court found this testimony was not credible. Moreover, appellant admits that he was told he was M.S.'s half-brother and that he invited her to live with him initially as his half-sister.

Conduct that would support a conviction for incest creates a rebuttable presumption of a substantial likelihood of serious physical or emotional harm "[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." Minn. Stat. § 253B.02, subd. 7a(b) (2008). Expert testimony corroborated the likelihood of incest causing substantial emotional harm to the victim. The district court found the expert testimony credible and further found that M.S. did suffer emotional harm. These findings support the conclusion that appellant's conduct toward her was the type of conduct likely to cause serious emotional or physical harm.

B. Credibility of the Testimony of M.S., R.O., and J.L.Y.

This court defers to the district court's role as factfinder and to its ability to judge the credibility of witnesses. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). Moreover, this court does not weigh 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).

Appellant argues that the district court abused its discretion in crediting the testimony of M.S., R.O., and J.L.Y. He challenges the crediting of M.S.'s testimony that she did not remember having intercourse with appellant because she experienced frequent blackouts as a result of taking Ambien. But expert testimony indicated that people taking Ambien could engage in complex activities and have no memory of doing so. In any event, the district court's conclusion that appellant committed harmful sexual conduct towards M.S. did not rely on her testimony about Ambien; it relied on his having intercourse with "a much younger sibling" who was "nearer of kin to him than a first

cousin.” The determination of harmful sexual conduct was based on the kinship relationship between appellant and M.S.

As to R.O., the district court specifically found that, despite some inconsistencies, her “overall testimony at the commitment trial was consistent with her prior statements regarding the sexual assault perpetrated against her by [appellant].” The district court, as factfinder, had the ability to evaluate the testimony and credibility of appellant and of R.O. The conclusion that R.O.’s overall testimony was consistent with her prior report is supported by the record when viewed in the light most favorable to the district court’s determination. *See In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995) (holding this court reviews record in light most favorable to findings).

In crediting the testimony of J.L.Y., the district court specifically addressed her letter recanting the allegation of sexual assault and found that she was credible when she testified that she wrote the letter only because of pressure from appellant and his family. Further, after evaluating both appellant’s and J.L.Y.’s testimony, the district court found that there was clear and convincing circumstantial evidence to support the finding of sexual penetration of J.L.Y. while she was unwillingly under the influence of Ambien.

The district court did not abuse its discretion in crediting the testimony of M.S., R.O., and J.L.Y.

C. Inclusion of M.L.J. as a Victim

Because the district court found that appellant’s conduct toward M.L.J. did not create a substantial likelihood of serious physical or emotional harm to her, appellant argues that it was error to find that his conduct was a part of “a course of harmful sexual

conduct” (SDP criterion) and of “a habitual course of misconduct in sexual matters” (SPP criterion). But the district court noted that M.L.J., like three other victims, was a female guest at appellant’s home who unknowingly received Ambien and, like all the victims except L.L.B., she was significantly younger than appellant. A showing of similar incidents of misconduct or of incidents that form a pattern can establish a habitual course of misconduct in sexual matters. *See, e.g., In re Bieganowski*, 520 N.W.2d 525, 530 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). The district court’s inclusion of the drugging of M.L.J. as a part of a course of harmful sexual conduct and of a habitual course of misconduct in sexual matters was not clearly erroneous.

The district court’s findings that appellant committed incest with M.S., that the victims’ testimony was credible, and that appellant’s conduct with M.L.J. was a part of a course of harmful sexual conduct and of a habitual course of misconduct in sexual matters were neither an abuse of discretion nor clearly erroneous and provide clear and convincing evidence to support appellant’s commitment.

2. Less Restrictive Alternative

[T]he court shall commit the patient 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 (2008). This court will not reverse a district court’s findings on the propriety of a treatment program unless its findings are clearly erroneous. *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003). “Under the current statute, 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.” *In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (emphasis omitted), *review denied* (Minn. Dec. 19, 2001).

Appellant challenges his commitment to the Minnesota Sex Offender Program (MSOP) on the ground that it is not the least-restrictive alternative, arguing first that the district court erred in concluding that appellant is “highly likely” to reoffend. In stipulating to the state’s ability to present clear and convincing evidence that he meets all the requirements for SDP commitment except for having engaged in a course of harmful sexual conduct and all the requirements for SPP commitment except for having engaged in a habitual course of misconduct in sexual matters, appellant stipulated to being highly likely to reoffend. In addition to appellant’s stipulation, the district court based its independent conclusion that appellant was highly likely to reoffend on its own evaluation of the evidence and on the expert testimony regarding recidivism and the factors set out in *Linehan I*, 518 N.W.2d at 614 (the *Linehan* factors). That conclusion is not clearly erroneous.

Appellant also challenges his commitment to MSOP on the ground that he is on federal intense-supervision release. But the district court found credible the expert testimony regarding appellant’s treatment needs and the conclusion that appellant requires treatment in a program such as MSOP. Appellant has failed to demonstrate that there is an alternative treatment program consistent with both his treatment needs and the needs of public safety. The district court’s determination that MSOP is the only

appropriate treatment program is supported by the record and is not clearly erroneous.²

3. Ineffective Assistance of Counsel

This court reviews ineffective assistance of counsel claims in a civil commitment proceeding under the same standards set forth in criminal proceedings. *In re Dibley*, 400 N.W.2d 186, 190 (Minn. App. 1987), *review denied* (Minn. Mar. 25, 1987). A claimant must establish that counsel's representation fell below an objective standard of reasonableness and that counsel's errors affected the outcome of the proceeding. *See Bruestle v. State*, 719 N.W.2d 698, 705 (Minn. 2006). There is a strong presumption that counsel's performance was reasonable. *Id.*

Appellant argues that his stipulation that he is highly likely to reoffend was the result of ineffective assistance of counsel because the various actuarial scores could be interpreted to indicate that he is not highly likely to reoffend. But appellant has not claimed that he was misinformed as to the contents of the stipulation or that he did not understand its consequences. Instead, the record reflects that appellant wished to stipulate to the commitment factors, that he believed sufficient evidence had been presented to meet the factors, and that appellant had sufficient time to consult with his attorney as to the consequences of the stipulation.

² Appellant implicitly argues that his commitment to MSOP is erroneous because of MSOP's treatment history. This argument is rejected in *In re Blodgett*, 510 N.W.2d 910, 916 (Minn. 1994) (holding that due process is not denied if civil commitment program provides treatment and periodic review). *Blodgett* also refutes appellant's explicit argument that his attorney's failure to challenge the treatment history was ineffective assistance of counsel.

Further, the stipulation occurred after the two court-appointed examiners had already testified that appellant met the stipulated elements of the SDP and SPP criteria and before respondent's examiner testified. That timing suggests a strategic purpose to the stipulation. This court gives particular deference to an attorney's trial strategy. *Id.* The stipulation does not indicate that appellant's counsel's representation fell below an objective standard of reasonableness.³

Finally, appellant argues that his attorney failed to establish the merits of alternative treatment centers and the assistance that his supervised release would provide in monitoring him. But appellant's attorney did present evidence on alternative treatment programs and argued that appellant's supervised release should be a factor in determining the least restrictive alternative. Despite these arguments, the district court found credible and persuasive the examiners' testimony that MSOP is the only available, appropriate program for appellant. Again, appellant does not show that his counsel's assistance fell below an objective standard of reasonableness.

4. Motion to Strike

Respondent has filed a motion to strike portions of appellant's appendix. The papers filed in the district court, the exhibits, and the transcript of the proceedings shall constitute the record on appeal. Minn. R. Civ. App. P. 110.01. When an appellate brief or appendix contains matters that are not part of the record below and were not considered

³ In any event, the district court specifically found that, even without the stipulation, the evidence supporting appellant's disorders and his inability to control his sexual impulses—and thus his likelihood to reengage in harmful sexual conduct—was clear and convincing.

by the district court, a motion to strike is properly granted. *Krueger v. Wash. Fed. Sav. Bank*, 406 N.W.2d 543, 545 (Minn. App. 1987). The district court file does not include the challenged documents, and appellant has not responded to the motion with any arguments as to why documents not before the district court should be considered on appeal.

Affirmed; motion granted.