STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1

In the Matter of the Civil Commitment of: James Albert Freeman

Filed May 4, 2010
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27PRCV0728

Roderick N. Hale, Minneapolis, Minnesota (for appellant)

Michael O. Freeman, Hennepin County Attorney, John L. Kirwin, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, 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 there is not clear and convincing evidence in the record to support either commitment, that the statutes governing SDP and SPP commitments violate the double-jeopardy, due-process, and equal-protection clauses of the federal and state constitutions, that the SDP statute is void for vagueness, and that he was denied his right to a jury trial. We affirm.

D E C I S I O N

In an appeal concerning civil commitment, we examine only whether the trial court complied with the requirements of the commitment statutes. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). The state must prove the facts necessary for SDP and SPP 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 review the record in the light most favorable to the findings. *Knops*, 536 N.W.2d at 620. 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, psychologists Mary Kenning, Ph.D. and Paul Reitman, Ph.D. (selected by Freeman), who both opined that Freeman meets all of the criteria for commitment as an SDP and an SPP and whose testimonies in that regard the district court found credible. Despite expert testimony to the contrary, on appeal, appellant James Albert Freeman argues that (1) there is not clear and convincing evidence in the record that he lacks adequate control over his sexual impulses to warrant SDP or SPP commitment and (2) there is not clear and convincing evidence in the record that he is likely to engage in future acts of harmful sexual conduct. Freeman also raises constitutional and procedural challenges to the commitment statutes that this court has repeatedly found to be without merit in prior cases.

I. Clear and convincing evidence supports Freeman's commitment as a SDP and SPP.

Freeman's social, criminal, and treatment history, and psychological and risk assessments are detailed in 146 findings of fact made by the district court in its initial commitment order. Freeman does not assert that any of the underlying findings are clearly erroneous. The expert opinions of the two examiners are detailed in 21 additional findings of fact contained in the initial commitment order.

An SDP is defined as a person who: (1) has engaged in a course of harmful sexual conduct (as defined in the statute); (2) has manifested a sexual, personality, or other mental disorder or dysfunction; and (3) as a result, is likely to engage in acts of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 18c(a) (2008). "For purposes of this provision, it is not necessary to prove that the person has an inability to control the person's sexual impulses." Minn. Stat. § 253B.02, subd. 18c(b). But the supreme court has held that the statute must be interpreted to require a showing that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan (Linehan IV)*, 594 N.W.2d 867, 876 (Minn. 1999). And the supreme court has held that "likely to engage in acts of harmful sexual conduct" must be interpreted to mean that the person is "highly likely" to engage in such conduct. *In re Linehan (Linehan III)*, 557 N.W.2d 171, 189 (Minn. 1996), *vacated and remanded*, 522 U.S. 1011 (1997), *aff'd as modified*, 594 N.W.2d 867 (Minn. 1999).

Freeman agrees that clear and convincing evidence in the record demonstrates that he has engaged in a course of harmful sexual conduct,[1] and he does not dispute that the record contains clear and convincing evidence that he has manifested a sexual, personality, or other mental disorder or dysfunction sufficient to support SDP commitment.[2]

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.

The psychopathic personality definition "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*.

[1] At the time of the commitment trial, Freeman had admitted to having had sexual contact with 17 victims and that he had committed non-contact sexual acts involving over 200 victims. His victim pools have included family members, strangers, children, and adults.

[2] Freeman does not deny his diagnoses of Alcohol and Cannabis Dependence in Remission in a Controlled Environment; Pedophilia, non-exclusive type; Paraphilias NOS; Exhibitionism; Voyeursim; Frotteurism; Antisocial Personality Disorder; Depressive Disorder NOS, and Transvestic Fetishism.

A. Likelihood of future sexual reoffending.

Freeman argues that his commitment as an SDP cannot stand because the record does not contain clear and convincing evidence that he is highly likely to engage in future acts of harmful sexual conduct. The district court found that Freeman is highly likely to reoffend based on Freeman's history and current diagnoses by the experts as well as the court's analysis of the six *Linehan* factors[3] 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). Freeman's argument is based on his assertion that he does not meet the *Linehan* criteria. We disagree.

1. Demographic characteristics

Freeman implies that his age–56 at the time of trial–precludes a finding that he is highly likely to reoffend sexually. But Dr. Kenning testified that even given the overall low base rates for violent behavior for men of Freeman's age, gender, history of male

[3] *Linehan I* concerned only the SPP law, but the supreme court later held that the same factors should be considered in analyzing commitment under the SDP law, adding that the district court may also consider evidence not specifically listed and is not foreclosed from isolating the most important factors in predicting harmful sexual conduct. *Linehan III*, 557 N.W.2d at 189.

victims, alcohol problems, and lack of adequate employment all increase, rather than decrease, Freeman's risk of reoffense, noting that having male victims "is a very big risk factor," as is alcohol use. Dr. Kenning opined that Freeman's sexual offenses derive primarily from his sexual deviance which, unlike general antisocial behavior, does not diminish with age. And Dr. Reitman testified that age is not considered to reduce risk for an offender who, like Freeman, has not completed sex-offender treatment. The record does not support Freeman's implicit argument that his age reduces his risk of reoffending sexually.

2. History of violent behavior

Freeman does not dispute the sufficiency of evidence in the record indicating that this factor supports commitment. Freeman notes only that he has no history of aggression while in confinement.

3. Base-rate statistics

Dr. Kenning and Dr. Reitman used a number of actuarial and other risk-assessment tools, all of which indicated a high likelihood of Freeman reoffending. And Dr. Kenning noted that Freeman's prior offenses, stranger victims, male victims, and treatment failure were additional factors indicating a high risk of sexual reoffense. Freeman cites selectively from the testimony of the experts in an attempt to argue that the base-rate statistics do not support commitment, but both experts testified that consideration of the actuarial and other risk-assessment tools aided their evaluations of Freeman's risk of reoffending and supported their opinions that he is highly likely to engage in further harmful sexual conduct.

4. Sources of stress in offender's environment

Freeman does not make any arguments on appeal related to this factor.

5. Context, and
6. Participation in sex-therapy programs

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, and the sixth factor examines participation in sex-offender-treatment programs. *Stone*, 711 N.W.2d at 840 (citing *Linehan I*, 518 N.W.2d at 614).

Freeman does not present any argument on appeal regarding context, but he argues that he has had extensive sex-offender treatment in prison on two occasions including almost four years of treatment at Moose Lake (MSOP) where he was a mentor in the program. But Freeman was terminated from the program, and the district court's findings contain more than five pages of excerpts from his MSOP treatment documenting his "decline in treatment during 2007." And Freemen admitted at trial that "he had growing difficulty in the treatment program as he approached his release date," and that, due to factors including his dishonesty, "his treatment professionals could not really assess where he was in the treatment process."

Dr. Kenning testified that research shows that sexual recidivism among persons terminated from sex-offender treatment is "usually much higher." Freeman cites a reference by Dr. Rietman to Freeman's "transformation" in treatment and opinion that Freeman "has learned, has developed a capacity to be honest . . . [and has made] heartfelt psychological changes. . . . He is admitting [to] all his victims." But at the review

hearing, Freeman admitted that at the time of trial he had failed to reveal to anyone two additional victims and that he was not completely honest during treatment at Moose Lake. An MSOP report noted that Freeman's secret keeping, among other reasons, supported Freeman's placement on probation from MSOP treatment in October 2007. Freeman did not return to treatment and never completed sex-offender treatment.

We conclude that there is no merit in Freeman's argument that the *Linehan* factors do not support the district court's finding.

B. Clear and convincing evidence supports Freeman's commitment as a sexual psychopathic personality.

With regard to SPP commitment, Freeman argues that the record does not contain clear and convincing evidence demonstrating that he has an utter lack of power to control his sexual impulses. To support this argument, Freeman references the arguments made with regard to his SDP commitment and Dr. Reitman's testimony that Freeman does not meet all of the "*Pirkl*" factors because he had not refused treatment. Freeman asserts that he "probably" does not meet two of the three "*Irwin*" factors because he has had significant sex-offender treatment, and the record contains instances of "very good progress." But Freeman does not present any analysis or authority to explain why these assertions negate the district court's finding, supported by the opinions of both experts, that Freeman has an utter lack of power to control his sexual impulses. An assignment of error based on "mere assertion" and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons*

Carpet Co., 290 Minn. 518, 519–20, 187 N.W.2d 133, 135 (1971)).

We decline to address Freeman's assertions in the absence of adequate briefing, except to note that the record contains ample clear and convincing evidence supporting the district court's finding that Freeman meets this commitment criterion.

II. Freeman's constitutional arguments lack merit.

Freeman 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 Freeman's arguments in other cases.

A. Substantive due process.

Freeman makes general arguments about due process without any specific argument about how his due-process rights have been violated in this case. He appears to base his argument on an assertion that the record does not establish a sufficient difficulty in controlling his behavior to justify civil commitment and that the laws are not narrowly tailored to distinguish the typical recidivist from the dangerous sexual offender as required by *Linehan v. Milczark*, 315 F.3d 920, 927 (8th Cir. 2003). But the district court found that Freeman demonstrates an utter lack of power to control his sexual impulses, and the Eighth Circuit, in *Milczark*, held that Minnesota's SDP law, as interpreted by caselaw, adequately distinguishes between the typical recidivist and the dangerous sexual

offender and complies with substantive due-process requirements. *Id*. Because the SPP law has an even stricter standard, it complies with due-process requirements.

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, and 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. Freeman does not contend that he will be deprived of treatment and periodic review. Similarly, the court has also 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*).

B. Equal protection.

Freeman argues that his commitment as an SDP and an SPP and being sent to a treatment program violate his right to equal protection because he is "singled out from among other criminal offenders" and that the stigmatization of being labeled a sex-offender is a form of unequal treatment. 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.

Freeman argues that Minnesota courts have neglected to address the asserted uniqueness of psychopathic sex offenders, or sexually dangerous persons, with any modern scientific detail. He asserts that Minnesota's courts are thereby reinforcing old

prejudices sought to be prevented by constitutional protections. But this court is bound to follow existing precedent; Freeman's argument is more appropriately directed to the supreme court.

C. Double jeopardy.

Freeman argues that SDP and SPP commitments violate the constitutional prohibition against double jeopardy because "there is no genuine difference between the terms and conditions of commitment and those of a life sentence without parole under criminal incarceration," and the point of precluding double jeopardy is to prevent multiple punishments for the same offense. 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, which are 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 Commitment of Martin*, 661 N.W.2d 632, 641 (Minn. App. 2003), *review*

denied (Minn. Aug. 5, 2003). We find no merit in Freeman's assertions that SDP and SPP commitments violate the constitutional prohibition against double jeopardy.

D. Jury trial.

Freeman 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*, 205 Minn. 545, 556–57, 287 N.W.2d 297, 303 (Minn. 1939)), *review denied* (Minn. Jul. 28, 1999). Freeman'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.").

E. Void for vagueness.

Freeman argues that Minn. Stat. § 253B.02, subd. 18c (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). Freeman's argument has previously been rejected by this court. *See In re Commitment of Ramey*, 648 N.W.2d 260, 268 (Minn. App. 2002) (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]."), *review denied* (Minn. Sept. 17, 2002).

Freeman also argues that the commitment laws allow commitment based on a 52% likelihood of reoffense and that this is unconstitutional. This is not a vagueness argument and his premise is incorrect. *Linehan III* rejected the argument that a more-likely-than-not, or 50.1% probability, is sufficient for commitment, holding that the standard is "highly likely." *Linehan III*, 557 N.W.2d at 180. Although Dr. Kenning testified that one of the actuarial tools showed that Freeman falls into a 52% likelihood-of-reoffense group, she also testified that this tool—the Static-99—is known to significantly underestimate recidivism by 30-40%. As discussed above, the finding that Freeman is highly likely to sexually reoffend is supported by clear and convincing evidence in the record, and there is no evidence to support his contention that he was committed based on a finding that his likelihood of reoffending is 52%.

Affirmed.