STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1898

In the Matter of the Civil Commitment of: Dennis Lee Whitley, Jr.

Filed March 30, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27MHPR08848

Michael C. Hager, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

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Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges his commitment as a Sexually Dangerous Person (SDP) and a Sexual Psychopathic Personality (SPP), arguing that clear and convincing evidence does not support commitment and that his commitment is unconstitutional for a variety of reasons. Because the evidence is sufficient to support commitment and appellant's constitutional arguments are meritless, we affirm.

D E C I S I O N

The state must prove the facts necessary for commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). We apply a clearly erroneous standard of review to the district court's factual findings. *In re Joelson*, 385 N.W.2d 810, 811 (Minn. 1986). We apply a *de novo* standard of review to the issue of whether the facts satisfy the statutory criteria for commitment. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*).

In this case, the district court appointed two examiners, Dr. Kelly Wilson and Dr. Paul Reitman, who both opined that Whitley meets all of the criteria for commitment as an SDP and an SPP and whose testimonies the district court found credible. Despite expert testimony to the contrary, on appeal, appellant Dennis Lee Whitley, Jr. argues that (1) there is not clear and convincing evidence in the record that he engaged in a course of harmful sexual conduct that was substantially likely to cause serious physical or emotional harm to another; (2) actuarial predictions of his likelihood of reoffending do not address whether it would be harmful reoffense; and (3) the *Linehan* factors do not support commitment.

I. Clear and convincing evidence supports Whitley's commitment as a sexually dangerous person.

Whitley's social, criminal, and treatment history, and psychological and risk assessments are detailed in 183 findings of fact made by the district court in connection with Whitley's initial commitment as an SDP and SPP. Whitley does not challenge the findings on any of these underlying facts. The expert opinions of the two examiners,

found credible by the district court, are detailed in 28 additional detailed findings of fact contained in the initial commitment order.

Under the Minnesota Commitment and Treatment Act, an individual may be civilly committed as an 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;[1] and, as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008). Whitley challenges the district court's conclusions of law that he engaged in a course of *harmful* sexual conduct and that his high risk of reoffending would involve *harmful* reoffenses. Whitley also argues that the *Linehan* factors do not support commitment. We disagree.

A. Course of harmful sexual conduct

A "course of harmful sexual conduct" is defined by its ordinary meaning, which is "a systematic or orderly succession; a sequence." *In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (quotation omitted), *review denied* (Minn. Sept. 17, 2002). A 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.* Whitley does not challenge the district court's conclusion that the state proved by clear and convincing evidence that he engaged in a course of sexual conduct: Whitley argues

[1] Whitley does not deny his diagnoses of Frotteurism, Antisocial Personality Disorder, Alcohol Dependence in a controlled environment, Cannabis Abuse, and Borderline Intellectual Functioning; he does not deny that his PCL-R score indicates that he has multiple features of pyschopathy; and, accordingly, he does not challenge the district court's finding that there is clear and convincing evidence that he has manifested a sexual, personality or other mental disorder or dysfunction.

that his conduct was not harmful because his harassment of adult females in the form of touching, rubbing, or grabbing has not been followed by what he terms "rape behavior."

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). Whitley provides no support for his apparent claim that the absence of penetration—assuming this is what he means by "rape behavior"[2]—means that his conduct did not create a substantial likelihood of serious physical or emotional harm.

There is clear and convincing evidence in the record supporting the district court's finding that Whitley's course of sexual conduct was harmful. The district court credited the testimony of Dr. Wilson and the testimony of Dr. Reitman. Both opined that Whitley's course of sexual conduct was harmful in that it created a substantial likelihood of serious physical or emotional harm. Dr. Wilson specifically rejected the notion that Whitley's history of sexual assaults could be characterized as mere "harassment of adult female strangers in the form of touching or rubbing" as Whitley now argues. She testified that this argument

> grossly diminishes the severity of the assaults; being chased in an isolated place; being suddenly attacked by a stranger. In

[2] As Whitley argues, there is nothing in the record indicating that his sexual misconduct ever involved penetration (i.e. "complet[ion] of a rape"). But in the 1989 assault, Whitley reached under the victim's skirt and grabbed her genital area; in the 1993 assault, Whitley ripped open the victim's pants and attempted to remove them; and in a 2002 assault, he grabbed the victim's genital area. In a psychological assessment several years after the 1993 assault, Whitley also admitted that he probably would have raped the victim of that assault had a car not entered the garage where he was in the process of assaulting her.

> one case, [the] woman [was] chased through the garage and knocked down, and even attempt[ed] to spray him with pepper spray and he persisted in tearing open the waist of her pants. It's very serious. It's very frightening for the victim.

Dr. Wilson noted that Whitley has been convicted of eight sexual offenses involving sexually assaulting unsuspecting female strangers. She noted that Whitley punched two of the victims, threatened some victims, and left some victims mid-assault only to return to assault them again. Dr. Wilson noted that several victims resisted Whitley's attacks and fought to protect themselves: Dr. Wilson opined that these assaults were likely to cause serious harm to the victims. As the record demonstrates and the district court found, Whitley's assaults include multiple victims, threats to gain compliance, repeated instances of committing multiple offenses on the same date, and violent behavior during the assaults (chasing victims on foot and on bicycle, striking victims as they try to escape, pushing, and grabbing victims).

Dr. Reitman concurred with Dr. Wilson, stating that "the sort [of sexual abuse] that Mr. Whitley engaged in, does cause a significant[ly] higher likelihood for the victims to experience serious mental illnesses, depression, anxiety, posttraumatic stress disorder [and d]epending on how old they are, . . . sometimes borderline personality disorder." Dr. Reitman testified that the victims would experience a higher likelihood of "[c]hemical dependency, . . . they have a higher likelihood of suicide, and they have a higher likelihood to go on and to have very poor adjustments in their . . . marriages and certainly they have difficulties in their sexuality." He testified that although Whitley's offenses varied in terms of harmfulness, "there are certainly more than two [offenses] that

. . . rise to the level of causing serious . . . emotional and physical harm." Dr. Reitman noted that Whitley's first victim in 1985 thought that she was going to be raped and opined that this was a "much more serious assault" than simply touching and running away. He also opined that in the 1987 assault in which Whitley rode his bike up to a woman and assaulted her and later returned and rubbed himself against her, "the victim would have been traumatized and it would have caused her serious emotional harm."

Additionally, the record reflects that at least two of Whitley's victims actually suffered serious harm as a result of being assaulted by Whitley. The presentence investigation report for Whitley's 1993 offense describes the harm to the victim as follows:

> The victim states this experience has "turned her life upside down." She feels her life "has digressed" because she has moved back in with her parents, out of fear, and she has limited her going out at night. She now sleeps with a night light on.
>
> She is now more afraid of males and is suspicious and uneasy about people walking up toward her, especially if they look like the defendant. She has a lot of fear because she genuinely believed she was going to be killed.
>
> . . . She believes she has "lost a lot" of her freedom.

Similarly, a presentence investigation report for Whitley's 2002 offense described the harm suffered by L.S.:

> LS reports that her life has changed dramatically as a result of this offense. She no longer feels safe in her own neighborhood which has caused her to change her normal activities. She has lost a significant amount of income due to dealing with this matter and notes that she continues to go to counseling [nine months after the assault.]

Although the district court did not rely on the statutory rebuttable presumption of substantial likelihood of serious physical or emotional harm that a conviction of criminal sexual conduct in the first, second, third, or fourth degree creates under Minn. Stat. § 253B.02, subd. 7a(b) (2008), Whitley's fourth-degree criminal sexual conduct convictions are sufficient to create such a presumption of serious harm. Whitley does not deny that he committed the assaults, and he has not presented any evidence tending to show that the victims of those assaults, quoted above describing the actual harm they suffered, did not suffer serious physical or emotional harm. Whitley's claim that his course of sexual conduct was not harmful is without merit: the record contains ample clear and convincing evidence of the harm that his conduct caused and was substantially likely to cause.

B. Likelihood of harmful sexual conduct in the future

Whitley argues that the record does not contain clear and convincing evidence that his high risk of reoffending includes a risk of engaging in "harmful" sexual conduct. *See* Minn. Stat. §§ 253B.02, subd. 18c(a)(3) (defining "sexually dangerous person," in part, as a person that "is likely to engage in acts of harmful sexual conduct"), .18, subd. 1(a), .185, subd.1 (requiring clear and convincing evidence).[3] Whitley argues that the actuarial tools the examiners used did not address whether Whitley is highly likely to engage in future *harmful* sexual conduct. This argument is based primarily on Whitley's unfounded belief that his course of past sexual conduct was not "harmful" and is equally meritless.

[3] The supreme court has held that "likely" as used in the statute means "highly likely." *In re Linehan*, 557 N.W.2d 171, 180 (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).

The record reflects that Whitley's actuarial risk of reoffending was only one of *several* factors the experts considered in opining that Whitley is highly likely to engage in future harmful sexual conduct. In addition to actuarial instruments, Dr. Wilson considered Whitley's deviant sexual behaviors and impulses throughout his life; the fact that after repeated attempts at treatment, Whitley reports that he has never attempted to stop sexually offending; Whitley's longstanding preoccupation with forced sexual contact; and the fact that Whitley has reoffended several times while involved in sex-offender treatment. Dr. Reitman considered Whitley's current diagnoses, criminal records, and psychological assessments, along with accepted actuarial risk-rating instruments. Whitley does not argue that these other factors that the examiners considered do not support the finding that he is likely to engage in future sexual conduct that is harmful.

As required by statute, the district court found that Whitley is highly likely to reoffend based on Whitley's history and current diagnoses by the experts as well as the court's analysis of the six *Linehan* factors used to determine 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.

In re Commitment of Stone, 711 N.W.2d 831, 840 (Minn. App. 2006) (citing *Linehan I*, 518 N.W.2d at 614), *review denied* (Minn. June 20, 2006). Whitley's argument that the *Linehan* factors do not support his commitment as an SDP is also without merit.

1. Demographic characteristics

Whitley argues that because he is now older, has addressed his chemical dependency issues in prison,[4] and would be monitored for ten years on conditional release, demographic characteristics do not support his commitment. But both experts testified about the numerous demographic factors that increase Whitley's risk of reoffense including his gender, unstable education and work histories, marital status, low intellectual level, violent juvenile history, and history of alcohol abuse. Dr. Reitman testified that Whitley's age will only reduce his risk of reoffending if he completes sex-offender treatment, which he has failed to do. Whitley's demographic characteristics clearly and convincingly support the finding that Whitley is highly likely to reoffend.

2. History of violent behavior

Whitley mischaracterizes his past sexual behavior as nonviolent, for the most part, and not recent, to argue that this factor weighs in his favor. But, as Dr. Wilson noted at trial, Whitley has punched victims, has threatened them, and has left some victims only to return to further assault them. Several victims resisted his attacks and fought to protect themselves. During one of Whitley's more violent assaults, he punched the victim in the forehead and knocked her to the floor. Dr. Reitman noted in his report that "Whitley has

[4] Whitley testified that the reason he did not drink intoxicating substances in prison was because he feared that prison "hooch" would cause blindness.

shown to be violent dating back to his early childhood and has proven to be quite violent as an adult. He has been violent with victims as well as DOC [Department of Corrections] staff and other inmates." Whitley has not denied any of the examples of his violence recited by Drs. Wilson and Reitman.

Although Whitley's most recent sexual offenses were committed in 1993 and 2002, he has been incarcerated for at least 14 of the past 16 years, and all of the past 7 years, and therefore has had little opportunity to reoffend more recently than in 1993 and 2002.[5] Whitley's history of violent behavior clearly and convincingly supports the determination that Whitley is highly likely to sexually reoffend.

3. Base-rate statistics

Despite Whitley's argument that his RRASOR score indicated that his statistical probability of reoffending in the next ten years is only 48.6% (i.e. not even more likely than not), both experts testified that charge and conviction data, on which the RRASOR score is based, dramatically understate the true incidence of sexual assault. Dr. Wilson noted that fewer than 2% of individuals in the sample scored higher than Whitley. The experts used six different accepted risk-assessment instruments to evaluate Whitley, and each opined that, based on the results, Whitley is highly likely to reoffend. Whitley's base-rate statistics clearly and convincingly support the determination that he is highly likely to sexually reoffend.

[5] Despite being under intense supervision, Whitley did commit and plead guilty to fourth-degree assault while in prison.

4. Sources of stress in offender's environment

Whitley asserts that he is at a low risk of reoffense because, if not civilly committed, he will be capable of earning an adequate income (reducing the financial stress in Whitley's environment),[6] and the terms of his conditional-release plan will provide structure in his life. Both examiners disagreed. Dr. Wilson noted that Whitley acknowledged that he could have financial issues if he is released into the community, and that using drugs and alcohol would be a source of stress. Dr. Reitman noted that Whitley exhibited an unstable, minimal work history and would have little ability to sustain himself. And Whitley himself acknowledged to Dr. Reitman that he had little support. Regarding Whitley's argument that his conditional-release plan will provide him with structure, the record does not reflect that a conditional-release plan exists. The sources of stress in Whitley's environment clearly and convincingly support the determination that he is highly likely to reoffend.

5. Context

The fifth *Linehan* factor to be considered is the similarity of the present or future context to those contexts in which the offender used violence in the past. *Stone*, 711 N.W.2d at 840 (citing *Linehan I*, 518 N.W.2d at 614). Whitley largely repeats his earlier

[6] Whitley appears to assume that the financial stress in his environment is a cognitive or affective factor which indicates that he may be predisposed to cope with stress in a violent manner. *See Linehan I*, 518 N.W.2d at 614 (describing "the sources of stress in the environment" as "cognitive and affective factors which indicate that the person may be predisposed to cope with stress in a violent or nonviolent manner"). We doubt that financial stress is per se a "cognitive [or] affective factor" under *Linehan I*, but here we assume for the sake of Whitley's argument that his financial stress is such a factor in this case.

arguments regarding his age (40), DOC supervision (i.e. conditional-release terms), and alleged sobriety, to argue that his context would be different than the context in which he previously offended. As discussed above, none of those arguments negate the clear and convincing evidence supporting the finding that he is highly likely to reoffend.

Whitley also asserts that he "has had some exposure to sex offender treatment," and this has apparently changed his context. But the record reflects that although Whitley has had exposure to sex-offender treatment for a very long time, he has repeatedly failed to complete such treatment and continues to have no relapse plan or understanding of his triggers. The record clearly shows that Whitley's exposure to sex-offender treatment has not changed his context in any meaningful way. Accordingly, both Drs. Wilson and Reitman opined that Whitley's present context is the same as it was when he committed his previous offenses. This factor also supports the finding that Whitley is highly likely to reoffend.

6. Participation in sex-therapy programs

Whitley does not present any argument of merit with regard to this factor. He asserts that he is now amenable to sex-offender treatment such that he does not need to be on "locked unit status." But Whitley's record of participation in sex-therapy programs belies his assertion.

Whitley was placed in the Nexus program in 1986 when he was 15 years old, but was terminated from the program after only a few months. He attended the Storefront Sexual Awareness Program later that year, but was terminated from the program after a few weeks. Whitley had six sexuality counseling sessions at a mental-health program in

1987, but told staff that he had no issues to discuss and was terminated from counseling when he sexually reoffended. In 1990, Whitley was rejected altogether for sex-offender treatment at Alpha Human Services because of his lack of remorse, insight, empathy, or discomfort, in addition to his chemical abuse and lack of response to past treatment attempts. In 1991, Whitley participated in sex-offender treatment while incarcerated but was terminated from the program after one month for making sexual and violent statements about a female guard. In 1992, he requested a session with a female psychologist and then masturbated in her presence. When Whitley was in prison following his 1993 offense, he was not accepted for sex-offender treatment because he was not amenable to treatment: he refused to admit his crime and continued to make excuses for his behavior. Whitley's participation in sex-therapy programs clearly and convincingly supports the determination that he is highly likely to sexually reoffend.

II. Clear and convincing evidence supports Whitley's commitment as a sexual psychopathic personality.

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. 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 psychopathic personality "excludes mere sexual promiscuity" and "other forms of social delinquency." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). It "is an identifiable and documentable violent sexually deviant condition or disorder." *Id*.

With regard to SPP commitment, Whitley argues only that a determination that he is a "clinical psychopath" as measured in the PCL-R does not constitute clear and convincing evidence that he is an SPP. We agree. In order to commit an individual as a "sexual psychopathic personality" (SPP), 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. Minn. Stat. § 253B.02, subd. 18b; *Linehan I*, 518 N.W.2d at 613. This is a legal determination.

As Dr. Wilson explained in her report, and as the county acknowledges, the PCL-R merely assesses the degree to which a person may be characterized as a "clinical psychopath," demonstrating egocentricity, manipulativeness, impulsivity, and lack of empathy or remorse. In other words, the PCL-R is a tool to make a *clinical* determination. As Dr. Wilson testified, even though the names 'sexual psychopathic personality' and 'clinical psychopath' are similar, they are not the same thing. "[T]he word 'psychopath' may be used differently in the field of psychology from its use in the SPP-commitment statute . . . ." *In re Commitment of Luhmann*, No. A07-912, 2007 WL 2417341, at *5 (Minn. App. Aug. 28, 2007).

Whitley's PCL-R score is not the sole basis of the district court's conclusion that Whitley is an SPP. The district court made extensive findings based on its review of

(1) Whitley's background, including his history of violent behavior and his repeated failure at sex-offender and chemical-dependency treatment; (2) his lengthy criminal history, which includes multiple convictions for criminal sexual conduct as well as other crimes; (3) Whitley's own testimony, including his recollection of his previous offenses, his claim that he does not understand why he commits sexual offenses, and his belief that his victims do not suffer a "major" impact; and (4) the expert testimony and reports of Drs. Wilson and Reitman, opining that Whitley satisfies the statutory criteria for commitment as an SDP and SPP.

Dr. Wilson, who administered the PCL-R to Whitley, used Whitley's PCL-R score mainly as an actuarial instrument to predict Whitley's risk of reoffense: Whitley scored very high. Whitley's PCL-R score also contributed to Dr. Wilson's opinion that Whitley fit within the statutory definition of an SPP. But Dr. Wilson's interview of Whitley, review of his background and criminal record, and Whitley's diagnoses of several mental disorders also contributed to her opinion. And Dr. Reitman, who did not administer or rely on PCL-R results, also opined that Whitley meets SPP commitment criteria. The record contains clear and convincing evidence to support the determination that Whitley is an SPP.

III. Whitley's constitutional arguments lack merit.

Whitley argues that the SDP and SPP statutes are unconstitutional as applied to him because they violate substantive due process and equal protection, are void for vagueness, constitute double jeopardy, and deprive him of his right to a jury trial. Minnesota statutes are presumed constitutional, and this court's "power to declare a

statute unconstitutional should be exercised with extreme caution." *Assoc. Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). Appellate courts have already addressed and rejected each of Whitley's arguments.

A. Substantive due process

Whitley argues that the nature and duration of his proposed treatment is improper, that he is being unconstitutionally deprived of his liberty because, as he asserts, he is "not in need of locked unit status such as is provided by MSOP [Minnesota Sex Offender Program]." But the Minnesota Supreme Court has previously rejected substantive-due-process challenges to both the SPP and SDP laws. The court has stated that "even when [SPP] treatment is problematic, as it often is, the state's interest in the safety of others is no less legitimate and compelling. So long as civil commitment is programmed to provide treatment and periodic review, due process is provided." *Blodgett*, 510 N.W.2d at 916. And Whitley does not contend that he will be deprived of treatment and periodic review. Similarly, the court has held that Minnesota's SDP law does not violate substantive due-process rights. *In re Linehan*, 594 N.W.2d 867, 873 (Minn. 1999) (*Linehan IV*).

Whitley argues that the foregoing cases are distinguishable because alternative treatment options were not at issue in those cases; rather it was the duration of the commitment that was the issue. But alternative options are not at issue here either. The record is clear that there is no valid alternative option available to Whitley: both experts agreed that Whitley requires placement at a secure residential facility and that MSOP was the best program suited to his needs. Even if there were an alternative option, there is no

statutory or constitutional requirement that Whitley be committed to the least-restrictive alternative. *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).

We find no merit in Whitley's substantive due-process arguments. Furthermore, Whitley's challenge is not yet ripe. *In re Commitment of Travis*, 767 N.W.2d 52, 67 (Minn. App. 2009) (holding that a substantive due-process challenge involving the right to treatment is premature at the time of indeterminate commitment).

B. Equal protection

Whitley argues that his commitment as an SDP and an SPP violates his right to equal protection because, as he asserts, he is "singled out from among other criminal offenders" for "indeterminate lockup," constituting "constitutionally suspect disparate treatment," especially in comparison to the treatment received by "more dangerous criminals" such as arsonists, murderers, and armed robbers. But the Minnesota Supreme Court has previously held that the SDP and SPP statutes do not violate the right to equal protection. *Blodgett*, 510 N.W.2d at 916–17 (addressing the SPP statute); *Linehan III*, 557 N.W.2d at 186–87 (addressing the SDP statute). "[T]he sexual predator poses a danger that is unlike *any* other." *Blodgett*, 510 N.W.2d at 917 (emphasis added).

Whitley argues that "Minnesota courts have neglected to address the asserted uniqueness of psychopathic sex offenders, or sexually dangerous persons, with any

updated scientific detail" for the past seventy years even though the science is "rapidly developing." He asserts that Minnesota's courts are thereby "reinforc[ing] old prejudices sought to be prevented by constitutional protections." But this argument is more appropriately directed to the supreme court, whose precedent is binding on this court.

C. Void for vagueness

Whitley argues that Minn. Stat. § 253B.02, subd. 18c (2008) (defining SDP), is void for vagueness because of the "broad language regarding failure to 'adequately control' sexual impulses." The phrase "adequately control" does not actually appear in Minn. Stat. § 253B.02, subd. 18c, but occurs in *Linehan IV*'s paraphrase of the statute:

> [T]he SDP Act allows civil commitment of sexually dangerous persons who have engaged in a prior course of sexually harmful behavior and whose present disorder or dysfunction does not allow them to *adequately control* their sexual impulses, making it highly likely that they will engage in harmful sexual acts in the future.

594 N.W.2d at 876 (emphasis added). Whitley's argument has previously been rejected by this court. *See Ramey*, 648 N.W.2d at 268 (stating: "[when] it seems highly likely that [a person] will engage in harmful sexual conduct, given his current mental disorders, past course of harmful sexual conduct, and difficulty in controlling his sexual impulses, the lack of adequate control standard is not vague as applied to [that person]").

Whitley also argues that Minn. Stat. § 253B.02, subd. 18b (2008) (defining SPP), is void for vagueness. He asserts that his "arguments [relating to the SDP act] also apply to the SPP Act." But in challenging a statute as void for vagueness, the challenging party must show that the statute lacks specificity as to his own behavior. *Ruzic v. Comm'r of*

Pub. Safety, 455 N.W.2d 89, 91–92 (Minn. App. 1990), *review denied* (Minn. June 26, 1990). And Whitley fails to discuss his own condition and explain why the SDP or SPP statutes lack specificity as to that particular condition. We find no merit in Whitley's assertions that the statutes are void for vagueness.

D. Double jeopardy

Whitley argues that SDP and SPP commitments violate the constitutional prohibition against double jeopardy, because "the SDP and SPP statutes operate each as a sentencing statute grafted onto the civil commitment process" and constitute "additional punishment." The Minnesota Supreme Court dealt squarely with this issue in *Linehan IV*, 594 N.W.2d at 871–72. There, the supreme court interpreted the double-jeopardy issue in light of the United States Supreme Court's decision in *Kansas v. Hendricks*, 521 U.S. 346, 117 S. Ct. 2072 (1997), in which the Supreme Court determined that a Kansas commitment law similar to Minnesota law did not violate the prohibitions against double jeopardy or ex post facto laws. *Id*. at 369–71, 117 S. Ct. at 2085. In *Linehan IV*, the Minnesota Supreme Court concluded that the Minnesota law focuses on *treatment* (not punishment), because a committed person can be released once sufficiently rehabilitated and in control of his or her sexual impulses. 594 N.W.2d at 871. Further, the purpose of the statute is not deterrence or retribution, the aims of criminal statutes; rather, the statute can be invoked only when a person is suffering from a mental or personality disorder that prevents him or her from exercising control over his or her behavior. *Id*. at 872. This court recently reiterated this holding in *In re Civil Commitment of Martin*, 661 N.W.2d 632, 641 (Minn. App. 2003), *review denied* (Minn. Aug. 5, 2003). We find no merit in

Whitley's assertions that SDP and SPP commitments violate the constitutional prohibition against double jeopardy.

E. Jury trial

Whitley argues that he was deprived of a jury trial. This argument also lacks merit. Seventy years ago, "the Minnesota Supreme Court . . . rejected the argument that a jury trial is required" in civil-commitment cases. *Joelson v. O'Keefe*, 594 N.W.2d 905, 910 (Minn. App. 1999) (citing *State ex rel. Pearson v. Probate Court*, 309 U.S. 270, 60 S. Ct. 523 (1940)), *review denied* (Minn. Jul. 28, 1999). Whitley's argument that Minnesota should require a jury trial because some other states provide jury trials is also meritless. *See Poole v. Goodno*, 335 F.3d 705, 710 (8th Cir. 2003) ("[T]he Minnesota state court decision declining to grant a jury trial in [a commitment] case is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.").

Affirmed.