

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2006).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0430**

In the Matter of the Civil Commitment of:
Marion Otis Owens.

**Filed July 29, 2008
Affirmed
Worke, Judge**

Crow Wing County District Court
File No. 18-P3-06-3461

James S. Dahlquist, 301 Fourth Avenue South, Suite 270, Minneapolis, MN 55415 (for appellant)

Lori Swanson, Attorney General, Angela Helseth Kiese, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Donald F. Ryan, Crow Wing County Attorney, 322 Laurel Street, Brainerd, MN 56401 (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

WORKE, Judge

On appeal from his civil commitment, appellant argues that (1) there is insufficient evidence to support his civil commitment, and (2) the civil-commitment proceedings violated his due-process rights and implicated double-jeopardy concerns. We affirm.

DECISION

Sufficiency of Evidence

Appellant Marion Otis Owens argues that the evidence is insufficient to support his civil commitment as a sexually dangerous person (SDP) and a sexual psychopathic personality (SPP). When reviewing a civil commitment, our review is limited to an examination of whether the district court complied with the Minnesota Treatment and Commitment Act and whether the commitment was justified by findings supported by evidence presented at the hearing. *In re Knops*, 536 N.W.2d 616, 620 (Minn. 1995). Findings of fact justifying commitment “shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01; *In re Schaefer*, 498 N.W.2d 298, 300 (Minn. App. 1993). But whether the evidence is sufficient to meet the standards for commitment is a question of law reviewed de novo. *In re Linehan*, 518 N.W.2d 609, 613 (Minn. 1994) (*Linehan I*). “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).

In November 1999, appellant pleaded guilty to third-degree criminal sexual conduct and third-degree assault. Appellant also pleaded guilty to an amended charge of disorderly conduct for a sexual offense he committed in November 1998. The district court sentenced appellant to concurrent sentences of 27 months for the third-degree assault and 88 months for the third-degree criminal sexual conduct. On two separate occasions following his initial release from prison, appellant failed to successfully

complete sex-offender treatment and was returned to prison. While incarcerated, appellant was assigned a risk level of three, and a petition to civilly commit him as a SDP and SPP was filed. The district court appointed Thomas Alberg, Ph.D., as the first court-appointed examiner and, per appellant's request, Robert Riedel, Ph.D., was appointed as the second court-appointed examiner. Paul Reitman, Ph.D., who completed a pre-petition evaluation of appellant, also submitted a report and testified at trial.

A SDP is defined as a person 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) as a result, is likely to engage in acts of harmful sexual conduct.” Minn. Stat. § 253B.02, subd. 18c (2006). “Harmful sexual conduct” is defined as “sexual conduct that creates a substantial likelihood of serious physical or emotional harm to another.” *Id.*, subd. 7a(a) (2006). The supreme court has interpreted the third factor as requiring proof that the person's disorder or dysfunction does not allow adequate control over sexual impulses and makes it highly likely that the person will reoffend. *In re Linehan*, 594 N.W.2d 867, 876 (Minn. 1999) (*Linehan IV*). Conduct that results in a conviction of third-degree criminal sexual conduct creates a rebuttable presumption of harmful sexual conduct. Minn. Stat. § 253B.02, subd. 7a(b) (2006).

All three experts testified that appellant has engaged in harmful sexual conduct. Based on the third-degree criminal sexual conduct conviction, there is clear and convincing evidence that appellant has engaged in a course of harmful sexual conduct. The experts disagreed on whether appellant meets the second element of the SDP statute. Alberg and Reitman testified that appellant manifests a sexual, personality, or other

mental disorder or dysfunction. Alberg diagnosed appellant with polysubstance dependence; paraphilia, NOS; RO sexual sadism; and antisocial personality disorder. Reitman testified that any of these diagnoses could cause appellant to reoffend sexually. Riedel did not agree that appellant met the second element of the SDP statute. Riedel diagnosed appellant with polysubstance dependence, in long-term remission in a controlled setting, and antisocial personality disorder, with borderline traits. The district court determined that the diagnostic opinions of Alberg and Reitman were more persuasive. The district court also determined that the opinions of Alberg and Reitman that appellant lacks adequate control over his sexual impulses were more persuasive. The record contains clear and convincing evidence that appellant meets the second element for commitment as a SDP.

When determining the likelihood of future harmful conduct in a SDP commitment, the Minnesota Supreme Court has articulated six factors to be considered: (1) relevant demographic characteristics; (2) history of violent behavior; (3) base-rate statistics for violent behavior; (4) sources of stress in the environment; (5) similarity of present or future contexts to past contexts in which violence was used; and (6) the record with regard to sex-therapy programs. *Linehan I*, 518 N.W.2d at 614. Both Alberg and Reitman testified that based on the *Linehan* factors, appellant is highly likely to reoffend. Riedel testified that he believed that appellant was “just below” the commitment threshold.

Appellant focuses on the experts’ disagreement on the base-rate statistics. Alberg testified that base-rate statistics for sex offenders are in the range of 30 to 52 percent, but

based on actuarial instrument estimates appellant's likelihood of reoffending is significantly higher than the base rates. Riedel's actuarial instrument estimates for appellant, however, were lower than Alberg's estimates. All three experts testified that actuarial tools underestimate an individual's likelihood of sexual reoffending because the statistics associated with those tools are based on arrests and convictions, and many sex offenses go unreported. The district court found that Riedel underscored appellant on several instruments; therefore, the court found that Riedel's testimony on this factor was not credible given the evidence. The district court's finding is not clearly erroneous and due regard is given to the district court in weighing the credibility of witnesses. *See* Minn. R. Civ. P. 52.01

Because the district court found that the opinions of Alberg and Reitman are more credible with respect to appellant's likelihood of reoffending, the court determined that appellant is highly likely to reoffend if not civilly committed. The district court's findings regarding appellant's commitment as a SDP are supported by the record and, therefore, are not clearly erroneous. The district court's credibility determinations of the examiners' and the victims' statements support the conclusion that appellant is a SDP who is likely to engage in acts of harmful sexual conduct.

Commitment as a SPP requires a showing of a habitual course of misconduct in sexual matters and an utter lack of power to control sexual impulses so that it is likely the person will attack or otherwise inflict injury on the objects of his uncontrolled desire. *Linehan I*, 518 N.W.2d at 613.

[SPP] means 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 (2006).

Alberg and Reitman testified that appellant meets the first element of the SPP statute—that appellant has engaged in a habitual course of misconduct in sexual matters. Riedel did not address this element in his report. The district court found that Alberg and Reitman's opinions that appellant's course of harmful sexual conduct was habitual were more persuasive. Alberg and Reitman also testified that appellant meets the second element of the SPP statute. Riedel did not address the second element in his report but testified that appellant exhibits three of the four conditions and that those conditions contributed in a major way to his irresponsibility with respect to sexual matters. The district court found that the evidence supports Alberg and Reitman's opinions. Finally, Alberg and Reitman testified that appellant meets the third criterion of the SPP statute—that appellant has an utter lack of power to control his sexual impulses. *In re Blodgett*, 510 N.W.2d 910, 915 (Minn. 1994). Riedel did not address whether appellant met this criterion but discussed a number of cases that address this factor. The district court found that the opinions of Alberg and Reitman on this issue were more persuasive than Riedel's.

The district court's findings regarding appellant's commitment as a SPP are supported by sufficient evidence and, therefore, are not clearly erroneous. The district court's credibility determinations in favor of the examiners' and the victims' statements support the conclusion that appellant is a SPP who is likely to engage in acts of harmful sexual conduct.

Due Process

Appellant next argues that his civil commitment, as interpreted in *Linehan IV*, violates his right to substantive due process. The Minnesota Supreme Court has upheld the constitutionality of the SDP statute under a substantive due-process challenge. *In re Linehan*, 557 N.W.2d 171, 184 (Minn. 1996) (*Linehan III*), judgment vacated and remanded, 522 U.S. 1011, 118 S. Ct. 596, *aff'd on remand*, 594 N.W.2d 867 (Minn. 1999). The supreme court has also upheld the constitutionality of the psychopathic personality statute, a precursor of the current SPP statute. *Blodgett*, 510 N.W.2d at 916 ("So long as civil commitment is programmed to provide treatment and periodic review, due process is provided."). Therefore, appellant's argument that his civil commitment violates his due-process rights fails.

Double Jeopardy

Finally, appellant argues that because he has served his sentences for the criminal-sexual-conduct convictions, his civil commitment constitutes double jeopardy. The Minnesota Supreme Court has rejected this argument. *Linehan IV*, 594 N.W.2d at 871-72 (addressing double-jeopardy challenge to SDP statute); *Joelson v. O'Keefe*, 594 N.W.2d 905, 911 (Minn. App. 1999) (addressing double-jeopardy challenge to SPP statute),

review denied (Minn. July 28, 1999). Civil commitment does not implicate double jeopardy because it is remedial, and its purpose is treatment rather than punishment. *Call v. Gomez*, 535 N.W.2d 312, 320 (Minn. 1995). Therefore, appellant's argument that his civil commitment constitutes double jeopardy fails.

Affirmed.