STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1885

In the Matter of the Risk Level Determination of R. L.

Filed July 20, 2010
Affirmed
Shumaker, Judge

Minnesota Department of Corrections
File No. 41-1100-20297-2

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

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

SHUMAKER, Judge

In this certiorari appeal, relator challenges the decision of an administrative law judge (ALJ) affirming assignment of a Risk Level II to him by the Minnesota Department of Corrections (DOC). We affirm.

FACTS

On June 27, 2008, relator R.L., then 19 years old, was charged with one count each of third-degree criminal sexual conduct and simple robbery. We are now asked to determine whether the End of Confinement Review Committee (ECRC) erred in its assignment of a Risk Level II to R.L.

According to the criminal complaint, a woman told police that R.L. raped and robbed her in Minneapolis by grabbing her and forcing her into the backseat of a car. The woman said that, after driving around in the car for awhile, R.L. climbed into the backseat with her, raped her, and then let her go, but kept her purse. As the woman spoke with police on the street, a man approached them with her purse and said he had found it in the middle of the street. When the police interviewed R.L., he initially denied being in Minneapolis at the time the incident occurred. He later admitted the following version of events, which later became part of the presentence investigation report (PSI): He was driving around Minneapolis selling drugs when he came across the woman. R.L. said that she wanted to buy drugs but did not have enough money, so he agreed to exchange consensual sex for drugs. After intercourse, R.L. said he drove around for about an hour with the woman, and when she got out of the car to smoke he drove off. After realizing that the woman had left her purse in the car, he threw it out the window.

After completing his interview with the police, R.L. grabbed the tape recorder and smashed it. Charges of felony theft and misdemeanor fourth-degree criminal damage to property were then added to the complaint. Based upon a plea agreement, R.L. pleaded

guilty to felony theft and misdemeanor fourth-degree criminal damage to property, and the third-degree criminal sexual conduct and simple robbery charges were dismissed.

The PSI conducted by probation officers outlined R.L.'s significant, recent juvenile criminal history and the time he spent in a number of juvenile facilities. R.L. assaulted a staff member after being told he was being taken to the secure unit for openly masturbating, and served time in segregation for six separate incidents of making sexually explicit gestures and six separate incidents of possessing sexually explicit contraband. As a result, in 2005, R.L. participated in a psychosexual evaluation, which noted evidence that R.L. has "poor sexual boundaries," and concluded that even though R.L.'s incarceration was not related to a sexual offense, he is at risk for sexual offending. The PSI further emphasized R.L.'s "history of anger, aggression and sexually explicit behavior" as most concerning, and highlighted R.L.'s self-identified "prolific sexual life" and "increasingly risky sexual behavior" as areas for concern. However, the PSI also indicated that the county chose not to prosecute the criminal-sexual charges because the victim lacked credibility.

Because R.L. was already on probation for a previous, unrelated conviction, he was sentenced to serve time in prison and ordered to register as a predatory sex offender. On June 14, 2009, R.L.'s sentence expired. Just prior to R.L.'s release, as required by statute, an ECRC evaluated the risk that R.L. would reoffend sexually. A DOC sex-offender treatment professional prepared a sex offender risk assessment recommendation report, which repeated some of R.L.'s psychosexual evaluation information contained in

the PSI. The report scored R.L. at 6 points on the Minnesota Sex Offender Screening Tool-Revised (MnSOST-R), which placed him at a presumptive Risk Level II.

The ECRC met and unanimously voted to assign R.L. a Risk Level II. At the meeting, R.L. asserted that he should not have to register as a predatory offender because he was not convicted of a sexual offense. R.L. disputed the accuracy of his juvenile disciplinary history and claimed to have engaged in very little sexual behavior while in juvenile placements. However, R.L. did not produce further evidence or records from his juvenile history and psychosexual evaluation to support his testimony.

After the meeting, R.L. appealed his risk-level assignment. On July 15, 2009, a contested hearing occurred in front of an ALJ, at which R.L. and the DOC professional testified.

The DOC professional testified about the process that he and other DOC professionals follow in making risk-level recommendations to the ECRC. He scored the MnSOST-R with information obtained from the complaint and the PSI. He explained that, had R.L. been acquitted of the criminal-sexual-conduct charge, then the Level of Service Inventory-Revised (LSI-R) would have been used instead of the MnSOST-R to determine his risk level. Since R.L. pleaded guilty to an offense that arose out of the same set of circumstances and the criminal-sexual-conduct charge was dismissed by plea agreement, the MnSOST-R was used. The MnSOST-R scoring guidelines require a defendant's score to be based on the available documents, which the professional reviews at face value without assessing credibility, and without talking to witnesses or victims. The professional also testified that he wanted to look at the documentation related to

R.L.'s sexually inappropriate behavior for his recommendation report, but since R.L. refused to sign a release for those documents, the ECRC was limited to the information contained in the PSI. R.L. testified that he did not know the female victim and he did not rape her.

On September 16, 2009, the ALJ issued findings of fact, conclusions, and an order. The ALJ explained that the ECRC is statutorily required to assess a predatory offender prior to the offender's release from prison, and affirmed R.L.'s Risk Level II assignment. The ALJ concluded that the ECRC properly followed the law by using the MnSOST-R to assess R.L.'s risk level and by relying on the available documents, including the criminal complaint and the PSI, to assess R.L.'s risk. The ALJ cited Minn. Stat. § 14.60, subd. 1 (2008), to support the finding that the documents the ECRC relied upon had probative value and that the ECRC was justified in relying on them. The ALJ determined that R.L.'s right to be heard was not violated, as he had an opportunity to testify and present direct evidence at the ECRC hearing. The ALJ also found that the female victim's statements and actions were more credible than R.L.'s. R.L. now appeals.

D E C I S I O N

On certiorari appeal, this court will affirm the decision of an ALJ unless the relator's substantial rights have been prejudiced because the decision was in violation of constitutional provisions, in excess of statutory authority or jurisdiction of an agency, made upon unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69 (2008).

In an appeal from a risk-level assignment, the offender bears the burden of showing, by a preponderance of the evidence, that the ECRC's risk-level determination was erroneous. Minn. Stat. § 244.052, subd. 6(b) (2008).

I.

R.L. pleaded guilty to the offense of theft, which arose from the same set of circumstances as a predatory sex offense; thus, he was required to register as a predatory offender under Minn. Stat. § 243.166, subd. 1b(1)(iii) (2008). His conviction triggered the process to assess his risk level. *See* Minn. Stat. § 244.052, subd. 3(d)(i) (2008) (stating that an end-of-confinement review committee shall assess the risk of reoffending and assign a risk level accordingly). R.L. does not now dispute that he is required to register as a predatory offender. Rather, R.L. asserts that the ECRC procedures in assigning him a risk level fell below the "procedural floor" set by Minn. Stat. § 244.052 (2008) (the notification act), because the ECRC based its risk-level assignment on "contested, uncorroborated hearsay by a witness deemed 'not credible.'" We disagree.

First, R.L. argues that he was deprived of an opportunity to be meaningfully heard because the ECRC, as the decision maker, did not engage in any credibility weighing but instead based its decision solely on allegations contained in the complaint.

Offenders are given the "right to seek administrative review," and such review "shall be conducted on the record." Minn. Stat. § 244.052, subd. 6(a), (b). Offenders bear the burden of proof in these review proceedings. *Id.*, 6(b). R.L. argues that this statutory reallocation of the burden of proof indicates that the ECRC should have engaged in some sort of fact-finding and "tested the state's evidence (i.e., the record)."

R.L. argues that the ECRC erred when it routinely treated complainants' allegations "as some sort of irrebuttable presumption in lieu of facts that would support a particular risk-level assignment." R.L. contends that the ECRC confused "the *condition* that mandates registration (i.e., conviction of an offense that is related to a predatory offense)," with "evidence to support a *factual finding* that supports a particular risk-level assignment." Thus, according to R.L., there is no meaningful review of the ECRC as they are not engaged in fact-finding or credibility-weighing. However, it is not the role of the ECRC to test the state's evidence; the notification act contemplates no such procedure.

The MnSOST-R scoring guidelines require the ECRC to base an offender's score on the available documents, taken at face value. The ECRC had before it the complaint and R.L.'s PSI. The PSI revealed the results of the psychosexual evaluation done while R.L. was at the juvenile-offender facility. The PSI emphasized R.L.'s "history of anger, aggression and sexually explicit behavior," and identified R.L.'s self-identified "prolific sexual life" and "increasingly risky sexual behavior" as areas for concern. R.L. had an opportunity at the ECRC hearing to produce records relating to or refuting the areas for concern, but he chose not to. He also had an opportunity to testify at the ECRC hearing, which he did. The ECRC had before it the fact that R.L. initially lied about the entire event, but then admitted some of it. R.L. had ample opportunity to be heard, and the ECRC did not err in relying on the information contained in the PSI and complaint.

Second, R.L. argues that the ECRC erred by applying the MnSOST-R to him because it is designed to measure risk of reoffending sexually, and the conclusion that he offended sexually is based solely on the "contested, uncorroborated hearsay statements"

in the complaint. R.L. contends that this is particularly objectionable because there is another screening tool available to the ECRC, the LSI-R, to use for assessment of an offender's risk of reoffending with a predatory offense other than a sex offense.

The DOC professional testified that the LSI-R is used if the person is acquitted on the sex-offense charges or if the sex-offense charges are dismissed for a lack of evidence. In a case such as this, for which the sex-offense charge was dismissed pursuant to a plea agreement, the use of the MNSOST-R is appropriate. Furthermore, which assessment tool to use is entirely within the discretion of the risk assessor; there is no legal requirement for the ECRC to use one or the other.

Thus, the ALJ did not err in determining that the ECRC did not descend below any procedural floor contemplated by the notification act. Furthermore, the ALJ did not err in determining that the assessor's reliance on the charges against R.L. and the complaint's description of the incident was appropriate in ascertaining which assessment tool to employ.

II.

R.L. next asserts that there is not sufficient evidence to support the ECRC's findings of fact because they were based solely on hearsay evidence contained in the complaint. An agency decision may be reversed if it is not supported by substantial evidence. Minn. Stat. § 14.69(e).

> The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted. If an administrative agency engages in reasoned decision making, the court will affirm,

> even though it may have reached a different conclusion had it been the factfinder.

Cable Commc'ns Bd. v. Nor-West Cable Commc'ns P'ship, 356 N.W.2d 658, 668-69 (Minn. 1984) (citations omitted).

R.L. cites to *State ex rel. Indep. Sch. Dist. No. 276 v. Dep't of Educ.*, which states that, absent a special statute, an agency "cannot, at least over objection, rest its findings of fact solely upon hearsay evidence which is inadmissible in a judicial proceeding." 256 N.W.2d 619, 627 (Minn. 1977) (quotation omitted). However, in affirming the ECRC's decision, the ALJ in this case relied on such a special statute, Minn. Stat. § 14.60, subd. 1, which allows an agency to "admit and give probative effect to evidence" that might otherwise be inadmissible, if it "possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs."

The ALJ's finding that the PSI and the victim's statements in the complaint had probative value is supported by the record. The victim asked for restitution for the $25 missing from her purse; however, according to R.L., the victim agreed to exchange sex for drugs because she did not have any money. The victim retained an advocate, and the ALJ made a prudent assessment that likely the victim would not have taken the trouble and effort to do that if she was fabricating the charges. R.L. initially denied being anywhere near the location at which the incident occurred, and later changed his story. Evidence provided by the two probation officers who conducted R.L.'s PSI also supported the conclusion that the victim's version of the incident was sufficiently probative.

Although the victim's accusation was not strongly corroborated, there is nothing to show that she was not telling the truth. As the ALJ recognized, the victim's supposed lack of credibility does not mean that there is no evidence to support her version of the story. It could mean that, given the burden of proof, prosecutors chose to pursue the charge for which they had greater evidence and to obtain a plea agreement, so that the perpetrator would at least be supervised and accountable to the court.

The agency relied on a special statute, and R.L. has failed to show by a preponderance of the evidence that the statements in the complaint lacked the requisite probative value or credibility to prevent their consideration by the ECRC. Considered in its entirety, the ECRC's decision was supported by substantial evidence.

III.

R.L. argues that the notification act is unconstitutional as applied to him, because it offends fundamental notions of due process in requiring an offender who has not been convicted of a criminal sexual offense to be the subject of notification. When a litigant claims a due-process violation, the court must first determine if a protectable liberty interest is implicated. *Boutin v. LaFleur*, 591 N.W.2d 711, 718 (Minn. 1999). A liberty interest is implicated where there is a loss of reputation ("stigma") together with a loss of some other tangible interest ("plus"). *Id.* (citing *Paul v. Davis*, 424 U.S. 693, 701-02, 96 S. Ct. 1155, 1160-61 (1976), which adopted the "stigma-plus" test). The party challenging a statute must prove beyond a reasonable doubt that the statute is unconstitutional. *In re Risk Level Determination of C.M.*, 578 N.W.2d 391, 396 (Minn. App. 1998).

This court has already addressed the constitutionality of the notification act. *See C.M.*, 578 N.W.2d at 398-99 (assessing the constitutionality of an earlier version of the notification act). In *C.M.*, the police publicly distributed a notice that suggested that C.M. had been convicted of criminal sexual conduct, when in fact he had not. *Id.* at 397. As in this case, C.M. was charged with criminal sexual conduct, but those charges were dropped based on a plea agreement. *Id.* at 392. This court determined that the language of the notification act at the time was unconstitutional because it appeared "to grant immunity to state and local entities even for making false statements in the course of community notification." *Id.* at 397. Thus, the notification act violated the stigma-plus test because the relator was required to register as a predatory offender (stigma), and he was deprived of his constitutional right to pursue a common-law defamation action (plus). *Id.* However, since *C.M.*, the legislature has amended the notification act to provide state and local officials with immunity that applies "only to disclosure of information that is consistent with the offender's conviction history," thus eliminating the "plus." Minn. Stat. § 244.052, subd. 7(c) (2008); 2000 Minn. Laws ch. 311, art. 2, § 12.

R.L. argues that although the legislature has eliminated this "plus" of the stigma-plus test, there are now other provisions in the statute that clearly remove pre-existing rights, so as to provide other "plusses," thus making the current version of Minn. Stat. § 244.052 unconstitutional. R.L. identifies examples such as the fact that "certain offenders are prohibited from attending community meetings at which their alleged dangerousness is discussed, and they may be prevented from living in certain areas." *See* Minn. Stat. § 244.052, subds. 4(i), 4a (2008). R.L. asserts that these "plusses," in

addition to the notification, fit the "stigma-plus" test so as to render the statute unconstitutional. However, it appears that the only possible "plus" under the statute for level II offenders such as R.L. is the prohibition on attending community meetings. *See id.*, subd. 4(i). The inability to attend a community meeting does not rise to the level of a "plus" as contemplated by the stigma-plus test. *See C.M.*, 578 N.W.2d at 397 (indicating that a "plus" is the deprivation of a constitutional right). Furthermore, an offender has opportunities to be heard and appeal a risk-level assignment prior to such a community meeting, if it happens.

As identified in *C.M.*, a "plus" would be the deprivation of a person's right to seek a remedy for defamation when labeled as a convicted sex offender if in fact he is not a convicted sex offender, which is a legal right protected by state law. *Id.* at 398-99. The current language of the statute does not give immunity to law enforcement and government officials who disseminate information inconsistent with an offender's conviction. Minn. Stat. § 244.052, subd. 7(c). Therefore, R.L. has failed to show beyond a reasonable doubt that the statute falls within the "stigma-plus" test as applied to him; thus, his constitutional challenge to the statute fails.

Affirmed.