STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2227

In the Matter of the Civil Commitment of: Wesley Elmer Wills.

Filed June 8, 2010
Affirmed; motion granted
Worke, Judge

Kandiyohi County District Court
File No. 34-PR-08-164

Thomas G. Kramer, Granite Falls, Minnesota (for appellant Wills)

Lori Swanson, Attorney General, John D. Gross, Assistant Attorney General, St. Paul, Minnesota; and

Boyd A. Beccue, Kandiyohi County Attorney, Willmar, Minnesota (for respondent state)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Collins, Judge.

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

WORKE, Judge

Appellant challenges his indeterminate commitment as a sexually dangerous person and sexual psychopathic personality, arguing that there is insufficient evidence to support the commitment. Appellant also argues that he was denied effective assistance of counsel, and the state moves to strike a document in appellant's appendix. We affirm and grant the state's motion.

D E C I S I O N

Appellant Wesley Elmer Wills argues that the evidence is insufficient to support the district court's conclusion that he satisfies the requirements for commitment as a sexually dangerous person (SDP) and sexual psychopathic personality (SPP). 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 defer to the district court's findings of fact and will not reverse those findings unless they are clearly erroneous. *In re Commitment of Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). But this court reviews de novo "whether there is clear and convincing evidence in the record to support the district court's conclusion that appellant meets the standards for commitment." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003).

SDP Commitment

A SDP is one who: (1) "has engaged in a course of harmful sexual conduct"; (2) "has manifested a sexual, personality, or other mental disorder or dysfunction"; and (3) "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a) (2008). While the state need not prove that the person has an inability to control sexual impulses, *id.*, subd. 18c(b), it must show that the person's disorder "does not allow [him] to adequately control [his] sexual impulses." *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*).

1. Course of harmful sexual conduct

The first prong requires the district court to find that appellant "has engaged in a course of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(1). A "course" of conduct is defined by its ordinary meaning, which is "a systematic or orderly succession; a sequence." *Ramey*, 648 N.W.2d at 268. "Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another." Minn. Stat. § 253B.02, subd. 7a(a) (2008). The statute does not explicitly require convictions, being consistently interpreted as allowing consideration of all harmful sexual conduct or behavior. *See Ramey*, 648 N.W.2d at 268 (concluding "that the course of conduct need not consist solely of convictions, but may also include conduct amounting to harmful sexual conduct [for] which the offender was not convicted").

The district court found that appellant has been convicted of many criminal sexual offenses, admitted to numerous other criminal acts for which he was not charged or prosecuted, and engaged in sexual conduct that creates a substantial likelihood of serious physical or emotional harm to others. The record supports the district court's finding.

The record shows that appellant was convicted of indecent exposure in 1991 and 2001, fourth-degree criminal sexual conduct in 1994, and attempted fourth-degree criminal sexual conduct in 1997. Appellant has also been convicted of many other criminal charges beginning in 1972, including: trespassing, disorderly conduct, criminal damage to property, illegal firearm possession, and attempted first-degree burglary. Appellant has admitted to numerous uncharged criminal acts, including: sexual abuse of a

10-year-old girl, sexual abuse of a 16-year-old mentally handicapped girl, sexually touching a 15-year-old girl, sexually abusing a female at a party, sexually abusing an 18-year-old woman while she was asleep, sexually abusing a 19-year-old woman, sexually abusing a 12-year-old girl when he was 18 years old, sexually abusing a 19-year-old woman who was a friend, sexually abusing an unidentified 19-year-old woman, sexually abusing a female after she passed out in a vehicle, having sexual intercourse with an unidentified 19-year-old woman who was sleeping, sexually penetrating at least a dozen women without their consent after searching for unlocked dorm rooms, sexually touching a friend who was "drunk and high," sexually assaulting an acquaintance who was asleep, sexually abusing his girlfriend "a good dozen times" while she was passed out, sexually abusing another female, peeping and sometimes masturbating while looking into windows of houses and dorm rooms, and numerous incidents of frottage and exposure.

The court-appointed examiners testified regarding appellant's course of harmful sexual conduct. Dr. Kelly Wilson testified that appellant has engaged in a course of harmful sexual conduct. Wilson stated that, although appellant admitted to many offenses, he minimized the sexual behavior of some of the offenses or denied that they were sexual in nature. Wilson testified that appellant's course of sexual conduct created a substantial likelihood of serious physical and emotional harm to the victims. Wilson stated that appellant's victims were often asleep or helpless and as a result can experience tremendous problems with sleep difficulties, anxiety, post-traumatic stress, impaired sexual functioning, and depression.

Dr. Paul Reitman testified that appellant has engaged in a course of harmful sexual conduct and caused his victims emotional and physical harm. Dr. Reitman stated that appellant "has a trail of victims that he has disturbed, maybe destroyed their lives." There is clear and convincing evidence to support the district court's finding that appellant engaged in a course of harmful sexual conduct.

2. Adequate control

The district court must also find that appellant suffers from a mental abnormality or personality disorder that does not allow him to adequately control his sexual impulses. *Linehan IV*, 594 N.W.2d at 876. The district court found that appellant suffers from anti-social personality disorder, paraphelia not otherwise specified (NOS), exhibitionism, voyeurism, and frotteurism, and as a result of suffering from these sexual and personality disorders, appellant cannot adequately control his sexual impulses. The record supports the district court's finding.

Dr. Wilson testified that appellant suffers from mental disorders, specifically meeting the criteria for paraphilia NOS; exhibitionism; voyeurism; frotterism; antisocial personality disorder; alcohol dependence in sustained remission; and cannabis dependence in sustained remission. Wilson stated that appellant also has some possible depressive symptoms and potentially a depressive disorder. Dr. Wilson testified that appellant's disorders cause him to lack adequate control over his sexually harmful behavior. According to Dr. Wilson, appellant has a history of impulsive behavior, poor judgment and failure to recognize consequences of his actions.

Dr. Reitman diagnosed appellant with exhibitionism, voyeurism, chemical dependency, sexual abuse of a child, sexual abuse of an adult, depression with psychotic features by history, and antisocial personality disorder. Reitman testified that these disorders cause appellant to lack control over his sexually harmful behavior. According to Dr. Reitman, appellant is impulsive, demonstrating failure to appreciate the consequences of his actions.

Dr. Wilson further noted that appellant's courtroom behavior exhibited chronic impulsivity, poor judgment, and failure to appreciate consequences of his behavior. The record shows that appellant was often argumentative with the court. Appellant waived his appearance at one hearing, stating that he did not see why he had to be present. Appellant also stated that he was "done with the trial," and declared that he was "gone" because he and his attorney disagreed on trial strategy. When given an opportunity to return to the courtroom, appellant stated that if he returned he was going to "raise some hell." At one point, appellant told the district court: "if you can't do your job right, then step down and let somebody else do it." There is clear and convincing evidence to support the district court's finding that appellant suffers from a mental abnormality or personality disorder that does not allow him to adequately control his impulses, sexual and otherwise.

3. Likelihood of reoffense

Finally, the district court must determine whether, as a result of appellant's course of misconduct and mental disorders or dysfunctions, he "is likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). The supreme court has

construed "likely" to engage in future acts of harmful sexual conduct to require a showing that the offender is "highly likely" to engage in future harmful sexual conduct. *In re Linehan*, 557 N.W.2d 171, 180 (Minn. 1996) (*Linehan III*), *vacated on other grounds sub nom. Linehan v. Minn.*, 522 U.S. 1011, 118 S. Ct. 596 (1997), *aff'd on remand sub nom. Linehan IV*, 594 N.W.2d 867. Six factors are considered in examining the likelihood of reoffense: (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 Linehan*, 518 N.W.2d 609, 614 (Minn. 1994) (*Linehan I*). The record shows that the district court considered the *Linehan* factors in finding that appellant is highly likely to reoffend.

1. Demographic characteristics

Appellant argues that because he is older (57 years old at the time of trial) and has addressed his chemical dependency, demographic characteristics do not support his commitment. Appellant committed his last offense in 2005. Dr. Wilson stated that this late-age offense is extremely unusual, and "puts [appellant] into a whole new category of risk and almost completely removes the aging effect on risk assessment." According to Dr. Wilson, appellant's ongoing antisocial behavior and his late-age sexual offense trump any aging effect or reduction in risk. Further, while appellant asserted that his sobriety since 2000 was a major component to him remaining law-abiding, he committed an

offense in 2005. The district court found that appellant committed this 2005 offense while in "apparent sustained [chemical-dependency] remission." Thus, appellant still offends when sober, making his chemical dependency only one risk factor. This factor supports the finding that appellant is highly likely to reoffend.

2. History of violent behavior

Dr. Wilson testified that appellant has a history of violent behavior, including a recent sexual offense and recent serious criminal activity. Wilson testified that appellant's deviant sexual interest started even before he was a teenager. This factor supports the finding that appellant is highly likely to reoffend.

3. Base-rate statistics

Dr. Wilson testified that the base-rate statistics indicate that appellant's likelihood of sexual recidivating within five years is 32.7%, compared to the average sexual offender reoffending at a rate of 13%. Dr. Reitman testified that appellant is "more than twice as likely to reoffend as the average prisoner would be after release." This factor supports the finding that appellant is highly likely to reoffend.

4. Sources of stress in offender's environment

The record shows that appellant has a poor ability to cope with stress, has a poor ability to avoid getting involved in illegal activities, and does not have a good plan or support system. According to Dr. Wilson, appellant has an acknowledged history of impulsive behavior, poor judgment, and failure to recognize the consequences of his actions. Further, appellant's behavior in court showed that he is chronically impulsive,

has poor judgment, and does not appreciate the consequences of his behavior. This factor supports the finding that appellant is highly likely to reoffend.

5. Context

The fifth factor involves consideration of "the similarity of the present or future context to those contexts in which the offender used violence in the past." *In re Commitment of Stone*, 711 N.W.2d 831, 840 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). Appellant has a history of searching for unlocked doors and windows and entering dwellings where women live. His last offense in 2005 involved an attempted burglary. Accordingly, both Dr. Wilson and Dr. Reitman opined that the present context is the same as the context when appellant committed previous offenses. This factor supports the finding that appellant is highly likely to reoffend.

6. Participation in sex-therapy programs

Although the district court acknowledged appellant's discharge from treatment, the court found that appellant's discharge was not successful. Initially, appellant refused to participate in an offered treatment program. And both examiners testified that appellant did not learn anything in treatment because he does not appreciate his cycle of conduct, he blames his victims, and he blames the system.

Dr. Wilson testified that appellant's completion of treatment did not change his risk level because he lacks an ability to illustrate any acceptance of what he has done and he does not have a clear treatment or relapse-prevention plan. Dr. Wilson also stated that appellant does not have an understanding of why he sexually offends and blames his behavior on drinking and using drugs. Wilson opined that appellant has little insight into

his sex-offending cycle and triggers, and his dismissiveness demonstrates that he has few skills to prevent him from committing another offense. Dr. Reitman stated that appellant is "very angry at the system" and that this anger could mean that appellant is "untreatable." Appellant's refusal to participate in treatment and failure to gain anything from treatment clearly and convincingly support the finding that appellant is highly likely to reoffend.

Each factor supports the district court's finding that appellant is highly likely to reoffend. Therefore, the district court did not err by concluding that appellant satisfies the requirements for commitment as a SDP.

SPP Commitment

Appellant also argues that he does not meet the requirements for commitment as a SPP. A 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 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. *Linehan I*, 518 N.W.2d at 613. The psychopathic personality "excludes mere sexual promiscuity" and "other forms of social

delinquency." *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). But the personality "is an identifiable and documentable violent sexually deviant condition or disorder." *Id.*

1. Habitual course of misconduct

Appellant challenges the district court's finding that he engaged in a habitual course of misconduct because it has been many years since he has engaged in sexually deviant behavior. Dr. Wilson testified that appellant's course of harmful sexual conduct was habitual. Dr. Wilson testified that appellant followed a pattern of engaging in sexually motivated behavior, such as being a prowler or attempting to gain entrance into a dwelling. Wilson testified that:

> In terms of risk assessment, [appellant] is an opportunist, and he also likes to create his own opportunities for victims. I think he had a preference maybe for younger-looking girls, but perped on whoever he could literally get his hands on. He did so by getting people intoxicated and waiting until they were not conscious so they would not have a chance to fight him, and then he later justified his offending by saying they didn't physically object in some way to his touching when they discovered him, that they were consenting to be touched, even if they were complete strangers and woke up in their dorm room with a man standing in their room touching them. So in terms of risk, it goes to the degree and pervasiveness of [appellant's] sexual deviant interests and his willingness to act on his sexual deviant interests.

The record also shows that appellant's 2005 offense was a burglary, which followed his pattern of misconduct. The district court did not err in concluding that appellant engaged in a habitual course of sexual misconduct.

2. Utter lack of control

In considering the second element of a SPP analysis, the district court must weigh several significant factors: (1) the nature and frequency of the sexual assaults; (2) the degree of violence involved; (3) the relationship (or lack thereof) between the offender and the victims; (4) the offender's attitude and mood; (5) the offender's medical and family history; (6) the results of psychological and psychiatric testing and evaluation; and (7) any factors that bear on the predatory sexual impulse and the lack of power to control it. *Id.*

1. Nature and frequency of the sexual assaults

The record shows that appellant's sexual misconduct occurred frequently over the course of many years. Additionally, the nature of appellant's offenses involved him breaking into dwellings where women lived and committing sexual acts on sleeping victims. Dr. Wilson testified that there is evidence that appellant has an utter lack of power to control his sexual impulses based on his extraordinary history of sexual offending, prevalent sexual deviation, convicted conduct, recent offense, attraction to young girls, admission to dozens, if not hundreds of offenses, and lack of real demonstration of capacity to change his criminal lifestyle. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses.

2. Degree of violence involved

Dr. Wilson testified that appellant committed violent sexual offenses. One reported incident involved appellant tackling a girl he watched walk into a wooded area. She screamed and several males chased him away. He also forcibly touched a "friend's"

breasts after he locked her in his car. She was pregnant and begged him not to do anything to her. He pulled another woman behind some barrels, pinned her down and touched her breasts. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses.

3. Relationship (or lack thereof) between the offender and the victims

Dr. Wilson stated that appellant has a broad victim range—anyone who happens to be available or somebody that he might find attractive. Appellant has had relationships with some of his victims, but some have been complete strangers. Appellant has a history of selecting a victim, masturbating at thoughts of offending her, and then attempting to gain access to the person's dwelling. In addition to the stalking component, there is an opportunistic element, involving an individual being in the wrong place at the wrong time, or giving appellant an opening. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses.

4. Offender's attitude and mood

Dr. Reitman testified that appellant is "severely entrenched in denial," does not have remorse or regret, has no understanding of the impact of his offenses, is angry at his victims, has no accountability, and is a severely disturbed man, who at an early age was imprinted with the idea that deviant sexualizing was normal. Dr. Wilson testified that appellant's attitude is dismissive and he is unable to appreciate the consequences of his behavior. Appellant's lack of courtroom decorum further demonstrated his attitude and mood, which exhibited a failure to show good judgment. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses.

5. Offender's medical and family history

This factor does not seem to be relevant in this matter.

6. Results of psychological and psychiatric testing and evaluation

Dr. Wilson conducted two hours of psychological testing, including administration of the Psychopathic Checklist (PCL-R). Dr. Wilson was "very certain" that she accurately categorized appellant as a high risk to reoffend. On the PCL-R, appellant scored a 29. Wilson testified that the common conception is that the closer the score is to 30 the greater the confidence in determining that the tested individual is a psychopath. Wilson indicated that appellant's score reflected his callousness, impulsiveness, manipulative behavior, and history of antisocial tendencies, which are the most prominent behaviors that he has that are consistent with psychopathy.

Dr. Reitman testified that he conducted assessments on appellant using several tests, including the Multiphasic Sex Inventory (MSI). The MSI indicated that appellant has some depression, anxiety around females, a lot of social tension, minimizes having sexual thoughts or fantasies, and holds his victims responsible by believing that he offended because the accuser invited it, wanted it, and liked it. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses.

7. Factors that bear on the predatory sexual impulse and the lack of power to control it

According to Dr. Wilson, appellant has an acknowledged history of impulsive behavior, poor judgment, and failure to recognize consequences of his actions. Dr. Reitman described appellant as impulsive, demonstrating failure to appreciate the

consequences of his personal acts, and being unable to appreciate what he has done. This factor supports the finding that appellant has an utter lack of power to control his sexual impulses. Thus, the district court did not err in concluding that appellant has an utter lack of power to control his sexual impulses.

3. Dangerousness to others

To determine whether an offender is dangerous to others, the district court must consider the same factors for determining whether an offender is highly likely to reoffend. *Linehan I*, 518 N.W.2d at 614. In other words, if a person is highly likely to reoffend, he is dangerous. As discussed in the analysis of the SDP criteria, appellant is highly likely to reoffend.

Dr. Wilson testified that appellant is dangerous to others and that he cannot be safely released into the community because he repeatedly demonstrated over the course of his life that he is not honest about his offending behavior unless he is caught or has no choice but to report it. Reitman opined that appellant is highly likely to reoffend. He testified that appellant presents tremendous treatment challenges because he is "so profoundly disturbed," requiring intensive, 24-hour, seven-days-a-week, secured therapy. There is clear and convincing evidence to support the district court's conclusion that appellant meets the criteria for commitment as a SPP.

Ineffective Assistance of Counsel

Appellant argues that he was denied effective 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, 704 (Minn. 2006). There is a strong presumption that counsel's performance was reasonable. *Id.* at 705.

The district court appointed Thomas E. Kramer[1] as appellant's trial attorney. At an April 21, 2009 hearing, appellant requested a new attorney. The district court questioned appellant's attorney regarding his experience before determining that appellant's attorney is a competent attorney familiar with the law and facts of the case. At the beginning of trial, appellant again requested a new attorney, stating that although his attorney was competent, they disagreed on trial strategy. Appellant's attorney stated that appellant asked him to call witnesses, whom he did not believe were helpful or necessary. The district court denied appellant's request.

Appellant's main contention is that his attorney refused to abide by his request to call certain witnesses. Appellant argues that the witnesses would have testified that he completed sex-offender, aftercare, and alcohol treatment, and exhibited good conduct in the community since 2000. But "[d]ecisions about which witnesses to call at trial and what information to present . . . are questions of trial strategy that lie within the discretion of trial counsel," and we generally do not "second-guess trial counsel's strategic decisions." *Leake v. State*, 737 N.W.2d 531, 539 (Minn. 2007). Additionally,

[1] Thomas E. Kramer represented appellant during the district court proceedings. Thomas G. Kramer represents appellant on appeal.

the district court considered the evidence that appellant wanted admitted. The court considered that appellant completed sex-offender treatment and aftercare in 2000-01, but found that the treatment was not successful. The court also noted that while appellant is chemically dependent on alcohol and marijuana, he is in "apparent sustained remission since 2000." Further, the district court found that appellant "identified to the examiners continued sobriety as a major component of his remaining law-abiding, although the 2005 firearm and burglary convictions did not involve the use of alcohol or drugs." Thus, a 2005 conviction refutes appellant's claim of good behavior. There is no indication that appellant's trial attorney was ineffective; therefore, this argument fails.

Motion to Strike

The state moved to strike a document listing potential witnesses from appellant's appendix. Appellant presented this document to the district court. The court reviewed the material before finding, among other things, that appellant's proposed witness list referred to pretrial preparation and that it was not related to the issues in the final determination hearing. The district court explicitly refused to admit the witness list; thus, it is not part of the record on appeal. Further, it has no bearing on our determination.

Affirmed; motion granted.