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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1619**

In re the Commitment of: Joseph Edwin Harju

**Filed February 9, 2010
Affirmed
Connolly, Judge**

St. Louis County District Court
File No. 69DU-PR-08-665

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Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and
Worke, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person (SDP). He argues that the district court abused its discretion by denying his motion to vacate his stipulation to commitment as an SDP, and by denying his motion for a continuance of the final determination hearing. He also argues that the district court

erred by finding that he remained an SDP and ordering his indeterminate commitment. Because the district court did not abuse its discretion in denying his motions, and did not err in finding by clear and convincing evidence that appellant remained an SDP, we affirm.

FACTS

Appellant Joseph Edwin Harju was born on January 6, 1953. He told a court-appointed examiner that he is attracted to adolescent boys. He also has a substance-abuse problem, and believes and acknowledges that if he were released and failed to remain sober, it would be “just a matter of time” until he reoffended.

Appellant has a long history of engaging in harmful sexual conduct, which includes incidents following significant periods of incarceration for committing sex offenses. He has committed numerous sex offenses in multiple jurisdictions, as outlined below. His first offense occurred in Michigan in 1972, when he was 19 years old; this involved him removing an 8-year-old boy’s pants and rubbing his penis on the boy’s rectum.

In 1987, appellant was convicted in Arizona of one count of attempted child molestation of a 13-year-old boy and two counts of indecent exposure to a 10-year-old boy and another child. In one incident, he showed pornographic magazines to two boys. He also masturbated while looking at the magazines; this was observed by at least one of the boys. In another incident, appellant invited two 13-year-old boys over to his home, where he gave them alcohol and marijuana, played strip poker with them, went swimming with them, photographed them, watched them through peepholes as they

showered, and threatened them if they told anyone about the incident. He did not enter a sex-offender treatment program while he was incarcerated in Arizona.

In 1999, appellant performed oral sex on a boy in Wisconsin. Separately, a 13-year-old runaway boy spent a weekend at appellant's apartment in 2000. Four other boys, ages 12, 13, 14, and 17, were also present during at least parts of the weekend. In 2000, a teenage boy reported to police that he had an ongoing relationship with appellant. At various times, appellant rubbed the boy's penis with his hand while the boy was asleep, performed oral sex on the boy, and rubbed his hand on the boy's penis while the boy was a passenger in his van. Appellant engaged in sexual contact with the boy on at least ten occasions. Some of these actions occurred in Minnesota, and appellant subsequently pleaded guilty to two counts of third-degree criminal sexual conduct.

On September 15, 2008, St. Louis County petitioned for appellant's commitment as an SDP and sexual psychopathic personality (SPP). On October 28, 2008, the district court ordered James H. Gilbertson, Ph.D., and Paul M. Reitman, Ph.D., to serve as court-appointed examiners and to submit written reports about appellant. Dr. Gilbertson submitted a 50-page report, in which he concluded that appellant might meet the statutory elements of an SPP and did meet the statutory elements of an SDP. Dr. Gilbertson diagnosed appellant with paraphilia, not otherwise specified, and a personality disorder with antisocial and avoidant features. Dr. Gilbertson observed several risk factors for appellant reoffending, including his divorce and lack of a stable, adult relationship, and his alcohol abuse and chemical dependency.

Dr. Reitman recommended appellant's commitment as an SDP, opining that appellant may also meet the SPP criteria. Dr. Reitman diagnosed appellant with paraphilia, alcoholism, cannabis dependence, and an antisocial personality disorder. He opined that appellant was highly likely to reoffend, in part because appellant was an untreated sex offender.

On December 16, 2008, an initial hearing was held in district court. At this time appellant stipulated to his commitment as an SDP. The district court issued an order for commitment, findings of fact, conclusions of law, and judgment. Appellant eventually changed attorneys and moved for his stipulation to be vacated and his commitment discharged. On May 13, 2009, Gary Hertog, Psy.D., L.P., submitted a treatment report in which he recommended continued commitment and offered his opinion that appellant continued to fall within the statutory SDP definition. On June 16, 2009, the district court held a final determination hearing. It subsequently found that appellant continued to be an SDP and ordered his indeterminate commitment. This appeal follows.

DECISION

I. The district court did not abuse its discretion by denying appellant's motion to vacate his stipulation.

In a civil-commitment proceeding, where one party opposes the other party's motion to withdraw a stipulation, the district court may only vacate the stipulation upon a showing of good cause. *In re Commitment of Rannow*, 749 N.W.2d 393, 396 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). "A stipulation may be vacated when it was made improvidently and in good conscience and equity should not stand. When

there is fraud or duress that prejudices the party making the stipulation, the stipulation was improvidently made.” *Id.* at 396-97 (citation omitted). We review the district court’s decision for an abuse of discretion. *Id.* at 396. A district court acts within its discretion by refusing to vacate a stipulation when the party “had a sound, rational basis for entering into the stipulation” and the stipulation was made “knowingly and voluntarily.” *Id.* at 399.

Appellant argues that the district court’s refusal to vacate the stipulation was an abuse of discretion because the stipulation was improvidently made, he did not agree with or understand the consequences of the stipulation, and the stipulation was based on an unfulfilled promise of more lenient treatment. The district court concluded that appellant’s stipulation was voluntary and intelligent “because he was clearly informed of the consequences of his commitment as a sexually dangerous person and made his understanding evident in the record.” The court relied on both the extensive and unambiguous language in the stipulation itself and on appellant’s testimony at his initial commitment hearing.

Appellant signed each of the seven pages of acknowledgments in the stipulation. The stipulation acknowledges that (1) appellant conferred with counsel, (2) appellant understood the nature of the proceedings, (3) appellant met the statutory criteria for commitment as an SDP, (4) the county possessed evidence that would likely convince the court by clear and convincing evidence that he was an SDP, (5) nobody threatened appellant in order to obtain his stipulation, (6) appellant waived his right to oppose the county’s petition and testify at a commitment hearing, and (7) the county withdrew the

portion of its petition alleging that appellant was an SPP in exchange for his SDP stipulation.

At the initial commitment hearing, appellant testified that he met and consulted with his attorney about the contents of the stipulation and the evidence that could be considered by the court. Appellant testified that he understood he was waiving his right to trial, which included the right to testify and call witnesses. He admitted the truth of the facts underlying his previous convictions for sex offenses. Appellant stated that he was stipulating to SDP commitment because of his attorney's opinion that, based on the evidence—which included two uncontradicted evaluations recommending his commitment—he would likely lose at trial. The district court judge made clear to appellant that, if appellant elected not to enter the stipulation, he had not predetermined whether the county would be able to show that appellant met the statutory definition of an SDP by clear and convincing evidence. Upon further examination, appellant testified that he knew he had a right to trial and that his attorney's opinion that he would likely be committed was largely based on the fact that the most significant evidence—both of the examiners' reports—recommended his commitment and was not contradicted.

It is clear from the record that appellant understood the nature of the proceedings and the legal consequences of his stipulation. He had a sound, rational basis for entering into the stipulation: the evidence made it very likely that he would ultimately be committed. Additionally, he was committed only as an SDP—instead of as both an SDP and an SPP—in exchange for his stipulation. Although he now argues that he was promised “more lenient treatment,” he specifically testified that he was not promised

anything in exchange for the stipulation. Notably, his assertion that he was supposed to receive more lenient treatment for being committed only as an SDP, but that he has not received such treatment, is not supported by any legal authority, and the only factual evidence in the record is appellant's own testimony at the review hearing that, "I don't see anybody getting more favorable treatment than anybody else as far as the SDPs over SPPs" in the Minnesota Sex Offender Program (MSOP). There is no evidence in the record of fraud or duress, and there is no evidence that his stipulation was not knowing and voluntary. Additionally, the district court's consideration of appellant's motion to vacate the stipulation was careful, thorough, and consistent with the evidence in the record. Thus, we conclude that the district court's refusal to vacate the stipulation was not an abuse of discretion.

II. The district court did not abuse its discretion by denying appellant's motion for a continuance of the final determination hearing.

We review a district court's denial of a motion for continuance of a final determination hearing for an abuse of discretion. *See Dunshee v. Douglas*, 255 N.W.2d 42, 45 (Minn. 1977). The MSOP must file a written treatment report with the district court within 60 days of an SDP's initial commitment. Minn. Stat. § 253B.18, subd. 2(a) (2008).¹ Generally, the court must hold a final determination hearing within the earlier of 14 days of its receipt of the treatment report or 90 days of the initial commitment. *Id.* However, the court may continue the review hearing for up to one year with the

¹ By its text, section 253B.18 applies to persons who are mentally ill and dangerous to the public, but, except as otherwise provided, it also applies to SDPs. Minn. Stat. § 253B.185, subd. 1 (2008).

agreement of the county attorney and the patient's attorney. *Id.*, subd. 2(b)(2) (2008). Commitment and Treatment Act Rule 23(b) also allows the district court to continue the final determination hearing "for good cause shown."

Appellant argues that there was good cause for a continuance within the meaning of Rule 23 because treatment had not yet started, and thus the district court's decision was not based on a "treatment report." Appellant also relies on the fact that treatment upon entering a treatment facility is mandatory. *See* Minn. Stat. § 253B.18, subd. 1(b) (2008) ("Once a patient is admitted to a treatment facility pursuant to a commitment under this subdivision, treatment must begin regardless of whether a review hearing will be held under subdivision 2."). However, appellant cites no authority for the proposition that the remedy for MSOP's alleged failure to treat him or to file a treatment report is a continuance of the final determination hearing.

At the final determination hearing, Dr. Hertog testified that appellant had not begun treatment. Appellant had recently begun the orientation-to-treatment phase, and treatment was set to follow at the next available opportunity. Thus, the MSOP has a formal treatment program, which appellant had not yet entered. But despite appellant's lack of treatment, caselaw indicates that judicial review is not the appropriate setting for a patient to raise a claim that he is not receiving treatment or that the treatment is inadequate. *In re Wicks*, 364 N.W.2d 844, 847 (Minn. App. 1985) ("Generally, the right to treatment issue is not reviewed on appeal from a commitment order."), *review denied* (Minn. May 31, 1985); *In re Pope*, 351 N.W.2d 682, 683 (Minn. App. 1984) ("The

treatment of patients is properly raised before a hospital review board and not before the committing court.”).

Requiring the district court to continue the final determination hearing would be inconsistent with the overall statutory scheme. The statute requires the commissioner of human services to establish one or more panels of an independent “special review board,” which contains one psychiatrist and one attorney and which must meet at least every six months. Minn. Stat. § 253B.18, subd. 4c(a) (2008). A committed person may petition the special review board for a reduction in custody (including a discharge from commitment) up to every six months. Minn. Stat. § 253B.185, subd. 9 (b)-(c) (2008). The special review board must issue written findings of fact and recommend denial or approval of the committed person’s petition; the findings and recommendation are forwarded to a judicial appeal panel, which makes the final decision on the committed person’s petition. *Id.*, subd. 9(f) (2008). The underlying policy appears to be that the district court must make its final determination fairly quickly, at which point the treating experts take over and may keep reviewing the person’s progress until he is ready for a reduction in custody.

Further, appellant’s condition is not one that is generally amenable to a quick remedy. We seriously doubt that the legislature expected career sexual offenders to be cured within 60 days of entering a treatment facility. Instead, the legislature likely intended a second layer of judicial review preceding indefinite commitment as a procedural safeguard to catch any mistakes made in the initial commitment, as well as to take into account any changed circumstances. Internal procedures that include the special

review board are then present to gauge a committed person's progress and the success of the treatment he has received.

Because we find no authority indicating that a district court may not hold a final determination hearing if an SDP has not yet received treatment following his initial commitment, we conclude that the district court did not abuse its discretion by denying appellant's motion for a continuance of the hearing.

III. The district court did not err by ordering the indeterminate commitment of appellant.

Whether the evidence is sufficient to meet the statutory requirements for commitment as an SDP is a question of law, which we review de novo. *In re Commitment of Martin*, 661 N.W.2d 632, 638 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). At the final determination hearing, the petitioner bears the burden of establishing by clear and convincing evidence that the respondent continues to be an SDP. Minn. Stat. § 253B.18, subd. 3 (2008); Minn. Spec. R. Commit. & Treat. Act 23(e). If the district court finds that the respondent is an SDP, it must order his indeterminate commitment. Minn. Stat. § 253B.18, subd. 3.

Appellant contends that the district court erred in ordering his indeterminate commitment. He makes two arguments in support of this position. First, appellant asserts that there was no evidence that his condition had changed because he had not yet received any treatment. In essence, this is an attempt to revive the previous issue—that the treatment report was not really a treatment report because he had not yet been treated. It is properly placed with consideration of whether the district court abused its discretion

in denying his motion to continue the final determination hearing. Appellant presents no reasoning or authority in support of the position that continued SDP status is not proved by clear and convincing evidence when the committed person has not begun receiving treatment.

Second, appellant contends that the treatment report was “incorrect,” or “improperly characterizes or considers” various pieces of information that Commitment and Treatment Act Rule 23(d) requires to be included in the report. Appellant suggests that the district court’s finding must be based on the nine criteria in Rule 23(d), but again presents no authority or reasoning in support of that conclusion. The rule states that the report “shall address the criteria for commitment and whether there has been any change in the respondent’s condition since the commitment hearing.” Minn. Spec. R. Commit. & Treat. Act 23(d). In reference to the nine “criteria” appellant points to, the rule requires the report to “provide [that] *information.*” *Id.* (emphasis added). These are not the criteria that the district court must consider; the district court must consider the statutory criteria, namely, whether the person is an SDP as defined by Minn. Stat. § 253B.02, subd. 18c (2008). The court must consider “all competent evidence,” which includes the report addressing those nine pieces of information, but those are not directly the nine criteria for determining whether the person is subject to indeterminate commitment. Minn. Spec. R. Commit. & Treat. Act 23(e) (stating what the district court must consider at the final determination hearing).

More importantly, in the 60-day evaluation, or treatment report, Dr. Hertog provided all of the information required by Rule 23(d). Dr. Hertog based the report on

his May 6, 2009 interview with appellant, as well as appellant's medical chart, the court-ordered evaluations by Dr. Reitman and Dr. Gilbertson, court documents, and other background information. Dr. Hertog diagnosed appellant with paraphilia, not otherwise specified; alcohol dependence and cannabis abuse and dependence, which were in remission because of the controlled environment; and a personality disorder, not otherwise specified, with antisocial and avoidant features. Dr. Hertog opined that appellant continued to meet the statutory requirements for commitment as an SDP because appellant's condition was unchanged, finding no new information indicating that his risk to the community had diminished since the initial commitment. He also opined that appellant had a "guarded to poor prognosis." Dr. Hertog specifically stated that appellant's diagnoses presented "long-term problems" that required "long-term, comprehensive sex offender specific treatment." He also explained that appellant was dangerous to the public because he would be "highly likely to engage in further acts of harmful sexual conduct" if he were released at that time.

At the final determination hearing, Dr. Hertog testified that the "short time frame" of appellant's commitment to MSOP was a factor weighing against a change in his SDP condition. Although he considered appellant's SDP condition to be a long-term problem, Dr. Hertog's testimony did not limit the lack of change in his condition to the short time he was at MSOP—he also noted the lack of treatment and apparently correct consensus that appellant was an SDP: "In part, yes, that he hasn't been in treatment and there [have] been no indications that any of the findings were incorrect or that anybody at MSOP had a different opinion."

Ultimately, the question presented is whether the county presented the district court with clear and convincing evidence that appellant continued to be an SDP. Dr. Hertog's report addresses everything required by rule and statute. Dr. Hertog has been a licensed psychologist since 1997, and he was absolutely clear that, in his professional judgment, appellant's condition could not be expected to be resolved in a short period of time (such as the amount of time between appellant's initial commitment and the final determination hearing). Dr. Hertog's report is consistent with the other evaluations in the record. It is also consistent with appellant's personal history, which includes over 30 years—essentially, all of appellant's adult life—in which he engaged in harmful sexual conduct with children despite incarceration and other serious consequences that he faced during that time.

Appellant clearly wishes Dr. Hertog's report reached a different conclusion, but the only evidence he points to in support of his contention that he was not an SDP at the time of the final determination hearing is the fact that Dr. Hertog described appellant as cooperative during the interview and well-behaved during his time at the MSOP. The only other evidence in the record even suggesting that appellant was not an SDP is the fact that he suffers from erectile dysfunction and numbness in his groin due to his physical ailments, which include disc degeneration and nerve interruption. But his physical condition was present during his initial commitment hearing. His offense history has included voyeurism and oral and digital stimulation, which means that impotence does not negate the risk he poses to the community. Because the record contains clear and convincing evidence that appellant was an SDP and continued to be an

SDP at the time of his final determination hearing, we conclude that the district court did not err in finding that appellant continued to be an SDP and ordering his indeterminate commitment.

Affirmed.