STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2306

In the Matter of the Civil Commitment of: Joseph Anthony Favors.

Filed June 22, 2010
Affirmed
Stauber, Judge

Dakota County District Court
File No. 19P107030418

Joe C. Dalager, Thuet, Pugh, Rogosheske & Atkins, Ltd., South St. Paul, Minnesota (for appellant)

James C. Backstrom, Dakota County Attorney, Pauline M. Halpenny, Assistant County Attorney, Hastings, 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

STAUBER, Judge

Appellant Joseph Anthony Favors challenges the district court's orders initially and indeterminately committing him as a sexually dangerous person (SDP) and as a sexual psychopathic personality (SPP). Because the district court's findings are supported by clear and convincing evidence and because the district court did not abuse its discretion in denying appellant's request for funds to seek an alternative to treatment in the Minnesota Sex Offender Program (MSOP), we affirm.

FACTS

Appellant, who was 45 years old when the current civil commitment petition was filed, has a lengthy history as a juvenile offender that includes theft, robbery, burglary, aggravated assault, unauthorized use of a motor vehicle, and possession of stolen property and a firearm. His adult criminal history, which began in 1979, includes assault, burglary, and aiding and abetting three armed bank robberies, for which he served approximately eight years in federal prison. The bank robberies occurred over a three-month period in 1981, and involved recruiting young women to commit the robberies, providing them with firearms and notes, and waiting outside in a getaway car.

Within months after his release from prison in February 1989, appellant committed his first sex offense that resulted in a conviction, engaging in digital and penile intercourse with his 11-year-old daughter, who ultimately contracted gonorrhea. Appellant threatened the lives of his daughter and her mother if either reported the abuse. He eventually pleaded guilty to second-degree criminal sexual conduct, and in July 1990, he was sentenced to 90 months in prison.

In February 1994, appellant committed his second sex offense that resulted in a conviction. While in custody in county jail, he attempted to touch the vaginal area of a female correctional officer. The officer evaded the contact, and appellant pleaded guilty to attempted fifth-degree criminal sexual conduct.

In April 1995, appellant was arrested for promoting prostitution. No criminal complaint was filed after the woman declined to press charges. The woman reported to police that appellant had been holding her against her will for two days and forcing her

into prostitution. She also claimed that appellant hit her, grabbed her by the throat, and threatened to kill her. Appellant claimed that he had just met the woman and that she wanted to prostitute herself in order to support her drug habit.

In 1996, while still on parole for his 1989 offense against his daughter, appellant committed his third and fourth sex offenses that resulted in a conviction. According to the complaint, appellant held two females, ages 15 and 16, at his trailer for approximately one week, providing them with marijuana, threatening them, and repeatedly having sexual intercourse with the 15-year-old, once while the 16-year-old was in bed with them. The 15-year-old became pregnant. Appellant pleaded guilty to third-degree criminal sexual conduct and solicitation of a child under age 18 to engage in prostitution, and received a 90-month prison sentence.

In January 2002, Dakota County filed its first petition to civilly commit appellant. After the two pre-petition screeners concluded that appellant did not meet the future harm criteria for commitment as SDP or SPP, the petition was dismissed. In February 2002, appellant was released from prison as a Level 3 sex offender and placed on supervised release.

In October 2002, during a search of appellant's residence, two sexually explicit photos were located. One photo was of a 20-year-old female whom appellant was attempting to recruit as a stripper. Also found were ads for prostitution with appellant's phone number on them, photos of several girls with biographical information, and other documents that suggested appellant was either engaged in the business or intending to do so. The search further revealed that appellant had asked to meet a 17-year-old female

with special needs through an Internet chat room. Appellant's supervised release was revoked as a result of these violations.

Appellant returned to prison and was ordered to enter sex-offender treatment. He entered the sex-offender treatment program at Lino Lakes in February 2003. He was discharged from the program in September 2004, and was considered to have successfully completed it.

In October 2004, appellant was released from prison and placed on supervised release. In November 2004, his release was revoked for 90 days, for a global positioning satellite (GPS) violation when he failed to go directly to his employment. In May 2005, his release was revoked for 60 days after he failed to comply with electronic monitoring and curfew rules. Appellant was released in August 2005, and secured housing in Farmington in October 2005.

In August 2007, appellant was arrested for violating the conditions of his release by having contact with a former girlfriend and for engaging in assaultive, abusive, or violent behaviors that included harassment, stalking, and threats of violence. The girlfriend testified at appellant's probation violation hearing that he assaulted her in May 2007. She further testified that appellant constantly threatened her and that she feared for her safety. Appellant had also sent a letter to a woman in Laos, indicating that he would marry her in some type of a "mail order" bride situation. Appellant was returned to prison in September 2007.

In August 2008, just prior to his scheduled release date, Dakota County filed a second petition to civilly commit appellant. Dr. James Gilbertson, one of the 2002 pre-

petition screeners, was again retained to provide a pre-petition screening evaluation. Dr. Gilbertson did not interview appellant, but limited his evaluation to a document review that included records submitted in connection with the 2002 petition, as well as records compiled since then. Gilbertson opined that appellant's risk of engaging in future acts of potential harmful sexual conduct was enhanced, and he recommended that Dakota County pursue appellant's commitment as SDP and SPP.

The district court appointed Dr. James Alsdurf and appellant chose Dr. Thomas Alberg to conduct independent evaluations. The district court concluded that clear and convincing evidence established that appellant met the criteria for initial commitment as SDP and SPP. The court further concluded that appellant needed treatment and that MSOP at Moose Lake or St. Peter was the least restrictive treatment program available to meet appellant's needs and the requirements of public safety.

At the 60-day review hearing, testimony was presented by Dr. Gary Hertog, who prepared MSOP's 60-day report, and from Dr. Chad Nelson, an examiner appointed at appellant's request. Both experts supported appellant's continued commitment. At the conclusion of the review hearing, appellant requested funds to seek a less-restrictive alternative to MSOP. The district court denied the request and ordered indeterminate commitment.

This appeal followed.

D E C I S I O N

I.

This court reviews the district court's commitment decision to determine whether the court erred as a matter of law in applying the statutory criteria. *In re Commitment of Stone*, 711 N.W.2d 831, 836 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). This court defers to the district court's role as fact-finder and its ability to judge the credibility of witnesses. *In re Ramey*, 648 N.W.2d 260, 269 (Minn. App. 2002), *review denied* (Minn. Sept. 17, 2002). "Where the findings of fact rest almost entirely on expert testimony, the [district] court's evaluation of credibility is of particular significance." *In re Thulin*, 660 N.W.2d 140, 144 (Minn. App. 2003) (quotation omitted).

I. SDP Commitment

A person may be committed as SDP if the petitioner proves that the person meets the criteria for commitment by clear and convincing evidence. Minn. Stat. §§ 253B.18, subd. 1(a), .185, subd. 1 (2008). An 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).

A. Course of harmful sexual conduct

"Harmful sexual conduct" is "sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another," and "harm" is presumed when behavior results in convictions of second- and third-degree criminal sexual conduct, as it has in this case. Minn. Stat. § 253B.02, subd. 7a (2008). "Incidents establishing a course

of harmful sexual conduct need not be recent and are not limited to those that resulted in a criminal conviction." *In re Commitment of Williams*, 735 N.W.2d 727, 731 (Minn. App. 2007), *review denied* (Minn. Sept. 26, 2007).

Appellant has four sex-related convictions: second-degree criminal sexual conduct (1989); attempted fifth-degree criminal sexual conduct (1994); third-degree criminal sexual conduct (1996); and solicitation of a child to engage in prostitution (1996). All experts who testified at the commitment hearing agreed that these convictions demonstrate that appellant has engaged in a course of harmful sexual conduct. Thus, clear and convincing evidence supports the district court's finding on this factor.

B. Disorder or dysfunction

The second prong of the SDP determination requires a court to find that the person suffers from a mental abnormality or personality disorder that does not allow him to adequately control his sexual impulses. *In re Linehan*, 594 N.W.2d 867, 875 (Minn. 1999) (*Linehan IV*). A diagnosis of antisocial personality disorder is sufficient to meet this requirement of the SDP statute. *Id*. at 878. The experts in this case agreed that appellant suffers from Axis II diagnosis of Antisocial Personality Disorder; Drs. Alberg and Alsdurf opined that he also suffers from an Axis I diagnosis of Sexual Paraphilia, NOS. In addition, Drs. Alberg, Alsdurf, and Gilbertson testified and concluded in their reports that appellant's disorders cause him to lack adequate control over his sexually harmful behavior. Thus, clear and convincing evidence supports the district court's findings on this factor.

C. Highly likely to reoffend

The third factor in assessing a person for SDP commitment is whether, as a result of the offender's course of misconduct and mental disorders or dysfunctions, the offender is "likely to engage in acts of harmful sexual conduct." Minn. Stat. § 253B.02, subd. 18c(a)(3). The supreme court has construed this statutory phrase to require a showing that the offender is "highly likely" to engage in harmful sexual conduct. *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).

Six factors are relevant to determining 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*).

1. Demographic characteristics

Several demographic characteristics favor appellant: he is older, has received his GED, has completed some college coursework, and has received trade certificates. Dr. Alberg agreed that positive factors are that appellant is now older and has progressed educationally. But Dr. Alberg also stated that other demographic characteristics weigh against appellant, including that he is male, has a poor relationship history, and has a history of employment difficulties. Moreover, Dr. Alsdurf opined that appellant's age

does not reduce his recidivism rate and that research does not support the conclusion that a 47-year-old male is at a substantially reduced risk for reoffending.

The district court found that appellant's demographic characteristics point toward reoffending. The court emphasized that appellant has been confined to prison for all but approximately three years of his adult life due to his lengthy criminal history and repeated violations of the conditions of his supervised release. The court further noted that appellant has not "demonstrated an ability to engage in a relationship and has shown a strong need to control and intimidate women." The court's findings are supported by the opinions of the experts and by other clear and convincing evidence.

2. History of violent behavior

Appellant has an extensive history of violent behavior that began as a juvenile and includes assaults, armed robberies, and sex offenses. Appellant argues that his history of violence ended in 1996 and that his release violation involving the assault of his former girlfriend was only a domestic dispute and did not involve any non-consensual sexual activity. But Drs. Alberg, Alsdurf, Gilbertson, and even Dr. Roger Sweet, who was the other 2002 pre-petition screener, all stated that appellant has a history of violent behavior. Dr. Alberg reported that appellant "is very willing to resort to violence to achieve whatever he desires." Clear and convincing evidence supports the district court's findings on this *Linehan* factor.

3. Base-rate statistics

Appellant agrees that his scores show a higher propensity for recidivism, and the district court so found. Dr. Alsdurf reported that appellant's likelihood of sexual

reoffending is high, as he would be classified as a violent rapist because he continues to be in that classification of offenders whose propensity for reoffending is viewed over a lifetime, not just a five- to fifteen-year period. Dr. Alberg reported that appellant's likelihood of reoffending is much higher than any base rate that has been determined for sexual reoffense. Dr. Alberg also testified that appellant's score on the SORAG places him in a category 9, which indicates a 100% chance of reoffending after seven years and that appellant's Static 99 results place him as a level six, which is the highest risk category for committing another sexual offense.

Appellant notes that the experts also agreed that his scores are unchanged from 2002, that his current age may be a protective factor, and that Drs. Alberg and Alsdurf acknowledged that an individual with a history of sexually offending is just as likely to commit some other type of offense as to commit a sex offense. Dr. Gilbertson, however, summarized in his report that even though appellant's scores could be adjusted to reflect appellant's offense-free time in the community and his completion of sex offender treatment, his continued pattern of interaction with women counteracts any positive adjustment. The district court's findings on this factor are thus supported by clear and convincing evidence.

4. Sources of stress

Appellant asserts that his stressors are no different today than after the dismissal of the 2002 petition. He further asserts that he was employable, was able to pay child support and receive unemployment compensation benefits after being laid off from a job, was able to obtain housing, and has significant family ties in the community.

But even after dismissal of the 2002 petition, appellant was unable to remain in the community for any length of time due to his repeated violations of the terms of his conditional release. His history in the community shows that he is impulsive and unable to exercise good judgment to control his behavior. Appellant is a Level 3 sex offender who has completed treatment, but has not been successful in the community. He accuses his probation officer of being out to get him, but his last violation involved an assault on his former girlfriend and behavior that indicated his continuing need to control and dominate women.

The district court found that appellant has significant stresses in his environment that contribute to his risk of reoffending. This finding is supported by clear and convincing evidence.

5. Similarity of present or future contexts to past offense contexts

Appellant asserts that his present and future circumstances are significantly different than the contexts in which he last offended. In particular, he has completed sex offender treatment to the satisfaction of the department of corrections, and since his last conviction in 1996, he has aged and obtained employment skills. Drs. Alberg and Alsdurf, however, both opined that they saw nothing in appellant's present or future circumstances that would be significantly different from the circumstances in which he has found himself in the past. This lack of change in his environment or surroundings increases his risk of reoffense.

6. Sex therapy programs

Appellant notes that he successfully completed sex-offender treatment at Lino Lakes in 2004, but almost all of the experts opined that appellant gained little from treatment. As Dr. Alsdurf testified, appellant has not integrated anything he may have learned in treatment, he does not have a relapse-prevention plan, and he has minimized his role in his sexual offenses. The experts believed that appellant's claim that he has a "zero percent chance of reoffending" indicates that he does not recognize his sexual offense pathology and the impact of his actions on his victims.

Based on the evidence and testimony presented on these *Linehan* factors, the district court found that it is highly likely that appellant will engage in further harmful sexual conduct. The district court specifically found the opinions of Drs. Alsdurf and Alberg to be compelling and persuasive, and support the conclusion that appellant is highly likely to reoffend in a sexual manner in the future.

Granted, the opinions of Dr. Gilbertson (who stated that it was "arguable") and of Dr. Sweet (who suggested that he did not believe appellant was likely to reoffend in a sexual manner and that he did not believe that soliciting prostitution was a sexual offense), did not fully support the court's conclusion. But, as the district court noted, Dr. Gilbertson nevertheless agreed with the opinions of Drs. Alberg and Alsdurf. In addition, the district court specifically rejected the opinion of Dr. Sweet, who stated that prostitution involves financial motivations and does not involve violent behavior or sexual misconduct within the meaning of the civil commitment act. The evidence in this case shows that the type of prostitution activity promoted by appellant did not involve

purely financial concerns and interests; rather, appellant's conduct involved physical and emotional coercion, and violence against women. As such, the district court did not err in determining that appellant's conduct constituted harmful sexual conduct within the meaning of the civil commitment act.

II. SPP Commitment

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).

A. Conditions rendering offender irresponsible in sexual matters

Drs. Alsdurf, Alberg, and Gilbertson agreed that appellant did not exhibit "conditions of emotional instability." But they also agreed that appellant has shown the other three conditions: impulsiveness of behavior, lack of customary standards of good judgment, and failure to appreciate the consequences of his personal acts. Drs. Alsdurf and Alberg also testified that these conditions cause appellant to act irresponsibly with respect to sexual matters. Thus, this element is met.

B. Habitual course of misconduct

Appellant argues that his sex offense history fails to meet the habitual standard of the SPP statute because his last sex offense that resulted in a conviction occurred in 1996. He insists that this court should conclude that "a period of some thirteen years with no new convictions [or] new formal charges clearly indicates that [he] has not engaged in a habitual course of misconduct as to sexual matters." Appellant further suggests that the 2002 petition was dismissed in part because the examiners did not find that his prior offending was habitual. But the 2002 petition was dismissed after the examiners, Drs. Sweet and Gilbertson, concluded that the evidence did not necessarily meet the future-harm criteria of SDP and SPP commitments. Appellant's history of offenses establishes a habitual course of misconduct.

C. Utter lack of power to control

In considering this element of the 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 history and family; and (6) the results of psychological and psychiatric testing and evaluation. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994).

Appellant challenges the district court's findings on the *Blodgett* factors. Appellant asserts that (1) his sexually assaultive behavior ended in 1996; (2) his history lacks the degree of violence noted in *Blodgett*; (3) the relationship between him and his victims varied significantly: one involved his daughter, one involved a jail guard, and

one involved an unrelated, 15-year-old girl; (4) he is characterized as somewhat narcissistic, glib, and aloof; (5) nothing in the record suggests that he has any medical concerns or that he comes from a dysfunctional family; and (6) the experts concur that he suffers from antisocial personality disorder, but there is disagreement over whether he should be diagnosed with paraphilia NOS, which he claims suggests a "diagnosis based upon history with no ongoing deviant arousal pattern."

The district court, however, found that appellant's frequency of sexual assaults is high, particularly considering the short period of time that he has been in the community. Appellant has used violence and has threatened his victims; he has offended against a relative, strangers, and acquaintances; his attitude and mood are hostile, guarded, and suspicious; he believes that he has done nothing wrong and has a tendency to blame others; he meets the criteria for a clinical psychopath and has been diagnosed as suffering from antisocial personality disorder; and testing results indicate that his risk of recidivism is high. Appellant's testimony was found to be incredible by the district court, because he minimized the seriousness of his conduct, placed blame on his probation officer for setting him up, continued to believe that he has no problem, and stated that there is "zero" chance that he will reoffend. The court found appellant's claims that he was able to control his sexual impulses because he did not rape his 16-year-old hostage and that the two girls wanted to be prostitutes, to be "beyond ludicrous."

Appellant further compares his record with the facts of several appellate court cases and asserts that when compared to the offenders involved in these cases, his history "dictates against [SPP] commitment." *See, e.g.*, *In re Bieganowski*, 520 N.W.2d 525, 530

(Minn. App. 1994), (grooming behaviors and "failure to remove himself from situations" and avoid precursors), *review denied* (Minn. Oct. 27, 1994); *In re Pirkl*, 531 N.W.2d 902, 909–10 (Minn. App. 1995), (although offender participated in sex-offender treatment he had not been changed by programs and remained likely to reoffend if given opportunity), *review denied* (Minn. Aug. 30, 1995); *In re Irwin*, 529 N.W.2d 366, 375 (Minn. App. 1995) (failure to acknowledge problem, never starting process of controlling behavior, and utter lack of power to control impulses), *review denied* (Minn. May 16, 1995). But appellant still exhibits many of the characteristics exhibited by the offenders in these cases. Thus, the district court's conclusion that appellant has an utter lack of power to control his sexual impulses is supported by clear and convincing evidence in the record.

D. Dangerousness to others

To determine whether an offender is dangerous to others, the district court must consider the same factors enumerated in *Linehan I* 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 also dangerous. As discussed above in the SDP analysis of the *Linehan* factors, appellant is highly likely to reoffend if released. Accordingly, appellant is also dangerous to others.

Because the record contains clear and convincing evidence that appellant meets the criteria for SPP commitment, the district court did not err in initially and indeterminately committing appellant.

II.

Appellant argues that the district court abused its discretion in denying his request for funds to obtain an evaluation to show an alternative to commitment, which was made at the conclusion of the 60-day review hearing. The focus of the 60-day review hearing is to determine whether there is "evidence of changes in the patient's condition since the initial commitment hearing." *Linehan III*, 557 N.W.2d at 171. The facility where an offender is initially committed is required by statute to submit a "treatment report" to the district court within 60 days of commitment. Minn. Stat. § 253B.18, subd. 2(a) (2008). The MSOP report must address the "criteria for commitment" by addressing nine criteria, including whether the patient is in need of further care and treatment and which program or facility is best able to provide further care and treatment, if needed. Minn. Spec. R. Commit. & Treat. Act 23(d).

In this case, Dr. Hertog testified and submitted a report supporting appellant's continued commitment as SDP and SPP. Dr. Nelson also reported and testified that there were no material changes in appellant's condition. Dr. Nelson suggested that if appellant was not under civil commitment and if the court found no need for secure treatment, then acceptance in a community-based program would be a viable alternative.

Appellant then requested funds to seek an alternative program, but the district court denied the request as an attempt to re-litigate an issue. Appellant insists that as an indigent litigant, he was denied the opportunity to show an alternative and was prevented from meeting his burden of showing such an alternative. *See In re Kindschy*, 634 N.W.2d 723, 731 (Minn. App. 2001) (stating that "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).

But the issue before the district court at the 60-day review hearing was simply whether there had been a change in appellant's condition. The testimony and evidence at the review hearing is limited to (1) the statutorily required treatment report; (2) evidence of changes in the patient's condition since the initial commitment hearing; and (3) other evidence that in the district court's discretion may enhance its assessment of whether the patient continues to meet the statutory criteria for commitment. *Linehan II*, 557 N.W.2d at 171.

There was no evidence of any change in appellant's condition that would qualify him for a less restrictive alternative than MSOP. The district court thus did not abuse its discretion in denying his request for funds.

Affirmed.